

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

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| In re Applications of |) | MM Docket No. 90-192 |
| |) | |
| THOMAS W. LAWHORNE |) | File No. BPH-880505OA |
| |) | |
| CAM-BROADCASTING, INC. |) | File No. BPH-880505OJ |
| |) | |
| |) | |
| For Construction Permit for a |) | |
| New FM Station on Channel 271A, |) | |
| Sylvester, Georgia |) | |

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1996 ; Released: November 7, 1996

By the Commission:

1. By this Memorandum Opinion and Order, we deny CAM Broadcasting's Application for Review of Supplemental Decision, 11 FCC Rcd 4635 (Rev. Bd. 1996), affirming, Supplemental Initial Decision, 10 FCC Rcd 7101 (A.I.J. 1995), and dismiss as moot Thomas Lawhorne's Contingent Application for Review. The Review Board disqualified CAM Broadcasting on a financial issue, and granted Lawhorne's competing application. Based upon the pleadings before us, the parties' exceptions, and the evidentiary record compiled in this proceeding, we agree with the Board that CAM has not demonstrated reasonable assurance for its \$200,000 bank loan from Adel Banking Company. We therefore affirm its decision with minor modifications.

BACKGROUND

2. In certifying CAM's financial qualifications, its sole voting stockholder, Lyra Coxwell, relied on a \$200,000 bank letter from Adel Banking Company that she had secured after two phone conversations with bank president R.T. Tebeau on May 3, 1988. During the first call, Coxwell identified CAM's two investors, attorney Randall Acree and physician Fred McLean, orally discussed CAM's proposal (i.e., the proposed tower site, the land, and the buildings, as well as the equipment needs and initial operating expenses), and indicated that she needed reasonable assurance of a bank loan to establish CAM's financial qualifications. (CAM Ex. 4). After faxing Tebeau a copy of a draft bank letter provided by her communications counsel, Coxwell called him to ascertain whether CAM could rely on the bank for reasonable assurance. Id. According to Coxwell, Tebeau advised that the bank was willing to grant the \$200,000 loan request and

would issue the commitment letter that she had requested. Id. The bank then issued the letter.

3. The Board concluded that CAM had not established reasonable assurance of the bank loan. Specifically, it noted inconsistencies between the bank letter, which detailed Coxwell's professional background and set forth the bank's lending requirements, and testimony that Tebeau was unaware of Coxwell's background and had not discussed the bank's lending requirements with her. On this basis, the Board concluded that the bank letter itself was unreliable. In determining that the bank had not preliminarily reviewed CAM's qualifications before issuing the letter, the Board rejected the contention that, due to its past dealings with Randall Acree and Dr. McLean and its negotiations with Coxwell, the bank had sufficient information to determine that CAM qualified for the \$200,000 bank loan. The Board noted that Coxwell had not discussed or provided any documentation of her personal finances or those of the other stockholders, and that the record did not reflect that the other stockholders were willing to personally guarantee the loan or that they would be acceptable to the bank if it were to depend on them for security. As to the argument that Tebeau had all the information that he wanted to issue the bank letter, the Board held that the bank's practice of requiring detailed documentation only with the formal loan application did not explain why Tebeau could not have informally reviewed such material and given a preliminary assessment of CAM's creditworthiness.

4. The Board also credited Tebeau's testimony that all he meant by the letter was a willingness to pursue the matter if CAM secured the permit, that he had not determined whether CAM's proposal warranted a \$200,000 investment, and that he would review information regarding the applicant's creditworthiness only after CAM got the permit and filed a formal loan request. In doing so, the Board rejected CAM's claim that Tebeau's memory about the 1988 letter was so impaired by the passage of time as to make reliance on his testimony reversible error. It found that, although he did not recall discussing the purported loan with Coxwell, Tebeau's recollection was otherwise unimpaired, and thus there was no basis to conclude that he was an incompetent witness concerning the preparation of the bank letter. Finally, the Board refused to accept a post-hearing statement from Tebeau concerning the bank's intentions. In doing so, it noted that an applicant is not entitled to a post-decisional opportunity to adduce favorable evidence, and that consideration of the statement would require an opportunity for cross-examination and disrupt the proceeding.

