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OCT 25 1993

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October 25, 1993

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

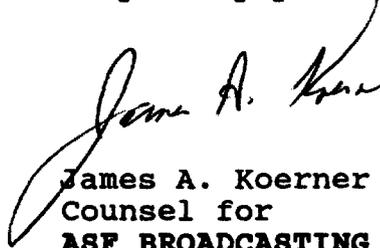
Re: MM Docket No. 93-107

Dear Mr. Caton:

On behalf of ASF Broadcasting Corporation, applicant in the above-referenced proceeding, there are transmitted herewith an original and six copies of its **PROPOSED FINDINGS OF FACT AND CONCLUSIONS**.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,


James A. Koerner
Counsel for
ASF BROADCASTING CORPORATION

Enclosures

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	MM Docket No. <u>93-107</u>
DAVID A RINGER, <u>et al.</u>)	File Nos. BPH-911230MA
)	
For Construction Permit for)	
New FM Station on Channel 280A)	
at Westerville, Ohio)	

TO: Administrative Law Judge
Walter C. Miller

PROPOSED FINDINGS OF FACT AND CONCLUSIONS

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OCTOBER 25, 1993

(i)

S U M M A R Y

In this five party comparative proceeding, only Ringer and ASF are entitled to full integration credit. ASF is preferred because of its principal's past management of the very station for which the authorization is sought. It is far from clear that Wilburn's allegedly integrated principal will have a significant management role at the station, or that the supposedly non-integrated principal will not be involved. Davis' integration proposal cannot be credited. ORA proposes no integration.

No party suffers any diversification demerit.

Under comparative coverage, Wilburn suffers a demerit with respect to the other applicants.

Every applicant except Wilburn proposes auxiliary power.

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TO: Administrative Law Judge
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PROPOSED FINDINGS OF FACT AND CONCLUSIONS

APPEARANCES

Arthur V. Belendiuk, Esquire on behalf of David A. Ringer ("Ringer"); James A. Koerner, Esquire on behalf of ASF Broadcasting Corporation ("ASF"); Eric S. Kravetz, Esquire on behalf of Wilburn Industries, Inc. ("Wilburn"); Dan J. Alpert, Esquire on behalf of Shellee F. Davis ("Davis"); Stephen T. Yelverton, Esquire on behalf of Ohio Radio Associates, Inc. ("ORA"); James Shook, Esquire on behalf of the Chief, Mass Media Bureau.

ASF Broadcasting Corporation ("ASF"), by its attorneys, hereby submits its Proposed Findings of Fact and Conclusions in the above-captioned matter, as ordered by the Presiding Judge.

I. PRELIMINARY STATEMENT

1. By Hearing Designation Order (DA-93-423) released April 15, 1993, the Assistant Chief, Audio Services Division, Mass Media Bureau designated for hearing the applications of Ringer, ASF, Wilburn, Davis and ORA, as well as applications

of two other applicants, since dismissed. Issues specified, renumbered to eliminate a mooted issue, are as follows:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The Designation Order also ordered that evidence be adduced with respect to the areas and populations to be served by each of the applicants, and the availability of other primary aural services in such areas.

2. A prehearing conference, at which direct case hearing exhibits were exchanged, was held on August 16, 1993. An evidentiary admission session, at which objections to the direct case exhibits were made, and rulings rendered, was held on August 20, 1993. The hearing itself was held on August 31, 1993, and the record was closed by Order (FCC 93M-642, released October 8, 1993).

II. PROPOSED FINDINGS OF FACT

A. Areas and Populations

3. The areas and populations within the 1 Mv/m contour of each of the applicants are as follows:

<u>Applicant</u>	<u>Population (1990)</u>	<u>Area (sq. km.)</u>
Ringer	604,567	2,363
ASF	607,783	2,052
Wilburn	404,608	1,828
Davis	629,837	2,319
ORA	597,617	2,476

(Joint Engineering Exhibit, Page 2)

4. All of the areas served by all of the applicants receive five or more aural services daytime. ORA will provide a fourth nighttime service to 183 persons in a 19 square kilometer area, and a fifth nighttime service to 2,251 persons within a 61 square kilometer area. (Joint Engineering Exhibit, Page 3)

