

# Shainis & Peltzman, Chartered

Counselors at Law

Suite 290  
1901 I Street, N.W.  
Washington, D.C. 20036

(202) 293-0011  
Fax (202) 293-0810

Aaron H. Shainis  
Lee J. Peltzman

Of Counsel  
William H. DuRoss, III  
Ruth S. Baker-Battist  
Robert J. Keller

May 25, 1999

RECEIVED

MAY 25 1999

Ms. Magalie Salas  
Secretary  
Federal Communications Commission  
Portals II - 12<sup>th</sup> Street Lobby  
Filing Counter - TW-A325  
445 - 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

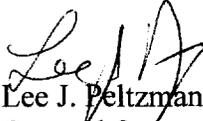
DOCKET FILE COPY ORIGINAL FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: MM Docket No. 97-234 ✓  
GC Docket No. 92-52  
GEN Docket No. 90-264

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications Limited, is an original and fourteen (14) copies of its Reply to Biltmore Forest Broadcasting FM's Opposition to Orion's Motion for Stay Pendente Lite in the above-referenced rule making proceeding. Please contact the undersigned in the event the Commission has any questions with respect to this Reply.

Sincerely,

  
Lee J. Peltzman  
Counsel for

ORION COMMUNICATIONS LIMITED

Enclosure

No. of Copies rec'd 07/14  
List A B C D E

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

RECEIVED  
MAY 25 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Implementation of Section 309(j) ) MM Docket 97-234  
of the Communications Act- )  
Competitive Bidding for Commercial )  
Broadcast Instructional Television )  
Fixed Services )  
)  
Reexamination of the Policy ) GC Docket 92-52  
Statement on Comparative Broadcast )  
Hearings )  
)  
)  
Proposals to Reform the ) GEN Docket 90-264  
Commission's Comparative Hearing )  
Process to Expedite The Resolution )  
Of Cases )  
)  
\_\_\_\_\_ )

To: The Commission

ORION COMMUNICATIONS, LTD.'S REPLY TO BILTMORE FOREST  
BROADCASTING FM'S OPPOSITION TO ORION'S MOTION FOR STAY  
PENDENTE LITE

Orion Communications Limited ("Orion"), by counsel,  
replies to Biltmore Forest Broadcasting FM's ("BFB")  
Opposition to Orion's Motion for Stay.

1. Success On The Merits.

BFB devotes about half of its brief to castigating  
Orion, arguing Orion really is only in this to flip the  
station.<sup>1</sup> BFB is free to rest on the laurels of its  
disgruntled twice-convicted perjurer and adjudicated

<sup>1</sup> BFB Mot. at 2-3.

deadbeat, Clyde Leeson, whom it surfaced only after Orion's founder, Zebulon Lee, was on his deathbed.

While Mr. Lee's wife, Betty Lee, and the Lee family have made it abundantly clear through their prior declarations and pleadings they intend to own and operate a family business, all of that doesn't matter for purposes of the underlying motion.

The issue before the Commission is whether Orion (and its colleagues whom BFB mentions and then more or less ignores), can meet the requirements for a stay, which we now address.

## **2. Irreparable Injury**

BFB's substantive opposition to Orion's motion is to argue Orion cannot demonstrate the requisite irreparable injury for a stay. BFB, unlike its somewhat more strident cohort, Wilsyr Communications, L.P., recognizes the pertinence of Virginia Petroleum Jobber's Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958) and the modified standard of Washington Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), to these proceedings. Nonetheless BFB's analysis of the facts and law misses the mark.

BFB's view of irreparable injury proceeds largely on the assumption the auction mechanism will be upheld.<sup>2</sup> But suppose it isn't. We know judicial review normally takes about a year in the United States Court of Appeals for the District of Columbia Circuit.<sup>3</sup> Meanwhile auctions are scheduled for September 28<sup>th</sup>.<sup>4</sup>

History is frequently a guide to the future and this case is a prime example. The FCC forced Orion off the air for seven months in 1997 before the Commission's now-discredited earlier action was overturned.<sup>5</sup> So Orion, a party which realistically cannot afford to participate in the new auction, stands in jeopardy of being told to get off the air long prior to the completion of judicial review.

