

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

In the Matter of)	
)	NAL/Acct. No. MB200941410028
)	FRN 0001587971
Clear Channel Broadcasting Licenses, Inc.)	
)	
Licensee of Stations WKGR(FM), Ft. Pierce, Florida and WLDI(FM), Wellington, Florida)	Facility ID No. 1245 BPH-20070119AHM
)	
Applications for Minor Change in Licensed Facilities)	Facility ID No. 2680 BPH-20070312ABO
)	
Licensee of Station WOLL(FM), Hobe Sound, Florida)	Facility ID No. 32969 BALH-20081205ACU BPH-20090219ADR
)	
Application for Consent to Assign Station License and Application for Construction Permit to Change Transmitter Site)	

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: November 20, 2009

Released: November 23, 2009

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the captioned January 19, 2007, application filed by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") proposing to change the community of license of Station WKGR(FM) from Ft. Pierce to Wellington, Florida (the "Wellington Application"). Also before us is the August 24, 2007, "Informal Objection and Request for Conditional Grant" (the "Objection"), filed against both the Wellington Application and Clear Channel's March 12, 2007, application to change the community of license of Station WLDI(FM) from Ft. Pierce to Juno Beach, Florida (the "Juno Beach Application") by Vero Beach Broadcasters, LLC ("VBB").¹ Also on file is VBB's December 10, 2008, Petition for Reconsideration (the "Petition for Reconsideration")² directed to the action of the Chief,

¹ VBB is the licensee of Stations WTTB(AM) and WGYL(FM), Vero Beach, Florida, WOSN(FM), Indian River Shores, Florida, and WJKD(FM), Vero Beach, Florida (collectively, the "VBB Stations"). Clear Channel filed an Opposition to the Objection on September 6, 2007 ("Opposition"), and VBB filed a Reply ("Reply") on September 18, 2007.

² Clear Channel filed an Opposition on December 24, 2008, and a Supplement to the Opposition on January 5, 2009.

Audio Division, Media Bureau, dismissing as moot the Objection to the extent it addressed the Juno Beach Application, and granting the Juno Beach Application.³ Additionally, we have before us the December 5, 2008, application for consent to assign the license of Station WOLL(FM), Hobe Sound, Florida from the Aloha Station Trust, LLC (“Aloha”) to Clear Channel (the “Assignment Application”), and a Petition to Deny directed against the Assignment Application, filed by VBB on January 12, 2009 (the “Petition to Deny”).⁴ Finally, we have before us an application for minor modification of the facilities of Station WOLL(FM) (the “Modification Application”).

2. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Sections 309(e) and 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission's Rules (the “Rules”),⁵ by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules,⁶ for the reasons stated below, we: (1) deny the informal objection and grant the Wellington Application; (2) grant the Petition for Reconsideration directed to the Juno Beach Application to the extent necessary to consider the arguments raised against that application and deny it in all other respects; (3) deny the Petition to Deny and grant the Assignment Application; and (4) grant the Modification Application; and (5) conclude that Clear Channel is apparently liable for a monetary forfeiture in the amount of eight thousand dollars (\$8,000) for unauthorized transfer of control in violation of Section 310 of the Act and Section 73.3540 of the Rules.⁷

II. GENERAL BACKGROUND/PLEADINGS

3. *WKGR(FM) and WLDI(FM)*. Prior to the filing of the Wellington and Juno Beach Applications (collectively, “the Applications”), both WKGR(FM) and WLDI(FM) were geographically located in the Ft. Pierce-Stuart-Vero Beach, Florida Arbitron Metro Market (the “Ft. Pierce Metro”), but were listed in Arbitron as “home” to the West Palm Beach-Boca Raton, Florida Arbitron Metro market (“WBP Metro”). The Ft. Pierce Metro, the country’s 95th largest Metro, is a “Tier 2” market (15-29 total stations). Under the current local radio ownership limits, licensees in the Ft. Pierce Metro can own up to six stations, no more than four of which are in the same service.⁸ Prior to the filing of the Applications here, Clear Channel owned a grandfathered combination of seven FM stations and one AM station in the

³ On February 25, 2009, Clear Channel filed a “Supplement to Opposition to Petition for Reconsideration and Opposition to Informal Objection,” to which VBB filed an Opposition on March 11, 2009.

⁴ Clear Channel and Aloha Trust filed respective Oppositions on January 27, 2009. Clear Channel filed a “Supplement to Opposition to Petition to Deny” on February 25, 2009. On March 11, 2009, VBB filed a consolidated “Opposition to Supplements to Oppositions” (“Opposition to Supplements”) directed to the supplements filed in both the Assignment and Juno Beach Application proceedings.

⁵ 47 U.S.C. §§ 309(e), 503(b).

⁶ 47 C.F.R. § 0.283.

⁷ 47 U.S.C. § 310; 47 C.F.R. § 73.3540.

⁸ See 47 C.F.R. § 73.3555(a)(1).

Ft. Pierce Metro.⁹ The WPB Metro, the 47th-ranked market, is a “Tier 3” market (30-44 total stations). Under the current local radio ownership limits, licensees in the WPB Metro can own up to seven stations, no more than four of which are in the same service.¹⁰ Prior to the filing of the Applications here, Clear Channel owned a grandfathered combination of five FM and two AM stations in the WPB Metro.¹¹

4. On January 19, 2007, Clear Channel filed an application to change the community of license of Station WKGR(FM) from Ft. Pierce to Wellington, Florida. On March 12, 2007, Clear Channel filed an application to change the community of license of Station WLDI(FM) from Ft. Pierce to Juno Beach, Florida. The proposed communities of license, Juno Beach and Wellington, are geographically located in the WPB Metro. Because WLDI(FM) and WKGR(FM) are already designated “home” to the WPB Arbitron Metro, the number of stations owned by Clear Channel in the WPB Metro would not change nor would Clear Channel’s grandfathered status. Grant of the Applications would, however, remove WKGR(FM) and WLDI(FM) from the Ft. Pierce Metro.

5. On August 24, 2007, VBB filed the Informal Objection against the Applications. VBB alleges, *inter alia*, that grant of the Applications would result in Clear Channel having an undue concentration of ownership in the relevant geographic radio markets.

6. On November 10, 2008, the staff granted the Juno Beach Application and dismissed the Objection as moot.¹² On December 10, 2008, VBB filed the Petition for Reconsideration seeking staff re-examination of that action. In the Petition for Reconsideration, VBB submits that its Informal Objection was not moot, and that it was staff error to not address the issues raised therein, *i.e.*, concerning the “radio gerrymandering fostered by Clear Channel.”¹³ The Wellington Application remains pending.

7. *WOLL(FM)*. WOLL(FM), Hobe Sound, Florida, is geographically located in the Ft. Pierce Metro but was listed as “home” to the WPB Metro. On January 11, 2007, Clear Channel changed WOLL(FM)’s “home” market to the Ft. Pierce Metro. On June 19, 2007, while the Applications were pending, Clear Channel filed an application¹⁴ to assign the licenses of WOLL(FM) and several other Clear Channel stations to Aloha.¹⁵ The Commission granted this unopposed application on January 8,

⁹ WCZR(FM), Vero Beach, Florida; WZTA(AM), Vero Beach, Florida; WQOL(FM), Vero Beach, Florida; WKGR(FM), Ft. Pierce, Florida; WSYR-FM, Gifford, Florida; WLDI(FM), Ft. Pierce, Florida; WAVW(FM), Stuart, Florida; and WOLL(FM), Hobe Sound, Florida.

