

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, DC

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

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

RECEIVED

JUL 22 1994

To: The Review Board

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITION FOR LEAVE TO AMEND

SUMMARY

This is an Opposition to the "Petition for Leave to Amend" filed by Wilburn Industries, Inc. on July 14, 1994. As seen herein, "good cause" does not exist for acceptance of the amendment -- no showing of "due diligence" was submitted along with its Petition, WII does not possess "reasonable assurance" of the availability of its transmitter site, grant of the amendment would require the addition of an "air hazard" issue in this proceeding, and no showing has been made establishing the adequacy of WII's new sources and levels of financing.

For all of these reasons, WII's Petition for leave to amend must be denied.

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Shellee F. Davis ("Davis"), by her attorney, hereby submits her opposition to the "Petition for Leave to Amend" ("Petition") filed by Wilburn Industries, Inc. ("Wilburn") in this proceeding on July 14, 1994.¹ With respect thereto, the following is stated:

1. WII filed its original application on December 30, 1994, specifying, as did the majority of the other applicants, a site owned by Mid-Ohio Communications, Inc., former licensee of Stations WBBY-FM, the former licensee of the frequency in contention in this proceeding. Under the terms of the assurances provided by Mid-Ohio

¹ Although Page 4 of the document states that the date of the filing is "January 4, 1994," Davis has confirmed that the document was filed on July 14, 1994.

(which later were also briefly provided verbally by John Shumate, the subsequent owner of the site), Mid-Ohio had agreed to lease the tower site (tower and building) located at State Route 37, Sunbury, Ohio; studio facilities located at 14 Dorchester Court, Westerville, Ohio; and "some or perhaps all of the equipment" listed on an inventory of equipment provided by Mid-Ohio for the sum of \$6000 per month. Attachment 1. WII (as well as ASF and Ringer) interpreted this arrangement to constitute essentially a turn-key operation whereby it would not be necessary for them to purchase any equipment to construct the station -- rather, they only would have to pay the \$6000 rental fee for the existing site and all equipment. This interpretation, however, was proven to be incorrect. The letter "guaranteed" only that Mid-Ohio would provide "some or perhaps all of the equipment" listed on an inventory of equipment provided by Mid-Ohio, and in fact, to confirm the accuracy of this interpretation of the December 1991 Mid-Ohio Letter, the author of the Mid-Ohio letter was contacted. Mid-Ohio's representative, Mr. Fry, confirmed that Mid-Ohio had no provided no assurances of necessarily leasing all of the equipment to any applicant. As Mr. Fry stated, while valid assurances had been provided by Mid-Ohio for lease of the Mid-Ohio tower, transmitter building and studio, the same could not be said for the tangible personal property owned by Mid-Ohio. Wilburn's budget, however, did not include a provision for the cost to replace the "some or perhaps all" of the former WBBY equipment that would not be available, nor did the budget have any provision for attorney fees for prosecution of its application. See Attachment 2. Davis filed a "Motion to Enlarge the Issues Against Wilburn Industries, Inc." in this proceeding on August 17, 1993 with respect to these matters. The requested

issues were denied by Memorandum Opinion and Order, FCC 93M-610 (Sept, 23, 1993) and Memorandum Opinion and Order, FCC 93M-597 (Sept. 20, 1993). Exceptions with regard to that denial remain pending.

2. WII, as did Davis, ASF, and Ringer, lost assurances for the continued specification of the Mid-Ohio site on or about April 8, 1994.² In its July 14, 1994 submission, WII seeks to amend both its transmitter site and financial proposal ostensibly to account for this loss. In so doing, WII alleges that there is "good cause" for the submission, claiming inter alia, that it needed not only to locate and secure and assurances for a new site, but also to obtain assurances so that it could meet the greater costs of constructing its station. It states in a conclusory fashion that "the time taken to accomplish all of these tasks was not excessive" and claims that it therefore acted with "due diligence," and further claims that the amendment will not require the modification or addition of issues or disrupt the orderly conduct of this proceeding. From this, WII claims that its amendment should be accepted.

