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88-577

December 11, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie R. Salas, Esq.

Secretary

Federal Communications Commission

445 12th Street, SW, Room TW-B204

Washington, DC 20554

Re: Channel 243A, Biltmore Forest, NC

Dear Ms. Salas:

Transmitted herewith, on behalf of Biltmore Forest Broadcasting FM, Inc., are the original and 14 copies of Consolidated Reply to Oppositions.

Please date stamp and return the file copy of the Reply.

Should further information be required, please contact the undersigned.

Respectfully submitted,



Donald J. Evans

Counsel for

Biltmore Forest Broadcasting FM, Inc.

DJE:deb

Enclosures

cc: Service List

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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|---|---|-----------------------------|
| In re Applications of |) | MM Docket No. <u>88-577</u> |
| |) | |
| LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP |) | File No. BPH-870831MI |
| |) | |
| WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP |) | File No. BPH-870831MJ |
| |) | |
| 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

**BILTMORE FOREST BROADCASTING FM'S
CONSOLIDATED REPLY TO OPPOSITIONS**

BILTMORE FOREST BROADCASTING
FM, INC.

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Its Attorney

December 11, 2000

**Before the
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To: The Commission

**BILTMORE FOREST BROADCASTING FM'S
CONSOLIDATED REPLY TO OPPOSITIONS**

Biltmore Forest Broadcasting FM, Inc. ("BFB") hereby replies to the three oppositions or partial oppositions which were filed with respect to BFB's and Liberty Production L.P.'s ("Liberty's") Joint Request for Approval of Agreement. We will focus primarily on the Comments of the Enforcement Bureau¹, while briefly correcting errors or misapprehensions in the filings of Orion Communications, Ltd. ("Orion") and Willsyr Communications, L.P.

¹ We note that, pursuant to Section 1.294 of the rules, the Bureau's Opposition was due on November 29, 2000. Unaccountably, the Bureau's Opposition was filed on December 5 -- almost a week after the deadline and with no explanation or request for permission to file late.

("Willsyr"). Liberty will separately address the issues raised by Orion with respect to the specifics of the terms of the settlement.

A. Uniqueness of the Case

One of the key justifications offered by Joint Petitioners in their request for approval was the fact that this is a one-of-a-kind case. The Bureau is concerned that any relief offered to movants here could serve as a precedent in other future auction cases. The facts clearly demonstrate otherwise. This case and the Selbyville, DE case are the only two remaining comparative hearing cases which the Commission will ever have to deal with. Never again will applicants go through a decade of litigation without moving a step closer to a permanent licensee. Never again will applicants and the Commission spend millions of dollars in contesting which applicant will better serve the public interest. Never again will the Commission enthrone one applicant as interim operator while other applicants are frozen out. In short, what the Bureau's comment fails to recognize is that this case and its litigants are burdened with a history which will never be repeated.

Both Congress and the Commission have repeatedly recognized the compelling equities which favored permitting the old cases to be settled rather than going to auction. See 47 U.S.C. 309(l)(3), requiring the Commission to take extraordinary steps to facilitate settlement of pending broadcast hearing cases; see also Waiver of Settlement Restrictions, 10 FCC Rcd. 12182 (1995), granting a blanket waiver of settlement restrictions to encourage settlements of pending cases. Implicit in those policy judgments was the notion that the parties to the old hearing cases had suffered enough, that they deserved different treatment from the fresh, new applicants who had not run the savage gauntlet of brutal comparative hearings. The horrible scars which each of the applicants in this case bear – financial, emotional, professional – attest

strongly to the ordeal they have been through. Now, of all their breed, only two hearing cases remain.

In approving the settlement of the last comparative renewal cases, the Commission candidly acknowledged that those cases were dinosaurs whose kind was never to be seen again. Trinity Broadcasting of Florida, Inc., 18 CR 839 (1999); EZ Communicatons, Inc., 12 FCC Rcd. 3307 (1997). There was no worry about setting bad precedent for the future since all the rules for future renewals had changed. It made sense, therefore, in that context, for the Commission to approve a settlement which it might otherwise have balked at. Similar considerations obtain here. There will, thankfully, never be another case like this one again. To ignore that dimension of the proceeding is to ignore the strongest impetus both for settling the case and *approving* settlement of the case. With the unique factual predicate presented here, the Commission can safely and appropriately approve this settlement without setting any kind of precedent whatsoever for future auctions.

