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November 29, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
Portals II - 12th Street Lobby
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445 12th Street, S.W.
Washington, D.C. 20554

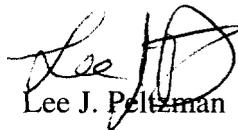
Re: MM Docket No. 88-577
Biltmore Forest, North Carolina
Partial Opposition to Joint Request for
Approval of Settlement Agreement

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications Limited, is an original and fourteen copies of its Partial Opposition to Joint Request for Approval of Settlement Agreement in the above-referenced Commission proceeding.

Please contact the undersigned in the even the Commission has any questions with respect to the filing of this Partial Opposition.

Sincerely,


Lee J. Peltzman

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Enclosure

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

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

In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP)	File No. BPH-870831MI
)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIPS)	File No. BPH-807831MJ
)	
BILTMORE FOREST BROADCASTING FM, INC.)	File No. BPH-870831MK
)	
SKYLAND BROADCASTING COMPANY)	File No. BPH-870831ML
)	
ORION COMMUNICATIONS LIMITED)	File No. BPH-870901ME
)	
For a Construction Permit for a New FM Broadcast Station on Channel 243A At Biltmore Forest, North Carolina)	

To: The Commission

**PARTIAL OPPOSITION TO
JOINT REQUEST FOR APPROVAL OF SETTLEMENT**

Orion Communication Limited (“Orion”), by its attorneys, hereby partially opposes the Joint Request For Approval of Settlement filed by Biltmore Forest Broadcasting FM, Inc. (“BFB”) and Liberty Productions, L.P. (“Liberty”). In support of its position, Orion submits the following:

The proposed Settlement Agreement by and between Liberty and BFB provides for the dismissal of Liberty’s application and the designation of BFB’s application as the auction winner subject to the following specified conditions: first, the dismissal of Liberty’s application with prejudice without penalty to Liberty; second, the designation of BFB as the auction winner by virtue of its high bid in Round 12 of Auction No. 25 rather than its actual high bid in Round 26;

third, the payment by BFB of Liberty's "reasonable and prudent expenses" in filing and prosecuting its application and participating in the consortium interim broadcast operation; and last, the approval of a Consulting Agreement between BFB and Liberty's general partner, Valerie Klemmer Watts, during the initial start-up of the Biltmore Forest FM station.

Orion has no objection to the dismissal of Liberty's application with prejudice. To the contrary, Orion has argued for the denial of Liberty's application throughout this proceeding, including subsequent to its designation as auction winner. Liberty should be disqualified and its application dismissed. Orion does, however, question the dismissal of Liberty's application without payment of the required penalty and the designation of BFB as auction winner by virtue of its high bid in an earlier round of the auction. Orion also has questions as to the validity of the Consulting Agreement between BFB and Liberty's general partner as well as the legitimacy of Liberty's so-called reasonable and prudent expenses to be reimbursed by BFB.

Liberty and BFB provide somewhat differing rationales for securing their relief. Both claim that the proposed agreement will be in the public interest because it will allegedly result in faster service to the public. Liberty and BFB also contend that fairness to the parties, especially given the unique history of the Biltmore Forest case, demands that they be provided their requested relief. They also claim that removal of Liberty will simplify the parties and the issues because of Liberty's current position before the Commission. Liberty was disqualified by the Presiding Judge in the Biltmore Forest's comparative case, but because it was such an obvious loser on other grounds, Liberty's disqualification was ignored by both the Review Board and the Commission. After the auction, Liberty's opponents, including BFB, raised other serious issues regarding both Liberty's basic qualifications as well as its eligibility to receive a bidding credit as a result of its relationship with multiple owner Cumulus Broadcasting.

Liberty alleges that Section 1.2109(c) of the Commission's rules, which requires a "defaulting" winning bidder to pay a specified penalty, does not embrace or contemplate a circumstance in which the dismissal of the winning bidder is approved by the Commission pursuant to a Settlement Agreement. Thus, since Section 1.2109(c) does not mention such a circumstance, Liberty reasons that the rule does not require the assessment of any penalty in this case. Liberty claims that it has not defaulted, but rather has every intention of fulfilling its auction obligation absent the pending Settlement Agreement. It takes credit for voluntarily stepping "aside in order to expedite the resolution of this case" and argues that "such steps should be encouraged rather than penalized."¹

BFB argues for its part that the Commission should adopt the fiction that Liberty's application was erroneously accepted to begin with and, therefore, Liberty should never have been permitted to take part in the auction. Thus, under this scenario, Liberty's application should be dismissed now as it should have been prior to the auction and Liberty's participation in the auction and the resultant ramifications should be ignored as if they never happened. Liberty would receive no penalty for bidding throughout the auction and its down payment would be returned while BFB would be credited with its highest bid against any bidder other than Liberty. Such a result allegedly would result in "essential justice" to both Liberty and BFB, "preserve the integrity of the auction rules and procedures", and would have "the practical effect of making [the] settlement economically feasible."² The parties contend that BFB should be designated as winner of the auction by virtue of its being the next-highest bidder after Liberty. They cite the Commission's First Report and Order in Docket 97-234, 13 FCC Rcd. 15920, 15952 (1998),

¹ Liberty's Memorandum in Support of the Joint Request for Approval of Settlement, filed November 17, 2000 at para. 10.

