

Before the
FEDERAL COMMUNICATIONS COMMISSION **FCC 00I-01**
JAN 14 3 27 PM '00
Washington, D.C. 20554

In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,)	File No. BPH-870831MI
A LIMITED PARTNERSHIP)	
)	
WILLSYR COMMUNICATIONS)	File No. BPH-870831MJ
LIMITED PARTNERSHIP)	
)	
BILTMORE FOREST)	File No. BPH-870831MK
BROADCASTING FM, INC.)	
)	
SKYLAND BROADCASTING)	File No. BPH-870831ML
COMPANY)	
)	
ORION COMMUNICATIONS)	File No. BPH-870901ME
LIMITED)	
)	
For A Construction Permit For A)	
New FM Broadcast Station on)	
Channel 243A At Biltmore Forest,)	
North Carolina)	

ORDER

Adopted: January 12, 2000 ; Released: January 14, 2000

By the Assistant General Counsel, Administrative Law Division:

1. The above-captioned applications for a new FM station on channel 243A in Biltmore Forest, North Carolina are pending before the Commission. Liberty Productions (Liberty) was the winning bidder for Biltmore Forest in the September 28, 1999 Closed Broadcast Auction, and the hearing proceeding in MM Docket 88-577 was resumed to consider an unresolved false certification issue specified against Liberty.¹

¹ *Liberty Productions*, FCC 99I-23 (OGC Nov. 23, 1999). See also *Public Notice: Closed Broadcast Auction*, DA 99-2153 (rel. Oct. 12, 1999) (announcing the winner of the auction and specifying the dates for remitting the down payment and for filing any amendments to the winning bidder's pending long-form application); *Public Notice: Clarification Regarding the Resumption of Hearing Proceeding in MM Docket 88-577 To Consider Winning Bidder's Basic Qualifications And To Clarify Amendment Procedures*, DA 99-2355 (rel. Oct. 28, 1999).

2 On December 23, 1999 Liberty filed a Supplemental Brief on the false site certification issue as authorized by the order resuming the hearing proceeding in this case.² Various motions to add other basic qualifications issues against Liberty have been filed by Orion Communications Limited (Orion), Biltmore Forest Broadcasting FM, Inc. (BFBFM), and Willsyr Communications Limited Partnership (Willsyr).³ Additionally, Orion and Willsyr oppose the acceptance of Liberty's November 10, 1999 amendment to its long-form application insofar as it specifies a new transmitter site and it reflects that Liberty entered into a loan agreement with Cumulus Broadcasting on September 10, 1999.⁴ Although responsive pleadings relating to these matters are pending before the Commission, no pleadings have been filed by the Enforcement Bureau. Pursuant to Section 0.111(b) of the rules, 47 C.F.R. § 0.111(b), the Enforcement Bureau serves as the Commission's trial staff in this adjudicatory proceeding.⁵ As discussed below, the pleadings raise questions, *inter alia*, as to Liberty's qualifications to be a Commission licensee, involve the interpretation of the Commission's new auction rules for commercial broadcast facilities (and, in particular, the stricter attribution standards applicable to bidders claiming new entrant status⁶), and entail a variety of processing and

² *Id.* at ¶ 6. On January 7, 2000, Orion Communications Limited filed a Response to Supplemental Brief, Biltmore Forest Broadcasting FM, Inc. filed an Opposition to Supplemental Brief, and Willsyr Communications Limited Partnership filed a Response to Supplemental Brief.

³ The following motions to enlarge issues, and responsive pleadings, are pending before the Commission: (a) Motion to Enlarge Issues Against Liberty Productions filed on November 12, 1999, by Orion Communications Ltd.; (b) Opposition to Motion to Enlarge Issues and Motion for Leave to File Out Of Time, filed on November 29, 1999, by Liberty Productions; (c) Motion to Enlarge The Issues filed on November 24, 1999, by Willsyr Communications; (d) Opposition to Motion to Enlarge Issues filed on December 3, 1999, by Liberty Productions; (e) Reply to Opposition of Liberty filed on December 13, 1999, by Willsyr Communications; (f) Supplement to Opposition filed on December 3, 1999, by Liberty Productions; (g) Second Motion to Enlarge The Issues filed on December 13, 1999, by Willsyr Communications; (h) Opposition to Second Motion to Enlarge The Issues filed on December 23, 1999, by Liberty Productions; (i) Reply to Opposition of Liberty filed on January 3, 2000, by Willsyr Communications; (j) Motion to Enlarge Issues filed on November 12, 1999, by Biltmore Forest Broadcasting FM, Inc; (k) Opposition to Motion to Enlarge Issues filed on November 26, 1999, by Liberty Productions; and (l) Reply to Opposition filed on December 7, 1999, by Biltmore Forest Broadcasting FM, Inc.

⁴ The following pleading have been filed: (a) Opposition to Amendment filed on November 22, 1999, by Orion Communications Ltd.; (b) Reply to (Orion's) Opposition to Amendment filed on December 3, 1999, by Liberty Productions; (c) Motion to Strike Reply to Opposition to Amendment filed on December 29, 1999, by Orion Communications Ltd. (d) Opposition to Amendment filed on November 22, 1999, by Willsyr Communications; (e) Reply to (Willsyr's) Opposition to Amendment filed on December 3, 1999, by Liberty Productions; (f) Motion to Strike Reply to Opposition filed on January 3, 2000, by Willsyr Communications; and (g) Consolidated Opposition to Motion to Strike filed on January 10, 2000, by Liberty Productions.