B. David A. Ringer

5. Ringer has applied as an individual applicant, i.e., a sole proprietor. (Ringer, Exhibit 1)

6. Ringer is presently, Treasurer, Secretary, Director and 25% stockholder of the licensee of Station WYBZ(FM), Crooksville, Ohio. (Ringer, Exhibit 4, Tr. 137) Crooksville is located approximately 45 miles from Columbus. (Tr. 137)

7. In the event of a grant of this Construction Permit, Ringer intends to sell his interest in WYBZ, and terminate his employment. (Ringer, Exhibit 4) In connection with his WYBZ interest, he visits the station once a week, generally to pay the bills. (Tr. 158) He is not an employee of the station. (Tr. 158)

8. Previously, from 1969 to 1972, Ringer worked at Station WLNO(FM), London, Ohio, primarily as an announcer, and from 1961 to 1962, while in college, at Station WMUB(FM), Oxford, Ohio as a news reporter. Neither of these involved any management positions. (Ringer, Exhibit 2, Tr. 158-159)

9. Ringer proposes to relocate to Westerville, Ohio. (Ringer, Exhibit 2) He will serve as General Manager of the

station on a full time basis, with duties including overall responsibility for sales, personnel and implementation of the station's EEO Program. (Ringer, Exhibit 2) His present residence, at 417 West 6th Avenue, in Columbus, Ohio, is approximately four or five miles from the studios of former Station WBBY, which Ringer proposes to utilize. (Ringer, Exhibit 2, Tr. 160) He has resided at this address since April 1992. (Ringer, Exhibit 2) This residence is within the 1 Mv/m contour of the proposed station. (Tr. 138-139)

10. Initially, Ringer claimed two previous residences in Columbus, Ohio as being within the 1 Mv/m contour. (Ringer, Exhibit 2, Tr. 139-140) However, it was later established that those residences were actually outside the 1 Mv/m contour. (Davis, Exhibits 4, 5, Tr. 276-282)

11. Ringer has not made any plans to sell his present residence, nor has he investigated housing availabilities in Westerville. (Tr. 141-142)

12. Ringer was previously in the publishing business and in the land business, but is no longer involved in publishing. (Tr. 143) He is now a land developer, and devotes as much time as he can to this business. (Tr. 157)

13. Initially, Ringer also claimed participation in civic activities within the service area of the proposed station. (Ringer, Exhibit 2) All of those activities took place prior to April of 1992. (Ringer, Exhibit 2) Ringer testified that some of those activities may have been outside

the 1 Mv/m contour, but those which he had done at home would have been within the 1 Mv/m contour. (Tr. 144-145) As noted, supra, these residences turned out to be without the 1 Mv/m contour.

14. Ringer intends to install auxiliary power generators at the studio and transmitter locations. (Ringer, Exhibit 3)

C. ASF Broadcasting Corporation

15. ASF is a corporation with two classes of stock. (ASF, Exhibit 1) Ardeth S. Frizzell holds 250 shares of voting stock, and Thomas J. Beauvais holds 750 shares of non-voting stock. (ASF, Exhibit 1) In addition, Ardeth S. Frizzell is President, Secretary, and the sole Director of the corporation. (ASF, Exhibit 1)

16. Ardeth Frizzell has no ownership interest in any mass communications medium. (ASF, Exhibit 2) Thomas J. Beauvais has interests in the licensees of WBTZ, Pinconning, Michigan, WFGH, Grand Rapids, Michigan, and a new FM station at Trussville, Alabama. (ASF, Exhibit 2)

17. Ardeth Frizzell is 51 years old. (ASF, Exhibit 3) She was born in, and still resides in Columbus, Ohio. Her residence is slightly outside the 1 Mv/m contour of the proposed station. (ASF, Exhibit 3)

18. From 1964 to 1965, Ms. Frizzell worked for DeLuca Beauty Salon, as General Manager, etc. In 1967 she began working for JC Penny in Columbus with duties including sales,

cashier and inventory. From 1972 to 1973, she was with Kelly Girls doing short-term jobs. (ASF, Exhibit 3)