3. As seen below, WII's amendment (1) lacks a showing of "due diligence," (2) would require the addition of a new issue in this proceeding at the present time, (3) seeks impermissibly to amend WII's financing where "reasonable assurance" of financing already was lacking from the outset, and (4) in any event, WII fails to include a "full financial showing" necessary for acceptance of financial amendments. For all of these

² Various parties, such as Davis, learned of that decision only later. In the case of Ms. Davis, she did not learn of the possible loss of the site (through reading of the WII April 13, 1994 filing) until April 14, 1994, which could not be confirmed by Ms. Davis through a conversation with Mr. Shumate until April 27, 1994.

reasons, WII's amendment must be rejected.

Due Diligence

4. Unless filing an amendment as a "matter of right," a party seeking to amend once a hearing has been designated must meet the "good cause" test mandated by Section 73.3522(b) of the Commission's Rules, as interpreted in Erwin O'Connor Broadcasting Co., 22 F.C.C.2d 142, 143 (Rev. Bd. 1970). Thereunder:

the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties would not be unfairly prejudiced; and that the applicant will not gain a comparative advantage.

Id. at 143. Accord, Shoblom Broadcasting, Inc., 93 F.C.C.2d 1027, 1028 (Rev. Bd. 1983), aff'd, 95 F.C.C.2d 444 (Rev. Bd. 1983), rev. denied, FCC 94-119 (April 2, 1984), aff'd mem. sub nom., Royce international Broadcasting Co. v. FCC, 762 F.2d 138 (D.C. Cir. 1985), cert. denied, 474 U.S. 995 (1985). Because engineering amendments run the risk of being disruptive to a multiparty comparative licensing proceeding, the "good cause" test for post-designation engineering amendments requires petitioners also to establish:

That the amendment is necessitated by event which the applicant could not reasonably have foreseen (e.g. notification of a new foreign station or loss of a transmitter site by condemnation)...

47 C.F.R. § 73.3522(b)(i).

5. With respect to the requirement that an applicant submitting a post-designation amendment act with "due diligence":

[t]he crucial period for consideration in determining due diligence dates not from the time the application is filed...but from the date the applicant is, or should have been, apprised of the problem requiring amendment.

Brownfield Broadcasting Corp., 88 F.C.C.2d 1054, 1058 (1982). The Commission's most recent statement of how it will apply its "due diligence" standard is contained in Montgomery County Media Network, Inc. d/b/a Imagists, 8 FCC Rcd 2763 (1993). In rejecting an amendment for lack of "due diligence" the Commission stated:

we have modified our former practice of liberally accepting post-designation amendments that cure disqualifying defects, such as the loss of a transmitter site or a financial commitment.

* * *

Given our heightened concern with avoiding undue delays that retard the provision of new service, we take this opportunity to review what constitutes due diligence under section 73.3522(b). As an initial matter, an applicant must show that it acted promptly after it discovered, or it should have discovered, the potentially disqualifying deficiency. Clearly, an applicant that sits idly by, either by doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously, lacks diligence.

* * *

An applicant waiting more than 30 days to file a petition for leave to amend should be prepared to explain the need for additional time, and it may be asked to document that, despite its failure to amend within 30 days, it took immediate steps upon learning of the deficiency. We note further that, in the absence of unusual circumstances, a delay of more than six months has been presumed to be excessive.

Imagists, 8 FCC Rcd at 2764-65 ¶¶ 10, 12, 14.

6. Under this standard, WII's Petition must be denied and its amendment rejected. In this case, WII has provided absolutely no information from which it can be judged or determined that WII has acted with any degree of "due diligence." Although its pleading recites in a conclusory manner that WII has acted with the requisite

"diligence," no facts, such as site letters, declarations, correspondence between the applicant and its agents, site owner, or bank, etc., have been included for scrutiny by the Board. This case, for example, in no way resembles Elijah Broadcasting Corp., 65 R.R.2d 461, 465 ¶ 15 (Rev. Bd. 1988), aff'd, 68 R.R.2d 205 (1990), where "due diligence" was found to exist after an applicant timely informed the Commission of the loss of its transmitter site, and also established through its submissions that it in fact immediately began a search for a suitable alternative site and filed progress reports with the Board detailing its progress, culminating in the specification of a new site within six months of the loss. WII, in short, is asking the Board to rely on blind faith with respect to the accuracy of its bald assertion that "due diligence," in actuality, exists.

