

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

In re Application of	)	
	)	
Secret Communications II, LLC (Assignor)	)	File No. BALH-20010918AAP
	)	Facility ID No. 52042
And	)	
	)	
Clear Channel Broadcasting Licenses, Inc. (Assignee)	)	
	)	
For Assignment of License of Station WFCB(FM), Chillicothe, Ohio	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 11, 2003**

**Released: May 1, 2003**

By the Commission:

1. The Commission has before it the application to assign the license of station WFCB(FM) (formerly WKKJ(FM)), Chillicothe, Ohio, from Secret Communications II, LLC (“Secret”) to Clear Channel Broadcasting Licenses, Inc. (“Clear Channel”). On November 8, 2001, David Ringer (“Ringer”) filed a Petition to Deny the assignment (“Ringer Petition”).<sup>1</sup> For the reasons stated below, we deny the Ringer Petition as supplemented,<sup>2</sup> and grant the assignment application.

<sup>1</sup> Secret and Clear Channel filed separate Oppositions on December 5, 2001 (the “Secret Opposition” and “Clear Channel Opposition,” respectively). While not a party to the subject assignment application, Concord Media Group, Inc. (“Concord”) filed an Opposition on December 6, 2001 (“Concord Opposition”). See “Background” section, *infra* at 2, regarding Concord. Ringer filed a Consolidated Reply on January 2, 2002. Additionally, Ringer filed a Motion for Document Disclosure on February 6, 2002, requesting the production of documents involving multiple stations in multiple markets. Concord filed a Motion to Strike the Motion for Document Disclosure on February 20, 2002. Secret and Clear Channel filed separate Oppositions to the Motion for Document Disclosure on February 21, 2002. Ringer filed a Reply on February 25, 2002. In the present context of the application for license assignment of WFCB(FM), the Motion for Document Disclosure is an unauthorized pleading and is hereby dismissed pursuant to 47 C.F.R. § 1.45. See, e.g., *The Two Way Shop*, 15 FCC Rcd 12439, 12441 (2000) (discovery inappropriate in case not designated for hearing); 47 C.F.R. § 1.311 (general discovery procedures to be used in cases “designated for hearing”).

<sup>2</sup> Ringer filed a Supplement to the Petition to Deny (“Supplement”) on July 15, 2002, attaching a copy of a complaint filed against Clear Channel and Hispanic Broadcasting Corporation (“HBC”) in the U.S. District Court, Southern District of Florida, Miami Division, by Spanish Broadcasting System, Inc. (“SBS”), Case No. 02-21755. Clear Channel did not file an Opposition or otherwise comment on the Supplement. According to Ringer, “SBS’s suit demonstrates [that] Clear Channel has actively participated in the management and operational affairs of HBC” despite its claimed ownership of a passive, non-cognizable 26% non-voting equity interest in HBC. Supplement at 2. Ringer contends that Clear Channel’s activity in the affairs of HBC evidences a pattern of conduct by which Clear Channel conceals and misrepresents the extent of control it exercises over certain radio companies, and that the lawsuit is thus relevant to the public interest analysis of the WFCB(FM) transaction. The SBS lawsuit was

## Background

2. On March 31, 1999, Secret consummated its acquisition of the station from Pearl Broadcasting Inc. ("Pearl").<sup>3</sup> As reported in the Secret Opposition, since Secret's acquisition of WFCB(FM), the station has been programmed under various time brokerage agreements ("TBAs"). The station's first TBA under Secret's ownership began on March 31, 1999, with Citicasters Co. Effective August 1, 1999, the station entered into a new TBA with Concord. As of September 16, 2001, Clear Channel assumed the TBA from Concord.<sup>4</sup>

3. Commission records indicate that seven radio stations are licensed to the community of Chillicothe. Of the seven, Clear Channel currently owns three -- WBEX(AM),<sup>5</sup> WCHI(AM), and WKKJ(FM), and is now proposing to acquire a fourth station, WFCB(FM), from Secret. The remaining three stations licensed to Chillicothe are noncommercial educational FM stations operating on the reserved FM band: Ohio University is the licensee of WOUH-FM; The Cedarville University is the licensee of WOHC(FM); and Xavier University is the licensee of WVXC(FM). Chillicothe is not part of an Arbitron radio market. Staff analysis shows that, including the seven stations licensed to Chillicothe, a total of eleven FM and five AM radio stations provide protected service to all or a substantial part of Chillicothe.<sup>6</sup>

