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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	MM DOCKET NO. 93-87
	)	
RAYMOND W. CLANTON	)	File No. BPH-911216MC
	)	
LOREN F. SELZNICK	)	File No. BPH-911216MD
	)	
	)	
For Construction Permit for a	)	
New FM Station on channel 279A	)	
in El Rio, California	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Honorable John M. Frysiak
Administrative Law Judge

CITATION TO RECENTLY
ISSUED FCC DECISION

Loren F. Selznick respectfully provides the Presiding Judge with a citation to a recently decided case by the Commission that is relevant to one of the issues being decided at present in the above-captioned proceeding.

One of the claims of Selznick opponent Raymond Clanton is that Selznick's original $360,070 budget allegedly omitted "a number of significant items." See, e.g., Clanton Reply Findings at 2-3. Selznick has argued that the allegedly "omitted" items are either irrelevant or can be reasonably inferred from her 1991 budget. See Selznick Reply Findings at 2-5.

In a recent en banc decision, the Commission has held that an applicant's cost budget should be liberally construed, particularly where the budget includes a "miscellaneous" category. See David A. Ringer, FCC 94-126, MM Docket No. 93-107, released June

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8, 1994, at ¶ 4. In the Ringer case, the Commission drew an "inference" that a one-page "Construction Summary" for a proposed new FM station in Ohio contained an allowance for operating expenses even though the line items in the budget were grouped into three categories, none of which made any mention of operating expenses and, in fact, appeared to be "inapt" for the inclusion of operating expenses. Id. A copy of the Commission's decision is appended hereto.

Respectfully submitted,

Robert Lewis Thompson
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June 16, 1994

Counsel for Loren F. Selznick

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-107

In re applications of

DAVID A. RINGER	File No. BPH-911230MA
ASF BROADCASTING CORPORATION	
WILBURN INDUSTRIES, INC.	File No. BPH-911230MC
SHELLEE F. DAVIS	File No. BPH-911231MA
WESTERVILLE BROADCASTING COMPANY LIMITED PARTNERSHIP	File No. BPH-911231MB
OHIO RADIO ASSOCIATES, INC.	File No. BPH-911231MC

For construction permit for
an FM station on Channel 280A,
in Westerville, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. On September 23, 1993 the Commission released a notice pursuant to 47 C.F.R. §1.80(f) and (g)(3) to advise Westerville Broadcasting Company Limited Partnership (WBC) that the Commission had information indicating that WBC may have misrepresented material facts with deceitful intent in a pleading filed on June 9, 1993, in violation of 47 C.F.R. §1.17, that a determination of liability would be made unless WBC were to remit $25,000 within thirty days, and that WBC would be allowed thirty days in which to file a response. 8 FCC Rcd 7037 (1993). WBC filed a response on October 22, 1993 and an erratum on October 25, 1993.

2. WBC was one of seven applicants for a new Class A FM station at Westerville, Ohio that were designated for hearing in April, 1993. The official application form that it used required the applicant to indicate by checking "yes" or "no" whether it had enough net liquid assets or funds available through borrowing from committed creditors to construct the proposed station and operate it for three months without revenue. WBC represented in its application that it would need a total of $300,000 to fund construction and operation for three months, and it checked the "yes" box to attest that it had enough available funds to meet that need.

3. On May 10, 1993, pursuant to the discovery provisions of 47 C.F.R. §1.325(c)(1), WBC produced various documents, including a one-page "Construction Summary" listing ten expense categories and giving dollar estimates for each, amounting to a total of $293,000. A competing applicant subsequently called attention to the fact that WBC's cost summary said nothing about the expenses of the first three months of operation and contended that a hearing issue should therefore be specified concerning the veracity of WBC's financial certification. WBC responded to that contention in an opposition pleading filed on June 9, 1993, denying that it had neglected to include three-months' operating expenses; it alleged, rather, that the principal who had prepared the cost summary, WBC general partner Freeman Edwards II, had made allowance for such expenses by including an estimate of them in the $39,000 amount identified in the summary as "Miscellaneous, spares, and contingency." It is to this allegation that we specifically referred when we notified WBC that it was apparently liable for misrepresenting facts in its June 9 opposition pleading.

4. We conclude in light of WBC's response that an assessment of liability is unwarranted. WBC asserts that in preparing its cost statement Edwards followed the format of a sample cost summary in a brochure that had been prepared for the FCC and distributed to members of the public at an FCC-sponsored seminar that he had attended. The brochure advised that applicants must certify that enough liquid assets are available for construction and operation of their proposed facilities for three months without revenue and referred to the sample cost summary as an illustrative set of cost estimates for a Class A FM station, such as WBC proposed. None of the numerous expenses itemized in the sample cost summary was specifically identified as operating expenses. The line items in the sample cost summary were grouped into three general categories: "Transmitter Plant," "Studio Equipment," and "Other," and the last item in the "Other" category was an entry designated "Miscellaneous, spares and contingency." Significantly, a note on the sample cost summary explaining that certain enumerated kinds of expenses were *not* included made no reference to operating expenses, and the indicated expense of "Miscellaneous, spares and contingency" was larger than any other itemized expense listed in the sample, comprising approximately fourteen percent of the overall total. An inference might understandably be drawn from these indications that the "Miscellaneous, spares and contingency" entry included an allowance for operating expenses, notwithstanding the entry's literal inaptness for that purpose. In view of these circumstances, and in view of the fact that no question was ever raised as to the adequacy of WBC's overall cost estimate, we find that WBC's explanation is plausible. Hence, we hold that there are insufficient grounds in the information before us for concluding that WBC made an actionable misrepresentation in asserting in its June 9, 1993 pleading that it had made allowance for its expected initial operating expenses in its summary of estimated expenses.

5. ACCORDINGLY, IT IS ORDERED, pursuant to 47 C.F.R. §1.80(f)(4), that the forfeiture inquiry against Westerville Broadcasting Company Limited Partnership (File No. BPH-911231MB) instituted by notice of potential liability, 8 FCC Rcd 7037 (1993), IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CERTIFICATE OF SERVICE

I, Karen D. Anderson, do certify that a copy of the foregoing "Citation to Recently Issued FCC Decision "was served by prepaid, First Class U.S. Mail on this 16th day of June, 1994, on the following:

Honorable John M. Frysiak
Room 223
Federal Communications Commission
2000 L Street, NW
Washington, DC 20036

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Karen D. Anderson

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* By Hand