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Secretary

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

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In re Applications of: )  
)  
)  
LIBERTY PRODUCTIONS, )  
A LIMITED PARTNERSHIP )  
)  
For Construction Permit )  
for a New FM Station )  
)  
For License to Cover )  
for Station WOXL-FM )  
)  
Facility No. 37242 )  
)  
Biltmore Forest, )  
North Carolina )

Federal Communications Commission  
Office of Secretary

MM Docket No. 88-577

File No. BPH-19870831MI

File No. BLH-20020220AAL

To: Chief, Enforcement Bureau  
  
Chief, Audio Division  
Media Bureau

SUPPLEMENT TO PETITION FOR RECONSIDERATION  
AND TO REOPEN THE RECORD

Respectfully submitted,

WILLSYR COMMUNICATIONS, LIMITED PARTNERSHIP

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SUPPLEMENT TO PETITION FOR RECONSIDERATION AND  
TO REOPEN THE RECORD

Willsyr Communications, Limited Partnership ("Willsyr"), by its counsel, pursuant to 47 CFR 1.106, hereby submits this "Supplement to Petition for Reconsideration and to Reopen the Record." It requests leave to supplement its "Petition for Reconsideration and to Reopen the Record, filed December 30, 2004, with respect to the action of the Chief, Audio Division, Media Bureau, by letter of December 3, 2004. That action effectuated an otherwise final grant of the application for construction permit (BPH-19870831MI) and grant of the application for license (BLH-20020220AAL) filed by Liberty Productions, a Limited Partnership ("Liberty").

This Supplement is being served both upon the Chief, Audio Division, Media Bureau, and the Chief, Enforcement Bureau. Willsyr requests that an investigation leading to a license revocation proceeding be conducted as to Liberty's representations in its application for construction permit and as to its participation in the September 1999 Closed Auction (Auction No. 25) for the Biltmore Forest permit. It is well-established Commission policy to revoke a permit or license on the basis of misrepresentations made in the application to obtain the permit. Revocation of License of Station WIBS, 43 FCC 287.

The purpose of this Supplement is to submit to the Commission newly discovered evidence which is material to the issues raised by Willsyr in its "Petition for Reconsideration and to Reopen the Record." Willsyr seeks the revocation of Liberty's construction

permit based upon repeated misrepresentations made by Liberty in obtaining the permit and based upon Liberty's willful violation of 47 USC 309 (1) (2) and the Commission's auction requirements.

The newly discovered evidence is a result of discovery conducted by Willsyr against Liberty in Liberty Productions, a Limited Partnership v. Willsyr Communications, Limited Partnership, (and its limited partners as individuals), Case No. 05 CVS 02996, Buncombe County Superior Court, North Carolina, filed July 13, 2005.

Liberty filed suit claiming that Willsyr and its partners defamed it in pleadings submitted to the Commission alleging misrepresentations by Liberty in obtaining its construction permit and in violating the auction rules. In response, Willsyr initiated discovery of Liberty's records on the basis of truth as defense to the claim of defamation.

After repeated delays and under objection, Liberty responded on November 14, 2005, to Willsyr's first request for production of documents. Included in the response was a copy of the "Term Loan Agreement," dated September 10, 1999, between Liberty and Cumulus Broadcasting, Inc. ("Cumulus").

The "Term Loan Agreement" provided for the funding of Liberty's auction bid in the Closed Auction, which commenced on or about September 28, 1999. Liberty had refused to disclose this agreement to the Commission on the basis that it was solely a loan and did not provide for Cumulus (or its assignees) to obtain

ownership or control of the Biltmore Forest permit. The Commission accepted Liberty's representations and did not require submission of the agreement.

A review of the "Term Loan Agreement" shows, however, that it provides for the sale of the permit to the lender of the funds for Liberty's auction bid. It is not solely a loan agreement.

Under Section 1.1, Cumulus (or its assignees as lender) agreed to lend Liberty up to \$1,600,000, to bid in the Closed Auction. Under Section 1.7, this amount with accumulated interest is to be repaid on the 91<sup>st</sup> day following the date that grant of the construction permit becomes a final order.

Under Section 1.9, Liberty has the right (but not the obligation) to sell the permit to the lender prior to the maturity date of the loan (and prior to any default). Upon a sale of the permit to the lender, it agreed to forgive the loan and all accumulated interest. In addition, the lender agreed to pay Liberty as a profit the difference between the amount loaned and \$1,600,000. Thus, if Liberty was able to obtain the permit for an auction bid of \$1,000,000, it would make a profit of \$600,000 on the sale of the permit to the lender for its auction bid.

Under Section 2.1 (b), the security for the \$1,600,000 loan to place Liberty's auction bid is the permit to be bid on. However, because this security interest is subject to the Commission changing its current policy prohibiting a security interest in a permit, there is actually no security for the loan.