19. Beginning in 1973, Ms. Frizzell began her career in broadcasting, working for WCOL and WXGT. Initially a research assistant, in 1976 she became promotion assistant. In 1978, she was promoted to assistant bookkeeper and finally from 1982 until 1985 she was computer coordinator/traffic assistant. In this latter capacity, she oversaw all computer operations, including scheduling of worktime between traffic and accounting departments, scheduling commercials, and providing invoices for billing. Beginning in 1985, Ms. Frizzell worked at Station WBBY, Westerville, Ohio, the station which ASF now seeks to reactivate. She began as traffic manager, and later became business manager. In 1990, she became general manager of the station and held that position until the station went off the air on December 31, 1991. As general manager, Ms. Frizzell supervised a staff of 25 persons and was responsible for virtually all day-to-day operations of the station. Since February 1992, Ms. Frizzell has been business and traffic manager at station WCKX, London, Ohio. (ASF, Exhibit 3)

20. As general manager at WBBY, Ms. Frizzell, of course, realized the frequency was becoming available. She told listeners and employees that she would try to reactivate the station. (Tr. 178) She had a close friend and former co-worker, Joanne Adams, who had previously applied for a radio station at Delaware, Ohio, with financial backing from Thomas

J. Beauvais. (Tr. 178-180) At Ms. Adams' suggestion, Ms. Frizzell called Mr. Beauvais, and later met with him; he agreed to provide financial backing. (Tr. 181) Ms. Frizzell's attorney prepared a Shareholders Agreement based upon a similar agreement which Joanne Adams had used in connection with her Delaware, Ohio application, but Ms. Frizzell has a greater equity interest than Ms. Adams did. (Tr. 193-195) Under the terms of the arrangement, Ms. Frizzell is required to contribute a total of \$12,000.00, all of which has been contributed. (Wilburn, Exhibit 3, Tr. 187) Mr. Beauvais is to contribute \$96,000.00 prior to grant, and to lend an additional \$100,000.00 after grant. (Wilburn, Exhibit 3, Tr. 187) Not all of his initial \$36,000.00 commitment has yet been contributed. (Tr. 187)

21. Ms. Frizzell proposes to be general manager, the same position she held prior to WBBY's going off the air. She will be in charge of all personnel and all operations of the station on a full time, 40 hour per week basis. All other business or employment will be terminated. (ASF Exhibit 3) She intends to try to re-hire, to the extent possible, persons who were employed at the station in 1991.

22. While at WBBY in management level positions, Ms. Frizzell participated in drives to collect shoes for the homeless in 1990 and 1991, and helped raise funds for TV Discovery Playground and for Children's Hospital. (ASF Exhibit 3)

23. Mr. Beauvais is general manager of Station WFGR. (Tr. 246) He had been active at Station WBTZ until it entered into an agreement with another station. (Tr. 248) He is not active in connection with the Trussville station. (Tr. 249) He is also part owner of an advertising agency in Southfield, Michigan. (ASF, Exhibit 2) There is no business relationship between that agency and either WFGR or WBTZ. (Tr. 250)

24. Under the terms of the Shareholders Agreement, Ms. Frizzell has the right to buy Mr. Beauvais' interest in the corporation, but he has no reciprocal right. (Wilburn, Exhibit 3)

25. ASF intends to have auxiliary power generators at both the studio and the transmitter site. (ASF Exhibit 4)

D. Wilburn Industries, Inc.

26. Wilburn is a corporation, which presently has two classes of stock. Three hundred seventy-five (375) shares of voting stock have been issued to Charles W. Wilburn, and 375 shares of non-voting stock have been issued to Bernard P. Wilburn. (Wilburn, Exhibit 1) Charles Wilburn is President, Secretary, Treasurer and the sole Director. His son, Bernard, is not presently an officer or director. (Wilburn, Exhibit 1)

27. When Wilburn was first organized, there was only a single class of stock, owned equally by Charles and Bernard Wilburn. (Tr. 305) As re-organized, they still have a 50/50 equity split. (Tr. 306)

