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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
	)	
Et. Al.	)	
	)	
For Construction Permit for New FM Channel 243C3 Biltmore Forest, North Carolina		

To: The Commission

OPPOSITION TO
MOTION TO STAY EFFECT OF ORDER PENDING JUDICIAL REVIEW

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its opposition to the Motion to Stay Effect of Order Pending Judicial Review, filed by Biltmore Forest Broadcasting FM, Inc. ("BFBFM") on June 13, 2001 in the above referenced proceeding. In support whereof the following is shown:

1. BFBFM seeks a stay of the effect of Commission's Memorandum Opinion and Order (FCC 01-129), released May 25, 2001 in the above proceeding. While BFBFM contends that it meets the traditional tests for a stay, [1] it has failed to offer any showing sufficient to establish any element of the four part test. Accordingly, BFBFM's Motion must be denied.

1. See: Washington Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841 (DC Cir. 1977); Virginia Petroleum Jobber's Association v. FPC, 259 F.2d 921 (DC Cir. 1958).

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List A B C D E

1. BFBFM must overcome a significant hurdle in order to justify the extraordinary relief requested. It must advance a compelling showing that it: (1) will suffer irreparable harm if the requested stay is not granted, (2) that it is likely to prevail on the merits of its appeal, (3) that the grant of its motion would not harm other interested parties, and (4) that the issuance of the requested stay would serve the public interest. BFBFM has utterly failed to establish any of these four elements.

I. BFBFM has failed to demonstrate that it will suffer irreparable harm if the stay is not granted.

2. Not only has BFBFM failed to demonstrate that it will suffer any irreparable harm, it has failed to advance any specific claim of harm, whatsoever. Instead, it laments the number of appeals filed in the proceeding to date and the fact that interim operation on the frequency has been undertaken at various times by Orion and the joint interim operator. BFBFM seems to suggest that if (a) the requested stay is not granted and (b) BFBFM is ultimately selected as the winning applicant, then it would somehow be harmed by the fact that Liberty would have been permitted to operate until such time as BFBFM was ready to commence operations.

3. While one might understand BFBFM's desire for initiate operations on a virgin channel that possibility simply does not exist, as Orion has been operating on the Biltmore Forest FM

channel for almost seven years. BFBFM fails to explain how the alleged harm will be increased by replacing Orion with Liberty as the operator. Having failed to offer any understandable, much less compelling, demonstration of irreparable harm, BFBFM is not entitled to the stay it seeks and its Motion must be denied on this basis alone.

II. BFBFM has failed to demonstrate a likelihood that it will prevail on the merit of its appeal.

4. BFBFM has not yet filed any appeal, yet it asserts that it is likely to prevail on the merits of an appeal, when filed. BFBFM suggests its appeal will "challenge the Commission's failure to adhere to the rules it established for the auction", as well actions it contends undermined the integrity of the auction. In this regard BFBFM re-argues its contentions that Liberty failed to submit a required certification and that the introduction of Cumulus as a lender required the dismissal of Liberty's application. BFBFM's likelihood of success on these issue is close to nil.

5. The Commission fully addressed these issue in its Memorandum Opinion and Order. As the Commission there indicated, the missing certification upon which BFBFM bases its primary argument, was not required pursuant to 47 CFR 1.2105(a) and thus could be supplied by amendment. Pursuant to 47 CFR 1.2105(b), only the omission of the information required to be included by 47 CFR 1.2105(a) would result in the application being found

unacceptable. No certification regarding "media interests of immediate family members" is required pursuant to Section 1.2105(a) and, thus, Liberty was entitled to supply such a certification by means of an amendment, had the Commission determined that its absence rendered the application incomplete. However, the Commission's processing staff did not consider the absence of the certification to provide any basis for either dismissing or requiring the supplementation of Liberty's application. See: Public Notice (DA 99-1800), released September 3, 1999, Attachment A, page 12; Public Notice (DA 99-1912), released September 17, 1999.