The "Term Loan Agreement" does not provide for any other collateral or personal guarantees by Liberty's principals.

Although Section 2.1 (a) and (b) refers to a "Note" and a "Security Agreement," Liberty failed to produce such documents (or originals of any documents). They will be provided to the Commission if obtained from Liberty after a motion to compel.

The Term Loan Agreement Demonstrates that Prior to Grant of the Permit Liberty had an Intent to Sell the Permit to its Lender

Under long established Commission policy, an applicant for a new construction permit must possess during the pendency of its application a bona fide intent to construct and operate the facilities applied for. Assignment and Transfer of Construction Permits, 16 FCC2d 789, at para. 2. Prosecution of an application on the basis of "speculative intent" is contrary to the public interest. Boca Broadcasters, Inc., 7 FCC2d 198, 201, at para. 13. Even with the Commission's elimination of its rules prohibiting the "trafficking" for profit of granted but unbuilt construction permits, the policy against speculation and "trafficking" for profit in yet to be granted construction permits was retained. 1998 Biennial Regulatory Review, FCC 98-281, 13 FCC Rcd 23056, 23069, at para. 27.

Here, on September 10, 1999, prior to grant of the construction permit, Liberty entered into a written agreement with the lender of the funds for its auction bid which guaranteed Liberty the right to sell the permit to the lender, with a guarantee of no liability or loss to Liberty, and the prospect of

making a profit on the sale if it could obtain the permit at a bid price under \$1,600,000.

Accordingly, Liberty had a speculative intent in prosecuting its application and sought to profit through "trafficking" with the lender for its auction bid in a then yet to be granted construction permit. Before obtaining the permit, Liberty had a contractual right to sell it. The fact that the lender did not have a right to buy the permit does not absolve Liberty of "trafficking." Liberty's intention during the pendency of its application and prior to grant was to sell the permit after the grant for a profit.

Such an intention prior to grant to sell the permit after the grant requires that Liberty's construction permit be revoked. In the Matter of A. Tornek, 4 FCC 193, 196, application for construction permit denied where it appeared that applicant did not intend to establish the station in question but to assign the permit after grant; City of Sebring, 3 RR 710, 725, no grant will be made to an applicant who does not intend to establish the station, but plans to assign the authority after grant to one who has no application status before the Commission; Boca Broadcasters, Inc., 7 FCC2d at 200, para. 11, a bilateral purchase agreement is not required, disqualifying issue will be specified where applicant placed advertisement indicating the availability for sale of construction permit before the grant became final.

The Commission's policy against speculating in construction

permits prior to grant is especially appropriate in a Closed Auction, where under 47 USC 309 (1)(2), the eligible bidders were strictly limited to those parties who had previously competed for the permit in a comparative hearing. Here, Liberty attempted to "game" the auction to the detriment of the other bidders through a scheme to obtain funds to bid by intending to sell the permit to its lender, a person not eligible to bid.

The fact that Liberty's pre-grant intention to sell the construction permit after grant did not unfold exactly as planned is not a defense to its wrongdoing. Liberty had sought a 35% bidding credit which was denied by the Commission after the auction bidding concluded. As a result, Liberty was then required to pay for the construction permit far more than the \$1,600,000, which Cumulus had agreed to lend.

The Commission decision denying Liberty a 35% bidding credit was released on May 25, 2001. Liberty's final auction payment was due on June 19, 2001. Cumulus assigned to SFG Partners, L.L.C. ("SFG"), as of June 18, 2001, the "Term Loan Agreement" and "Security Agreement," both dated September 10, 1999. The final auction payment was made and the construction permit was issued to Liberty on or about July 9, 2001.

SFG assigned the Cumulus agreements to Asheville Radio Partners, L.L.C. ("ARP") as of August 21, 2001. ARP is also the owner and holder of a "Promissory Note," dated September 10, 1999, and renewed and extended on October 7, 1999. It was created to

fund Liberty's auction bid. See, "Amended and Restated Term Loan Agreement," Recitals, Section A, dated as of August 21, 2001. The main principal of both SFG and ARP is Edward Seeger.

ARP, as the assignee of the Cumulus agreements, dated September 10, 1999, and as Liberty's lender under these agreements, is in privity with Cumulus and thus stands in its shoes. The fatal infirmities that lie in these pre-grant agreements with Cumulus accrue to ARP and remain with Liberty. Before the Bureau for consideration is fruit from a poisoned tree.

ARP executed as of August 21, 2001, an "Option Agreement" to purchase the permit from Liberty for \$450,000, along with an option payment of \$350,000. It also agreed to enter into a "Time Brokerage Agreement" with Liberty. Under the terms of this agreement, ARP will reimburse Liberty for 100% percent of its costs incurred in operation of the station. See, "ARTLA," Section 7.5, p. 18, dated as of August 21, 2001. ARP moreover agreed to lease studio space to Liberty and equipment necessary to operate the station. See, "Lease Agreement," dated February 20, 2002.

