

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

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JUN 19 2001

Federal Communications Commission
Office of Secretary

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)	

To: The Commission

ENFORCEMENT BUREAU'S CONSOLIDATED OPPOSITION TO
MOTION TO STAY EFFECT OF ORDER PENDING JUDICIAL REVIEW AND
ORION COMMUNICATIONS, LTD.'S MOTION FOR STAY PENDENTE LITE

1. On June 13, 2001, Biltmore Forest Broadcasting FM, Inc. ("BFBFM") filed a pleading styled "Motion to Stay Effect of Order Pending Judicial Review." Also, on June 13, 2001, Orion Communications Limited ("Orion") filed a pleading styled "Orion Communications, Ltd.'s Motion for Stay Pendente Lite." Both motions seek a stay of *Liberty Productions, a Limited Partnership*, FCC 01-129, released May 25, 2001 ("MO&O"). The Enforcement Bureau hereby submits a consolidated opposition to the BFBFM and Orion motions.

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2. Background. This proceeding has a long, tortured history as evidenced by numerous Commission and court decisions, beginning some 11 years ago with *National Communications Industries*, 5 FCC Red 2862 (ALJ 1990). In addition, during this period, a station has been built, which Orion currently operates. *See Orion Communications, Ltd.*, 10 FCC Red 13066 (1995), *recon. denied*, 11 FCC Red 19589 (1996), *rev'd*, 131 F.3d 176 (D.C. Cir. 1997). See also Orion's motion, Declaration of Betty Lee at ¶ 3. More recently, in September and October of 1999, four of the five remaining captioned applicants participated in an auction designed to settle, finally, which of these entities should become the ultimate permit holder for a new FM station in Biltmore Forest, North Carolina. The *MO&O* followed challenges to the qualifications of Liberty, the gross high bidder at the auction.

3. After receiving pleadings from all parties (except Skyland Broadcast Company), the Commission concluded in the *MO&O* that Liberty's application should be granted, provided that it pays the gross amount of its high bid. In pertinent part, the *MO&O* determined that Liberty's pre-auction failure to submit a certification relating to media interests of immediate family members ("family attribution certification") did not require dismissal of its application. In addition, the *MO&O* held that Liberty was not entitled to a claimed bidding credit, and that, consequently, Liberty was obligated to pay the full amount of its bid. Finally, the *MO&O* resolved a misrepresentation issue in Liberty's favor.

4. BFBFM's motion. BFBFM seeks a stay pending an appeal it states it intends to file. BFBFM believes a stay is warranted because it has a reasonable chance of prevailing on its appeal. In this regard, BFBFM submits the *MO&O* erred by failing to dismiss Liberty's application for its failure to submit a family attribution certification. BFBFM further claims that it relied on an anticipated Commission dismissal of Liberty in developing its bidding strategy

and in placing its bids. BFBFM also argues that the Commission improperly changed the auction rules by allowing Liberty to acquire the license notwithstanding Liberty's loss of a new entrant bidding credit. BFBFM submits that failure to issue a stay will result in irreparable harm to the listening public if Liberty is allowed to displace Orion and then is itself displaced following a court decision overturning the *MO&O*. BFBFM also contends that other interested parties will not be harmed by issuance of a stay and that the public interest favors a stay. As to this last point, BFBFM reiterates its prior assertions that the Commission conducted a flawed auction and that serious disruption to the listening public would follow a "premature" change of operators. BFBFM also posits that a "brief" retention of the status quo is preferable to the "multiple disruptions" that would follow removal and installation of new operators.

5. Orion's motion. Orion contends that it will suffer irreparable harm if a stay is not issued pending judicial review. In this regard, Orion tenders the declaration of its chief executive officer, who asserts that when Orion was last forced off the air between June 1997 and January 1998, it lost "incalculable advertising revenues and market share" which it has yet to recover. Orion also believes that it will prevail on the merits of an appeal. Orion argues that the *MO&O* will be overturned because it improperly reversed the Administrative Law Judge's conclusion that Liberty's general partner falsely certified the availability of a transmitter site. In addition, Orion echoes BFBFM's claim that the *MO&O* erred by not dismissing Liberty following its failure to submit the family attribution certification. Orion concludes that the equities favor a stay. In this regard, Orion reiterates its belief that the *MO&O* is demonstrably flawed and contends that no other party will be adversely affected by the issuance of a stay.