7. It may well be that there is a reason for this lack of documentation. In contrast to WII's lack of documentation, Davis has obtained a copy of the letter of "reasonable assurance" apparently provided to WII by the person in control of WII's new site WII, Ms. Dolores Buell. Attachment 3. That letter is dated **March 31, 1994**. From this document, two questions are raised.

8. First, WII claims that it did not learn of the loss of the Mid-Ohio/Shumate site until "April 7, 1994." If that is so, then why was WII apparently already seeking assurances concerning the availability of an alternative transmitter site (i.e., the site controlled by Dolores Buell) already on March 31, 1994? The clear suspicion that is generated by this document is that WII is being less than candid with the Commission and its recitation of the facts, and that in actuality, it very possibly first learned of the impending loss of the Shumate site well before the other applicants in this case. Insofar

as "due diligence" is determined based upon "the date the applicant is, or should have been, apprised of the problem requiring amendment" (Brownfield Broadcasting Corp., 88 F.C.C.2d 1054, 1058 (1982)), the earlier existence of that information may well be crucial and determinative in judging the merits of WII's Petition.

9. Secondly, based upon that March 31, 1994 date, it must be concluded that WII *waited three and one-half months after already securing what it believed were assurances for a new site* before submitting an amendment to the Commission for the new site. That *three and one-half month period* clearly does not constitute "diligence." Rather, it represents dilatory conduct.

10. In short, WII has provided absolutely no information from which a finding of "due diligence" validly can be derived and further, the information which now has been provided (by Davis) indicates a total absence of diligence. For these reasons, rejection of WII's amendment is warranted.

Lack of Reasonable Assurance

11. WII's Petition seeks to amend its application to specify land located "Approximately 600 meters northeast of the intersection of State Route 37 and County Line Road in Licking County, Ohio," at 40° 11' 33" N, 82° 45' 07"W. In its Petition, WII certified as to the availability of his proposed site, stating that he:

has...reasonable assurance in good faith that the site or structure proposed in Section V of this form, as the location of its transmitting antenna, will be available for the applicant's intended purpose

Attachment 4. WII further certified that his "reasonable assurance" was based upon contacts with the "Owner" of the designated site, namely "Dolores Buell" at "(614)965-

3826." Attachment 4.

12. In conjunction with her own attempts to acquire "reasonable assurance" of the same site WII is now proposing to use (which is the same site previously proposed by ORA), Ms. Davis learned that Mrs. Buell is the Executor of the Estate of Hugh Buell, her deceased husband, who was the owner of the land in question. Thus, although Mrs. Buell controls the owner of the land, she is not herself the "owner" of the land. Cf. Attachment 4. More importantly, although there is some likelihood that the land may become available to an applicant in this proceeding at some point in the future, at the present time the site is already leased by Mrs. Buell to a party unaffiliated with this proceeding, who is using the land for agricultural purposes. As Mrs. Buell recited in letter to Ms. Davis in relevant part:

the land currently is leased to a tenant. Any lease negotiated...will be subject to the present tenant's release of the specified parcel and agreement with specification for use of the land.

Attachment 5.³ Although Mrs. Buell "thinks" that the tenant would be willing to allow the site to be used also as the site of a broadcast tower, Ms. Buell nevertheless is unwilling formally to ask the tenant for permission to lease the site to any applicant for Channel 280A, Westerville, Ohio at the present time. Moreover, she has requested that the tenant not be contacted. Attachment 7.⁴ Thus, WII can provide no indication that this condition can be satisfied.

³ See also Attachment 6 (letter from Tamara L. Caudy, daughter of Dolores Buell) ("[a]s you are aware, the land is currently rented as farm land").

⁴ Accord Attachment 6 ("[w]hile I cannot guarantee it, I believe that [Mrs. Buell] would consider discussing with the farmer the possibility of releasing the proposed tower site from the rest of the land in the rental agreement...") (emphasis added).