28. Neither the applicant nor either of its principals have interests in other communications media. (Wilburn Exhibit 1)

29. Both Charles Wilburn and Bernard Wilburn are attorneys, and partners with each other in the law firm of Weldon and Wilburn in Circleville, Ohio. Charles Wilburn began practicing in 1964, and Bernard joined the firm in 1984. (Tr. 286-287)

30. Initially, the Wilburns intended to share management duties at the station. (Tr. 294) Charles was to be assistant to the public service director, and Bernard was to be assistant to the program director. (Tr. 303) However, they did not know who would be the program director or who would be general manager or station manager. (Tr. 304) Each was to work part-time in their respective capacities. (Tr. 364-365) After the application was filed, the corporation was restructured. (Tr. 306) Although equity remained on a 50/50 basis, and financial contributions also remained equal, Charles would become full time general manager. (Tr. 306-308) Charles testified that his duties would be to hire competent people since he lacked experience. (Tr. 308) Other than his law firm, he has not had experience managing any business. (Tr. 309) One possible employee or consultant would be Nelson Embry, an acquaintance of Charles Wilburn for some 25 years. (Tr. 310-311, 312-313, 315) Mr. Embry owned and managed a radio station in Circleville, Ohio for many

years. (Tr. 311) Mr. Wilburn testified that Mr. Embry would have quite a bit of responsibility, but he, Charles Wilburn, would be there if only as assistant manager. (Tr. 346)

31. Charles Wilburn presently lives in Upper Arlington, Ohio, but intends to relocate to Westerville, approximately nine miles away. (Wilburn, Exhibit 2) He will turn over his law practice to his son. (Tr. 317) In 1991, Mr. Wilburn's income was approximately \$60,000.00 to \$70,000.00. In 1992, it was about \$75,000.00, and in 1993, it is in excess of \$250,000.00. (Tr. 335, 338)

32. Charles and Bernard Wilburn are equal partners in the law firm, which is a general practice firm. (Tr. 287, 289) Each has supplied 50% of the prosecution costs by virtue of the fact that all costs to date have been paid out of the law firm account. (Tr. 358-359) Wilburn Industries has never had a separate bank account. (Tr. 359, 370) Each is entitled to 50% of the profits of the station. (Tr. 361) Prior to the re-organization of Wilburn Industries, Inc., Charles and Bernard Wilburn intended to share costs, profits and management duties. (Tr. 362) However, they intended for someone else to be in overall control of the station, working 40 hours per week. (Tr. 364-365)

E. Shellee F. Davis

33. Davis has applied as a sole proprietor. (Davis, Exhibit 1) She does not own or control any medium of mass communication. (Davis, Exhibit 1, page 7)

34. Davis proposes to relocate to Westerville, and to become general manager of the station, working full time in that capacity. (Davis, Exhibit 1) She is a minority. (Davis, Exhibit 1) Further, she has lived at various locations within the 1 Mv/m contour of the proposed station. (Davis, Exhibit 1)

35. At the present time, Shellee Davis is 37 years old. (Tr. 375) She is President and owner of Britt Business Systems, Inc., and has been since 1988. (Tr. 376) Britt is an office equipment dealer, primarily trading in Panasonic and Xerox equipment. (Tr. 377) In 1991, gross revenues were \$1.2 million, and in 1992, gross revenues were \$1.4 million. (Tr. 377) Britt has a total of nine employees. (Tr. 377) Britt's largest accounts are house accounts, for which no commission needs to be paid. (Tr. 378-379)

36. Davis has substantial equity in Britt, and has made personal loans to it, some of which are still outstanding. (Tr. 382) If awarded the Construction Permit, she intends to sell Britt, but to date, she has made no effort in that regard. (Tr. 383) Nor does she know the value of Britt. (Tr. 384) She does not intend to try to sell Britt until she has a license. (Tr. 385) After receiving the permit, she would put Britt on the market, and hopefully someone would buy it as soon as possible, but she has no idea how long it may take. (Tr. 385-386) She would not necessarily sell Britt before operating the Station. (Tr. 385) It could take a year

to sell it. (Tr. 386) Britt's value, and ability to make money, is its right to sell Xerox and Panasonic equipment. (Tr. 389-390, 393-394) The Dealer Agreement with Panasonic provides that the Agreement cannot be transferred. (Ringer, Exhibit 5, paragraph 16) The Agreement with Xerox recites that it was entered into on the basis of personal knowledge of the territory and ability to sell; it cannot be transferred without prior written consent. (Ringer, Exhibit 6, page 5) Sale of Xerox and Panasonic equipment is approximately 90% or more of the business of Britt. (Tr. 430)