¹⁰ *Id.*

¹¹ WKGR(FM), Fort Pierce; WLDI(FM), Fort Pierce; WBZT(AM), West Palm Beach, Florida; WZZR(FM), Rivera Beach, Florida; WRLX(FM), West Palm Beach, Florida; WJNO(FM), West Palm Beach, Florida; and WOLL(FM), Hobe Sound.

¹² *Broadcast Actions*, Public Notice, Report No. 46860 (Nov. 10, 2008), p. 6.

¹³ Petition for Reconsideration at 4, 7.

¹⁴ File No. BALH-20070619AIT.

¹⁵ Also on June 19, 2007, Clear Channel filed applications to assign the licenses of Ft. Pierce Metro Stations WSYR-FM, Gifford, Florida, and WCZR(FM), Vero Beach, Florida, from its subsidiary Capstar TX Limited Partnership to Aloha. See Application No. BAL-20070619ACD. This application also was granted on January 8, 2008.

2008.¹⁶ Thus, prior to the filing of the Assignment Application, Clear Channel had no cognizable interest in WOLL(FM).

8. On December 5, 2008, Clear Channel filed the Assignment Application, proposing to reacquire Station WOLL(FM) from Aloha, and on December 12, 2008, VBB filed the Petition to Deny. In that pleading, VBB incorporates by reference the Informal Objection and Reply filed in the proceedings related to the Applications.¹⁷ It reiterates its arguments, asserting that the "essence" of its objections is "straightforward and reasonably simple," in that Clear Channel is "gaming" the multiple ownership rules by shifting radio stations between two Arbitron Metro Markets "to suit its private business interests."¹⁸

9. On February 19, 2009, Clear Channel filed an application for a construction permit to change WOLL(FM)'s transmitter site ("WOLL Modification Application") to a location 60 kilometers from its current location and near the center of the Ft. Pierce Metro.

III. THE WELLINGTON APPLICATION.

10. **Background:** Pursuant to Sections 309(d) and (e) of the Communications Act of 1934, as amended ("Act"),¹⁹ informal objections and petitions to deny must, among other things, provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a) of the Act,²⁰ which governs our evaluation of new construction permit applications. Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant fails to meet that standard, the Commission may deny the application after notice and opportunity for a hearing under Section 309(e) of the Act.

11. VBB prefaces its Objection by stating, *inter alia*, that it does not object to the grant of either the Juno Beach or Wellington Application "as such," but that it is "greatly concerned" about, post-grant, the Stations' future impact on the Ft. Pierce Metro, and how WLDI(FM) and WKGR(FM) will be

¹⁶ Clear Channel indicates that it undertook this assignment as part of Clear Channel's obligation to divest itself of grandfathered stations prior to the consummation of the transfer of control of Clear Channel from its public shareholders to the shareholders of the private equity funds, Thomas H. Lee Equity Fund VI, L.P., and Bain Capital (CC) IX, L.P. Clear Channel Opposition to Petition to Deny at 2, citing *Existing Shareholders of Clear Channel Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 1421 (2008).

¹⁷ Petition to Deny at 5.

¹⁸ Petition for Reconsideration at 2.

¹⁹ 47 U.S.C. § 309(d), (e).

²⁰ 47 U.S.C. § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

counted in the Ft. Pierce Metro for purposes of the multiple ownership rules.²¹ Thus, VBB requests that any grant of the Applications contain the condition that WLDI(FM) and WKGR(FM) continue to be counted in the Ft. Pierce Metro for multiple ownership purposes.

12. VBB states that its stations are in the Ft. Pierce Metro and, because they compete with WLDI(FM) and WKGR(FM) for audience and advertising revenues, they will be directly affected by the proposed changes of community of license. VBB states that Clear Channel is engaged in market restructurings in many of its radio markets around the country in connection with the multi-market sale of its grandfathered combinations,²² but its "real intent" in the instant case appears to be to try to remove WLDI(FM) and WKGR(FM) from being counted as part of the Ft. Pierce Metro for purposes of the Commission's multiple ownership rules.²³

13. In this regard, VBB states that when the Commission adopted the *2002 Biennial Review Order*, it intended that applicants be required to demonstrate compliance with the new multiple ownership rules when filing applications to change a radio station's community of license.²⁴ VBB asserts that WLDI(FM) and WKGR(FM) must continue to be counted as part of the Ft. Pierce Metro because of their pre- and post-transaction "continuous impact on the Ft. Pierce Metro."²⁵ Specifically, VBB states that WLDI(FM) and WKGR(FM) have consistently accumulated higher average quarter hour audience shares and rankings in the Ft. Pierce Metro than in the WPB Metro, and that WLDI(FM) and WKGR(FM) will remain "significant competitors" throughout the Ft. Pierce Metro.²⁶ VBB maintains that Clear Channel will continue to own 7 stations -- 5 FMs and 2 AMs -- in the WPB Metro, but in the Ft. Pierce Metro, Clear Channel will now be counted as owning only 3 FMs and 2 AMs, and could, therefore, acquire one more FM station in that Metro.²⁷ VBB submits that permitting Clear Channel to acquire an additional FM station in the Ft. Pierce Metro, even though WLDI(FM) and WKGR(FM) "will

²¹ Objection at 2-3.

²² Objection at 2.

²³ *Id.*

²⁴ Informal Objection at 6. See *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13723 n. 569 (2003), ("2002 Biennial Review Order"), aff'd in part and remanded in part, *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004), stay modified on reh'g, No. 03-3388 (3d Cir. Sept. 3, 2004).

²⁵ Objection at 3.

²⁶ *Id.* at 4. VBB submits (Attachment 1 to Objection), a comparison of the average quarter hour shares and station rank for WKGR(FM) and WLDI(FM) in the Ft. Pierce Metro and the WPD Metro based on the Arbitron books for Spring '06, Fall '06 and Spring '07.

VBB also states that in adopting the *Ownership Report*, the Commission found support in a Bear Stearns study that stated: "the mean audience share and revenue share that the top 3 in-market radio station groups receive is 58.9% and 82.9%, respectively." VBB asserts that WLDI(FM) and WKGR(FM) are consistently in one of the top 3 radio groups assigned to the Ft. Pierce Metro. According to VBB, in the last three Arbitron books for the Ft. Pierce Metro, WLDI(FM) has ranked #3, #8 and #2, and WKGR(FM) has ranked #5, #6, and #5.

²⁷ Objection at 4.

remain significant competitors" in that Metro, would contravene the very Commission rules that were designed to prevent undue local market concentrations.²⁸ VBB states that it is "incumbent" on the Commission to avoid this result and the "potential negative competitive impact" it will have on VBB and other broadcasters in the Ft. Pierce Metro. VBB asserts that in deciding to include stations that are "home" to a market, the Commission noted that: "[I]t makes sense to us . . . to count those stations in the market in which they are commercially recognized as competitors."²⁹ In this regard, VBB asserts that there is no proposed change in the technical facilities of either WLDI(FM) or WKGR(FM), in that "both transmitters will remain where they are now," but that the Stations will "virtually disappear" from the Ft. Pierce Metro for purposes of the Commission's radio multiple ownership rules. VBB argues that "economic reality" requires that WLDI(FM) and WKGR(FM) continue to be counted as part of the Ft. Pierce Metro "where they will remain significant competitors."³⁰ VBB states that if the Commission grants the Applications, it must do so only by imposing a condition that WLDI(FM) and WKGR(FM) continue to be counted in the Ft. Pierce and WPB Metros for "all purposes under the Commission's multiple ownership rules."³¹

14. In its Opposition, Clear Channel states that VBB's objection is based on its assumption of how a post-transaction "competitive landscape" will look in the Ft. Pierce Metro, "completely ignoring" the fact that grant of the Applications will provide Juno Beach and Wellington with their first local service, and is therefore in the public interest. Clear Channel states that it is reasonable for it to move the Stations to the proposed communities in the West Palm Beach market because the majority of the Stations' listeners are located there.³² Clear Channel also submits that the Objection is procedurally defective because it was filed after the Commission's deadline for commenting on the Applications.