13. From the foregoing, serious questions are seen to exist concerning whether WII's proposed site amendment can be accepted at the present time. Past and recent Commission precedent has established that an applicant must have reasonable assurance that its transmitter site is available at the time it is submitted to with the Commission. George Edward Gunter, 60 R.R.2d 1662, 1663 (Rev. Bd. 1986) (case remanded for resolution of this basic qualification issue); see also, Cuban-American Limited, 2 FCC Rcd 3462, 3463 (Rev. Bd. 1987) (applicant compelled "by weight...of authority" to concede that it had an obligation to have an acceptable site when it first filed its application). Questions as to the availability of site availability arise from the longstanding policy of the Commission that states that when an applicant proposes a site, it must do so with "reasonable assurance" that the site will be available to it. George E. Cameron, Jr. Communications, 71 F.C.C.2d 461 (1979). It is well established that in order for an application to possess "reasonable assurance" of the availability of its site, prior to being able to represent such availability to the Commission, the applicant must receive an indication that the person in control of the land will be favorably disposed toward entering into an arrangement. El Camino Broadcasting Corp., 12 F.C.C.2d 25, 26-27 (Rev. Bd. 1968). The "assurances" must be based upon contacts with a present owner of the land (William F. Wallace and Anne K. Wallace, 49 F.C.C.2d 1424 (Rev. Bd. 1974)), the present landowner's agent (Christian Fundamental Church v. FCC, 12 R.R.2d 2116 (D.C. Cir. 1968)), or the person in present control of the land. As the Review Board has stated:

We reaffirm that the touchstone for reasonable assurance of site availability is the site owner's or his authorized agent's express

approval of the site specification or at least some basic negotiations between the parties from which reasonable assurance can be inferred.

Cuban-American Limited, 2 FCC Rcd at 3266 (emphasis added). Where, as here, an applicant affirmatively states to the Commission the identity of the person whom he contacted, and where it is shown the person contacted is not the person in legal control of the proposed site, that alone has been held to be sufficient to question the applicant's technical qualifications for the continued processing of its application.

14. "Reasonable assurance" of the availability of WII's proposed site is lacking here for at least three reasons. First, as the Review Board has stated:

Where a site owner expressly conditions access to the site and those conditions are not met or [are] unlikely to be met, it cannot be glossily claimed that one has "reasonable assurance" nonetheless.

South Florida Broadcasting Co., Inc., 57 R.R.2d 495, 500 (Rev. Bd. 1984). Here, the landowner has conditioned access to her land on the assent of her tenant, a condition which has not been met. Moreover, it also is well established that a "mere possibility" that a site will be available is not sufficient to show reasonable assurance of a site. William F. and Anne K. Wallace, 49 F.C.C.2d 1424 (Rev. Bd. 1974); Houston Family Television, Ltd., 58 R.R.2d 1557 (Rev. Bd. 1985). Therefore, regardless of Mrs. Buell's personal belief that she "thinks" that the tenant would be willing to allow the site to be used also as the site of a broadcast tower, there is not yet any objective proof of the accuracy of her belief. Finally, insofar as there have apparently been no contacts with the person in legal control of the property, there obviously can be no "reasonable assurance" of the site's availability. Even a landowner only can give assurances with

respect to those rights which he or she continues to hold or which he or she has legal right to convey. Here, occupancy rights to the site have already apparently been conveyed away, to a tenant/farmer, vitiating any ability on the part of the landowner to convey "reasonable assurance." See, e.g., Vela Broadcasting Co., 1 FCC Rcd 637, 653-56 (ALJ 1986) (no reasonable assurance where, despite site owner's grant of consent for use of tower, there exists conflicting options for use of the site which already have been conveyed); Catamount Broadcasting, Inc., 55 F.C.C.2d 256, 257-58 (Rev. Bd. 1975) (no reasonable assurance where availability of site subject to consent of tenant); United Broadcasting Co., 58 F.C.C.2d 1346, 1351-52 n.17 (Rev. Bd. 1976) (site issue warranted where there is uncertainty concerning who (owner or tenant) has authority to convey assurances concerning availability of site).

15. In light of this conflicting information concerning the status of the land and the uncertainty of Mrs. Buell's legal right to even propose to "lease" the land to an applicant in this proceeding where the land already is leased to another, WII's Petition cannot be granted for this reason, as well.