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dismissed by the court on January 31, 2003. In any event, the Commission normally will not act on mere allegations of misconduct prior to adjudication by the court, and thus we decline to address the SBS complaint in our analysis of the instant transaction. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1204-05 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986) ("*Character Qualifications*") (the Commission has generally declined to explore matters currently being litigated before the courts or to duplicate ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the law in question); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified*, 7 FCC Rcd 6564, 6565-66 (1992) ("*Character Policy*") (information regarding pending matters presumptively not relevant to applicant's character qualifications). As with the Ringer Petition, Ringer also includes in the Supplement numerous Clear Channel and HBC EEO Employment Reports to substantiate his allegation regarding Clear Channel's pattern of the use of front companies. We address those EEO-related exhibits herein. *See infra* at 5-6, 8-10.

<sup>3</sup> The application to assign WFCB(FM) from Pearl to Secret was filed August 24, 1998, and granted October 27, 1998 (File No. BALH-19980824EB).

<sup>4</sup> Secret Opposition at 4. The term TBA is used synonymously with "local marketing agreement" or "LMA" throughout this decision.

<sup>5</sup> Citicasters Licenses, Inc., a subsidiary of Clear Channel, is the licensee of WBEX(AM). *See* File No. BAL-20011214AGU.

<sup>6</sup> Each of the four commercial stations licensed to Chillicothe provides the requisite principle community contour over Chillicothe (*see* 47 C.F.R. §§ 73.24(i), 73.315(a)), while the three noncommercial FM stations provide the requisite 60 dBu coverage to at least 50 percent of Chillicothe (*see* 47 C.F.R. § 73.515). The other nine stations that provide protected service to all or a substantial part of Chillicothe are as follows: WTVN(AM), WRFD(AM) and WNCI(FM) - all licensed to Columbus, Ohio; WXIC and WXIZ(FM), Waverly, Ohio; WHOK-FM, Lancaster, Ohio; WXZQ(FM), Piketon, Ohio; WPAY-FM, Portsmouth, Ohio; and WSRW-FM, Hillsboro, Ohio. *See* 47 C.F.R. §§ 73.182(d) (defining minimum AM signal strength to provide requisite primary service) and 73.215(a) (defining FM protected service contours). Clear Channel is the licensee of WSRW-FM and Citicasters Licenses, L.P., a Clear Channel subsidiary, is the licensee of WTVN(AM) and WNCI(FM).

4. Initially, Ringer contends that Clear Channel has not disclosed the number of stations it owns or controls in the Chillicothe market, asserting that the multiple ownership exhibit submitted with the application omitted two Clear Channel-owned stations. Ringer also alleges that: (1) Clear Channel, in an attempt to mislead DOJ and the Commission, has established front companies through which it controls radio stations in various markets, and that Concord, the entity claiming to operate WFCB(FM) pursuant to a TBA until September 16, 2001, is one such front company; (2) Clear Channel has lacked candor and made misrepresentations to the Commission; (3) on the whole, public interest considerations and Clear Channel's bad character preclude grant of the subject application.

5. Section 310(d) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. Section 310(d), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Secret's radio broadcast license to Clear Channel before the assignment may occur. If the Commission is unable to find that grant would be consistent with the public interest, or if a substantial and material question of fact is presented, Section 309(e) of the Act specifies that the Commission shall designate the application for hearing. Section 309(d) of the Act, 47 U.S.C. § 309(d)(1), erects a two-step requirement for a hearing: (1) a petition to deny must contain specific allegations of fact that, taken as true, make out a *prima facie* case that grant of the application would not serve the public interest; and (2) the allegations, together with opposing evidence, must raise a substantial and material question of fact whether grant of the application would serve the public interest.<sup>7</sup>

6. The first step of our inquiry is to ask whether, if "all the supporting facts alleged in the affidavits were true, ... a reasonable factfinder [could] conclude that the ultimate fact in dispute has been established."<sup>8</sup> "Allegations within these documents that consist of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits, are not sufficient."<sup>9</sup> "At the second step, a substantial and material question is raised when 'the totality of the evidence arouses a sufficient doubt on the question whether grant of the application would serve the public interest that further inquiry is called for.'"<sup>10</sup> "Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. § 309(d)(2)."<sup>11</sup> By affidavit, Ringer establishes standing to file the Petition to Deny as a local resident and listener of the station.<sup>12</sup> We conclude, however, that no substantial and material question of fact exists as to whether grant of the application is in the public interest. Ringer's specific allegations are addressed in detail below.

