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

MM Docket No. 93-241

In re Applications

DARRELL BRYAN File No. BPH-920109MA

SBH PROPERTIES, INC. File No. BPH-920123MD

For Construction Permit for a
New FM Station on Channel 276A
in Tusculum, Tennessee

Appearances

J. Richard Carr, Esq. on behalf of Darrell Bryan; *Timothy K. Brady, Esq.* on behalf of SBH Properties, Inc.; and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: July 13, 1995; Released: July 19, 1995

PRELIMINARY STATEMENT

1. The captioned applications were designated for comparative hearing by *Hearing Designation Order ("HDO")*, released August 31, 1993, 8 FCC Rcd 6296 (Chief, Audio Services Division). The following issues were designated for comparative hearing:

A) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

B) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

2. SBH Properties, Inc. ("SBH") filed a Motion to Enlarge Issues Against Darrell Bryan ("Bryan") on February 15, 1994. By Public Notice dated February 25, 1994, the Commission suspended and held in abeyance the processing of applications and the adjudication of hearing proceedings which involve a comparative analysis.

3. By *Memorandum Opinion and Order,* FCC 94M-296, released April 25, 1994, the SBH motion to enlarge was granted in part and the issues in this proceeding were enlarged as follow:

To determine whether Bryan is presently financially qualified;

To determine whether Bryan was financially qualified at the time it so certified;

To determine whether Bryan's financial certification was false; and

To determine in light of the evidence adduced under the foregoing issues the effect on Bryan's basic qualifications.

4. A hearing session on the added financial issues was held on July 26, 1994 and the record on the financial issues was closed. The record was later reopened to admit two additional exhibits and again closed.

5. Subsequently, on June 19, 1995, the above-named applicants entered into a settlement agreement wherein SBH agreed to have its application dismissed with prejudice in return for certain monetary consideration and consulting services. The settlement agreement was approved and the SBH application was dismissed by *Memorandum Opinion and Order,* FCC 95M-159, released July 17, 1995. In as much as only the financial qualification/false certification issues specified against Bryan remain to be resolved the case is ripe for *Initial Decision.*

FINDINGS OF FACT

Bryan's Financial Qualification

6. Darrell Bryan consulted his attorney, Rick Hayes, in order to initiate an application. Mr. Hayes provided Mr. Bryan with a sample budget to use as an outline in assembling a list of construction and operating costs. The sample budget included listings of equipment and construction costs as well as operating costs for three months (Bryan Ex. 8, p. 1).

7. Mr. Bryan also reviewed catalogs and other materials from equipment companies that he had on hand in order to obtain prices for various items of equipment. He relied extensively on the 1990 catalog from Broadcast Supply West ("BSW") of Tacoma, Washington (see excerpts from catalog in Bryan Ex. 8, pp. 5-13; Tr. 32). The other catalogs reflected similar prices (Bryan Ex. 8, p. 1).

8. After reviewing the BSW catalog and seeing prices for various items of equipment, Mr. Bryan contacted that company by telephone, and was advised by BSW that if he purchased several items of equipment, the merchandise would be discounted from 20 percent to 30 percent. BSW prices were used and included prices for a Gentner remote control, the audio console, the distribution amp, an 8 foot equipment rack, carts, an audio processor and the STL transmission line (Bryan Ex. 8, p. 1).

9. Bryan also relied on prices obtained from Hall Electronics of Charlottesville, Virginia from whom he had made prior purchases. Hall Electronics gave him a price for the FM transmitter and for a 300-foot tower. He also relied on Hall for his price for the main antenna and transmission line, in addition to incorporating their recommendation of budgeting used equipment for the STL package, a pair of parareflector antennas and an ITC Delta Recorder. In compiling his various costs, he inadvertently omitted the price for an FM modulation monitor which is currently $1,450 (Bryan Ex. 8, p. 1; Tr. 34, 43; Bryan Ex. 9, p. 10).

10. Having been informed that exact costs for the antenna would be based on the configuration of the equipment which would be determined by an engineer prior to beginning construction, Mr. Bryan incorporated a price for a six kilowatt transmitter, and, a price for a six-bay antenna into his budget to ensure that the cost of any size antenna would be covered. The record shows that the proposed six kilowatt transmitter will work with either a four-bay or six-bay antenna (Bryan Ex. 9, p. 3). Mr. Bryan based his price for IGM automation equipment on a brochure he had obtained from that company (Bryan Ex. 8, p. 2.).