15. **Discussion.** For the reasons discussed below, we conclude that VBB does not raise any substantial or material questions of fact that would require denial of the applications, resolution in a hearing, or imposition of the requested condition.

16. In the *Ownership Order*, the Commission adopted a new, geography-based definition of radio markets based on Arbitron Metros as reported by BIA. This new market definition is used to determine compliance with the numerical limits under Section 73.3555(a) of the Commission's Rules ("Rules") in Arbitron-rated markets.³³ When the Commission adopted its bright-line, geography-based radio rule for rated markets, it concluded that "[b]y applying the numerical limits of the local radio

²⁸ *Id.* at 4-5.

²⁹ *Id.*

³⁰ *Id.* at 4, 6.

³¹ *Id.* at 8-9.

³² Opposition at 3. Clear Channel indicates that the Ft. Pierce Metro is less than half the size of the WPB Metro, and even if WKGR(FM) and WLDI(FM) have a greater market share in the Ft. Pierce Metro, the stations have more cumulative listeners in the WPB Metro. It states that according to the Spring 2007 Arbitron ratings book, WKGR(FM) has 1,043,000 age 12+ listeners in the WPB Metro and 522,000 age 12+ listeners in the Ft. Pierce Metro. Also using the Spring 2007 Arbitron ratings book, Clear Channel states that WLDI(FM) has 1,276,000 age 12+ listeners in the WPB Metro and 884,000 age 12+ listeners in the Ft. Pierce Metro.

³³ *WKML License Limited Partnership*, Letter, 20 FCC Rcd 10877 (2005 MB), citing *Ownership Order*, 18 FCC Rcd at 13727 n. 587.

ownership rule to a more rational market definition, we believe that, *in virtually all cases*, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.”³⁴ Despite this, the Commission is bound to give a “hard look” to petitions that allege that a particular transaction is not in the public interest, notwithstanding compliance with the new rule.³⁵ The petitioner, however, faces a high hurdle and must present specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, and a substantial and material question is presented to be determined by the Commission.”³⁶

17. First, Clear Channel demonstrates compliance with the numerical ownership limits required in order to change a station's community of license.³⁷ We note that, at the time Clear Channel filed the Applications, they would not have complied with the se limits. At that time, Clear Channel owned a grandfathered cluster of 5 FM and 2 AM stations in the WPB Metro. Under the multiple ownership rules, however, in a market with between 30 and 44 stations, one owner may hold up to seven stations, no more than four of which are in the same service. To remedy this, on March 15, 2007, Clear Channel filed amendments to the Applications requesting a waiver of Section 73.3555(a). Subsequently, however, on August 7, 2008, Clear Channel amended both the Wellington and Juno Beach Applications to advise the staff of the assignment of WOLL(FM) to a divestiture trust, Aloha. Clear Channel therefore requested to withdraw the waiver requests as moot. We find that, with the removal of WOLL(FM) from Clear Channel’s WPB Metro stations, it now owns 4 FM and 2 AM stations in that Metro and that grant of the Wellington Application will not alter those numbers, which comply with Section 73.3555(a) of the Rules.

18. Notwithstanding the assignment of WOLL(FM) to Aloha and the Wellington Application’s facial compliance with the numerical limits in Section 73.3555(a) of the Rules, the Commission has emphasized that its ultimate obligation is to consider the potential benefits and harms of transactions on the listening public. As the Commission observed in the *Ownership Order*, “[p]reserving competition for listeners is of paramount concern” in our public interest analysis.³⁸ The Commission stated that the numerical limits approach is designed to promote competition by assuring that a sufficient number of rivals are actively engaged in competition for listening audiences.³⁹ We note that grant of the Wellington, Juno Beach, or Assignment Application *infra*, will not alter the number of competitors in the

³⁴ See *Cumulus Licensing LLC*, Letter, 21 FCC Rcd 2998 (MB 2006) (“*Cumulus*”), citing *Ownership Order*, 18 FCC Rcd at 13813.

³⁵ See *Cumulus*, 21 FCC Rcd at 3002, citing *Ownership Order*, 18 FCC Rcd at 13647 (explaining that although “[w]e are confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest . . . we are obligated to give a hard look both to waiver requests . . . as well as petitions to deny”).

³⁶ *Id.*, citing *Ownership Order* at 13647, n.131 (*case citations omitted*).

³⁷ See 47 C.F.R. § 73.3555, Note 4; *cf. also Multicultural Radio Broadcasting Licensee, LLC*, Letter, 23 FCC Rcd 12001, 12002 (MB 2008), citing *Galaxy Communications*, Letter, 21 FCC Rcd 2994 (2006).

³⁸ See *Cumulus*, 21 FCC Rcd at 3003, citing *Ownership Order*, 18 FCC Rcd at 13716. See also *Ownership Order*, 18 FCC Rcd at 13641.

³⁹ *Id.* at 13716.

Ft. Pierce Metro: according to BIA data, eleven station owners currently compete in the Ft. Pierce Metro, and eleven owners will remain in the Metro post-transaction.

19. Furthermore, because the Commission recognized that companies often successfully petition Arbitron to change Metro boundaries, create new Metros, and/or change a station's home designation (*i.e.*, companies may "opt in" or "opt out" of a Metro in certain circumstances) "for purposes of circumventing the local radio ownership rule," the Commission established a two-year waiting period for changes in Metros as "safeguards to deter parties from attempting to manipulate" the relevant data boundaries and home market designations.⁴⁰ In the instant case, there is no change in the Metro boundaries, creation of new Metros, and/or changes in a station's home designation by "opting in" or "opting out" of a Metro.⁴¹ Rather, Clear Channel proposes to change WLDI(FM)'s and WKGR(FM)'s communities of license by providing a first local service to Wellington and Juno Beach – communities geographically located within the WPB Metro. Thus, invoking the two-year "safeguard" is not appropriate in this instance. VBB does not cite any case, and Commission precedent does not support its request that we impose the requested condition. We also disagree with VBB's claim that Clear Channel is engaging in "gamesmanship." Indeed, VBB does not present any information, other than speculation, that the Applications were filed for other than legitimate business purposes. In this regard, a dispute over the inferences that should be drawn from the fact that Clear Channel has proposed to change the Stations' communities of license, pursuant to specified Commission criteria, does not qualify to establish a substantial or material question of fact.⁴²

20. Based on the foregoing, VBB has not established a substantial and material question of fact that grant of the Wellington Application will result in competitive harm, and we will deny the Objection.

IV. THE JUNO BEACH APPLICATION

30. **Discussion.** The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of petitioner's last opportunity to present such matters.⁴³

⁴⁰ See *White Park Broadcasting, Inc.*, Letter, 21 FCC Rcd 2317 (MB 2006).

⁴¹ See *Citicasters Licenses, L.P.*, Letter, 22 FCC Rcd 17788, 17790 n.12 (MB 2007) ("under certain circumstances, applicants may not take advantage of a market size increase until two years after BIA has listed, as "home to the Metro, the station that triggered the market size increase . . . The two-year restriction does not apply, however, if the triggering station is licensed to a community that is geographically located within the Metro boundaries . . .").