New Issue

16. WII's application proposes to construct a new tower, 98 meters above ground. This increases the height of the structure beyond that proposed by ORA (the other applicant currently proposing use of the site) and consequently, Section V-B, Item 5, of WII's application indicates that the approval of the Federal Aviation Administration has been sought. Attachment 8.

17. Pursuant to Section 17.7 of the Commission's rules, notification to the FAA

is required for any proposed construction above 60.96 meters. This has been done by WII. It is well-established under FCC policy where an application (such as WII's) has not yet received FAA clearance, the application routinely is designated for hearing to determine whether the application would constitute a hazard to air navigation. See, e.g., Janice M. Scotland, 8 FCC Rcd 3074 (MMB 1993); Winston Broadcasting Co., 3 FCC Rcd 7180 (MMB 1988); Lawrence J. Falk, 5 FCC Rcd 7705 (MMB 1990); Playa del Sol Broadcasters, 5 FCC Rcd 7606 (MMB 1990); Frank K. Spain, 6 FCC Rcd 6892 (MMB 1991). In exercising its responsibilities under Section 309 of the Communications Act to find that a grant would serve the public interest, convenience, and necessity, the Commission must consider all relevant factors, including the height and location of proposed antenna structures. The Commission "usually follows" FAA recommendations. New York Municipal Broadcasting System (WNYC), 52 R.R.2d 541, 556 (1982).

18. Here, there has not yet been a determination of no hazard for the Commission to consider, and until that time, an FAA "air hazard" issue is warranted in this case. Therefore, WII was not accurate in its assessment at the present that acceptance of its amendment will require "no modification or addition of issues." Petition at 3. For this reason, as well, acceptance of WII's amendment is not warranted at this time.

Financial Amendment

19. In addition to its engineering amendment, WII also seeks leave to amend the financial qualifications portion of its application, to increase its proposed operating budget from \$150,000 to "\$410,670.00;" to remove "Bernard Wilburn" as a source of

funds; to increase "Charles W. Wilburn" as a source of funds from "\$75,000" to "\$210,670;" and for the first time to include "The Savings Bank" of Circleville, Ohio as a source of funding (in the amount of \$200,000). Compare Attachment 9 (excerpt from WII Dec. 30, 1991 application) with Attachment 10 (excerpt from WII July 14, 1994 Petition). No budgetary information, personal balance sheet of Charles Wilburn, copy of any documentary letter from The Savings Bank, etc. has been submitted by WII in support of its Petition.

20. Under Commission precedent, prior to submitting a broadcast application, an applicant must be financially qualified. Revision of Application for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3853, 3859 ¶ 44 (1989); Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Stations, 7 FCC Rcd 5074, 5078 n.24 (1992) ("an applicant seeking to correct [an] underlying problem would have to submit an amendment showing that it was financially qualified at the time of application"). A broadcast applicant has the burden of establishing its financial qualifications. 47 U.S.C. § 308(b); see Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). In order to be financially qualified, an applicant must have secured a "present firm intention" from a financing source, future conditions permitting, of sufficient funds to construct and operate its proposed station for three months without revenues (Merrimack Valley Broadcasting, Inc., 82 F.C.C.2d 166, 167 (1980); Financial Qualifications Standards for Aural Broadcast Applicants, 68 F.C.C.2d 407, 408 (1987)), and that financing source must have adequate funds to provide the loan. As the Review Board has stated:

This financial test does not turn on the subjective intent of the applicant, but upon a narrower and more objective inquiry to determine if, at the time an applicant certified its financial qualifications, it had reasonable assurance of the required funds from a committed source.

Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., FCC 93R-3 (Rev. Bd. March 5, 1993). With regard to financial amendments, an applicant seeking to amend its application beyond the relevant cut-off date is required to make a "full financial showing" demonstrating its initial financial qualifications. Radio Representatives, Inc., 6 FCC Rcd 6995 (1991). An applicant that certified initially to its financial qualifications will not be permitted to amend without first demonstrating that it was financially qualified at the time of the original certification. Albert E. Gary, 5 FCC Rcd 6235, 6236 ¶ 10 (Rev. Bd. 1990); Pepper Shultz, 5 FCC Rcd 3273 ¶ 2 (1990). An applicant must establish its initial financial qualifications as an essential ingredient to a "good cause" showing for a later financial amendment. Marlin Broadcasting of Central Florida, 5 FCC Rcd 5751 (1990). In order for an amendment to be accepted, an applicant must demonstrate that its initial certification was valid. Mabelton Broadcasting Co., 5 FCC Rcd 6314, 6326 n.36 (Rev. Bd. 1990). In the event an applicant was not initially financially qualified, it cannot rely on a later-obtained letter in support of its financial qualifications. Marc A. Albert, 6 FCC Rcd 6235 (Rev. Bd. 1991); Texas Communications Limited Partnership, 7 FCC Rcd 3186, 3187 (1992); Ponchartrain Broadcasting Co., 8 FCC Rcd 2256, 2257 ¶ 11 (1993).

21. Based upon this precedent, WII's proposed amendment must be rejected. First of all, as a basic matter, it is well-established that an applicant cannot amend its

application where it did not have reasonable assurance to begin with. Here, as is explained in more detail in its pending exceptions, WII's financial proposal always has been deficient. As noted above, WII proposed originally to use a site owned by Mid-Ohio Communications, Inc., the former licensee of Station WBBY-FM, which is the station that vacated the frequency at issue in this proceeding. As a part of the arrangement, Mid-Ohio intended to lease the tower site (tower and building) located at State Route 37, Sunbury, Ohio; studio facilities located at 14 Dorchester Court, Westerville, Ohio; and proposed to allow the prevailing applicant access to certain equipment that it previously used in conjunction with its operations. WII (as well as ASF and Ringer) misinterpreted this arrangement to constitute essentially a turn-key operation whereby it would not be necessary for them to purchase any equipment to construct the station -- rather, they only would have to pay the \$6000 rental fee for the existing site and all equipment. This interpretation, however, was proven to be incorrect. The letter "guaranteed" only that Mid-Ohio would provide "some or perhaps all of the equipment" listed on an inventory of equipment provided by Mid-Ohio (Attachment 1), and in fact, to confirm the accuracy of this interpretation of the December 1991 Mid-Ohio Letter, the author of the Mid-Ohio letter was contacted. Mid-Ohio's representative, Mr. Fry, confirmed that Mid-Ohio has provided no assurances of necessarily leasing all of the equipment to any applicant. As Mr. Fry stated, while valid assurances had been provided by Mid-Ohio for lease of the Mid-Ohio tower, transmitter builder and studio, the same could not be said for the tangible personal property owned by Mid-Ohio:

With regard to the personal property, Mid-Ohio provided no assurance concerning what itemized equipment in the inventory

accompanying the correspondence would be available to the successful applicant.

Attachment 11. Thus, while Davis (another proposed user of the site) made financial arrangements to secure funding sufficient to independently purchase (if necessary), any or all of whatever equipment Mid-Ohio may have chosen not to provide to the operator of the proposed station, WII (as well as Ringer and ASF) did not. This omission resulted in WII's grossly deficient initial budget of only "\$150,000." Attachment 2. Thus, instead of including funds in its budget sufficient to accommodate the possible unavailability of some or all of the equipment for the operation of the station (the very situation in which WII now finds itself placed), WII wrongly proceeded under the false assumption that "all" equipment had been "committ[ed]" to a successful applicant in this proceeding, and consequently, no additional funds were budgeted by it for the purchase or lease of equipment to ensure their ability to successfully construct and operate their proposed station.

22. Consequently, it cannot validly be stated that in this respect the WII's amendment is "necessitated by events which it could not reasonably have foreseen," nor can the amendment be accepted at this late date since it would have the impermissible effect of allowing an applicant to amend its application to repair a defect in its application where it did not have "reasonable assurance" of the availability of sufficient funds to begin with. Marc A. Albert, 6 FCC Rcd 6235 (Rev. Bd. 1991); Texas Communications Limited Partnership, 7 FCC Rcd 3186, 3187 (1992); Ponchartrain Broadcasting Co., 8 FCC Rcd 2256, 2257 ¶ 11 (March 31, 1993). For this reason, as well, WII's Petition must be denied.