⁵ Among the functions of the Enforcement Bureau is to "[s]erve as trial staff in formal hearings conducted pursuant to 5 U.S.C. § 556 regarding applications, revocations, forfeitures and other matters designated for hearing."

⁶ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 14 FCC Rcd 12541, 12545 ¶ 8 (1999) ("Due to the significant advantages being conferred on applicants claiming new entrant status, and to insure

enforcement issues pertaining to the implementation of the new auction procedures. Significantly, authority to conduct commercial broadcast auctions is delegated to the Mass Media and Wireless Telecommunications Bureaus, and this is the first hearing case in which the permit will be awarded after an auction.

3. In this regard, Section 73.5007(a) of the rules, 47 C.F.R. § 73.5007, provides for the award of a 35 percent new entrant bidding credit if the winning bidder (and no individual or entity with an attributable interest in the winning bidder) has no attributable interest in any other media of mass communications. What constitutes an attributable interest is defined by Section 73.5008 of the rules, 47 C.F.R. § 73.5008. In a Memorandum Opinion and Order, 14 FCC Rcd 12541, 12543 ¶ 6 (1999), the Commission “concluded that [for purposes of the new entrant bidding credit] it would be appropriate to attribute the mass media interests of investors holding more than a 33 percent equity and/or debt interest in a broadcast auction bidder claiming new entrant status, even if such an interest is nonvoting.” The related change in Section 73.5008 took effect upon publication in the Federal Register on August 18, 1999,⁷ and was therefore applicable to the bidders participating in the September 28, 1999 Closed Broadcast Auction.⁸

4. In its short-form application, Liberty certified that it was eligible for a 35 percent new entrant bidding credit. The pending pleadings raise questions as to Liberty’s eligibility for the bidding credit given the media interests held by Liberty’s 65 percent limited partner, David Murray, and the numerous media holdings of its lender, Cumulus Broadcasting. At issue is whether to specify a further false certification against Liberty, and whether to set aside the results of the auction even if there is no basis for such further false certification issue, because a determination of ineligibility arguably would impair the integrity of the September 28, 1999 auction. A question has also been raised as to whether Liberty’s short-form application was defective, and should have been dismissed prior to the auction, because it did not include a certification that Liberty was in compliance with the Commission’s policies relating to media interests held by family members. Additionally, there is an allegation of an unreported ownership change assertedly warranting the addition of misrepresentation/lack of candor issues, or other character issues, against Liberty. Thus, in addition to the false site certification issue not previously considered by the former Review Board or the Commission, there are

fairness to competing bidders and the public, we conclude that more carefully limiting eligibility for such status by adoption of a stricter attribution standard is appropriate”).

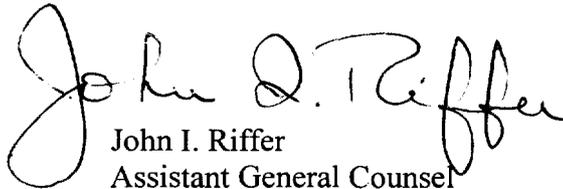
⁷ 64 Fed. Reg. 44856 (Aug. 18, 1999). See also *Public Notice: New Rule Now In Effect Concerning Equity/Debt Threshold For Use With Determining Eligibility for New Entrant Bidding Credit*, DA-1663 (Aug. 19, 1999) (“The purpose of this Public Notice is to provide notification that OMB approval has been obtained and Federal Register publication occurred today, August 18, 1999. Therefore, the new equity/debt threshold rule is now in effect . . . Bidders participating in the September 28, 1999 Closed Broadcast Auction and seeking a New Entrant Bidding Credit are reminded that they will be subject to the [new] equity/debt threshold rule”).

⁸ 14 FCC Rcd at 12547 ¶ 11 (“We find good cause to make the rule amendments effective immediately upon publication in the Federal Register so that bidders in the September 28, 1999 Closed Broadcast Auction seeking a New Entrant Bidding Credit will be subject to the revised eligibility standard”).

numerous questions that concern Liberty's basic qualifications and that involve the processing of auction applications generally. In these circumstances, in order to assist in the resolution of all of these questions, it would be useful to have the views of the Enforcement Bureau, in its capacity as trial staff in this adjudicatory proceeding, on all matters bearing on Liberty's basic qualifications and the processing of its short-form application and subsequent auction-related filings.

5. ACCORDINGLY, IT IS ORDERED, That the Enforcement Bureau MAY FILE the above-described pleading within 30 days of the release of this Order; and that Reply Comments MAY BE FILED within 15 days thereafter.⁹

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "John I. Riffer". The signature is written in a cursive, flowing style with a large initial "J".

John I. Riffer
Assistant General Counsel
Administrative Law Division
Office of General Counsel

⁹ The Bureau's filing, and any reply pleadings, should not exceed 30 pages in length. Each party to this proceeding may file a single reply pleading.