⁴² See *California Public Broadcasting Forum v. F.C.C.*, 752 F.2d 670, 674 (C.A.D.C. 1985) (the Act "creates guidelines for the Commission to follow in dealing with such petitions to deny . . . This statutory standard puts a heavy burden on a party submitting a petition to deny . . . First the party must show the requisite *specificity and support* . . . *dispute over the proper inferences to be drawn from agreed-upon facts does not qualify*"). Cf. also *Elijah Broadcasting Corporation*, Letter, 16 FCC Rcd 21561 (MB 2001) (burden is on petitioner to demonstrate motive, as the Commission will not infer improper motive by speculation lacking factual support).

⁴³ 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

30. In the Petition for Reconsideration, VBB presents the same arguments it advanced in the foregoing Wellington Application proceeding arguing that its Objection was not in any way rendered moot by grant of the Juno Beach Application. It argues that its concerns over Clear Channel's manipulation of the Commission's local radio ownership rules and its request for a conditional grant of the Juno Beach Application remain valid and meritorious.

30. We concur with VBB that its objections to the Juno Beach Application should not have been summarily dismissed as moot but instead should have been addressed on the merits prior to grant of that Application. Accordingly, we will grant reconsideration for the purpose of considering the merits of its objection to the Juno Beach Application. For the reasons set forth above in discussion of the Wellington Application, we find that the Juno Beach Application complies with Section 73.3555(a) of the Rules. Accordingly, we will deny the Petition for Reconsideration in all other respects.

V. ACCEPTABILITY OF THE WELLINGTON AND JUNO BEACH APPLICATIONS

24. The Wellington and Juno Beach Applications were filed pursuant to Section 73.3573(g) of the Rules, which treats an application to modify a station's authorization to specify a new community of license as one for minor modification.⁴⁴ Any such application must demonstrate compliance with the Commission's multiple ownership rules⁴⁵ and must result in a preferential arrangement of allotments.⁴⁶ The applications contained exhibits addressing each of those requirements.⁴⁷ As discussed above, the applications comply with the Commission's multiple ownership rules. Additionally, we conclude that the relocation of WKGR(FM) from Ft. Pierce to Wellington will constitute a preferential arrangement of allotments, as it provides Wellington, Florida (2000 census population 38,216) with its first local service, and that the proposal complies with all other applicable statutory and regulatory requirements. We also find that grant of the subject Juno Beach Application would constitute a preferential arrangement of allotments, as it will provide Juno Beach (2000 census population 3,262) with its first local service, and that the proposal complies with all other applicable statutory and regulatory requirements. We will grant the Wellington and Juno Beach Applications below without the imposition of any condition.

⁴⁴ See 47 C.F.R. § 73.3573(g). See also *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006), permitting broadcast stations to propose community of license changes by minor modification application ("*Changes of Community*").

⁴⁵ 47 C.F.R. § 73.3555, Note 4.

⁴⁶ See *Changes of Community*, 21 FCC Rcd at 14218. See also *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990). See also *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*"). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

⁴⁷ See Wellington Application, Attachments 5 (Multiple Ownership Showing) and 33 (Section 307(b) Showing); Juno Beach Application, Attachments 5 (Multiple Ownership Showing) and 33 (Section 307(b) Showing).

VI. THE ASSIGNMENT APPLICATION

25. **Background.** *Petition to Deny.* In its Petition to Deny, VBB incorporates by reference its Informal Objection and Petition for Reconsideration filed against the foregoing Wellington and Juno Beach Applications,⁴⁸ and reiterates the arguments therein. In addition, however, VBB states that Clear Channel, by removing WKGR(FM) and WLDI(FM) from the Ft. Pierce Metro, without relocating the technical facilities, can reacquire WOLL(FM) from the Aloha divestiture trust and be in numerical compliance with the Rules.⁴⁹ “If successful,” VBB maintains that Clear Channel would own or have attributable interests in more stations than permitted in the WPB and Ft. Pierce Metros under the Rules, with the consequential competitive advantage.⁵⁰

26. VBB also alleges that Clear Channel operated WOLL(FM) in violation of the Commission approved Aloha Trust arrangement, entered into between Clear Channel and Aloha.⁵¹ VBB submits that, in accordance with the Commission's attribution rules, Clear Channel is prohibited from having any role in the management and operation of WOLL(FM). VBB states that this is “explicit” in the language of the Trust Agreement, i.e.:

The Trustee shall have absolute and complete control over the operations of a Station . . . no person other than the Trustee or managers designated by the Trustee shall have authority with respect to the management of such Station or the Station Assets to such Station for so long as this Trust Agreement is in effect.⁵²

VBB asserts that the Trust Agreement, also included in the subject Assignment Application, “does not reflect reality,” as Clear Channel effectively ignored the Trust Agreement and has continued operating WOLL(FM) as if the assignment to Aloha never happened.⁵³ VBB asserts that Clear Channel has effectively ignored the Trust Agreement, continuing its management and operation of the stations [assigned to the Trust] as if there never was an assignment to Aloha, with no distinction being made between the stations licensed to Clear Channel and those licensed to Aloha Trust.⁵⁴ VBB states that there is no Aloha office, staff, phone number or employees.⁵⁵ VBB asserts that subsequent to the assignment of

⁴⁸ Petition to Deny at 4-5.

⁴⁹ *Id.* at 2, 6-8.

⁵⁰ *Id.*

⁵¹ *Id.* at 9-11. VBB argues that one of the consequences of Clear Channel's violation of the Trust Agreement is that, because Clear Channel “effectively operates” and sells time on the stations it assigned to Aloha, WCZR(FM) and WSYR-FM, these stations should be attributable to Clear Channel. *Id.* at 6 n. 7 and 8-9.

⁵² *Id.*

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.*

the Stations to Aloha, the status quo was maintained. Specifically, VBB alleges that the management and operation of WOLL(FM) remained exactly as it was prior to the transfer to Aloha Trust – Clear Channel continued to program WOLL(FM) and continued to sell advertising time for the Station, and Clear Channel marketed and represented Aloha's stations in the market as its own, “in blatant violation of the terms of the Trust Agreement.”⁵⁶

⁵⁶ *Id* at 12-14. Specifically, VBB submits that “Among other examples of CCB continuing operations” are:

Shared Management. While the Trust Agreement calls for CCB and Aloha to compete with one another as separate entities, with management kept separate and apart, In fact, the Program Director, Director of Sales, Chief Engineer, Business Manager, General Manager, and Market Manager are identical for all of the CCB and Aloha stations in the market. There are no Aloha employees located in the Ft. Pierce or West Palm Beach markets. Aloha has just one employee, trustee Jeanette Tully. (We note that the Trust Agreement indicates that Ms. Tully is the sole member of Aloha, but it makes no reference to her as an Aloha employee.)

Shared Ad Sales - The CCB sales staff sells time for the Aloha stations as if they remain CCB entities, as they are treated no differently than the CCB stations in the market. The ads are sold by the same people, out of the same building. For example, each year CCB promotes a one-day Memorial Day sale. Included as Attachment 1 are rate sheets brought to VBB last year by many of the approximately 300 local advertisers in the market in an attempt to get a better deal for advertisements on VBB stations. Emblazoned on each page is the CCB logo for not only the CCB stations, but for Stations WSYR and WCZR, both of which are Aloha stations.