37. As President of Britt, Davis has a salary of \$25,000.00, and has her expenses paid for. (Tr. 424) Britt, which is a Sub-chapter S corporation, had 1992 income of approximately \$80,000.00. (Tr. 425-426) She hopes to have a salary, as general manager of the radio station, of \$30,000. (Tr. 387-388)

38. Davis' husband, Reginald Davis, had previously filed applications for Indianapolis and Upper Arlington. (Tr. 401) In one of them, he received a settlement. (Tr. 402) She did not know who her husband's counsel was in either case. (Tr. 402) Her brother-in-law, Ben Davis, had also filed an application for Huron, Ohio. (Tr. 404) It was Ben Davis who gave Davis her attorney's name. (Tr. 404) That attorney referred her to an engineer, provided the form letter for the bank, and provided cost figures. (Tr. 405-406)

39. Davis has been active in a number of civic organizations, including the Columbus Chapter of Links, Inc., United Way, Columbus Speech and Hearing Board, New Salem Baptist Church, and other organizations. (Davis, Exhibit 1, pages 2-7)

40. At hearing, Davis admitted that in certain interviews she made statements to the reporter that were not true. These included the nature of her business relationship with Ben Davis, his title with Britt, the nature of the Cleveland office of Britt. (Tr. 440-444)

41. Davis intends to install auxiliary power. (Davis, Exhibit 2)

Ohio Radio Associates, Inc.

42. ORA is a corporation with four equal stockholders, Joseph D. Carney, John J. Carney, James A. Carney (who are brothers), and John M. Mino. All four are directors. John Carney is President, Joseph Carney is Secretary and Vice President, James Carney is Treasurer and Vice President, and John M. Mino is the Assistant Secretary, Assistant Treasurer, and Vice President. (ORA, Exhibit 1)

43. Neither ORA nor its stockholders have cognizable or attributable interests in any medium of mass communications. (ORA, Exhibit 1)

44. ORA does not propose to integrate any of its owners into management. (ORA, Exhibit 1)

45. ORA proposes to provide auxiliary power at the studio and transmitter site. (ORA, Exhibit 1)

III. PROPOSED CONCLUSIONS

46. As a comparative broadcast proceeding, this case is governed by the principles enunciated in Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 383 (1965) ("Policy Statement"). Over the nearly three decades since those principles were devised, there have been numerous cases interpreting, refining and distinguishing various aspects of the guidelines. Even in 1965, however, the Commission noted that "[t]he hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent." Policy Statement at 393. Nevertheless, the Commission decreed that the two primary objectives are ". . . first the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." Policy Statement, at 394.

47. In reviewing the evidence adduced in this case, it is well to keep in mind the views of Commissioner Hyde:

"It [the Policy Statement] would press applicants into a mold in order to meet the Commission's perceived standards, thus deterring perhaps better qualified applicants from applying; it would preclude significant consideration of material differences among applicants and result in automatic preference of applicants slavishly conforming to the mold, and eventually force the Commission to decide cases on trivial differences

among applicants since basically they would all have come out of the same press." Policy Statement, at 400 (Com'r Hyde, dissenting)

Now, having been urged by the Court, the Commission may be realizing the wisdom of Commissioner Hyde's remarks.¹

A. Areas and Populations

48. All of the areas and populations to be served by the various applicants are well-served, i.e., five or more aural services during the daytime. ORA alone provides slight nighttime service to areas with fewer than five aural service. However, that service is extremely slight; only 183 persons (0.03% of its coverage area) will receive a fourth nighttime service, and 2251 persons (0.37%) will receive a fifth nighttime service. To the extent ORA could possible claim any preference, it would be negligible.