23. Finally, WII proposed amendment must also be rejected since its financial certification does not include information sufficient to establish the certification's accuracy. As noted above, an applicant seeking to amend its application beyond the relevant cut-off date is required to make a "full financial showing" demonstrating its initial financial qualifications. Radio Representatives, Inc., 6 FCC Rcd 6995 (1991). See Texas Communications, 6 FCC Rcd at 5192 (applicant must take procedural step of filing an amendment and a good cause showing to make a new bank letter part of its proposal). Here, WII has not submitted a copy of its new bank letter, its revised budget, or a financial balance sheet of Mr. Wilburn sufficient to accommodate the increase in his personal financial commitment. Consequently, WII has submitted absolutely nothing from which the Board can base a decision with respect to whether it can accept its financial amendment. For this reason, as well, its Petition must be denied.

Conclusion

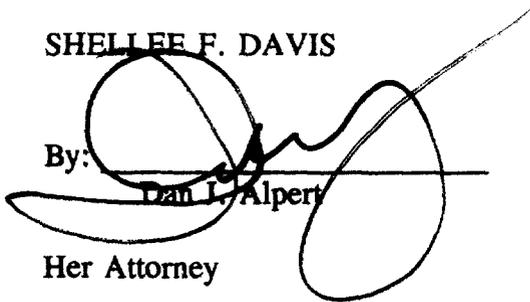
24. WII's proposed amendment contained a broad range of procedural and substantive deficiencies, each individually and collectively prevent the grant of its Petition. Moreover, grant of its Petition would require the addition of air hazard and site availability issues in this proceeding. For all of these reasons, WII's Petition must be denied.

WHEREFORE, it is respectfully requested that the "Petition for Leave to Amend," filed by Wilburn Industries, Inc., be denied.

Respectfully requested,

SHELLEE F. DAVIS

By:


Dan J. Alpert

Her Attorney

*The Law Office of Dan J. Alpert
1250 Connecticut Ave., N.W.
7th Floor
Washington, DC 20036*

July 22, 1994

ATTACHMENT 1

MID-OHIO COMMUNICATIONS, INC.
Post Office Box 14
Westerville, Ohio 43081

December 24, 1991

Charles W. Wilburn
Attorney at Law
210 S. Court Street
Circleville, OH 431131

WILBURN INDUSTRIES, INC.
"Exhibit 2"

RE: Mid-Ohio Communications, Inc./WBBY-FM/Lease of Assets

Dear Mr. Wilburn:

This correspondence is in regard to your recent inquiry pertaining to the lease of certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which is utilized in regard to the broadcast operation of WBBY-FM. You have indicated that you are planning to apply for the broadcast license of WBBY-FM, Westerville, Ohio, and this correspondence is to confirm that should the Federal Communications Commission award you the construction permit, Mid-Ohio Communications, Inc., the former licensee of WBBY-FM, is willing to negotiate appropriate leases with you for certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies in the amount of Six Thousand Dollars (\$6,000.00) per month.

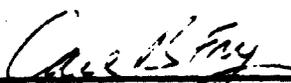
The real estate lease and equipment lease which would commence upon the FCC granting your construction permit would include the use of the tower site (tower and building) located at State Route 37, Sunbury, Ohio 43074; studio facilities located at 14 Dorchester Court, Westerville, Ohio 43081; and equipment utilized in the operation of the station. The equipment would include some or perhaps all of the equipment itemized in the inventory accompanying this correspondence. Failure to lease all of the equipment listed in the inventory will not result in a reduced lease package price. This correspondence conveys an intent to negotiate terms of lease agreements and does not in and of itself constitute lease agreements. Although it is contemplated that mutually acceptable terms will be negotiated in regard to the various leases, there is no guarantee of that occurrence.

Within sixty (60) days of the date of this letter, you must provide Mid-Ohio Communications, Inc. with a showing of financial qualifications satisfactory to Mid-Ohio Communications, Inc. for it to enter into the above-referenced leases. Mid-Ohio Communications, Inc. reserves the right to cancel this letter within sixty (60) days of receipt of your financial information. Notwithstanding the above, at the time you receive the construction permit, Mid-Ohio Communications, Inc. reserves the right to again review your financial condition to determine if you then have financial qualifications satisfactory to Mid-Ohio Communications, Inc. to enter into the above-referenced leases. In regard to a showing of financial strength, if the lessee is a corporation, the principals of lessee will have to personally sign unconditional guarantees in regard to the lease obligations.

