

any efforts to identify an attorney to assist him at such a time as his father leaves the firm. Tr. 371. Charles Wilburn testified that Bernard probably works "around 40" hours per week. Tr. 317. When asked if his son is going to have to work 80 hours a week in order to handle his father's additional workload, Charles Wilburn testified: "Till the transition is made and he can hire additional help if he finds it necessary, yes." Tr. 317.

43. Charles Wilburn testified: "...I'm guardian of different persons who have businesses and I manage them, yes. In connection with my law practice, certainly." Tr. 309. Charles Wilburn also testified: "...frequently I would be asked to accept a power of attorney to operate business affairs, particularly among older clients who retire and leave the area, and they would leave me in charge of their affairs. That's quite common. I have several of those now." Id. These powers of attorney were given to Charles Wilburn individually and not to his firm. Tr. 310. At hearing, Charles Wilburn could not recall how many power of attorney appointments he had. Id. Charles Wilburn testified that it would take ninety days for him to effect an orderly turn over of his business. Tr. 317. When asked if he would continue to assist his son with the practice, Charles Wilburn testified: "As far as, you know, going to the office and helping him work on a case, no, I wouldn't be doing that. If he called me on the phone and asked me a

question, asked my opinion, certainly I would give it." Tr. 336-7. After he turns over his business to his son, Charles Wilburn will not be receiving any of the fee income from the firm. Tr. 319 & 336.

44. Charles Wilburn's income from the firm has varied over the last 9 or 10 years from "about 50 to a high of about 250,000 a year, in a year." Tr. 335. Charles Wilburn believed his income for 1992 to be "around 75,000" and his income for 1991 to be "probably 60 or 75." Tr. 338. When asked what years he had made 250,000, Charles Wilburn stated: "1993 has been the highest year." Tr. 338. This was due to a one contingency fee that Charles Wilburn received for a negligence case. Tr. 351. Wilburn does not have a separate checking account and all of the bills for the radio station project have been paid out of the law firm's checking account. Tr. 367 & 370. Bernard Wilburn testified: "my half of contribution would come out of the income generated from the law firm, yes." Tr. 371.

3. Diversification

45. "Wilburn Industries, Inc. and its two shareholders have no interest in or connection with any radio or television broadcast station or any other medium of mass communications." Wilburn Ex. 1, p. 1.

E. OHIO RADIO ASSOCIATES, INC.

1. Ownership Structure

46. The record shows that:

"Ohio Radio Associates, Inc. is an Ohio corporation which was incorporated on January 31, 1992. The corporation has four (4) Directors and stockholders who each have a twenty-five (25%) per cent (sic) equity and voting interest. The Directors and stockholders are Joseph D. Carney, John J. Carney, James A. Carney (who are brothers) and John M. Mino. There are no non-voting stockholders. John J. Carney is President. Joseph D. Carney is the Secretary and Vice President. James A. Carney is the Treasurer and Vice President. John M. Mino is the Assistant Secretary, Assistant Treasurer, and Vice President."

ORA Ex. 1, p. 1.

2. Integration

47. "ORA does not propose to integrate its owners into management and thus does not claim any comparative credit for integration." ORA Ex. 1, p. 1. "ORA will provide auxiliary power at its studio and tower site." Id.

3. Diversification

48. "Neither ORA nor its stockholders control or own (including non-voting stock or limited partnership interests) or have any cognizable or attributable interest...with any...broadcast stations...other recognized medium of mass communications...." ORA Ex. 1, p. 1.

IV. CONCLUSIONS OF LAW

A. BACKGROUND

49. An evaluation of the evidence gathered in this proceeding must be made under the applicable standards set forth by the Commission to determine which of the remaining two applicants is best qualified to serve the public interest. The Commission has set forth the appropriate

criteria to make this determination in the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) ("Policy Statement") and more recently in various opinions and decisions.

50. In determining which applicant is best qualified to become a licensee, the Commission focuses on two main areas of concern: the diffusion of control of the mass media (diversification) and the best practicable service to the public. See Policy Statement at 394. With diversification, the Commission attempts to ensure that media outlets are owned by the greatest possible number of different persons. Thus, applicants without other media interests or those who will divest themselves of such interests will be given substantial (if not decisive) credit and "will all but certainly prevail" over those applicants who own several outlets in the proposed service area or elsewhere. See Policy Statement at 394-5 and Martin Inter-Mart, Inc. 3 FCC Rcd 1650 (Rev. Bd. 1988) citing, Newton Television, Ltd., 3 FCC Rcd 553 (Rev. Bd. 1988).