Another example is included as Attachment 2, which includes samples of ad rates from CCB's annual "one day sale" in which it offers heavily discounted rates in return for an annual contract. Note that these ad rates promoting CCB's annual sale on October 23, 2008, do not differentiate between WSYR (Aloha Trust), WCZR (Aloha Trust), WQOL (CCB) and WAVW (CCB) offerings, which are presented on the exact same letterhead in the same format and style.

Blatant Treatment of Aloha Stations as CCB Entities - On the CCB website, and on the air of Aloha stations, CCB has blatantly held out Aloha stations as their own. For example, Attachment 3 hereto is an advertisement for "Clear Channel Radio Employment Opportunities," printed from the CCB website. Among the station logos included on the page are those for WSYR and WCZR, which are Aloha stations. http://clearchanneltc.com/employment_calendar.html.

Identical Programming. CCB has repeatedly stated on-air that Aloha stations are CCB stations, such as at the conclusion of public service announcements broadcast on Aloha stations. This may not come as a huge surprise given that the CCB Program Director also serves as the Program Director for Aloha stations WSYR and WCZR. Here is a transcript of one such incident, airing at 8 a.m. on Sunday, January 11, 2009 on Aloha station WCZR:

Good morning and welcome to Facts and Feelings. Facts and Feelings is a public affairs program produced by the community service department of WCZR. The opinions expressed on this show are strictly those of the host and their guests and do not necessarily represent the opinions of the staff, management or sponsors of WCZR or *Clear*

(continued...)

27. *Aloha Trust Opposition.* In its Opposition, Aloha claims that its operation of WOLL “is in full accord with the terms of the Trust Agreement, which, in turn, have been found by the Commission to be consistent with Commission policy.”⁵⁷ To the extent that VBB’s objections can be read to challenge the specific terms of the Trust Agreement, Aloha states that VBB could have challenged the Trust Agreement at the time it was pending before the Commission in the WOLL(FM) Trust Application, and its arguments now should be dismissed as an untimely petition for reconsideration.⁵⁸ It states that VBB’s allegations are “highly selective and misleading.”⁵⁹ Aloha states that the terms of the Trust Agreement satisfy the Commission’s insulation standards governing a divestiture trust, while simultaneously containing provisions recognizing Aloha’s position as a short-term, interim operator of the Station, charged with preserving the Station’s assets in order to obtain the highest possible price from a third-party buyer.⁶⁰ Aloha states that, for these reasons, a number of provisions of the Trust Agreement contemplate some overlap between Clear Channel’s assets and personnel:

Section 2(b)(i)⁶¹ contemplates some shared assets among Aloha Trust Stations and Clear Channel stations in the same market, and indicates that Clear Channel will retain title to all assets other than those which are used solely in the operation of the Aloha Trust Stations;

Section 2(c)⁶² similarly contemplates Aloha Trust’s use of shared assets, and states

(Continued from previous page) _____

Channel Communications, Inc. (emphasis provided). And now, here's the host of Facts and Feelings, J. Ralph Lundy

Additionally, public service announcements broadcast on the Aloha stations routinely indicate that the announcements are provided by CCB. For example, the program "Clear Connections" broadcast on Aloha Trust station WSYR on January 12, 2008 included the statement, "presented by Clear Channel of the Treasure Coast."

⁵⁷ Aloha Opposition at i.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.*

⁶¹ Section 2.(b)(i) of the Trust Agreement states that:

(b) Notwithstanding Section 2(a) hereof, [Clear Channel] shall not convey, transfer, assign, and deliver, and [Aloha] shall not acquire and assume, any of the following assets (the “Excluded Assets”), all of which shall be retained by [Clear Channel]:

(i) any and all assets useful in the operation of other radio stations owned by [Clear Channel] in the relevant Metro, and all assets of [Clear Channel] other than those assets of [Clear Channel] which are used solely in the operation of the Stations.

⁶² Section 2.(c) of the Trust Agreement states that:

(c) To the extent that any of the Excluded Assets are also used or useful in the conduct of the business and operation of the Stations as of the Closing Date (the “Shared Assets”), then, during the term of this Trust Agreement, [Clear Channel] shall make such arrangements on or before the Closing as are reasonably necessary to provide for [Aloha’s] continued use of the Shared Assets by the Stations without any cost to [Aloha].

(continued....)

that "the Company shall make such arrangements on or before the Closing as are reasonably necessary to provide for the Trustee's continued use of the Shared Assets by the Stations without cost to the Trustee";

Section 5(a)(v)⁶³ expressly contemplates Aloha Trust's independent decision to retain personnel previously employed by Clear Channel; and Section 5(c) provides that Clear Channel may provide shared employees ("Cluster Employees) to in-market Aloha Trust Stations to perform services necessary for the operation of the Station ("Shared Employee Services"), and states that, "[w]ith respect to those Cluster Employees who perform Shared Employee Services, (i) when performing services for a Station, such employees shall report to and be supervised solely by the Trustee, (ii) when performing services for other radio stations owned by the Company, such employees shall report to and be supervised solely by the Company, and (iii) such employees shall be given instructions by the parties to conduct themselves accordingly."⁶⁴

Aloha states that these provisions demonstrate its obligation to maintain independent control of WOLL(FM) and does not preclude it from preserving the successful features of WOLL(FM) 's past operation. It also states that other provisions of the Trust Agreement addressing Aloha Trust's obligation

(Continued from previous page) _____

⁶³ Section 5.(a)(v) of the Trust agreement reads:

(a) During the term of this Trust Agreement, the right to manage the business of any Station held in the Aloha Station Trust shall be solely vested in the Trustee, subject to the following conditions:

(b) (v) [Aloha] shall cause any employee hired by it (including any person previously employed by [Clear Channel] whom [Aloha] elects to retain) to execute and deliver to [Aloha] an agreement, in form and substance acceptable to [Aloha], pursuant to which such employee agrees to comply with the rules, regulations, and policies of the FCC, including without limitation all rules, regulations, and policies governing communication regarding Station operations among such employee and [Clear Channel] or its members, shareholders, partners, officers, directors, employees, and affiliates.

⁶⁴ Aloha Opposition at 6-7, citing Section 5.(c) of the Trust Agreement. The Trust Agreement also indicates that, the Trustee is expressly prohibited from offering employment or hiring "any of the employees of the Company whose employment relates in whole or in part to the business and operations of other stations" owned by Clear Channel in the relevant Metros. "To the extent that any of the [Cluster Employees] provide services that are reasonably necessary for the conduct of the business and operation of a Station," Clear Channel will make such Shared Employee Services Available to Trustee" under the terms specified above. Although the "Cluster Employees" will report to and be supervised solely by Aloha when performing services for a Station, "[n]othing herein creates an employment relationship between the Trustee and employees of the company." Trust Agreement, Section 5(c). The Trustee is, however, permitted "to hire those individuals employed exclusively by the Stations" on the same terms and conditions as those employees were employed by Clear Channel, except that the Aloha is not required to provide such employees with any medical, pension, insurance, or other employee benefit plans. To the extent Clear Channel wished to continue to provide such benefits after the closing date, the Trustee agrees to provide to Clear Channel reports, data, or other information necessary to administer those plans. *Id.* at Section 5(b).

to sell the Station, explicitly require it to maintain the status quo insofar as doing so will preserve the Station's assets and promote the highest selling price, i.e..⁶⁵

The Trustee shall have exclusive control over the operation and management of the Stations, shall conduct the operation of the Stations in the ordinary course of business consistent with past operations of the Stations, and, to the extent possible, shall maintain the status quo of such operations as currently conducted with a view to maximizing the value to be received by the Company consistent with the Trustee's duties as a licensee of the FCC and as a fiduciary of the Company.