APPLICATION FOR REVIEW

5. In its application for review, CAM faults the Board for relying on Tebeau's 1995 testimony to reject its facially valid 1988 bank letter. Such reliance, CAM argues, is arbitrary and capricious given the Board's recognition, 11 FCC Rcd at 4636 ¶6, that Tebeau could remember very little about the circumstances surrounding preparation of the 1988 letter other than that either Randall Acree or Lyra Coxwell asked him to write it. CAM submits, moreover, that Tebeau's hearing testimony as a whole corroborates, rather than contradicts, the existence of a

loan commitment. Specifically, it cites testimony confirming that the letter contains the actual loan terms that would govern the loan, that the bank did not need any further information from CAM in order to issue the May 1988 bank letter, and that a final decision on CAM's loan was impossible until it submitted a formal application, which could not occur until CAM received the permit. According to CAM, this clarifies that when Tebeau testified that the letter expressed only "a willingness to pursue the matter," he meant no more than that the loan would be available future conditions permitting. CAM argues that this is the essence of reasonable assurance under Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 ¶ 2 (1980). Accordingly, CAM maintains that, as in Multi-State Communications, Inc. v. FCC, 590 F.2d 1117 (D.C. Cir. 1978) and Las Vegas Valley Broadcasting Co. v. FCC, 589 F.2d 594 (D.C. Cir. 1978), it was improperly disqualified for lacking what amounts to a legally binding financial commitment.

6. CAM argues further that the Board erred in not considering Tebeau's post-decisional statement refuting the ALJ's erroneous interpretation of his hearing testimony. According to CAM, this rejection is arbitrary, capricious, and unprecedented. It claims, moreover, that the written statement makes clear that, when the bank issued the 1988 letter, it intended to give CAM reasonable assurance of its financial qualifications, that the bank went as far as it could in that letter without making it a legally binding commitment, and that it remains willing to make the loan. Citing Harrison County Broadcasting, 6 FCC Rcd 5819, 5821 (Rev. Bd. 1991), and Annette B. Godwin, 8 FCC Rcd 4098, 4101 ¶ 10 (Rev. Bd. 1993), which emphasize that the Commission does not second-guess a banker's judgment, CAM maintains that Tebeau's unambiguous statement reaffirming the bank's commitment to loan the necessary funds to CAM mandates a finding that it is financially qualified.

DISCUSSION

7. We affirm CAM's disqualification on the financial issue. For the reasons stated below we find that the record is devoid of evidence that, before it issued the bank letter, the bank had preliminarily reviewed CAM's individual qualifications, as required. Thus, we conclude that, even assuming that adequate collateralization is demonstrated and tentative loan terms are identified, the bank letter does not establish reasonable assurance of financing under Commission precedent.

8. As an initial matter, we agree with CAM that Tebeau's testimony has limited probative value, given his faint recollection of any of the circumstances surrounding the preparation of the May 5, 1988 bank letter. Tebeau testified that, although he recalled being asked by either Coxwell or McLean to draft a bank letter and he recalled signing the letter, he did not remember the substance of any discussion concerning this matter. (Tr. 139-42). Under these circumstances, his testimony provides no evidentiary basis to find what he had intended by that letter or which portions of the letter were copied from a sample letter and which portions were drafted to fit CAM's particular situation. Thus, we place no reliance on Tebeau's testimony that, when he signed the May 1988 letter, he did not have a present firm intention to lend CAM \$200,000,

future conditions permitting, and vacate that portion of the Board's decision, 11 FCC Rcd at 4638 ¶ 17, finding that Tebeau's testimony is inconsistent with the bank letter. Regarding Tebeau's post-record statement, the Board is correct that CAM, having had ample opportunity to present evidence on this issue, is not entitled to "parry with the offer of more evidence." Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941). Moreover, even if admissible, the post-record statement, in which Tebeau acknowledges extreme difficulty in remembering the conversations in question, has no relevance to the financial issue since it purports to clarify testimony that is not entitled to any weight. And to the extent that CAM argues that Tebeau's hearing testimony, as a whole, establishes reasonable assurance, that testimony offers no additional insight into the bank's intention at the time it issued the letter, beyond what is evident from the language of the letter and from the testimony of Coxwell, who was responsible for arranging CAM's financing. Thus, even viewed in its most favorable light, Tebeau's hearing testimony establishes neither that the bank preliminarily reviewed the borrower's qualifications before issuing the bank letter nor that the bank then had a present, firm intention to finance CAM's proposal.