If judicial review overturned the FCC, then what solace would that bring Orion? BFB says no one will have lost any substantive rights or property rights.<sup>6</sup> It's wrong. Orion would stand in the position of having been

---

<sup>2</sup> BFB Mot. at 3-4.

<sup>3</sup> Administrative Office of the United States Courts, Annual Report of the Judiciary at Table B-4 (1999) (median of all civil cases was 10.9 months for twelve months ending Sept. 30, 1997).

<sup>4</sup> FCC Public Notice, DA 99-940 at 12 (May 17, 1999).

<sup>5</sup> Orion Communications, Ltd. v. FCC, 131 F.3d 176 (D.C.Cir. 1997).

<sup>6</sup> BFB Mot. at 4.

twice right and twice grievously irreparably wronged. As Ms. Lee's accompanying Supplemental Declaration attests, time off the air costs Orion incalculable lost revenues and listening audience.<sup>7</sup>.

Moreover BFB forgets something else altogether: Orion and the joint movants, and probably even BFB itself, have invested several hundred thousand dollars in the underlying cases. There is no means of recovering those sums. This, too, is irreparable injury.

### **3. BFB Ignores The Merits**

It is curious that even BFB cannot keep an entirely straight face when parroting the Commission's claim new valid comparative criteria could not be devised.<sup>8</sup> Nor is there the *slightest* record evidence the Commission tied to do so, BFB's protestation to the contrary.<sup>9</sup>

Both BFB and its ally, Wilsyr, suffer from another shortcoming in their briefs: both utterly ignore the FCC's uneven treatment of Orion's and its sisters' cases versus its treatment of the broadcaster renewal application cases. And both are silent about the implications of retroactively abrogating Orion's reliance interests. That silence is

---

<sup>7</sup> Betty Lee Supp. Dec., ¶ 2 (May 24, 1999).

<sup>8</sup> BFB Mot. at 3.

<sup>9</sup> BFB Mot. at 3.

unsurprising for when one applies the pentangular standards of Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987) (*en banc*), which governs "secondarily retroactive" administrative rules altering the future consequences of past transactions, the result cuts against BFB (and Wilsyr).

Here, the FCC has created a new rule of first impression which reverses settled practice and curtails Orion's and its colleagues' financial investments. The new rule clearly has secondarily retroactive implications. It dramatically impacts Orion's prior financial investment, which exceeds \$500,000. No statutory interests are at stake: the FCC has the discretion to adopt reasoned comparative rules for cases such as Orion's.

#### **4. Balancing Of Interests**

BFB claims it would be "prejudiced grievously by any delay in the auction" because supposedly Orion is generating cash to participate in the auction.<sup>10</sup> As in much of BFB's statements, this is unadorned fluff.

First, through its Opposition to BFB's unsuccessful Petition to Comply<sup>11</sup> Orion represented it has not

---

<sup>10</sup> BFB Mot. at 4.

<sup>11</sup> Orion Response to Petition to Comply With Court Order (D.C.Cir., No. 98-1513, filed Jan 26, 1999).

accumulated a cash hoard to participate in an auction which it opposes.

Second, the repetitive nature of BFB's filings with the Commission and the Courts and its sudden perfervid desire for an auction suggest that it really is the one with a cash hoard.<sup>12</sup>

Third, BFB argues that holding auctions on a parallel will likely expedite review "by a number of years."<sup>13</sup> But if the auction mechanism for the few cases at issue are stayed for a few months pending judicial review, that would be far better than the administrative mess the Commission would create by going ahead only to be overturned. In this respect, we again refer to the Clark-Cowlitz problem which BFN so obviously ducked: if this did not present a formidable hurdle then one can be reasonably certain BFB would have addressed it.

Moreover, BFB is in no position to assume an auction mechanism would give it the frequency. It still would have to confront its own character problems. BFB is, after all, the one which filed an "abjectly false" site certification

---

<sup>12</sup> Of course, Wilsyr, which comes with the baggage of a "sham" and "window dressing" General Partner, probably has its cash hoard as well. Orion Communications, Ltd. v. F.C.C., 131 F.3d at 180 (citing administrative findings concerning Wilsyr's General Partner).

<sup>13</sup> BFB Mot. at 4.

and unsuccessfully touted its principal as a Native American.<sup>14</sup>

#### 5. Public Interest

BFB contends the public interest lies decisively in ending these cases soon. We agree as to the principle but not the means.