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<sup>7</sup> 47 U.S.C. § 309(d)(1)(e). See also *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

<sup>8</sup> *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

<sup>9</sup> *North Idaho Broadcasting Company*, 8 FCC Rcd 1637, 1638 (1993), citing *Gencom Inc.*, 832 F.2d at 180 n.11.

<sup>10</sup> *Serafyn v. FCC*, 149 F.3d at 1216, citing *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985).

<sup>11</sup> *North Idaho Broadcasting Company*, 8 FCC Rcd at 1638.

<sup>12</sup> See *CHET-5 Broadcasting, L.P.*, 14 FCC Rcd 13041, 13042 (1999) (party-in-interest status accorded to petitioner who demonstrates either that he resides in the station's service area or that he listens or views the station regularly and that such listening or viewing is not the result of transient contacts with the station).

### Multiple Ownership Analysis

7. Ringer argues that the multiple ownership exhibit submitted with the assignment application is flawed because it omitted Clear Channel-owned stations WFJX(FM), Hilliard, Ohio, and WSRW(AM), Hillsboro, Ohio. This omission, Ringer contends, hampers a determination of multiple ownership rule compliance. Furthermore, according to Ringer, this false representation caused the Commission to provide inadequate Public Notice because, unable to determine the percentage of radio revenue that Clear Channel actually controls in the market, the staff did not include in the Public Notice the standard language inviting public comment on concentration issues.<sup>13</sup> In addition, Ringer asserts, grant of the application “will give Clear Channel control of every commercial radio station in Chillicothe”<sup>14</sup> and thus, effectively “eliminate all radio competition in the Chillicothe market.”<sup>15</sup>

8. **Discussion.** Staff analysis established that station WFJX(FM) should have been included in the multiple ownership study for the subject application because the WFJX(FM) contour overlaps the contour of WFCB(FM), as modified by a then-outstanding construction permit.<sup>16</sup> However, station WSRW(AM)’s contour does not overlap the WFCB(FM) contour, and so its exclusion from the exhibit was appropriate. Clear Channel concedes its error with respect to WFJX(FM) and appropriately provided a revised multiple ownership study which demonstrates compliance with the radio local ownership rule, 47 C.F.R. § 73.3555(a).<sup>17</sup> There is no evidence that the omission in the initial application exhibit derived from an intent to deceive, and there is no apparent motive to omit WFJX(FM) from which we might infer such an intent. Including WFJX(FM) in the original application would not have altered Clear Channel’s compliance with the numerical station ownership limits nor, because WFJX(FM) is not in an Arbitron market, would it have changed our decision not to flag the transaction. Thus, the error does not rise to the level of misrepresentation.<sup>18</sup>

9. Ringer’s assertion that Clear Channel’s initial error caused the Commission to issue a defective Public Notice is without merit. As noted, the Commission would not have flagged the Public Notice for the proposed WFCB(FM) assignment because WFJX(FM) is not part of an Arbitron radio market with revenues reported by BIA.<sup>19</sup> Also without merit is Ringer’s broad assertion that grant of the

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<sup>13</sup> See Public Notice, Broadcast Applications, Report No. 26985 (rel. Oct. 9, 2001). It is Commission policy to issue a Public Notice “flagging” proposed radio transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market, or two entities controlling 70 percent or more of the advertising revenues in that Arbitron market. See, e.g., *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 n. 10 (2000).

<sup>14</sup> Petition at 7.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> The modification application (File No. BMPH-20011120ABH) was granted January 25, 2002. The license application (File No. BLH-20020304AFX) was granted March 29, 2002.