51. "Best practicable service" includes the integration of ownership into management and the enhancement of such integration by local residence (including prior civic involvement) and broadcast experience. See Policy Statement at 395-6. Additional preferences are given to applicants that pledge to have minorities integrated into station management. See Order re: Race and Gender

Preferences, 3 FCC Rcd 766 (1988), minority preference affirmed, Metro Broadcasting, Inc. v. FCC, 67 RR 2d 1353 (U.S. 1990). Finally, the Commission gives "slight" credit to those applicants that specify that they will supply auxiliary power to maintain the station's operation in the event of a power failure. See Bradley, Hand & Triplett, 89 FCC 2d 657 (Rev. Bd. 1982) citing, Addendum To Policy Statement, 2 FCC 2d 667 (1966). Given this framework, the following conclusions can be drawn.

B. DAVID A. RINGER
1. Integration

52. Unlike the other applicants in this proceeding, David Ringer deserves 100% full-time integration credit. He has shown conclusively that he will be able to commit at least 40 hours per week as General Manager of the new Westerville station. See Findings at ¶5. Mr. Ringer's integration credit should be enhanced for his record of local residence and civic involvement in the service area of the proposed station. See Findings at ¶6&7. Mr. Ringer should receive further enhancement for his prior broadcast experience and his proposal to install auxiliary power. See Findings at ¶8&9.

2. Diversification

53. Mr. Ringer has pledged to sell his 25% interest in WYBZ(FM), Crooksville, Ohio, his only broadcast interest, if he is granted the new Westerville station. See Findings at ¶10. Mr. Ringer has further pledged to terminate his

current employment and any other relationship with this station, if he is successful in this proceeding. Id. Therefore, the interest in WYBZ(FM) should not be attributed to Mr. Ringer and the Commission should find that he has a perfect record under the diversification criterion.

C. ASF BROADCASTING CORPORATION
1. Integration

54. A very different story exists for ASF. As the record conclusively shows, there is no basis for awarding any integration credit to ASF. ASF has failed to demonstrate reliably that its nominally controlling principal, Ardeth Frizzell, will in fact exercise control and ASF has otherwise left fundamental uncertainty about the true nature of its organizational structure. See Royce International, 5 FCC Rcd 7063, 7064 (1990).

55. The facts in this case are surprisingly similar to those in previous Commission proceedings, where an applicant's integration proposal was found to be too unreliable to garner credit. For example, in Eugene Walton, 6 FCC Rcd 6071, 6077 (Rev. Bd. 1991), an applicant with a two-tiered ownership structure failed to properly include, in its enabling document, two of the insulation provisions that Commission has stated must be present in order for a two-tiered applicant to receive integration credit. The record also showed that, inter alia:

- o The applicant's limited partner met his general partner a mere two days before filing their application.

- The limited partner did not previously know the general partner and recruited her after only one meeting.
- The limited partner suggested the form of the limited partnership agreement to be used.
- The agreement did not prohibit the limited partner from communicating with the general partner about day-to-day activities of the station.

See Eugene Walton, 6 FCC Rcd at 6077; see also Poughkeepsie Broadcasting Limited, 6 FCC Rcd 2497 (1991).

56. Given these facts, the Review Board concluded that the limited partner had given away control of the applicant "in a manner that is patently unreasonable on its face...." Id. Furthermore, the Board stated that this "give away was illusory and fatally flawed, because the limited partnership agreement did not contain two of the insulation provisions required by the Commission." Id.

57. In a similar vein, the record in this proceeding shows that:

- Ms. Frizzell and Mr. Beauvais met for the first time a mere seventeen days before filing their Westerville application. See Findings at ¶¶13-15.
- Frizzell and Beauvais were strangers before that one and only meeting. Prior to filing the application, Mr. Beauvais had very little knowledge about Ms. Frizzell's broadcast experience, knew nothing about her financial abilities and never saw the proposed budget for the station. Likewise, prior to filing, Ms. Frizzell had no information about Mr. Beauvais' broadcast or business backgrounds. Id.
- Mr. Beauvais suggested the form of the Shareholders Agreement that the parties executed (the exact form that Mr. Beauvais had used in a previous FCC filing) and Ms. Frizzell did not

change or negotiate any of the material terms in the Agreement other than a small shift in the percentage of equity. Id.