B. Loss to the Treasury

The Bureau bases most of its opposition to the proposed settlement on the hypothetical loss to the Treasury of some thousands of dollars. We are constrained to note, first, that the protracted length of these proceedings has already deprived the Treasury of thousands of dollars. While the proceedings against Liberty drag on, the Treasury is getting *no* money in the door. Nor is there any assurance, if Liberty is disqualified, that Liberty will have the wherewithal to pay *any* of the substantial penalties on which the Bureau casts such a covetous eye.² Yes, *if* Liberty were found qualified (possibly after years of hearings) and *if* Liberty were

² According to the hearing record, Liberty's sole general partner was a part-time teacher in the Asheville area. How the Bureau expects her to pay well over a million dollars in penalties is unclear, particularly since her funding source will presumably have no further obligations to lend funds at that point.

found to owe not the discounted auction bid but rather the undiscounted amount (a finding which BFB has pointed out would necessarily require the dismissal of Liberty's application), and *if* Liberty did not default but paid the undiscounted auction price (which the Bureau now demands but which Liberty never actually bid), there might be a significant difference between the funds the Treasury would have taken in and the funds it will realize as a result of the proposed settlement. Looked at from the plain standpoint of sound money management, however, the Treasury might very well conclude that its chances of recovering the highest amount from this auction in the shortest time are best found in this settlement proposal.

Be that as it may, the Commission has repeatedly insisted in response to express Congressional directives, that its foremost concern in resolving mutually exclusive cases is *not* maximizing the recovery to the treasury.³ Rather, Congress and the Commission have adopted competitive bidding as the means best designed to quickly and efficiently get licenses into the hands of the applicants who are likely to put them to their best economic use.

While Congress has charged us to recover a portion of the value of the public spectrum made available through competitive bidding, this does not amount to maximizing revenue, nor is it our sole objective. To the contrary, our goals are to encourage the rapid deployment of service, efficient use of the spectrum, and the other goals enumerated in Section I ...[W]e can best achieve these objectives by awarding licenses to the parties that value them most highly.

³ The Bureau correctly notes that the Communications Act expressly bars the Commission from basing its public interest determinations solely or predominantly on revenue maximization only in the context of rulemaking proceedings. 47 U.S.C. 309(j)(7). However, Congress also expressly evinced an intent that revenue maximization not over-ride other valid public interest methods of resolving mutual exclusivity. 47 U.S.C. 309(j)(6)(E).

Implementation of Section 309(j) – Competitive Bidding, 75 RR2d 1 at Para. 73 (1994). The Bureau’s overwhelming emphasis on maximizing revenue runs directly contrary to the Commission’s oft-stated guiding precepts. (“Although the raising of revenue is not our dominant concern” (MDS) 10 FCC Rcd. 9589 at para. 105 (1995); “Our reasons for adopting competitive bidding . . . do not include revenue-raising considerations.” (Paging 15 CR 1083 (1999).) The settlement proposal proffered here puts the permit in the hands of the applicant other than Liberty which placed the highest value on the permit. Whether that figure is \$1,300,000 or \$645,000 should be immaterial to the Commission as long as the permit gets to the second highest bidder.

Curiously, the Bureau made no attempt to substantively address the fact that BFB attempted, but was not permitted, to withdraw high bids made in rounds prior to the close of the auction. If BFB is correct – and both the rules and the public notices issued in connection with the auction bear BFB out – BFB should have been permitted to withdraw its last two bids without penalty. However, the auction software did not anticipate such an eventuality and erroneously did not permit it. The proper result would have left BFB with a second highest net bid of \$745,000 – not very different from the \$645,000 amount with which it would have won the auction if Liberty had not been a bidder at all. By ignoring inconvenient aspects of the bidding dynamic, the Bureau significantly inflated the amount which the Treasury stands to lose.