9. Having found that Tebeau's testimony is unreliable, we conclude, based on the May 1988 bank letter itself and the testimony of CAM principal Lyra Coxwell, that the bank letter does not establish reasonable assurance. To demonstrate reasonable assurance of a bank loan, an applicant must show that the bank has preliminarily reviewed the borrower's individual qualifications (i.e. borrower's assets, credit history, current business plan, and other similar data), that adequate collateral has been demonstrated, and that the letter sets forth tentative loan terms (i.e., interest rate, repayment terms, collateral requirements, and other basic terms) that are mutually acceptable to the lender and the borrower. Liberty Productions, 7 FCC Rcd 7581, 7584 (1992), citing Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). Preliminary review by the bank of the borrower's individual qualifications can be established either by a showing that the bank has a long and established relationship with the borrower or that the borrower has provided the bank with appropriate information as to its current business proposal, its assets, and credit history.

10. In contrast to Multi-State and Las Vegas, where the banks' intent to make the loan was clear from the bank letter and from corroborating testimony, CAM has not met its burden of showing by probative evidence that, when Tebeau wrote the letter, the bank had a "present firm intention to make the loan, future conditions permitting." Merrimack, 82 FCC 2d at 167 ¶ 2. See also Northampton Media Associates, 4 FCC Rcd 5517, 5519 ¶¶ 15-16 (1989), aff'd sub nom. Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991) (applicant has the burden of establishing reasonable assurance by probative evidence, which necessarily includes something more than the self-serving, uncorroborated testimony of the individual responsible for the certification). Here, the bank letter itself, as well as the testimony of Lyra Coxwell, who was responsible for procuring that letter, reflects that the bank merely issued an invitation for CAM to apply for a loan if and when it receives a construction permit. Whatever the bank's rationale for following this approach, such an invitation does not constitute reasonable assurance under Commission precedent. See e.g. Fox Television Stations, Inc., 8 FCC Rcd 2361, 2436-39 ¶¶ 91-

94 (Rev. Bd. 1993), modified, 9 FCC Rcd 62 (1993), aff'd sub nom. Rainbow Broadcasting, Inc. v. FCC, 1995 WL 224866, --- F.3d --- (D.C. Cir. 1995) (Table) (bank's aversion to being legally bound did not establish reasonable assurance where its willingness to make the requested loan was expressly conditioned on satisfaction of the bank's normal lending requirements, including collateralization and an acceptable comprehensive business plan, when the formal loan application is made).

11. The May 1988 bank letter does not contain any indication that the bank meaningfully reviewed CAM's individual qualifications. Although Tebeau "anticipate[s] the opportunity to arrange financing" for CAM, the bank's willingness to grant the \$200,000 loan is expressly conditioned on "[y]our satisfaction of the bank's normal lending practices (ie: collateralization, an acceptable comprehensive business plan, and execution of all customary documentation required by the bank) at the time your written loan request is made." (Emphasis added.) Moreover, unlike the bank letter ultimately deemed sufficient in Multi-State, which was expressly conditioned upon the continued participation of several stockholders with whom the bank was favorably acquainted or their replacement by stockholders who were acceptable to the bank, nothing on the face of the May 1988 bank letter reflects that the bank had any established relationship or familiarity with CAM Broadcasting or with any of its principals, or that it had reviewed data concerning their qualifications. Addressed to Coxwell, the letter from Tebeau reflects that they had discussed "the construction of the FM station and tower," and it alludes to Coxwell's "professional abilities and knowledge of the business." (CAM Ex. 4). As to the latter, however, CAM does not claim that Coxwell has any broadcast experience, and the reference to Coxwell's background is virtually identical to language in a sample bank letter that Coxwell faxed to Tebeau. (Tr. 241; Lawhorne Ex. 10).

12. The testimony of Coxwell confirms that the bank extended only an invitation to apply for a loan in the future, and that the bank had not preliminarily reviewed CAM's individual qualifications when it issued the \$200,000 loan letter. Coxwell testified that she had two phone calls with Tebeau. During the first call, she identified the two other investors, and discussed the concept of reasonable assurance with Tebeau. (Tr. 249, 251). Specifically, she claims to have discussed CAM's need for "a statement from the bank stating that if and when the construction permit was granted, that he would be willing to discuss with CAM legal financing for building the radio station." (Tr. 249). It is clear from Coxwell's testimony that she was asking for nothing other than assurance that, if CAM prevailed at the Commission, the bank would accord due consideration to a loan application filed by CAM at that time.

13. It is also clear from Coxwell's testimony that Tebeau lacked sufficient information to preliminarily review CAM's qualifications for a bank loan. In this regard, CAM does not claim to have provided Tebeau with any written documentation other than the sample bank letter. (Tr. 250). Nor does it claim that Coxwell had an existing relationship with the bank. Coxwell candidly testified that she had had no personal dealings with bank (Tr. 250-51), and that she had not discussed her personal financial situation or that of her two investors with Tebeau (Tr. 252).