Mid-Ohio Communications, Inc. hereby grants you the authority to specify WBBY-FM's transmitter location in your FCC application. We wish you the best of luck in your application for licensure being prepared for filing with the Federal Communications Commission.

Sincerely,

MID-OHIO COMMUNICATIONS, INC.

By: 
Carl B. Fry, Authorized Representative

Attachment

OFFICE INVENTORY 12/91

FRONT OFFICE

FIRST FLOOR

Item

- 1 Double pedestal metal desk
- 1 Brown Steno chair
- 1 Black side chair
- 2 2 Drawer metal filing cabinet
- 1 Panasonic T35 Typewriter
- 1 AT & T PC6300 computer and terminal w/printer
- 1 Sanyo CY5000 DP Calculator
- 1 Bostich EPS Electric pencil sharpener

LOBBY

- 2 Waiting room side chairs (wood & rust)
- 1 table w/ glass top

SALES OFFICE

- 6 desks (4 double pedestal & 2 single pedestal)
- 7 Steno chairs
- 1 wooden desk (computer table)
- 3 4 Drawer file cabinets
- 3 Wall dividers
- 1 Eureka Mighty Mite cleaner
- 1 Panasonic jetflo sweeper
- 1 Kodak Slide projector in case
- 1 36 slot sales cabinet
- 1 IBM selectric typewriter
- 1 Epson equity II+ Computer & terminal
- 1 Panasonic KX-P1124 24pin Multi-node Printer
- 1 Hewlett-Packard Desk Jet Printer

SALES MANAGERS OFFICE

- 1 Double pedestal desk
- 1 Gray executive chair
- 1 gold side chair
- 2 2 drawer file cabinets
- 1 Glass end table
- 1 Brass table lamp

GENERAL MANAGER OFFICE

- 1 Wooden double Pedestal desk
- 1 Blue executive chair
- 2 Blue side chairs
- 1 2 drawer file cabinet
- 1 Wooden top (credenza type)
- 1 Brass lamp
- 1 Telex Copyette

CONFERENCE ROOM

- 1 Conference table
- 6 side arm chairs
- 1 Credenza
- 1 Sharp SF750 Copier
- 1 Zenith 19" color TV
- 1 Zenith Video tape recorder
- 1 panasonic Microwave oven
- 1 GE small refrigerator
- 1 Presentation board w/ easel
- 1 WBBY old clock

PUBLIC SERVICE OFFICE

SECOND FLOOR

- 1 Double Pedestal desk
- 2 Steno Chairs
- 1 Diablo printer
- 1 File cabinet
- 1 Panasonic typewriter
- 1 Olivetti 35 typewriter
- 1 Sanyo small refrigerator
- 1 Samsung Classic Microwave oven

MUSIC LIBRARY

- 1 Wood table
- 2 Steno chairs
- 1 Single pedestal desk
- 1 Magnavox CD player
- 1 Toshiba receiver
- 1 AT&T Computer & terminal
- 1 Epson LX810 Printer

PROGRAM DIRECTORS OFFICE

- 1 Double pedestal desk
- 1 Steno chair
- 1 4 drawer file cabinet
- 2 Side chairs
- 1 Utility table
- 1 Stereo table
- 1 Technics Quartz Turntable/synthesizer
- 1 Onkyo Integra Integrated Amp
- 1 Sony C D Player
- 2 SBL Speakers

STUDIOS

- 1 Metal Table
- 1 Steno chair
- 4 Side chairs
- 1 Apple Computer w/ C Itoh Printer
- 1 Panasonic electronic modular switching system
- 1 Code-A-Phone (PVM 7530)

MISCELLANEOUS

- 1 Cobra Scanner #SR900
- 1 Randix Stereo AM/FM Cassette
- 1 Realistic AM/FM Receiver
- 1 Set of Greenwood Sales Teaching books/tapes
- 1 Panasonic portable AM/FM Cassette
- 1 Paper Cutter
- 2 Large waste baskets
- 13 Waste-basket
- 15 Large plastic desk floor mats