11. Mr. Bryan took into consideration that he already had on hand an extra EBS monitor, and an extra 5kw Kubota generator that were not in use (Bryan Ex. 8, p. 2; Tr. 41). He budgeted a price for a transmitter building to be built by a local contractor. He based his cost estimate for studio furniture on a local source that could build any unit needed to hold studio equipment (Tr. 45). Bryan's estimate for office furniture took into consideration the fact that he had unused tables, desks, chairs and typewriters that could be used at the FM station which he had personally purchased and were in storage WSMG (Tr. 46). Based on the foregoing process, Mr. Bryan arrived at an initial equipment and construction budget of approximately $99,000 (Bryan Ex. 8, p. 2).

12. In calculating the 90-day operating costs, Mr. Bryan relied on his own experience acquired operating radio station WSMG(AM) in the same market. Bryan estimated the cost for electricity (Tr. 81); expenses for telephone services (Tr. 86-87); for health insurance (Tr. 88); and site purchase payments (Bryan Ex. 8, p. 2). He included two payments for loan repayment which included the payment of both principal and interest based on the interest rate in effect at that time (Bryan Ex. 6, p. 1).

13. Mr. Bryan arrived at a total construction and operating cost of $136,482.88 and then added an additional $38,517.12 to cover any future cost increases, additional equipment, engineering or legal expenses to arrive at the total loan amount of $175,000. All of the legal and engineering expenses incurred up to July 6, 1994 have been paid (Bryan Ex. 8, pp. 2-3).

14. Richard Mertz, a consulting engineer, testified on the current cost of constructing Bryan's proposed station and prepared an updated equipment cost estimate. The equipment specifications in his estimate were determined after review of Bryan's FCC application. Bryan's original equipment budget did not provide brand names for all of the listed items of equipment. In his new estimate, Mr. Mertz provides a detailed list of equipment with brand names. Additionally, the Mertz estimate specifies only new equipment even though the original Bryan estimate had specified a few used items. Mr. Mertz included in his new estimate the costs supplied by Bryan for a generator and by Walter Stone for a transmitter building and tower.

15. To rebut SBH's counter that the proposed station cannot be built within the funds available in Bryan's budget, Mr. Mertz prepared two detailed estimates based on all new equipment at current prices. The only difference between the two estimates is that one includes the cost of a 7/8 inch transmission line and the other includes the cost of a 1 5/8 inch transmission line. The detailed estimates prepared by Mertz demonstrate that the proposed Bryan station can be built today using all new equipment for a cost ranging from only 3.28 percent to 5.35 percent over Bryan's 1991 estimates (Bryan Ex. 9).

16. Mr. Bryan contacted Stan Puckett, President of Greene County Bank for the funds necessary for construction and operation for the initial 90 days. As Greene County Bank had already extended a $300,000 loan to Mr. Bryan when he purchased his AM radio station in 1989, he was an established customer of the bank and they were familiar with his finances, his operation of the AM station, and his credit history on the $300,000 loan. His financial statement and biography were already on file at the bank (SBH Ex. 7, pp. 30-31).

17. Mr. Puckett testified that he informed Mr. Bryan that repayment would be interest-only for the first year with payments being made quarterly based on a 15-year amortized repayment at 1.5 percent above prime (Bryan Ex. 6, p. 1; Bryan Ex. 8, p. 3). He also stated that any decision to incorporate the station would trigger a requirement of pledge of stock (Bryan Ex. 8, p. 3). The bank's Executive Committee had met and not only authorized the issuance of the December 12, 1991 commitment letter but approved the loan to Mr. Bryan (Bryan Ex. 6, p. 2; Bryan Ex. 8, p. 3). Mr. Bryan subsequently obtained a letter from Mr. Puckett in September 1993 confirming the continued availability of the loan and clarifying that the pledge of stock would only be required in the event of incorporation (Bryan Ex. 6, p. 2; Bryan Ex. 8, p. 3).

18. Mr. Puckett, the bank president, testified that continued ownership of WSMB(AM) by Mr. Bryan was not of concern to the bank, and the fact that the bank has a pledge of stock of Burley Broadcasters, Inc. in connection with the 1989 loan would not bar a sale of WSMG(AM). Burley Broadcasters, Inc. is wholly owned by Mr. Bryan. Mr. Puckett stated that the proceeds of any sale would be applied to the payment of the balance on the 1989 loan (Bryan Ex. 6). Mr. Puckett testified that if the proceeds of a sale of WSMG(AM) did not completely retire the WSMG loan, which as of July 1, 1994 was $210,000, any shortfall would be folded into the FM station loan and handled under the new note (Bryan Ex. 7, p. 28; Bryan Ex. 6., p. 1). Since only $210,000 is owed on the AM station loan, a sale of the AM station for less than half of Mr. Bryan's valuation, would provide sufficient funds to completely retire the AM station loan (Bryan Ex. 6, p. 1). In addition to the pledge of stock, Greene County Bank currently has a lien on the equipment, furniture and fixtures used at WSMG (SBH Ex. 10). Any equipment or furniture retained by Bryan after the sale of the AM station to be used at the new FM station would fall under the new bank lien that would apply to any acquired assets under the FM loan (Tr. 105-106); See December 12, 1991 commitment letter attached to SBH Ex. 7. Since legal and engineering expenses have been paid by Bryan on an ongoing basis, the full amount of the $175,000 is still available to Bryan for construction and operation (Bryan Ex. 6, p. 2; Bryan Ex. 8, p. 3). Mr. Puckett made it clear that the bank had not simply issued a letter to consider a loan at a later date but had actually approved the loan to Bryan and that "[i]n order to draw the full amount of the loan Mr. Bryan only has to come in to the bank and show that he has received a permit to build the new FM station and sign the note and the loan documents." (Bryan Ex. 6, p. 2).