In addition, the Bureau professes puzzlement at why BFB bid against Liberty in the auction at all if it knew that BFB was subject to disqualification. (Bureau Opposition at Footnote 7.) Given the fact that the Commission has now spent over a year considering the issue of Liberty’s disqualification and given the fact that the Bureau itself has admitted that it

has not consistently enforced at least one of the rules on which BFB is relying for Liberty's disqualification, can there be any wonder that BFB did not place the utmost confidence in the Commission's willingness, for the first time, to disqualify an auction winner? BFB was willing to pay a substantial price for a clean win in the auction in order to avoid the very quagmire that the case has become. But the deep pockets to which Liberty had access ultimately made that impossible.

C. The Unacceptability of Liberty's Application

The Bureau brushes aside BFB's argument that Liberty's application should not have been accepted in the first place and thus is subject to dismissal *nunc pro tunc*. It adheres doggedly to the view expressed in its earlier comments that, even though the rules and the Public Notices required Liberty to include a "family media" certification on pain of dismissal, and even though Liberty did not include such a certification, Liberty's application is still acceptable because the Bureau did not apply its own rules in this regard in some other unspecified instances. Not to put too fine a point on it, either the Mass Media Bureau or the Auction Division seems to have erred. The proposed settlement, whereby Liberty agrees to be dismissed *nunc pro tunc* on these grounds, accomplishes the purposes of the settlement while letting sleeping dogs lie. At a minimum, the Bureau could at least have acknowledged (1) that there was something problematical about the Auction Division accepting and processing an application which was patently inconsistent with its own prior pronouncements and (2) that this settlement would obviate that problem.

D. Other Matters

1. Both the Bureau and Orion note that Orion bid the same amount in Round 12 as BFB, only it did so later. Under the auction rules, a tie bid goes to the bidder who bids first.

Orion was perfectly free to outbid BFB in the next round, but it chose not to do so. Thus, the fact that Orion bid the same amount as BFB in Round 12 is wholly immaterial to the discussion; BFB's bid was deemed superior due to its earlier placement. Willsyr, for its part, asserts that BFB's Round 12 bid was "less than the bid price of the third highest bidder." Willsyr Opposition at p.2. Willsyr is simply wrong, as Attachment A to the Bureau's pleading makes clear. BFB's Round 12 bid was second only to Liberty's Round 13 bid and was never less than anyone else's bid.

2. Willsyr also suggests that the license should be re-auctioned, with the remaining parties agreeing to step into the shoes of BFB in the settlement with Liberty. There is no authority whatsoever for taking a proposed settlement, re-working it into a different context, and then imposing its terms on non-parties to the original settlement. Willsyr's strange request in this regard should be denied out of hand.

3. Both Orion and Willsyr seem to take umbrage at the fact that BFB would pay less money to the Treasury under the proposed settlement than it would have if Liberty were simply disqualified or if there were no settlement. It is a mystery as to how either party has standing to complain about how much BFB pays for the license. As long as BFB is paying more than either of them bid, they are not injured or damaged in any way. Their grouching in this regard comes across as nothing more than sour grapes.

4. Both Orion and the Bureau allude to the fact that service is currently being provided in the community by Orion on an interim basis. They presumably offer this unfortunate fact as evidence that there is no need to expedite a permanent licensing decision in this case. Without disturbing Orion's rosy image of itself as "a first class broadcast operation" – an image not necessarily shared by many, if not most, residents of the community – we can

safely say that the operation remains a tentative one. The station can hardly put roots down, make investments in new plant, hire permanent staff or take any other forward-looking actions while its status remains day-to-day. It is the community that suffers from this long period of uncertainty about the license. Moreover, from the other applicants' point of view, it is intolerable that Orion has been on the air now for more than five years, blithely generating profits and revenues, despite the fact that the basis for its original grant was declared arbitrary and irrational. Every day that its interim operation persists is a continuing affront to justice and fair play.

E. Conclusion

For the reasons set forth above and in the Joint Request and accompanying memoranda, the Joint Request for Approval of Agreement should be granted.

Respectfully submitted,

BILTMORE FOREST BROADCASTING FM, INC.

By 

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December 11, 2000

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, P.L.C., certify that a true copy of the foregoing "CONSOLIDATED REPLY TO OPPOSITIONS" was sent by first class mail, postage prepaid, this 11th day of December, 2000, to the following:

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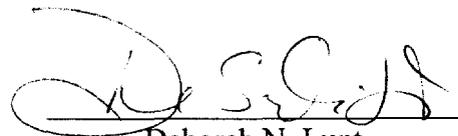
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