6. It also should be noted that the provisions in Attachment B to Public Notice (DA 99-1346), released July 9, 1999 clearly implied that the referenced certification was necessary to avoid the attribution of the media interests of immediate family members, only where such interests actually exist. As such, inasmuch as no family member of Liberty's general partner had any such interests, Liberty logically concluded that the referenced certification was inapplicable to it. In addition, the certification that no member of the general partner's family held any media interests was already present in Liberty's longform application in any event. No explanation has been given for the necessity of redundancy in this regard.

7. To the extent that BFBFM attempts to argue that it relied upon Liberty's failure to submit the allegedly required certification "in developing its bidding strategy and placing its

bids", such a contention is utterly incredible. BFBFM's claim that it was relying upon its belief that Liberty's application would be dismissed due to the absence of the certification at issue is completely refuted by its own conduct during the auction. If BFBFM believed and was relying upon the notion that Liberty's application was defective, it would not have continued bidding against Liberty, alone, once it had outbid Orion. [2]/

8. BFBFM also challenges the Commission's action on the basis that it "impaired" the "integrity of the auction process" by eliminating Liberty's bidding credit, something BFBFM contends that Liberty was unable to do. BFBFM essentially contends that Liberty could not legally enter into a loan arrangement with Cumulus, because such action had the effect of eliminating Liberty's entitlement to the bidding credit and Liberty could not change its bidding credit after filing its 175.

9. BFBFM is incorrect. As the Commission indicated, while an applicant could not establish its entitlement to a bidding credit after the 175 filing deadline, it could loose or suffer a diminishment of any credit to which it was originally entitled. More importantly, BFBFM has failed to offer any evidence that or even suggest how the fact that Liberty's bidding credit was ultimately disallowed had any impact, whatsoever, upon the

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2. Orion dropped out of the bidding after its bid of $ 990,000.00, while BFBFM continued bidding until its bid reached $ 2,124,000.00. If BFBFM believed that Liberty's application would be dismissed, as defective, it need only have outbid Orion.

integrity of the auction. The disallowance of Liberty's bidding credit impacted Liberty and Liberty, alone.

10. Although BFBFM has not yet filed any appeal, its contention that it intends to rely on the arguments contained in its Motion strongly suggest it has little possibility of success.

III. BFBFM ignores the harm that a stay would entail to Liberty and other interested parties.

11. BFBFM contends that "Liberty will experience no harm whatsoever other than the loss of any revenue which it might generate during the pendency of the appeals." This falls far short of the affirmative demonstration of lack of harm to other interested parties required to justify a stay. It is no doubt painfully easy to characterize the denial of the benefit of an authorization for which one has paid over $ 2.3 million as "no harm whatsoever." However, having submitted the highest bid, having been found fully qualified and subject to remitting payment in full, Liberty is entitled to all of the benefits of the authorization for which it has paid.

12. While BFBFM claims that it is "sensitive" to the fact that Liberty has already paid over $ 300,000.00 against its high bid and that "there would be some injustice" in requiring Liberty to pay the balance of its bid with no intent of promptly issuing a construction permit, it suggests that the Commission simply defer Liberty's obligation to pay the balance of its bid, not that Liberty be permitted to enjoy the benefit of the

authorization for which it has paid. [3]

13. Liberty has not only expended a significant sum prosecuting its application and supporting a nonprofit interim operation on the frequency, it has also advanced over $ 300,000.00 to the U.S. Treasury in payment for the right to operate on the Biltmore Forest frequency and by June 19, 2001 will have remitted the balance due against a total of $ 2,336,000.00. In addition, Liberty has already suffered irreparable harm from the Commission's unreasonable delay in granting its application, incurring over $ 50,000.00 in interest charges on the funds it borrowed to pay the downpayment on its bid. Any cognizable harm that BFBFM or any other party may suffer from the lack of any stay pales in comparison to what Liberty is paying for the right to operate on the frequency.