CONCLUSIONS OF LAW

19. The record establishes that Bryan obtained a sample budget from his attorney and studied catalogs that he had on hand at his AM station. He reviewed a catalog from an equipment company, Broadcast Supply West, which indicates in its catalog that it discounts equipment from list prices. Mr. Bryan then telephoned BSW as customers are instructed to do in the catalog and applied the discounts in arriving at a price for various items of equipment. He arrived at the price for the automation equipment from a brochure that he had received from the manufacturer, IGM. He telephoned Hall Electronics and obtained prices for the transmitter and tower. He also took their recommendation and obtained a quote from them for three items of used equipment, and, included a price for a six bay antenna since he was unsure at that time exactly how many bays would ultimately be needed. The $800 cost of studio furniture in the budget was obtained from a local source who would build what was needed; the $500 cost for office furniture took into consideration the fact that he had on hand various office furniture that could be used at the FM station. After pricing the equipment that would be needed, Mr. Bryan arrived at a total cost estimate of approximately $99,000 for equipment.

20. SBH has asserted that Bryan has underestimated his costs; SBH submitted equipment sales proposals from equipment companies in an effort to show that Bryan will have to spend considerably more. The SBH estimates are attached to a statement by Mr. William Seaver who requested them from Continental, Harris and RF Specialties. Seaver has no engineering background; he asked for proposals for a 6 kilowatt station with a 300 foot tower utilizing two-bay, three-bay and four-bay antennas. He acknowledged that the estimates were simply run off from proposals on computer. Furthermore, the detailed estimates prepared by Mertz demonstrates that the proposed Bryan station can be built today using all new equipment for a cost ranging from only 3.28 percent to 5.35 percent over Bryan's 1991 estimates. Such cost increases would normally be expected as a result of inflation over a period of two and half years.

21. In compiling operating costs, Mr. Bryan relied on his experience as the owner/operator of WSMG(AM) in the same market who is familiar with employee salaries and other radio station expenses such as electric power, telephone, etc. Mr. Bryan's total estimate for operating costs was $37,993.88 (SBH Ex. 15) which is more than $11,500 more than SBH allocated for its three month's operating expenses. After compiling both construction and operating costs, Mr. Bryan added a surplus of approximately $38,000 and obtained a loan approval from the bank for $175,000. If the highest equipment and construction cost presented by Mr. Mertz of $104,051.97 (Bryan Ex. 9, p. 12) is added to Bryan's three month operating costs total of $37,993.88 (without deleting the site and office payments), the total cost to Bryan to construct and operate at the present time is $142,054.85, resulting in an available surplus of $32,954.15.

22. Bryan is relying on a loan commitment from Greene County Bank. The record establishes that all of the factors discussed *Scioto Broadcasters,* 5 FCC Rcd 5158 (Rev. Bd. 1990) are present in the Greene County Bank letter. Moreover, Bryan's source of funds, Greene county Bank, did not just provide a letter to Bryan; the bank's president, Stan Puckett, testified that Bryan's loan request had been placed on the agenda of the bank's Executive Committee and had actually been approved prior to the issuance of the December 12, 1991 letter. Mr. Puckett testified that in order to draw the full $175,00, Bryan only has to show that he has received the FM construction permit and execute the loan documents. Bryan has established that $175,000 was available to him from Greene County Bank at the time that he certified and that such funds are still available.

23. In light of the foregoing the financial and false certification issues ARE RESOLVED in Bryan's favor.

ULTIMATE CONCLUSIONS

24. SBH's application has been dismissed pursuant to a settlement agreement entered into by SBH and Bryan. Bryan the sole remaining applicant has been found financially and otherwise qualified to be a Commission licensee. There is no impediment to the grant of his application.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Darrell Bryan (File No. BPH-920109MA) IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).