<sup>17</sup> The revised study was also attached as Exhibit 2 to the Clear Channel Opposition. A subsequent multiple ownership study was submitted on October 24, 2002, pursuant to the October 17, 2002, request of staff, to reflect WFCB(FM)’s operation at its currently licensed site. Staff analysis of the October 24, 2002, amendment confirms compliance with 47 C.F.R. § 73.3555(a).

<sup>18</sup> See, e.g., *LUJ, Inc.*, 17 FCC Rcd 16980 (2002); *Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15464 (1996).

<sup>19</sup> BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides funding, consulting and financial services to the communications, Internet and media industries, and makes available to the public revenue data for stations assigned to Arbitron metro markets.

captioned application will eliminate all competition in the “Chillicothe market” by giving Clear Channel control of all commercial radio stations licensed to the community of Chillicothe. There is no Commission rule or policy prohibiting an entity from owning all commercial radio stations licensed to a particular community.<sup>20</sup> In any event, as noted above, sixteen stations provide protected service to all or a substantial part of Chillicothe.<sup>21</sup> The Petition fails to acknowledge that radio stations licensed to communities other than Chillicothe also serve listeners in Chillicothe. Moreover, the Ringer Petition does not provide any properly supported evidence demonstrating that grant of the assignment will impair competition in the Chillicothe radio market.

### **Real Party in Interest / Unauthorized Control**

10. Ringer contends that where Clear Channel is unable to own certain stations directly due to limitations imposed by either DOJ or the Commission’s ownership rules, it holds such stations through front companies. Ringer claims that Concord is one such Clear Channel front company and that there is evidence of Clear Channel’s presence in the operation of stations that Concord owns or operates under TBAs. Specifically, Ringer presents as evidence certain Commission filings by Clear Channel, alleged statements by employees at the Concord stations, internet websites for those stations, and circumstances surrounding Clear Channel’s assumption of the TBA for WFCB(FM). Ringer’s evidence in each of these areas is discussed below.

11. **Commission Filings.** Ringer argues that Clear Channel’s use of front companies is a pervasive practice evidenced in numerous Commission filings, and notes in particular filings related to Equal Employment Opportunity (“EEO”) reporting requirements. For example, on June 1, 2000, when Clear Channel filed the Broadcast and Cable Initial Election Statement (“EEO Election Statement”), which requires filing parties to report on commonly owned stations and stations operated pursuant to a TBA which share one or more employee, Clear Channel listed WFCB(FM) in addition to its three Chillicothe stations.<sup>22</sup> On the same date, Concord filed its own EEO Election Statement and also listed WFCB(FM), indicating that the station was being operated pursuant to a TBA. Likewise, both Concord and Clear Channel submitted FCC Form 395-B, Broadcast Station Annual Employment Report (“Employment Report”), for station WFCB(FM).

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<sup>20</sup> The local radio ownership rule, 47 C.F.R. Section 73.3555(a), limits the number of stations in which a party may hold attributable interests in any particular radio market as defined by our contour overlap methodology (*i.e.*, the area encompassed by the principal community contours of the mutually overlapping stations proposing to have common ownership). *See generally Definition of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001). *See also Definition of Radio Markets*, 15 FCC Rcd 25077 (2000).

<sup>21</sup> *See supra* ¶ 3. During the pendency of the assignment proceeding, the Audio Division, Media Bureau, released a Report and Order in MM Docket No. 99-322 reallooting Channel 227B to Ashville, Ohio, and modifying station WFCB(FM)’s license to specify Ashville, Ohio, as its community of license. *Chillicothe and Ashville, Ohio*, 17 FCC Rcd 20418 (MB, 2002). As a condition of license modification, within 90 days of the December 5, 2002, effective date of the Report and Order, the licensee of WFCB(FM) was to submit a minor change application for a construction permit specifying the new community of license. This change did not entail relocation of the transmitter or other facilities changes and thus did not result in alteration of the station’s signal contours. On December 6, 2002, Franklin Communications, Inc., North American Broadcasting Co. and WLCT Radio Incorporated jointly filed a petition for reconsideration of the Report and Order which is still pending.

<sup>22</sup> The three other stations, all licensed to Chillicothe, are: WCHI(AM); WKKJ(FM) (formerly WFCB(FM)); and WBEX(AM).