- o ASF's Shareholders Agreement does not bar Mr. Beauvais from being an employee, independent contractor or agent for the station nor does it bar Mr. Beauvais from communicating with Ms. Frizzell on the day-to-day activities of the station. See Findings at ¶12.

58. As with the applicant in Eugene Walton, there can be no other conclusion here but that Mr. Beauvais has "given away the store" to his purported controlling stockholder, Ms. Frizzell. The fact that the parties did not know each other prior to filing, the haste with which the transaction was entered into, as well as both party's ignorance concerning the other party's business and financial backgrounds, "runs contrary to reasonable business judgment since, in a legitimate business transaction, one would expect the...(parties) to study the situation more carefully before committing themselves." Poughkeepsie Broadcasting Limited, 6 FCC Rcd 2497 (1991). Add the fact that Ms. Frizzell's total contribution (\$12,000) is minuscule when compared to Mr. Beauvais' \$196,000 investment and the record, as a whole, seriously undermines the reliability of ASF's purported two-tiered ownership structure.³ Given this record, ASF's claim for integration credit should be rejected.

³ These facts would severely undermine ASF's business structure, despite the fact that Ms. Frizzell may have been involved in the prosecution of the application. See Poughkeepsie Broadcasting Limited, 6 FCC Rcd at 2498.

59. More importantly, because ASF's enabling documents failed to contain the most important of the Commission's required insulation provisions, ASF's two-tiered ownership structure is patently unreasonable on its face. See Ownership Attribution, 58 RR 2d 604, 619 (1988). The Commission has long-held that, in order for a structured applicant to receive integration credit, the passive principals must be just that - passive investors - and have no mechanism at their disposal whereby they can exert control over the potential licensee. See Evergreen Broadcasting Co., 6 FCC Rcd 5599 (1991), recon. denied, 7 FCC Rcd 6601 (1992). These critical omissions from ASF's enabling documents represent an independent grounds for denying its integration proposal.

2. Diversification

60. Rather than completely deny ASF's integration credit, the Commission alternatively could simply attribute Ms. Beauvais' interests in calculating both integration credit and a diversification demerit. In such a case, while ASF would, at best, receive 25 percent full-time integration credit (equal to Ms. Frizzell's 25% equity position), its application would be fatally weakened by the addition of a moderate to substantial diversification demerit that would be appropriate, given the attribution of Mr. Beauvais' various other broadcast interests.

D. SHELLEE DAVIS
1. Integration

61. In this proceeding, Shellee Davis has represented to the Commission that she will either sell or completely walk away from her successful copier supply company in order to implement her integration proposal. As will be shown, Ms. Davis plan is neither believable nor realistic and, therefore, she should receive no integration credit.

62. Ms. Davis asks the Commission to believe her plan of full-time integration. However, her wavering and evasive hearing testimony raises serious doubts about her ability to provide credible evidence to the Commission. On at least two different occasions, Ms. Davis gave equivocal testimony in a clear effort to hide the truth on important issues. Perhaps the best example of Ms. Davis' inability to be completely forthright with the Commission was on the question of her income from Britt. This was an important issue in this proceeding, for the size of Ms. Davis' income would tend to show whether or not she would truly be able to walk away from her thriving copier business. When she was asked what her income from Britt was, she answered "\$25,000." See Findings at ¶27. It was only after being questioned by the Presiding Judge, that Ms. Davis finally that her income was actually larger. Id.

63. Likewise, Ms. Davis could not give a consistent answer as to her brother-in-law, Ben Davis' status with Britt. See Findings at ¶26. At one point she stated that

Ben Davis "runs Cleveland." Id. At another point she stated that Mr. Davis actually owns the Cleveland branch of Britt. Id. Later, it was revealed that Ms. Davis has been lying to various publications, trying to pass Mr. Davis off as her partner and/or an officer of her corporation. Id. At first glance, this does not appear to be an important fact. However, when the issue is whether the Commission can believe an applicant's promise of integration, it should closely examine any instance where the applicant was less than candid in its testimony before the Commission. In this case, it has been shown that, on at least two different occasions, Shellee Davis was evasive and less than forthcoming with the Commission. It is exactly this type of questionable testimony that should raise serious doubts about Ms. Davis' credibility and render her integration proposal wholly unreliable.