There is no evidence, moreover, that the other two stockholders discussed their financial situation with Tebeau, or provided him with any written documentation of their finances.

14. CAM claims that it has met the first test set forth in Scioto, because the bank, by virtue of its past dealings with non-voting stockholders Randall Acree and Fred McLean, is sufficiently familiar with their financial backgrounds that it would be willing to approve the \$200,000 bank loan to CAM. However, the record does not reflect that the bank had any significant financial information about either investor. Neither the fact that Acree was a bank customer, nor that McLean had co-signed a loan as an equity owner of the hospital, is sufficient to establish that the bank letter constitutes reasonable assurance. Even assuming that the bank had a long and established relationship with Acree and/or McLean and that it would have been willing to rely on either or both of them to guarantee the loan, the bank letter does not reflect such reliance. Nor is there any evidence that either Acree or McLean had agreed to provide security for a \$200,000 loan. A lender's relationship with the principal of an applicant, standing alone, does not necessarily establish reasonable assurance. Coast TV, 10 FCC Rcd 2852, 2858 ¶ 30 (Rev. Bd. 1995), review denied, 10 FCC Rcd 10623 (1995), appeal pending sub nom. Mission Broadcasting Corp. v. FCC (D.C. Cir. 95-1548) (bank letter rejected as mere accommodation to valued customer, because the bank, despite having an established relationship with the applicant's president and reaffirming its willingness to make the loan, did not know the identity of the other investors, had not received any information concerning their financial/professional backgrounds or the proposed station, and had not specified loan terms that were acceptable to the borrower); Marlin Broadcasting of Florida, 5 FCC Rcd 5751 (1990), aff'd sub nom. 952 F.2d 507 (D.C. Cir. 1992) (brief phone conversation with a friend at the bank does not establish reasonable assurance).

15. In support of its claim that the bank letter also meets the second prong of the Scioto test for reasonable assurance, CAM relies on Coxwell's description of the FM proposal during her first phone call to Tebeau. Specifically, Coxwell testified that during the first phone call to Tebeau, she discussed with him the tower, the antenna, the land, the buildings that CAM would need, as well as its operating expenses, but that this discussion was not followed up with any written documentation. (Tr. 251). Nor did Coxwell send Tebeau any written correspondence memorializing their oral discussion. (Tr. 252). We agree with CAM that it is not fatal that this exchange was oral. Harrison County, 6 FCC Rcd at 5821 ¶¶ 12-14 (reasonable assurance found, where the applicant made an oral financial presentation to the banker and the banker testified that the bank had a present, firm intention to finance the application). Nor is it critical in today's business world, where much is accomplished by fax machines, that Tebeau and Coxwell never met face-to-face. Nevertheless, the Board is correct (11 FCC Rcd at 4638 ¶ 15) that the record reflects that Tebeau had only minimal information concerning the proposal.

16. In addition, CAM asserts that reasonable assurance is demonstrated because the record reflects that the bank did not regard written documentation as a prerequisite for the bank letter. Coxwell testified that, when she called Tebeau back, she asked him whether he needed

any written documentation from her at that time. (Tr. 252). According to Coxwell, Tebeau told her no, not at that time, that the bank would go forward with any requirements when CAM receives the construction permit. Id. This would be premature, he explained, since the requirements for a loan might have changed by that time. Id. Her understanding was that, although she had not provided a detailed business plan, Tebeau was comfortable with her earlier oral recitation of the list of what the \$200,000 must cover (i.e., tower, land, buildings, equipment, as well as construction and initial operating expenses). (Tr. 252-53).

17. Notwithstanding CAM's contention, the bank's willingness to issue the bank letter without written documentation of the proposal or other data relating to the applicant's creditworthiness does not demonstrate reasonable assurance under Welch Communications, Inc., 8 FCC Rcd 1285 (1993), aff'd sub nom. on other grounds, Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217 (D.C. Cir. 1993). The lender in that case was not a bank, but BROADCASTCAP, an entity organized specifically to make loans to minority broadcast applicants. Its lending practices recognized that, as a practical matter, such applicants are unlikely to have the financial wherewithal to qualify for a traditional bank loan. To this end, BROADCASTCAP requires a showing of broadcast experience, rather than detailed financial information, from its loan applicants. In addition, it undertakes an independent evaluation of the market instead of relying on the borrower's business proposal. Because BROADCASTCAP had followed its usual lending practices in issuing the loan commitment to the Welch applicant, the loan commitment was deemed to afford the applicant reasonable assurance of funding. There has been no comparable showing, however, that Adel bank has devised unusual lending practices that eschew the traditional financial data (i.e., assets, credit history, current business plan, etc.) ordinarily required of loan applicants and that it issued the May 1988 bank letter in accordance with those practices. Compare Liberty Productions, 7 FCC Rcd at 7584 (no financial issue warranted where, despite omission of an express statement that the bank had reviewed the borrower's financial wherewithal, the letter indicated the bank was familiar with the borrower and there was nothing to indicate that the bank had departed from its usual practices in issuing the commitment letter).