28. Aloha submits that VBB's allegations concerning shared assets, personnel, and programming, is covered by one of the Trust Agreement provisions and that Aloha's conduct thus comports with the terms of the Trust Agreement, which was approved by the Commission here and complies with the Commission's insulation standards.⁶⁶ Aloha states that it operates and controls WOLL(FM) consistent with its obligation to preserve the assets of the station and maintain the status quo.⁶⁷ In addition, Aloha Trust states that VBB's claim that it is "warehousing" WOLL(FM) is contradicted by the express terms of the Trust Agreement, which provides that:

The Aloha Station Trust shall be irrevocable as to each Station held by the Aloha Station Trust until: (i) such time as (x) the Trustee causes the Stations to be sold to third party buyer pursuant to a separate written agreement and with the prior approval by the FCC or (y) the Company or its subsidiaries divest themselves of sufficient attributable interests in radio stations in the relevant Metro, or there is a change in the number of stations in the relevant Metro, to permit the Company or its subsidiaries to have an attributable interest in such Station under the FCC's rules, in which case the Trustee shall, subject to any required approval of the FCC, promptly assign the relevant FCC Licenses and other Station Assets relating such Station back to the Company. . . .⁶⁸

29. *Clear Channel Opposition.* In its Opposition, Clear Channel defers to Aloha to respond to VBB's allegations of violations of the Commission's divestiture trust criteria, "since station operations

⁶⁵ *Id.* at 7-8.

⁶⁶ *Id.* at 8-9. See *Lorimar Telepictures Corp.*, 3 FCC Red 6250 (1988) (permitting communications between trustee and beneficiary concerning existing contracts); *Letter to John F. Garziglia, Esq. et al.*, 22 FCC Red 21786, 21788 (MB 2007) (upholding divestiture trust agreement despite objections regarding proposed use of same offices and studios by trust stations and beneficiary/divesting company stations) (the "*Garziglia Letter*"); *Stockholders of Infinity Broadcasting Corporation and Westinghouse Electric Corporation*, 12 FCC Red 5012 (1996).

⁶⁷ Aloha Opposition at 10.

⁶⁸ Aloha Opposition at 9, referencing Section 1.(c)(i) of the Trust Agreement. On August 19, 2008, prior to the filing of the Assignment Application, Clear Channel and Aloha amended this section of the Trust Agreement to state that "the Trustee *may* [rather than "shall"] . . . assign the [license . . . back to Clear Channel] (emphasis added). See "First Amendment Trust Agreement."

are under control of Aloha Trust.”⁶⁹ However, Clear Channel submits that VBB’s Petition is, at the very least, procedurally defective, in that it addresses the terms of the Trust Agreement and, as such, is an untimely petition for reconsideration.⁷⁰ Alternatively, Clear Channel argues that VBB has chosen an improper forum to challenge the Commission’s divestiture trust rules and policies, which would require a rulemaking proceeding.⁷¹ Clear Channel asserts, referencing the foregoing Wellington and Juno Beach proceedings, that the WLDI(FM) and WKGR(FM) applications were filed for legitimate public interest and business reasons, unrelated to WOLL(FM).⁷² Clear Channel states that it has demonstrated that the WOLL(FM), WLDI(FM), and WKGR(FM) applications, independently and evaluated together, comply with the Commission’s multiple ownership rules and policies.⁷³ It states that it is not attempting to manipulate those rules, noting that Aloha hired a nationally recognized media broker to sell WOLL(FM), but such efforts were unsuccessful, and only after the staff granted the WLDI Application did it determine that it could own an additional station in the Ft. Pierce Metro and sought to reacquire the station from Aloha.⁷⁴ To the extent that VBB argues that WOLL(FM) will remain competitive in the WPB Metro, Clear Channel counters that the Modification Application proposes to relocate the WOLL(FM) transmitter site some 60 kilometers north of its current site, at the center of the Ft. Pierce Metro.⁷⁵

30. Clear Channel also states that the information provided by VBB does not constitute operation or control by Clear Channel of WOLL(FM) (or WYSR-FM or WCZR(FM)), because the information was either produced or created before July 30, 2008, the day the assignment to Aloha Trust was consummated, or was an oversight.⁷⁶ Clear Channel submits the Declaration of John Hunt (“Hunt”), Market Manager for Clear Channel in West Palm Beach and Ft. Pierce, which it contends demonstrates that the alleged conduct proffered by VBB, concerning the advertising rate sheets and website information, does not evidence that Clear Channel operated or controlled any stations, post-assignment to Aloha.⁷⁷ Specifically, Hunt declares that the ad rate sheets were created, and the website and EEO

⁶⁹ Clear Channel Opposition at 1, n. 1.

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 6.

⁷² *Id.* at 5.

⁷³ *Id.* at 6. Clear Channel observes that, pursuant to its request, Arbitron listed WOLL(FM) as “home” to the Ft. Pierce Metro on January 11, 2007, and thus the two-year waiting period from the effectiveness of the change ended on January 11, 2009, while the Assignment Application was pending.

⁷⁴ *Id.* at 5 n.9.

⁷⁵ Clear Channel Supplement to Opposition to Petition to Deny at 3. Clear Channel indicates that, from the proposed location, WOLL(FM) will not provide a principal community contour to any part of the WPB Metro. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* John Hunt declares, in pertinent part, that:

The ad rate sheets appended to the Petition to Deny as Attachment 1 were from Memorial Day, 2008, when Clear Channel was still the licensee of WOLL, WSYR-FM, and WCZR. The ad rate sheets appended to the Petition to Deny as Attachment 2 were

(continued....)

information were posted, prior to July 30, 2008, when Clear Channel was still the licensee of WOLL(FM) and the other stations. Hunt declares that the standard language for the "Facts and Feelings" program was an oversight, in that the language was not changed after WCZR and WSYR-FM were placed in trust.⁷⁸

31. **Discussion.** In order to assess the merits of a petition to deny, a two-step analysis is required. First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.⁷⁹ This threshold determination is made by evaluating the petition and the supporting affidavits. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.⁸⁰ If no such question is raised, the Commission will deny the petition and grant the application if it concludes that such grant otherwise serves the public interest, convenience, and necessity. Because the allegations pertain to the circumvention of our multiple ownership rules, we conclude that the Petition is sufficient to make out a *prima facie* case.

32. VBB alleges that Clear Channel is manipulating the Commission's ownership Rules, but it also alleges that Station WOLL(FM) has been operating in violation of the Commission's divestiture trust insulation criteria. Because the allegations pertain to the circumvention of our multiple ownership rules, in the context of an alleged violation of our rules and policies governing divestiture trusts, we conclude that the Petition is sufficient to make out a *prima facie* case. However, we conclude that, for the reasons discussed below, VBB does not raise any substantial or material questions of fact that would require denial of the applications or resolution in a hearing, or imposition of the requested condition.

33. First, regarding compliance with the Commission's local radio ownership rules, we note that the two-year waiting period imposed by the *Ownership Order* does not bar Clear Channel's reacquisition of WOLL(FM). Arbitron first listed WOLL(FM) as "home" to the Ft. Pierce Metro on January 11, 2007, and the two-year period therefore expired on January 11, 2009. Additionally, we find that Clear Channel's reacquisition of Station WOLL(FM) would comply with the Commission's local

(Continued from previous page) _____
based on templates created prior to July 30, 2008.

The information contained on the Internet page appended to the Petition to Deny as Attachment 3 was posted to Clear Channel's website prior to July 30, 2008. Additionally, the information on this webpage that relates to WSYR-FM and WCZR are old EEO public file reports [dated October 1-2005-September 30, 2006] and were produced when those stations were licensed to Clear Channel.