64. Even if the Commission can see through Ms. Davis evasive hearing tactics, it should reject her integration plan as simply not believable. Ms. Davis claims that she will either sell Britt or, if she is not able to find a buyer, close it down. However, it defies logic that Ms. Davis would walk away from the Midwest's most successful copier business, a business that has turned the corner and is profitable, in order to commit herself to a new venture for which she has absolutely no experience. Likewise, the record does not support Ms. Davis' claim that she will

simply sell her copier business, when the preponderance of evidence shows that it has very little value without her personal involvement.

65. Simply put, Britt Business Systems is Shellee Davis. The record shows that they are one and the same. Despite her hollow claims to the contrary, without Shellee Davis, Britt is worthless. Her own Direct Case Exhibits demonstrate that Britt has been successful because of Ms. Davis' personal involvement she takes with her customers, the bulk of which have been her personal customers and who look to her for personal care and attention. See Findings at ¶28. Without Shellee Davis' dominant presence, Britt will be a worthless company. It is not realistic, therefore, to believe that Ms. Davis will ever be able sell Britt to willing buyer.

66. Ms. Davis has tried to minimize her role in Britt by arguing that other employees have begun to take on important roles in her company. See Findings at ¶28. However, the record shows that Ms. Davis will be taking two of these valued employees with her - her business manager and one of her sales persons - to her new radio station, further weakening her company's value. Id.

67. Furthermore, the record shows that selling her business will not be as easy as Ms. Davis has made it appear. Her Panasonic contract, which represents a large portion of her business, cannot be assigned to a new buyer.

See Findings at ¶29. While her Xerox contract permits assignment, it requires Xerox's prior written consent. Id. Ms. Davis has not even told Xerox about her plans. Id. While it is her belief that Xerox will permit her to assign her contract to a new owner, there is nothing in the record to show that Xerox holds a similar position on this matter.⁴ See Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3952-3 (Rev. Bd. 1988), citing, 2 Wigmore on Evidence, §285 (1940); and McCormick On Evidence, §272 (1984) ("if a party has it peculiarly in its power to produce a witness whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable"). These facts considered, there remains a serious doubt as to whether Ms. Davis will, in fact, be able to sell her copier business to accommodate her integration plan.

68. "Under the Commission's competitive licensing protocols, each applicant has the burden to prove its entitlement to the credit it seeks under the comparative criteria established in the 1965 Policy Statement." Victorson Group, Inc., 6 FCC Rcd 1697, 1699 (Rev. Bd. 1991), citing Policy Statement, supra; Royce International

⁴ What is certain is that Xerox's contract states that it entered into its agreement with Ms. Davis based upon her "knowledge of the Territory, ability to market the supplies, provide service, and your financial status." See Findings at ¶39. This clause would appear to further limit the number of potential buyers for Ms. Davis' business.

Broadcasting, 5 FCC Rcd 2d 7063 (1990) and Julia S. Zozaya, 5 FCC Rcd 6607 (1990). When an applicant has another business interest which could conflict with its integration proposal, its must make the effort to show how it will accommodated this outside interest or integration credit will be denied. See Victorson Group, Inc., 6 FCC Rcd at 1699, citing, Blancett Broadcasting Co., 17 FCC 2d 227 (Rev. Bd. 1969). "Indeed the very existence of outside interests renders an applicant's commitment questionable." Naguabo Broadcasting Company, 6 FCC Rcd 4879 (1991), citing, Blancett Broadcasting Co., supra, and Leininger - Geddes Partnership, 2 FCC Rcd 3199 (Rev. Bd. 1987). In this case, Shellee Davis has failed to show how she will accommodate her outside business interest in order to fulfill her integration pledge. For the reasons outlined above, her proposal to sell or terminate her successful copier business is not believable and is simply not supported by the record evidence in this proceeding. Therefore, Shellee Davis should receive no integration credit.

2. Diversification

69. Davis does not have any attributable media interests and has a perfect record under this criterion.

E. WILBURN INDUSTRIES, INC.

1. Integration

70. As was the case with Shellee Davis, Wilburn has failed to adequately demonstrate that Charles Wilburn's full-time integration plan is realistic under the

circumstances. The record shows that at the outset neither Wilburn intended to be the manager of their station and they realized that, realistically, they could only commit part-time to the station, in non-managerial roles. It was not until after the weakness of their original plan was disclosed by counsel, that the Wilburns modified their approach and set forth their current plan.