BFB, true to form, takes a closing pot shot at Orion by stating the local community has been served by "a rump service which could never be secure in its own permanence".<sup>15</sup> But as the Court of Appeals noted in reversing the Commission's prior actions, but for the FCC's tolerating BFB's and Wilsyr's "repetitious" efforts to "debat[e] matters on which [the Commission] ha[d] already deliberated and spoken,"<sup>16</sup> Orion long ago would have had permanent licensure.

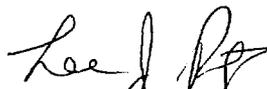
---

<sup>14</sup> Orion Communications, Ltd. v. F.C.C., 131 F.3d at 180 (citing administrative findings).

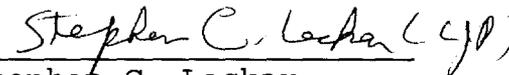
<sup>15</sup> BFB Mot. at 5.

In closing, we can say this: the local community and media was and has been supportive of Orion and its principals. We have not seen any ground swell of support for its opponents.

Respectfully submitted,  
Orion Communications, Ltd.



\_\_\_\_\_  
Lee J. Peltzman  
Shainis & Peltzman  
Suite 290  
1901 L St., NW  
Washington, D.C. 200369  
202.293.0011



\_\_\_\_\_  
Stephen C. Leckar  
Butera & Andrews  
Suite 500  
1301 Pennsylvania Ave., NW  
Washington, D.C. 20004  
202.347.6785

May 25, 1999

---

<sup>16</sup> Orion Communications, Ltd. v. F.C.C., 131 F.3d at 180.

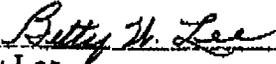
## SUPPLEMENTAL DECLARATION OF BETTY LEE

1. I am a principal of Orion Communications, Ltd.
2. Orion has since 1994 operated the Biltmore Forest, N.C.-FM frequency under interim authority. In June, 1997, we were forced off the air by the FCC, which replaced us with the so-called Biltmore Forest Consortium. We did not regain our temporary operating authority until mid-January, 1998, when the Court struck down the FCC action taking us off the air. We lost incalculable advertising revenues and market share during that period and still have not recovered from it. Moreover, we lost the services of several valued employees, who we have not been able to replace because of the previous shut down by the FCC.

I have read the foregoing and declare under penalty of perjury that it is true to the best of my knowledge.

Executed at Asheville, N.C.

this 24<sup>th</sup> day of May, 1999.

  
Betty Lee

CERTIFICATE OF SERVICE

I, Lisa L. Stone, secretary at the law firm of Shainis & Peltzman, Chartered, do hereby certify that I sent copies of the foregoing this 25th day of May, 1999, via first class U.S. mail, postage prepaid, to the following:

Robert J. Wiggers, Esq.  
Department of Justice,  
Antitrust Div.  
Appellate Section, Rm. 10535  
Patrick Henry Bldg.  
601 D St., NW  
Washington, D.C. 20530

Daniel M. Armstrong, Esq.  
& Gregory Christopher, Esq.  
Office of the General Counsel  
Federal Communications Commission  
445-12<sup>th</sup> St., SW, **Room 8-A766**  
Washington, D.C. 20554;

Stephen Yelverton, Esq.  
1225 New York Ave., NW  
Washington, D.C. 20005

Timothy Brady, Esq.  
Suite 208  
P.O. Box 986  
Brentwood, TN 37207

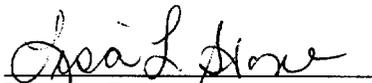
Donald J. Evans, Esq.  
Donelan, Clary, Wood & Maser  
1100 New York Ave., NW, Suite 750-W  
Washington, D.C. 20005-3934

Robert Depont, Esq.  
P.O. Box 386  
Annapolis, MD 21404

Harry Cole, Esq. & Gene Bechtel, Esq.  
Bechtel & Cole, Chtd.  
1901 L St., NW,  
Washington, D.C. 20036

Robert Marmet, Esq.  
2932 Thurston Rd.  
Frederick, MD 21704

Richard Swift, Esq.  
Tierney & Swift  
2173 K Street, NW  
Suite 350  
Washington, D.C. 20037

  
Lisa L. Stone