The PSAs referenced on page 18 of the Petition to Deny are co-produced by Clear Channel. The language referenced on page 18 is standard language for the "Facts and Feelings" program and it was an oversight that this language was not changed after WCZR and WSYR-FM were placed in trust.

⁷⁸ *Id.*

⁷⁹ See 47 U.S.C. § 309(d); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

⁸⁰ 47 U.S.C. § 309(d)(2).

radio ownership rules. Subsequent to consummation of the Assignment Application, Clear Channel will have an attributable interest in four stations (one AM, three FM) in a market with 15-29 total stations.⁸¹

34. To the extent that VBB's Petition can be read to challenge the specific terms of the Trust Agreement, we agree with Aloha and Clear Channel that such challenge is untimely. The Commission's approval of the Trust Agreement is final, and the original Trust Agreement is not before us.⁸²

35. Moreover, although not before us now for approval, the terms of the Trust Agreement, particularly those quoted and cited above, appear to place responsibility for WOLL's management, programming, finances, and personnel with Aloha. Specifically, the Trust Agreement requires that the "Trustee shall have absolute and complete control over the operations of the Station . . . and no person other than Trustee or managers designated by Trustee shall have any authority with respect to management of the Station" during the term of the Trust Agreement.⁸³ The Trust Agreement further provides that "Trustee shall operate the Station as a separate, independent . . . competitor to [Clear Channel], and Trustee shall ensure that management of the Station is kept separate and apart from, and not influenced by, [Clear Channel]."⁸⁴ Furthermore, the Trust Agreement prohibits Clear Channel from "communicat[ing] with Trustee regarding the operation or management of the Station,"⁸⁵ other than for an expressly provided purpose, such as the sale of the Station to a third party,⁸⁶ and provides that any such communications "shall be evidenced in writing and shall be retained by Trustee for inspection upon request by FCC."⁸⁷

36. In this case, however, because Aloha operates WOLL(FM) using Clear Channel equipment and staff, we must determine if VBB has presented evidence calling for further inquiry regarding whether the actual operation of the Station complied with the express terms of the trust agreement, or if Clear Channel did indeed dictate or influence WOLL(FM) operations.

37. Section 310(d) of the Communications Act states, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be

⁸¹ WZTA(AM), Vero Beach, Florida; WQOL(FM) and WAVW(FM), Stuart, Florida; and WOLL(FM), Hobe Sound, Florida. WKGR(FM) and WLDI(FM) properly are no longer reported in the Ft. Pierce Metro upon grant of the Applications and, as discussed in detail below, VBB has not shown that Clear Channel was so involved in the personnel, programming, and finances of the Aloha stations that it in fact controlled those stations. Thus, VBB's off-the-cuff argument that WCSR(FM) and WSYR-FM should be attributed to Clear Channel is meritless.

⁸² The staff granted File No. BALH-20070619AIT on January 8, 2008. The parties consummated the transaction on July 30, 2008. There were no appeals of the grant of that application.

⁸³ Trust Agreement, § 5.(a)(i).

⁸⁴ *Id.*, § 5.(a)(ii).

⁸⁵ *Id.*, § 11.(a).

⁸⁶ *Id.*, § 11.(b).

⁸⁷ *Id.*, § 11.(c). See *Letter to John F. Garziglia, Esq., et al.*, 22 FCC Rcd 21786, 21790 (MB 2007), in which identical provisions were referenced in support of a Media Bureau determination that "responsibility for [the station's] management, sales, programming, finances, and personnel clearly falls to [the Trustee]."

transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by *transfer of control* (Emphasis Added) of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.⁸⁸

Section 73.3540(a) of the Commission's Rules states that “[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control.”⁸⁹

38. Regarding VBB’s allegations that Clear Channel actually controlled WOLL(FM) (and other stations) subsequent to its assignment to Aloha, the Commission analyzes *de facto* control issues on a case-by-case basis.⁹⁰ In determining whether an entity has *de facto* control of an applicant or a licensee, we have traditionally looked beyond legal title and financial interests to determine who holds operational control of the station.⁹¹ For broadcasters in particular, we examine the policies governing station programming, personnel, and finances. A broadcast entity’s surrender of control over any one of these indicia to another is sufficient to find that the other entity has *de facto* control.⁹²

39. With respect to personnel, VBB argues that management (Program Director, Director of Sales, Chief Engineer, Business Manager, General Manager, and Market Manager) is identical for all Clear Channel and Aloha stations in the Ft. Pierce Metro. The Trust Agreement permits Aloha to retain and hire Clear Channel employees.⁹³ Under the express terms of the Agreement, Aloha also may in fact use Clear Channel employees who it determines are “reasonably necessary to conduct the business and operation” of a station (although it may not “hire” one of those employees away from Clear Channel), provided that, when performing services for the station, such employees are to report to and be supervised solely by Aloha.⁹⁴ We have previously approved the “shared employee” concept, finding it not to constitute an indicium of unauthorized control, provided that the employee reported to and was supervised by the appropriate party when undertaking his or her duties.⁹⁵ VBB has provided no evidence

⁸⁸ 47 U.S.C. § 310(d).

⁸⁹ 47 C.F.R. § 73.3540(a).

⁹⁰ See *Shareholders of Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18843 (2003); *Chase Broadcasting, Inc.*, Decision, 5 FCC Rcd 1642, 1643 (1990).

⁹¹ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856, 863 (1969), *aff’d sub nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

⁹² See, e.g., *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) (“Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control”).

⁹³ Trust Agreement, §§ 5(a)(iv), (v) and (b).

⁹⁴ See Trust Agreement, § 5(c) regarding “cluster employees” and “Shared Employee Services.”

⁹⁵ See, e.g., *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 21196, 21206 (2007) at ¶ 26; *William L. Silva, Esq.*, Letter, 9 FCC Rcd 6155 (MMB 1994) (no unauthorized transfer of control found where, although prospective purchaser arranged for construction of FM broadcast station, all employees and equipment utilized in construction of the station were hired or acquired with permittee’s approval, and payments to employees and for equipment were drawn from permittee’s account).

that Clear Channel violated the express terms of the Shared Employee Services agreement by dictating the actions of the Shared Employees in the day to day operation of WOLL(FM). Neither has VBB provided any evidence that Clear Channel or any of its officers, directors, stockholders, or affiliates communicated with Aloha or the shared employees in a manner prohibited by the Trust Agreement.

40. Although some of the material submitted by VBB was produced prior to the July 30, 2008, assignment of WOLL(FM) to Aloha, other material – the ad rate sheets appended to the Petition to Deny as Attachment 2, the information contained on the Internet page appended to the Petition to Deny as Attachment 3 that relates to WSYR-FM and WCZR, and the PSAs referenced on page 14 of the Petition to Deny – clearly were created *after* that date. With respect to programming aired on WOLL(FM), VBB has identified (and Clear Channel has admitted to) certain marketing irregularities with respect to WCZR(FM) and WSYR-FM, but VBB has provided no evidence that Clear Channel was actually dictating program content on WOLL(FM) or any other Aloha station. Although Clear Channel and Aloha may share the same Program Director for stations WCZR(FM) and WSYR-FM,⁹⁶ VBB has provided no evidence that the programming decisions for WOLL(FM) or other Aloha stations were dictated to that Program Director by Clear Channel and not Aloha. VBB thus has provided little evidence that Clear Channel has any undue influence over the day-to-day programming choices for stations licensed to Aloha.⁹⁷ However, the “oversight” announcements aired on several WSYR-FM programs establish a *prima facie* case that Clear Channel did not always properly insulate programming decision-making for its stations from those it assigned to Aloha. Clear Channel has not provided specific evidence to warrant a conclusion to the contrary.

