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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	**MM Docket No. 93-107**
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORPORATION	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES, INC.	)	File No. BPH-911231MC
	)	

For Construction Permit for an FM
Station on Channel 280A in
Westerville, Ohio

To: The Review Board

OPPOSITION TO SUPPLEMENT TO
SECOND MOTION TO ENLARGE ISSUES

Wilburn Industries, Inc. ("Wilburn"), by its attorneys, hereby submits its Opposition to the Supplement to Second Motion to Enlarge Issues Against Wilburn ("Supplement") which was filed on April 21, 1994 by Ohio Radio Associates, Inc. ("ORA"). In support thereof, the following is stated:

ORA's Supplement requests the addition of a qualifying issue to determine whether Wilburn has reasonable assurance that its proposed tower site will be available to it upon grant of its application. According to ORA, the letter from the property owner which Wilburn obtained in December, 1991, failed to provide

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the requisite reasonable assurance of site availability, and the recent sale of such property to a third party, reported in Wilburn's amendment of April 13, 1994, establishes that no such assurance ever existed. As will be shown below, however, such request on the part of ORA is entirely spurious.

The facts and circumstances surrounding this matter are clear, unequivocal and uncontroverted. In Wilburn's application, the principals of the applicant certified that Wilburn intended to utilize the site, tower and equipment owned by Mid-Ohio Communications, Inc. ("Mid-Ohio"), the former licensee of Station WBBY-FM, Westerville, Ohio. Prior to such certification, they obtained a letter from Carl B. Fry, Mid-Ohio's authorized representative, dated December 27, 1991, which: referenced Charles Wilburn's inquiry as to whether the site and facilities were available for lease; confirmed that the real property and personal property were in fact available; stated that Mid-Ohio is willing to negotiate an appropriate lease; identified the property which would be leased; and specified the monthly rental payment which would be charged for the use of such property. The letter also stated that the rent would not be reduced if Wilburn chose to use only some of Mid-Ohio's equipment, and required Wilburn to demonstrate its financial qualifications within the following sixty days. Mid-Ohio advised Wilburn, as well, that it reserved the right to again review Wilburn's financial condition at the time a lease is negotiated and that it would require

Wilburn's principals to personally and unconditionally guarantee Wilburn's obligations under the lease. Finally, Mid-Ohio stated that its letter did not constitute a binding commitment on its part and that, although it contemplated that mutually acceptable terms will be negotiated at the time Wilburn obtains a construction permit, it could not guarantee that occurrence. Wilburn then provided the financial information required by Mid-Ohio under cover of a letter to Mid-Ohio dated February 6, 1992. More than two years later, by letter dated March 2, 1994, Mr. Fry notified Wilburn that the property had been sold to a third party.

Thus, contrary to ORA's allegation, Wilburn and Mid-Ohio clearly had reached a "meeting of the minds" and had a firm understanding that the site in question would be available for lease. The property to be leased was precisely defined, the monthly rent was specified, and other critical matters, such as the applicant's financial position and the requirement that its principals personally guarantee the applicant's obligation under the contemplated lease, were expressly addressed. Wilburn also satisfied the sole condition imposed by the owner at that time. In these circumstances, there can be no good faith doubt that prior to filing its application Wilburn obtained "reasonable assurance" that its proposed site would be available to it. See, Genesee Communications, Inc., 3 FCC Rcd 3595 (Rev.Bd. 1988); Radio Delaware, Inc., 4 FCC Rcd 8630 (Rev.Bd. 1989); Adlai E.

Stevenson 5 FCC Rcd 1588 (Rev.Bd. 1990); National Communications Industries, 6 FCC Rcd 1978 (Rev.Bd. 1991); Rem Malloy Broadcasting, 6 FCC Rcd 5843 (Rev.Bd. 1991).

Furthermore, the fact that, over two years later, the site owner accepted an offer from a third party does not show that Wilburn lacked reasonable assurance of site availability when it filed its application. It merely shows that such assurance was not legally binding and that circumstances changed over a long period of time.

In view of the foregoing, there is absolutely no factual or legal basis for the qualifying issue sought by ORA. Plainly, the owner of the site had done far more than merely express a general "willingness to deal" or indicate that he would "discuss the possibility of lease at some future date", as alleged by ORA. Moreover, contrary to ORA's claim that the terms of the proposed lease were not negotiated, the basic and most critical elements of the lease were expressly set forth in Mid-Ohio's letter and, where a condition was established, such condition was satisfied by Wilburn.

The precedent cited by ORA also fails to support its Motion. Indeed, as discussed above, the cases upon which it primarily relies plainly establish that Wilburn had obtained the "reasonable assurance" of site availability which is required by the Commission. National Communications Industries, supra; Rem

Malloy, supra; Adlai E. Stevenson, supra. When issues were specified in those proceedings, it was due to patently distinguishable circumstances: whereas Wilburn obtained the owner's unequivocal statement that its property was available for lease under specific terms and conditions, the applicants in those cases had engaged only in vague discussions with owners who did no more than agree to entertain the idea of making their land available, so that negotiating a lease with those owners never was a more than a mere possibility. Similarly, in contrast to the facts of the instant proceeding, where Mid-Ohio provided specific terms and conditions to Wilburn and Wilburn then satisfied the sole pre-grant condition, the applicants in Dutchess Communications Corp., 101 FCC 2d 243 (Rev.Bd. 1985); Cuban-American Limited, 2 FCC Rcd 3264 (Rev.Bd. 1987); and Lee Optical and Associated Cos., 2 FCC Rcd 5480 (Rev.Bd. 1987), ignored the conditions set by the property owner. They also either failed to contact the landowner or disregarded the owner's statement that his land was unavailable for the applicant's purpose.[1] The later sale of that property does not obviate or modify these basic facts, nor does it distinguish this case from those where the Commission held that its requirements had been satisfied.

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[1] ORA also cited Emision de Radio Balmeseda, Inc., 7 FCC Rd 8629 (Rev. Bd. 1992), and Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331 (1991). Neither of these cases appears to be relevant to the matter raised by ORA's Supplement.

In sum, ORA's Supplement is entirely without merit. The facts of this case and applicable Commission precedent establish that Wilburn obtained the requisite reasonable assurance that the site specified in its application would be available to it upon grant of its application. ORA can argue otherwise only by ignoring such facts and precedent and pointing to prior rulings where the facts are patently distinguishable from those of the instant proceeding.

Accordingly, ORA's Supplement to Second Motion to Enlarge Issues Against Wilburn should be denied.

Respectfully submitted,

WILBURN INDUSTRIES, INC.

By: Eric S. Kravetz

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May 3, 1994

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CERTIFICATE OF SERVICE

I, Tracy Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 3rd day of May, 1993, caused to be mailed U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Supplement to Second Motion to Enlarge Issues" to the following:

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