49. On the other hand, Wilburn suffers a disadvantage because of its low coverage. The other applicants, including ORA, serve from 47% (ORA) to 56% (Davis) more population. Thus all of them are entitled to a coverage preference over Wilburn. Beach Broadcasting Ltd. Partnership, 6 FCC Rcd. 4485 (1991) (22% differential in well served areas is entitled to a preference). As among those applicants, however, none can claim a preference. Washington Christian Television Outreach, Inc., 99 FCC2d 395 (Rev. Bd. 1984), aff'd 59 RR2d 787 (1985)

¹Re-examination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd. 2664, Further Notice, 8 FCC Rcd. 5475; Bechtel v. FCC, 957 F.2d 873 (D.C.Cir. 1992).

(subsequent history omitted) (10% population differential results in no preference). Here the differentials range from 5.4% (Davis vs. ORA) to 3.6% (Davis vs. ASF).

B. Diversification

50. Of the applicants, only Ringer has a presently cognizable mass communication interest, and he has pledged to divest that interest. If successful, he would be held to that pledge. Comparative Hearing Process (Reconsideration), 6 FCC Rcd. 3403 (1991) ASF's non-voting shareholder has broadcast interests, but they are non-cognizable as to ASF. See, e.g., 47 C.F.R. 73.3555, n. (f); Attribution of Ownership Interests, 97 FCC2d 997, 1020-1021 (1984). No evidence has been adduced that Mr. Beauvais would have any active connection with the proposed station. His own advertising agency does not even do business with the stations in which he has an ownership interest.

51. Accordingly, no applicant receives either a preference or a demerit under the criterion.

C. Integration - Quantitative

52. All of the remaining applicants, save ORA, claim 100% quantitative integration credit. However, not all can be taken at face value. For reasons which follow, only Ringer and ASF are entitled to the claimed credit.

53. Ringer, as noted, intends to terminate his existing business activities and to devote his attentions to the operation of the radio station. His present activities appear

to consist only of land development. Thus, he probably should be awarded 100% integration credit.

54. ASF similarly can claim 100% integration credit. Ardeth Frizzell, the sole voting stockholder has pledged to quit all existing employment in order to re-enter the position she previously held. She also had promised listeners and employees of WBBY that she would seek to re-activate the station. She previously held the position of general manager, and seeks to return to it. A better integration pledge can scarcely be imagined.

55. Thomas J. Beauvais is strictly a passive owner. He is an investor with broadcast experience, and who recognizes broadcast experience in others. Previously, he invested, passively, in an application for a new FM station at Delaware, Ohio. It sustained the challenge, but the voting stockholder dropped out for serious health reasons. Given the background, and the fact that Ms. Frizzell has the right to buy out Mr. Beauvais' interest (he having no reciprocal right) there is no reason not to grant the full 100% quantitative credit.

56. Wilburn presents a different situation. Unlike ASF, which was a two-tier structure from the inception, Wilburn began as a single tier, with both father and son holding voting stock. From the beginning, they intended to share, 50/50, expenses, profits, voting rights and management. After filing, however, Wilburn reorganized, with everything being the same except voting rights and management responsibility.

57. Charles Wilburn, the purported general manager-to-be, is a practicing lawyer, in practice with his son. He makes a good living, but states that he wants to retire. He will turn the legal business over to his son, and that will be the end of Charles Wilburn, the lawyer.

58. When the application was first filed, Charles Wilburn knew a Nelson Embrey, who had owned and operated a radio station in Centerville, Ohio for many years. He felt that he could use Mr. Embrey's assistance, and proposed that he would play some role in the proposed station. With that in mind, Charles Wilburn initially proposed to have a part-time job at the station as an assistant to some unnamed and unknown public service director. His son, Bernard, was to be an assistant to an unnamed and unknown program director. The station would be run by an unnamed and unknown general manager. Upon reorganization, however, Charles Wilburn was to become general manager, even though Mr. Embrey would still be on the team. Candidly, Charles Wilburn admitted that his duties would be to hire competent people since he had no experience. Further, he candidly admitted that, possibly, Mr. Embrey would be the general manager and that he -- Charles Wilburn -- would be his assistant.