ARP agreed to "loan" Liberty up to \$2.75 Million for the auction bid payment, for construction and operation of the station, and for its legal fees in defending grant of the permit. See, "Renewed and Extended Promissory Note" ("REPN"), Section (a) and Section 1, p. 1, dated as of August 21, 2001; "ARTLA," Section D, p. 2, and Section 1.6, p. 4, dated as of August 21, 2001.

Liberty and its General Partner, have no liability under the

"loan" from ARP, nor any obligation to contribute collateral or capital for construction and operation of the station. Liberty's re-payment of the "loan" to ARP may be satisfied solely out of the amount due to it under the "Time Brokerage Agreement" with ARP. This amount is to be credited by ARP against the amount due to it under the "Promissory Note." See, "ARTLA," Section 1.7 (a), pp. 4-5, dated as of August 21, 2001.

ARP exercised its August 21, 2001, "Option Agreement" to acquire from Liberty the Biltmore Forest station. The date of exercise has not been disclosed. ARP then assigned its right to purchase the station to Saga Communications of North Carolina, L.L.C. ("Saga"). Under the terms of that agreement, ARP will directly receive from Saga some \$8 Million for the station. From these proceeds, ARP will pay Liberty the amount of \$450,000. See, BAPH-20040116ACT.

Accordingly, through assignment of the Cumulus agreements, the same result has been achieved as initially intended. Liberty will profit from its pre-grant intention to sell the permit, with no risk in holding the permit, and the lender for its auction bid will reap most of the profits from the sale of the permit, even though not an eligible auction bidder.

#### Liberty Misrepresented the Term Loan Agreement

Liberty filed an Amendment to its Form 301 application, on November 10, 1999, reporting that it had a loan agreement with Cumulus. It represented that the loan agreement with Cumulus does

not provide it with "any option to acquire the construction permit or license for the Biltmore Forest station or any right to broker time on or manage the station."

This representation is misleading and lacks candor. Liberty failed to disclose that, at Section 1.9 of the Term Loan Agreement, it had a contractual right to sell the permit to Cumulus. This right to sell to Cumulus resulted in a potential or future ownership interest by Cumulus.

Liberty's motive to not fully disclose its right to sell the permit to Cumulus is that such a potential interest would have made Cumulus a "real party in interest" to the Liberty application and thus reportable in its Form 175, pursuant to 47 CFR 1.2112 (a). Competitive Bidding Procedures, FCC 03-98, rel. May 8, 2003, n. 230, a "real party in interest" is a person in a position to potentially control. If Cumulus had been reported as a "real party in interest" to Liberty's Form 175, Liberty would have been ineligible to bid, pursuant to the restrictions of 47 USC 309 (1)(2), which prevent new parties from being added to an otherwise eligible bidder.

The future ownership interest of Cumulus would have also been reportable in the then applicable Form 301, Section II, Question 4. This would have raised questions as to whether Liberty's application was subject to dismissal and provide a further motive for Liberty to conceal and dissemble. Grace Missionary Baptist Church, 80 FCC2d 330.

In its Amendment of November 10, 1999, Liberty represented that "while the loan agreement does provide for a security interest in the assets of the Applicant, it provides for the disposition of such assets pursuant to a public or private sale in the event of default, subject to prior FCC approval."

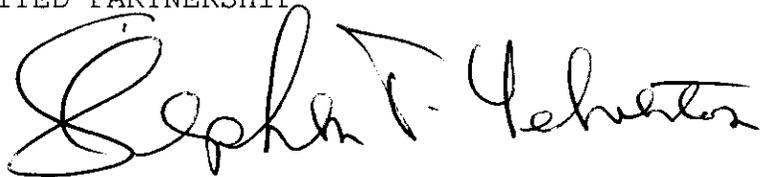
This representation is misleading and lacks candor. Section 2.1 (b) of the "Term Loan Agreement" explicitly provides for a security interest in the construction permit, if allowed by the Commission. Liberty simply cannot tell the truth about anything.

Conclusions

WHEREFORE, Willsyr requests that an investigation be conducted leading to a revocation hearing as to Liberty's repeated misrepresentations in its application for construction permit and in the 1999 Closed Auction and its willful violation of 47 USC 309 (1)(2). A copy of the "Term Loan Agreement," dated September 10, 1999, will be delivered separately to the Bureau under seal.

Respectfully submitted,

WILLSYR COMMUNICATIONS,  
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November 28, 2005

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney licensed to practice in the District of Columbia, do hereby certify that on this 28th day of November, 2005, I have caused to be hand-delivered or mailed, U.S. Mail, first-class, postage prepaid, a copy of the foregoing "Supplement to Petition for Reconsideration and to Reopen the Record" to the following:

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