18. We thus emphasize that Welch is a very narrow exception to the holding of Scioto that, where an applicant relies on a loan commitment letter, it must show, inter alia, that the lender has preliminarily reviewed the borrower's individual qualifications for a loan. Moreover, even assuming that the bank's practice was to defer consideration of such matters until CAM received the construction permit, this would not warrant a different result under Commission precedent. Our policies are clear that, whatever the bank's practice, the applicant has the burden of establishing that a bank letter affords reasonable assurance that the necessary funding will be available, and that to do so, the applicant must show, at a minimum, that the bank has made a meaningful evaluation of, and is satisfied with, the borrower's individual qualifications. Absent probative evidence that the lender has made such a judgment, however, we have no basis for finding that the bank letter affords reasonable assurance that, future conditions permitting, the necessary funding will be available. See Isis Broadcast Group, 7 FCC Rcd 5125, 5129 ¶ 17 (Rev. Bd. 1992), review denied, 8 FCC Rcd 7040 (1993) (the issue is whether the applicant had

reasonable assurance of financing, not the reasonableness of the lender's decision to grant or withhold such assurance, or the likelihood of the applicant ultimately qualifying for the loan once it submits the necessary loan request information).

19. In this regard, Harrison County and Annette B. Godwin, cited by CAM for the proposition that the Commission does not second-guess the judgment of a bank, are clearly inapposite. In Harrison County, the applicant had discussed her business plan with the bank, provided the bank with her cost estimates as well as the rough outline used to derive them, orally discussed her personal financial conditions (including her assets and credit history) with the bank, and told the bank that she had sufficient funds to prosecute her application. In Annette B. Godwin, the applicant had provided the bank with the ordinary loan request data and documentation. In the face of probative evidence in both cases that the dialogue between the bank and the applicant was sufficient to permit a meaningful review of the prospective borrower's individual qualifications, there was no basis to second-guess the banks' decisions to issue the commitment letters, particularly in light of the bankers' testimony corroborating that, at the time of the bank letters in question, there was a present, firm intent to make the loan. Here, by contrast, it is clear from the testimony of Lyra Coxwell, the CAM principal who allegedly secured the bank letter, that she had not provided the bank with any information that would have enabled it to meaningfully assess CAM's creditworthiness. Moreover, the Board is correct (11 FCC Rcd 4639 ¶¶ 20, 23) that there is no probative evidence indicating on what basis Tebeau, before issuing the bank letter, could have made a meaningful judgment as to CAM's creditworthiness. In these circumstances, the May 1988 letter signed by bank president Tebeau and specifying tentative loan terms does not afford reasonable assurance that, future conditions permitting, the bank will lend CAM the \$200,000 that it needs to construct and initially operate the station. CAM has therefore failed to establish that it is financially qualified and its application was properly denied.

ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED That the Supplemental Decision, 11 FCC Rcd 4635 (Rev. Bd. 1996) IS MODIFIED to the extent reflected herein, that the Application for Review, filed May 17, 1996, by CAM Broadcasting IS GRANTED to the extent reflected herein and IS DENIED in all other respects, and that the Contingent Application for Review, filed May 20, 1996, by Thomas W. Lawhorne IS DISMISSED as moot.

21. IT IS FURTHER ORDERED, That the Partial Motion to Strike, filed June 7, 1996, by Thomas W. Lawhorne IS GRANTED.¹

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹Lawhorne objects to references in CAM's Application for Review to the asserted indictment on seven felony counts of Thomas W. Lawhorne, noting that Lawhorne has never been indicted. We will grant the partial motion to strike. This apparently refers to an arrest warrant issued against Lawhorne in September 1991. By Order, FCC 94M-581 (Oct. 18, 1994), the ALJ accepted an amendment reporting that the arrest warrant was subsequently dropped without prejudice. See also Thomas W. Lawhorne, 7 FCC Rcd 4341 ¶¶ 3-4 (1992), holding that Lawhorne should have reported this matter to the Commission, pursuant to section 1.65, but that its failure to do so did not warrant the addition of a reporting issue.