6. Discussion. To justify a stay, a petitioner must demonstrate: 1) that it is likely to prevail on the merits of its claims; 2) that, absent the stay, it will suffer irreparable injury; 3) that

a stay will not substantially harm other interested parties; and 4) that issuance of a stay is in the public interest. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985). In the Bureau's view, irrespective of whether a stay will harm others or whether a stay has any bearing whatsoever on the public interest, it is plain that neither movant can show that it is likely to prevail on the merits or that, without the stay, it will suffer irreparable injury. Hence, their motions warrant denial.

7. At the outset, neither BFBFM nor Orion has demonstrated that it is likely to prevail on the merits. With regard to the family attribution certification, the *MO&O* at ¶¶ 15-19 explained why dismissal was not warranted and, in so doing, addressed every argument made by BFBFM and Orion in their motions. Likewise, concerning Liberty's inappropriately claimed bidding credit, the *MO&O* addressed at great length why the correct resolution was loss of the credit, not dismissal of Liberty's application. *See MO&O* at ¶¶ 32-40. Again, in so doing, the *MO&O* addressed every argument made by BFBFM in its motion. Significantly, in both instances, the Commission was interpreting its own rules regarding the conduct of the auction. However, nothing in either BFBFM's or Orion's motion suggests that the Commission's interpretation was incorrect, much less clearly incorrect. Hence, court reversal based on either argument is highly unlikely. *See Qwest Corporation v. FCC*, D.C. Cir. Nos. 00-1376 and 1377, released June 15, 2001 ("We review the Commission's reading of its regulation under highly deferential standards, and would reverse only a clear misinterpretation.")

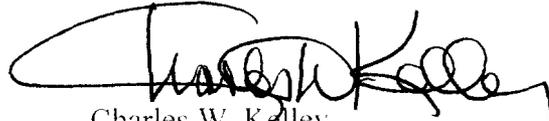
8. Finally, unlike Orion, the Bureau believes that substantial evidence supports the *MO&O*'s conclusion that Liberty did not falsely certify the availability of the site initially specified in its application. First, contrary to Orion's strident insistence that the Administrative Law Judge had it right when he concluded that Liberty falsely certified in its application about

the availability of its transmitter site, the *MO&O* at ¶ 52 correctly observed that his conclusion was not entitled to deference because he did not make specific demeanor findings. Second, only after undertaking a *de novo* review of the record and considering all relevant evidence (*MO&O* at ¶¶ 57-72), did the *MO&O* resolve the issue in Liberty's favor. In so doing, the *MO&O* addressed all significant arguments regarding evidentiary conflicts relied upon by Orion and recognized that even if Liberty did not have reasonable assurance of the site's availability it did not follow that Liberty falsely certified. Once again, Orion has not demonstrated that it is likely to prevail on the merits.

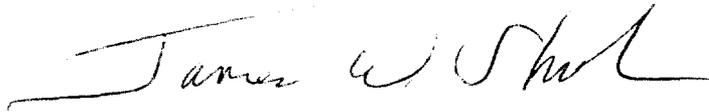
9. Equally as devastating to their causes, neither BFBFM nor Orion comes close to demonstrating that it would suffer irreparable injury without a stay. In the case of BFBFM, its motion fails to suggest how the absence of a stay will cause *it* irreparable harm. Thus, its motion should be denied summarily. *See Wisconsin Gas Company, supra*. As for Orion, all it submits are the conclusory claims of its principal, Betty Lee, that, when a prior Commission decision had forced it off the air temporarily "[w]e lost incalculable advertising revenues and market share ... If we are removed again pending full review, this is certain to recur and will destroy our business." Betty Lee Declaration at ¶ 3. Per *Wisconsin Gas Company*, 758 F.2d at 674, a movant cannot rely on bare allegations but must provide proof that the harm has occurred in the past and is likely to occur again or proof indicating that the harm is certain to occur in the near future. Inasmuch as Orion has not provided any such proof, its motion also warrants denial.

10. Conclusion. Both motions fail to meet the criteria established for determining whether a stay should be issued. Accordingly, both should be denied.

Respectfully submitted,



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June 19, 2001

CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 19th day of June, 2001, sent by first class United States mail (or by hand) copies of the foregoing "Enforcement Bureau's Consolidated Opposition to Motion to Stay Effect of Order Pending Judicial Review and Orion Communications, Ltd.'s Motion for Stay Pendente Lite" to:

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