² BFB's Memorandum in Support of the Joint Request for Approval of Agreement, filed November 14, 2000 at pp. 4-5.

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wherein the Commission concluded that, in those cases where the winning bidder has defaulted or been disqualified, it would offer the construction permit to the next highest bidder rather than auction off the construction permit to new applicants.

The parties' reasoning in support of their settlement is inconsistent. First, Liberty makes much of the fact that it is not a "defaulting" winning bidder and, therefore, does not come under the provisions of Section 1.1209(c) of the rules. Yet, while Liberty has not defaulted in the classical sense that it is unable to pay the amount of its winning bid, it has voluntarily chosen not to pay that bid. Moreover, but for its settlement, it is quite likely that it would be disqualified based on the numerous matters presented by the other applicants to the Commission.

BFB asks the Commission to engage in the fiction that Liberty never took part in the Commission auction, as if Liberty's actions at auction only effected BFB and none of the other applicants. Or course, while BFB's fiction would result in "essential justice" to it and Liberty, the relief it seeks would be unjust to Orion, who has only played by the FCC's rules and been selected as the superior applicant too many times to count and who has provided service to the citizens of Biltmore Forest and Asheville for most of the 1990's. Also, Orion bid the same amount as BFB did at Round 12 of the auction. See Attachment. BFB cannot possibly know that, absent the involvement of Liberty, with its multiple owner backer Cumulus and all of its financial resources, Orion quite likely would have stayed in the auction beyond Round 12 and battled BFB alone. Liberty and BFB argue that the specific language in the Commission's rules should not be applied because of equitable considerations, then turn around and claim that, under the language of the Commission's First Report and Order, the Commission must offer the construction permit to BFB as the next highest bidder. In fact, Section 1.1209 of the Commission's rules grants the Commission discretion to either re-auction the permit to existing or new applicants or offer the permit to other highest bidder in descending order of their final

bids. Given the taint of Liberty's involvement in the auction, the only appropriate decision would be to re-auction the permit to the existing applicants. The language which the parties refer to in the First Report and Order makes reference to re-auctioning the permit to new applicants. Orion suggest that the Commission re-auction the permit to the existing applicants

The other reasons offer by the parties for approval of their settlement are questionable at best. Approval of the settlement will not result in faster service to the public. As the parties themselves point out, Orion has been providing to service to the Biltmore Forest area for the better part of a decade. While this has been an interim operation, the listeners of the station have always considered it to be a first class broadcast operation. Thus, since there is service, demonstratively quality service, already being provided to Biltmore Forest, the settlement will not result in much of anything new other than the opportunity for BFB to own a valuable frequency. Also, while settlement will simplify the parties and issues and eliminate the need to resolve issues with respect to Liberty, so would the simple disqualification of Liberty for all of its obvious faults. Moreover, contrary to the parties' claims, the agreement does not do substantial justice to all of the applicants by effectively placing them in the position that they would have been in if Liberty had not participated in the action at all. Only a new auction would do that, since, as noted above, Orion's actions at the auction were, like BFB's, guided by the involvement of Liberty and its financial backer, Cumulus.

Accordingly, Orion has serious questions whether the dismissal of Liberty's application without payment of a penalty and the designation of BFB as auction winner by virtue of a high bid in an earlier round of the auction would truly be in the public interest. However, if the Commission is convinced that the public interest would be served thereby, it should follow through on the parties' reasoning and re-auction the Biltmore Forest permit, permitting only

those applicants who have been through the fifteen (15) year Commission proceeding to take part.

Orion also questions the Consulting Agreement between BFB and Valerie Klemmer Watts. The parties claim that the terms of that Agreement are consistent with those approved by the Commission in other instances. However, the Commission has historically viewed “consulting agreements between former adversaries with a fair degree of skepticism and given them close scrutiny.” Aurio A. Matos, 9 FCC Rcd 5764 (Rev. Bd. 1994) at para. 7. Mrs. Watts is to be paid a total of \$75,000.00 over three years, a substantial sum to pay someone who has only limited broadcast experience. However, unlike most employment agreements, Watts is not paid the same amount each month. She is to be paid a total of Thirty Thousand Dollars (\$30,000.00) within thirty days of the grant of BFB’s construction permit. Orion is unfamiliar with consulting or employment agreements where a party is paid tens of thousand of dollars within thirty (30) days of a grant. This would appear to be more of a device to allude the compensation limit than a bona fide consulting agreement. Moreover, nothing within the four corners of the agreement assures anyone that any consulting service will actually be rendered in exchange for the payments required under the Agreement. Mrs. Watts is obligated to devote the maximum of fifty (50) hours per month, however, there is no minimum commitment of consulting time under the Consulting Agreement. There is not even a commitment by BFB to ask for her services at all. If BFB does not ask for her services, it still cannot withhold payment. Thus, it is unclear that the Commission can legitimately conclude that the consulting payment is fair compensation for services actually to be rendered rather than impermissible consideration for the agreement to dismiss the Liberty application. See Aurio A. Matos at para. 8. Compare Gifford Orion Broadcasting, Ltd., 9 FCC Rcd 314, 315 n. 6 (1993) (revised consultancy