59. Basically, Wilburn began as a 50/50 plan with Charles and Bernard Wilburn, just as their law firm is. With the reorganization, little changed except facially. If Charles is planning to retire from the law firm, it is

unlikely he will begin a new career, 40 hours or more per week, at a radio station, particularly when he has an experienced broadcaster at the helm. In the meantime, Bernard is still on the hook for one-half of the expenses, losses, etc.

60. At best, the Wilburn proposal can be viewed as 50% integration on a part-time basis. Reality must set in. Mr. Embrey -- or someone similar -- will be setting policy and carrying it out with Charles Wilburn looking over his shoulder occasionally. Bernard, as a 50% contributor and participant in the profits can scarcely be expected to remain in the background.

61. Davis is entitled to no integration credit. Her proposal cannot be honored. While not a "sham" in the traditional sense, Davis' proposal is too incredible and evasive to be believed. The FCC, and, particularly, the Review Board was applauded by the Court for attempting to ferret out applicants which cannot cut the mustard. Marlin Broadcasting of Central Florida, Inc. vs. FCC, 952 F.2d 507, 511 (D.C.Cir. 1992)

62. In the normal course "sham" proposals involve a two-tiered applicant, either corporate or partnership, or an ideal "front" for a real party in interest. See, generally,

Mableton Broadcasting Company, Inc., FCC 93R-53, released October 22, 1993, and cases therein cited.²

63. Two-tiered cases found wanting sometimes involve an "integrated" principal and one or more "non-integrated" principals, with a proposal that gives away the store or otherwise lacks credibility. See, e.g., Annette B. Godwin, 8 FCC Rcd. 4098, 4103-4105 (Rev. Bd. 1993); Gloria Bell Byrd, 7 FCC Rcd., 7976 (Rev. Bd. 1992) aff'd, FCC 93-460, released October 1, 1993. Other times, there are fronts for undisclosed interested parties. See, e.g., Religious Broadcasting Network, 3 FCC Rcd. 4085, 4088 (Rev. Bd. 1988). Yet another reason for refusing integration credit is an applicant's failure to explain how other business interests, to be retained, will be handled. Washington Outreach, supra.

64. Davis presents a mix of these. Her direct case hearing exhibit states that she will terminate paid employment and sell her existing business to effectuate her integration pledge. At hearing, however, she waffled. Ms. Davis testified that once she obtained the permit, she would put her existing business up for sale. She has no idea of its appraised value, or how long it may take to sell it. So far she has not inquired. Further, she may not sell the business before beginning to operate the radio station. That,

²Interestingly, while the Review Board reversed the ALJ's ultimate conclusion as to the successful applicant, it concurred with his conclusions (if not his methodology) with respect to other applicants which failed an integration test.

obviously, will depend upon how long it takes to sell the business or to get the station into operating condition.³

65. Sale of Davis' existing business presents some problems. Over 90% of the business revenues stems from its ability to sell Panasonic and Xerox equipment. Yet, her distributorship/dealer agreements with those companies are non-transferable or are based upon personal services. Thus, the "sale" of the business may not be effectuated quickly, if at all.

66. Finally, Davis' testimony relative to a change of careers is incredible. As the owner of Britt Business Systems, she made 1992 income of something in excess of \$105,000.00 plus payment of a number of expenses. As manager of this new radio station she will, hopefully, make \$30,000.00 annually. Britt Business Systems, between 1991 and 1992 enjoyed growth of about 17%. As a five year old company, it's growth years are far from over. It defies credibility that Ms. Davis would terminate that business for managing a small radio station.⁴

³The station is already constructed and ready for operation. The equipment is in place and ready to be leased.

⁴In Barry Skidelsky, 70 RR 722 (Rev. Bd. 1992), the Review Board refused to accept a similar argument concerning a proposed change of career by a communications attorney. However, there, the person in question had already held a number of positions at radio stations. Ms. Davis cannot say the same.