14. Accordingly, contrary to BFBFM's unsupported contentions, the grant of a stay would significantly harm other interested parties. Precluding Liberty from utilizing the authorization for which it has bought and paid while BFBFM pursues any number of appeals would impose serious and unconscionable injury upon Liberty.

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3. Likewise, BFBFM's "sensitivity" does not extend to point of suggesting that Liberty is entitled to a refund of it downpayment or credit for the use of $ 303,000.00 over the past 18 months nor does it go far in paying the $ 50,000.00+ in interest charges that Liberty has already incurred over the last 18 months on those funds.

IV. BFBFM has failed to demonstrate that a stay would serve the public interest.

15. BFBFM suggests that its requested stay would serve the public interest on the theory that retention of the status quo is preferable to "the serious disruption to Orion and the people of Biltmore Forest which will occur if a new operator is installed prematurely" and that "there is no compelling reason to disturb the present operating configuration, especially if the Commission defers Liberty's payment obligation."

16. BFBFM's concerns regarding "disruptions", whether multiple or otherwise, are entirely speculative in nature and do not rise to the level of serious public interest considerations. BFBFM's purported concerns appear to arise from a time when the Commission regulated the length a licensee was required to retain ownership. Those regulations were eliminated years ago and with them any concern for the purported disruption BFBFM fears. In the current environment radio stations change hands frequently and change format even more often. Orion has operated on the frequency at issue pursuant to temporary authority (and at times no authority) for almost seven years. Numerous other stations have changed operators many times during the same period. Accordingly, it would appear that the community of Biltmore Forest is being subjected to far less disruption than is normal.

17. Likewise BFBFM's contention that there is "no compelling reason to disturb the present operating configuration" is not a public interest consideration, but simply an argument. Contrary

to its contention there are several compelling reasons why a stay would significantly disserve the public interest.

18. As an initial matter, Congress has determined that the public interest is best served by obtaining for the benefit of the U.S. Treasury the highest payment the market will bear in exchange for the issuance of initial broadcast construction permits. Inherent in that determination is the proposition that the sooner such funds are paid into the Treasury the better. Were the Commission to grant a stay under the present circumstances, it could not realistically expect Liberty to remit $ 2,336,000.00 for a permit that it was not prepared to issue, forthwith. Indeed, the Commission's own rules require the submission of the remaining balance due only at such time as the Commission is prepared to issue a permit. Thus, were a stay issued and the payment of the balance of Liberty's bid delayed, as BFBFM suggests, the public interest would suffer through the delay in receipt by the Treasury of over $ 2,000,000.00.

19. Similarly, a stay would disserve the public interest by having a chilling effect on future auction participants. If a stay is issued under the present circumstances, it would send a clear signal to participants in future broadcast auctions that, having won the auction, been found qualified by the Commission and having remitted their bids in full, they nevertheless could face significant delays in receiving the authorizations for which they had bid and paid. Anticipating such delays, potential future participants would be less willing to bid or at least less

willing to bid as much as they would have been had the threat of delay not been raised.

20. Finally, Liberty will provide significantly superior service to Biltmore Forest and the surrounding environs with its Class C3 facilities than the Class A operation presently being conducted by the interim operator. Historically, in both the comparative and allocations context the Commission has consistently recognized that the public interest is served by increases in area and population coverage. During the days of comparative licensing the Commission routinely awarded credit for superior coverage and it continues to make determinations under 47 USC 307(b) based upon superior service to areas and populations. Accordingly, the public interest would be disserved were this improvement in service to be delayed as the result of the grant of a stay.

WHEREFORE, premises considered, the Motion to Stay Effect of Order Pending Judicial Review, filed by BFBFM, should be DENIED.

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP

By: _____
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June 19, 2001

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 18th day of June, 2001, served a copy of the foregoing Opposition to Motion for Stay Pendente Lite by First Class mail (except where noted otherwise), postage prepaid upon the following:

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