41. Similarly, with respect to WOLL(FM) finances, VBB presents no evidence that Clear Channel, as opposed to Aloha, has paid the Station’s operating expenses since the consummation of the assignment of the Station to Aloha. However, the ad rate sheets support a finding that Clear Channel had or retained some authority with respect to the stations it had assigned to Aloha. Here again, Clear Channel has not provided specific evidence to warrant a conclusion to the contrary.

42. It is true that none of the evidence of Clear Channel involvement in the operation of Aloha stations involves WOLL(FM), the station involved here. Additionally, standing alone, the rate cards, EEO website postings, and PSAs might evidence carelessness and a lack of attention to detail rather than that Clear Channel actually controlled the personnel, programming, and finances of stations licensed to Aloha. However, coupled with the facts that Aloha operates its stations using staff also employed by Clear Channel and with equipment owned by Clear Channel, these post-assignment irregularities indicate that Clear Channel failed to exercise a proper degree of care to separate its stations from the Aloha stations in all cases. Accordingly, we find that the foregoing post-assignment activity by Clear Channel evidenced an unauthorized transfer of control warranting the assessment of a forfeiture.

43. *Proposed Forfeiture.* This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁹⁸ Section 312(f)(1) of the Act defines willful

⁹⁶ See *Petition at 14*.

⁹⁷ See, e.g., *Mid-Atlantic Network, Inc.*, Letter, 23 FCC Rcd 7582 (MB 2008)(restriction on program format changes contained in covenant not to compete held impermissible); *Cumulus*, 21 FCC Rcd at 3005-06 (same).

⁹⁸ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

(continued...)

as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁹⁹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁰⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰¹

44. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for the unauthorized transfer of control.¹⁰² In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁰³

45. In this case, Clear Channel's creation of the ad rate sheets, the information contained on the Internet page that relates to WSYR-FM and WCZR, and the PSA's, occurred after the July 30, 2008, assignment of WOLL(FM) to Aloha, and evidence an apparent willful and repeated violation of Section 310(d) of the Act and Section 73.3540(a) of the Rules with respect to stations for which it was not the licensee, and we find that the imposition of the forfeiture in the base amount is appropriate.

46. VBB has provided no additional evidence that Clear Channel had any actual involvement in operation of the Station or that either Aloha or Clear Channel failed to abide by the restrictions specified in the Trust Agreement. Moreover, an unauthorized transfer of control such as that discussed above, by itself, does not raise questions about a party's qualifications to be a licensee.¹⁰⁴ Accordingly, we find that VBB has presented no substantial and material question of fact calling for further inquiry and requiring resolution in a hearing regarding the Assignment Application. Additionally, we find that the application complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity. We will grant the Assignment Application below.

VII. THE WOLL MODIFICATION APPLICATION

47. VBB filed no objection to grant of the Modification Application. However, it states in its March 11, 2009, Opposition to Supplements that the purpose of the Supplements is to report that Clear Channel, with the consent of Aloha Trust, has filed an application to move the WOLL(FM) transmitter site so that the station can, "in fact," serve the Ft. Pierce Metro and provide principal
(Continued from previous page) _____

⁹⁹ 47 U.S.C. § 312(f)(1).

¹⁰⁰ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁰¹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Red 4387, 4388 (1991).

¹⁰² See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Red 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Red 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁰³ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Red at 17100; 47 C.F.R. § 1.80(b)(4).

¹⁰⁴ See *Cumulus Licensing, Corp.*, Order, 16 FCC Red 1052 (2001) and *FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Red 10429 (1995).

community coverage to its city of license, Hobe Sound.¹⁰⁵ VBB states that it does not object to Clear Channel's reporting the filing of the Modification Application, but, contrary to Clear Channel's representation, it does not evidence Clear Channel's "actual intentions" to operate WOLL(FM) as a Ft. Pierce station," or obviate the need for the requested condition on any grant of the Applications.¹⁰⁶ VBB asserts that even if the Modification Application is granted, CCB will hold a three-year permit to build and license the modified facilities, "without any assurance this will ever happen."¹⁰⁷

48. VBB's statements regarding Clear Channel's "actual intentions" amount to mere speculation and warrant no further action. Similarly, VBB's attempt to find fault in the fact that Clear Channel will have three years in which to construct WOLL(FM)'s modified facilities – the standard construction period authorized by Section 73.3598(a) of the Rules¹⁰⁸ – is not supported by any evidence that Clear Channel does not intend to construct those facilities.¹⁰⁹ The Modification Application complies with all pertinent statutory and regulatory requirements, and we will grant it below.

VIII. ORDERING CLAUSES

49. IT IS ORDERED, that Vero Beach Broadcasters, LLC's August 24, 2007, Informal Objection IS DENIED and the minor change application to specify Wellington, Florida as the community of license for Station WKGR(FM) (File No. BPH-20070119AHM) IS GRANTED.

50. IT IS FURTHER ORDERED, that Vero Beach Broadcasters, LLC's December 10, 2008, Petition for Reconsideration IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

51. IT IS FURTHER ORDERED, that Vero Beach Broadcasters, LLC's January 12, 2009, Petition to Deny IS GRANTED to the extent indicated above and IS DENIED in all other respects, and the application (File No. BALH-20081205ACU) to assign Station WOLL(FM), Hobe Sound, Florida, from Aloha Station Trust to Clear Channel Broadcast Licenses, Inc. IS HEREBY GRANTED.

52. IT IS FURTHER ORDERED, that the application for construction permit to modify facilities (File No. BPH-20090219ADR) for WOLL(FM) IS HEREBY GRANTED.

53. IT IS FURTHER ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Clear Channel Broadcast Licenses, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of eight thousand dollars (\$8,000) for its apparent willful and repeated violation of Section 310(d) of the Communications Act, as amended, and Section 73.3540(a) of the Commission's Rules.

¹⁰⁵ VBB incorporates by reference its pleadings in the foregoing proceedings.

¹⁰⁶ Clear Channel Opposition at 6.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ 47 C.F.R. § 73.3598(a).

¹⁰⁹ Although the Commission will not grant a construction permit to an applicant that does not intend to construct the proposed facility, *see, e.g., Scott & Davis Enterprises, Inc.*, FCC 83-442, Mimeo No. 95123 ¶ 4 (Sep. 27, 1983), VBB has made no such showing here.

54. IT IS FURTHER ORDERED, that pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Clear Channel Broadcasting Licenses, Inc., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

55. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank--Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

56. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

57. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

58. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹¹⁰

59. IT IS FURTHER ORDERED that a copy of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Clear Channel Broadcasting Licenses, Inc., 2625 S. Memorial Drive, Suite A, Tulsa, OK 74129 and to its counsel Richard J. Bodorff, Esq., Wiley Rein, LLP, 1776 K Street, NW, Washington, DC 20006; to Aloha Station Trust, LLC, 2810 Thousand Oaks Drive, No. 210, San Antonio, Texas, 78232, and to its counsel, Barry A. Friedman, Esq., Thompson Hine, LLP, 1920 N Street, NW, Suite 800, Washington, DC 20036; and to Alan C. Campbell, Esq., Fletcher, Heald & Hildreth, PLC, 1300 N. 17th Street, 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle, Chief
Audio Division
Media Bureau

¹¹⁰ See 47 C.F.R. § 1.1914.