71. Under this plan, Charles Wilburn claims that he will completely terminate his active and successful law practice and enter into a new business pursuit - the field of broadcasting - for which he has no prior experience. To accomplish this task, Charles states that he will turn over his entire practice to his son Bernard. See Findings at ¶41. However, Charles Wilburn admitted that this would mean that his son would probably have to work 80 hours a week in order to handle all of the firm's business. See Findings at ¶42. Charles even suggested that he would willing to continue providing advice and counsel to his son, even after Charles had begun operating the new station. See Findings at ¶43. While Charles Wilburn stated that his son could hire additional attorneys or support staff to help him with his increased workload, no concrete plans have been developed along these lines. See Findings at ¶¶42-43.

72. As the record shows, it will very difficult, if not impossible for Charles Wilburn to divorce himself from his busy law practice in order to accomplish his full-time

integration proposal. Since the Wilburn's intend to fund at least one-half of the capital necessary for their new station from income generated from the law practice (see Findings at ¶44) and since Charles Wilburn is unquestionably the heart and soul of the business, there will exist a very strong temptation for Charles Wilburn to continue in his current full-time role at the firm. With an additional forty-hour a week commitment to his law practice, it is not realistic to believe that Mr. Wilburn will be able to provide the necessary forty hours a week to his new station. More than likely, Charles Wilburn will do what he intended to do from the start - hire professionals to run his station and take no active role in its management.

73. Given these facts, Wilburn has failed to prove its entitlement to the full-time integration credit it seeks and its integration proposal must be denied. See Victorson Group, Inc., 6 FCC Rcd at 1699 (citations omitted).

2. Diversification

74. Since the Wilburns hold no other media interests, they also have a perfect record under the diversification criterion.

V. ULTIMATE CONCLUSIONS

75. Given the fact that ASF's integration credit should be drastically reduced or it should receive a moderate to substantial diversification demerit for the broadcast interests of Thomas Beauvais, either outcome would

eliminate its application from further comparative consideration. See Martin Intermart, 3 FCC Rcd 1650 (Rev. Bd. 1988) and Newton Television Ltd., 3 FCC Rcd 553 (Rev. Bd. 1988). Similarly, since ORA did not propose full-time integration for its principals, this would quickly eliminate its application from further comparative evaluation.

76. This leaves the applications of Ringer, Wilburn and Davis. For the reasons set forth above, neither the integration proposals of Wilburn nor Davis should be credited and only David Ringer deserves an award of 100% full-time integration credit. Such a stark quantitative difference between the level of integration credit of the two other applicants and Ringer's 100% credit would be great enough to eliminate the need for further qualitative comparison. See Miracle Strip Communications, Inc., 4 FCC Rcd 5064, 5065-66 (1989). That being the case, Ringer's application is quantitative superior and should be granted.

WHEREFORE, the above-premises considered, David A. Ringer respectfully requests that his application for a Construction Permit for a new FM station at Westerville,

Ohio be **GRANTED** and that the mutually exclusive applications of ASF, Wilburn, Davis and ORA be **DENIED**.

Respectfully submitted,

DAVID A. RINGER

By: 

Arthur V. Belendiuk
Shaun A. Maher

His Attorneys

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(202) 785-2800

October 25, 1993

CERTIFICATE OF SERVICE

I, Patricia Neil, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 25th day of October, 1993, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

The Honorable Walter C. Miller (*)
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Room 213
Washington, DC 20554

James Shook, Esq. (*)
Hearing Branch
Federal Communications Commission
2025 M Street, N.W.
Room 7212
Washington, DC 20554

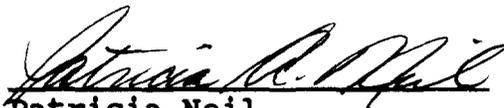
James A. Koerner, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20015-2003
Counsel for ASF Broadcasting Corp.

Dan J. Alpert, Esq.
Law Office of Dan J. Alpert
1250 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for Shellee Davis

Stephen T. Yelverton, Esq.
McNair & Sanford, P.A.
Madison Office Building
Suite 400
1155 Fifteenth Street, N.W.
Washington, DC 20005
Counsel for Ohio Radio Associates, Inc.

Eric S. Kravetz, Esq.
Brown, Nietert & Kaufman, Chartered
1920 N Street, N.W.
Suite 660
Washington, DC 20036
Counsel for Wilburn Industries, Inc.

(*): By Hand Delivery


Patricia Neil