agreement accepted after a provision specifying a maximum number of hours replaced with one specifying a minimum and maximum number).

Moreover, there are legitimate questions as to what “expertise” Valerie Watts brings to the BFB station. While she was co-manager of the interim consortium station, in fact, immediately after acquiring control from Orion, the consortium entered into an LMA with a Florida broadcaster to build and operate their interim station. The entire station was programmed from Florida. While Mrs. Watts may have been physically present at a station studio from time to time, it is unclear what broadcast expertise she acquired. Certainly, it is hard to imagine what useful insights and experiences she acquired in “starting a radio station from scratch in Asheville.”³ As noted above, because of Orion’s lengthy interim operation prior to the consortium taking control, it was not necessary to start any radio station from scratch and, in any event, the entire station’s program time was immediately leased to a separate entity after Watts became the co-manager. The parties also seek to credit Valerie Watts with considerable site work in having arranged a new transmitter site for Liberty. Mrs. Watts should have experience in arranging such sites since her application was disqualified at hearing for her misrepresentation to the Commission in locating an earlier tower site.

The remainder of the Settlement Agreement itself raises material questions. Liberty seeks reimbursement of almost Thirty-two Thousand Dollars (\$32,000.00) for work done by a local attorney. It supplies a Declaration from the local attorney, one Robert Dungan. What it does not state is that Mr. Dungan, upon information and belief, was, during the time that most of these services were provided to Liberty, the husband of Valerie Klemmer Watts, Liberty’s general partner. While he may be presently divorced from her, there is a question whether that

³ Joint Request for Approval of Agreement, filed November 14, 2000 at p. 4.
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gives Liberty the right to collect monies to pay a principal's spouse for work done when he was a spouse.

Moreover, while it is Orion's understanding that the joint interim operator, Biltmore Forest Radio, Inc., did not make a profit from its operation of the station, it was permitted to pay off its expenses, including legal expenses. Thus, there are questions as to why it is necessary for Liberty to be reimbursed for those same legal expenses here.

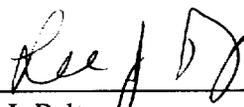
Finally, it is unclear absent production of a Loan Agreement by and between Cumulus, how Liberty could have accumulated Fifty Thousand Dollars (\$50,000.00) in interest expense in the one year that has occurred since the auction. Absent provision of that Loan Agreement, the Commission should not approve this expense as being reasonable and prudent.

In view of the above, Orion believes that the Commission should require the parties to provide more information with respect to the Consulting Agreement and Settlement Agreement. Orion also would consent to the dismissal of Liberty's application under the conditions discussed above.

Respectfully submitted,

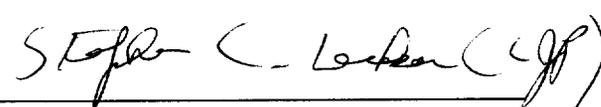
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November 2, 2000

BID VERIFICATION

10/01/1999 15:37:09

Auction: 25-Closed Broadcast Stage: 1 Round: 12 Waivers Remaining: 2 Waivers Used: 3

FCC Account Num: 0252122432 Fax: (202)293-0810 Maximum Eligibility Amt: 130,000

Bidders: Brian M Lee Activity Required Amt: 130,000

Barry A Lee Current Activity Amt: 130,000

Lee J Peltzman

	<u>Bid Date</u>	<u>MX Group</u>	<u>Description</u>	<u>Bid Amt</u>	<u>Withdraw/ Remove Date</u>
Bid Submitted	10/01/1999 15:36:4	FM34	Biltmore Forest, NC	990,000	

Liberty 1,089,000

CERTIFICATE OF SERVICE

I, Dawn L. Hughes, secretary in the law offices of Shainis & Peltzman, Chartered, do hereby certify that on this 29th day of November, 2000, copies of the foregoing were sent (except where noted) via first-class United States Mail, postage pre-paid, to the following persons:

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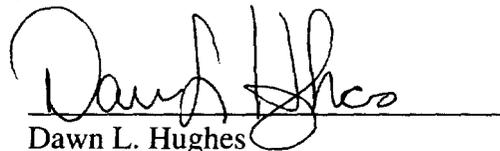
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