12. In the Youngstown, Ohio radio market, Ringer states that Clear Channel similarly filed such EEO-related reports<sup>23</sup> for Concord, as well as for another of its alleged front companies, Youngstown Radio Licensee, LLC (“YRL”). For instance, on October 2, 2000, YRL filed its Employment Report, listing the five Youngstown market stations it owns.<sup>24</sup> A second Employment Report was filed by Clear Channel on November 16, 2000, on behalf of YRL, which listed ten Youngstown market stations – the five owned by YRL and five additional stations owned by Clear Channel.<sup>25</sup> The second Employment Report lists Clear Channel’s corporate headquarters in San Antonio, Texas as the YRL corporate address, with Rick Wolf, Clear Channel vice president and corporate counsel, as signatory. On the other hand, Concord, as TBA operator of WTNX(FM) and WPAO(AM),<sup>26</sup> never filed an Employment Report for these two Youngstown market stations, Ringer asserts. In other words, numerous EEO-related reports combined information pertaining to Clear Channel with information pertaining to the alleged front companies. Ringer claims that this pattern recurred in reports ostensibly filed by YRL, as well as in reports filed for Concord stations in the Pensacola and Jacksonville, Florida radio markets and the Catskill and Hudson, New York radio markets.<sup>27</sup>

13. **Alleged Statements of WFCB(FM) Employees.** The Ringer Petition includes the affidavit of Lois E. Colley (“Colley”), a licensed private investigator, who spoke with three WFCB(FM) employees -- an account executive, a receptionist and a station manager/sales manager -- between November 1 and November 6, 2001. According to Colley, all three employees told her that Clear Channel owned the station.

14. **Internet Representations.** Ringer claims that representations on internet websites also support his claim that Clear Channel controls the Concord stations. Specifically, he asserts that the WFCB(FM) website provides links to stations identified as “sister stations.” These “sister stations” are Clear Channel’s three Chillicothe stations. Additionally, four Concord stations in the Jacksonville, Florida market have web pages with icons reading “Clear Channel Jacksonville Media Family.”<sup>28</sup>

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<sup>23</sup> All EEO-related reports at issue were filed in 2000.

<sup>24</sup> The Employment Report was signed by Roland T. Adeszko, Executive Vice President of YRL and General Manager. The stations listed are: WNIO, WTNX(FM), WICT(FM), WPAO and WNCD(FM).

<sup>25</sup> The stations listed are: WNIO, WTNX(FM), WICT(FM), WPAO and WNCD(FM), owned by YRL; and WRTK, WBBG(FM), WBTJ(FM), WMXY(FM), and WKBN, owned by Clear Channel.

<sup>26</sup> YRL is the licensee of these two stations.

<sup>27</sup> In his Supplement, to substantiate the allegation regarding Clear Channel’s use of alleged front company HBC, Ringer submitted additional Employment Reports for radio stations in the areas of McAllen, El Paso, San Antonio and Houston, Texas; Los Angeles, San Diego and San Francisco, California; Las Vegas, Nevada; Chicago, Illinois; Phoenix, Arizona; Miami, Florida and New York, New York. *See supra* note 2. Ringer alleges that certain Employment Reports filed by HBC subsidiaries used the Clear Channel corporate mailing address and were signed by Clear Channel’s Rick Wolf. Ringer further contends that certain Employment Reports filed by Clear Channel list one or more stations licensed to HBC, but does not identify on the submitted reports which stations are owned by HBC. *See Supplement* at 4-5.

<sup>28</sup> The stations are: WJGR(AM), WZAZ(AM), and WZNZ(AM), all in Jacksonville, Florida, and WBGB(FM), Ponte Vedra Beach, Florida.

15. **Clear Channel Assumption of the WFCB(FM) TBA.** Ringer asserts that the Assumption Agreement, purporting to document Clear Channel's September 16, 2001, assumption of Concord's TBA with Secret for WFCB(FM) (the "Concord TBA"), was not actually executed until after Ringer filed his Petition to Deny, and that this fact evidences an attempt by Clear Channel to manufacture exculpatory evidence.<sup>29</sup> As corroboration, Ringer points out that the TBA filed with the Commission by Secret on September 17, 2001, as required by 47 C.F.R. § 73.3613, consists of only the Secret-Concord TBA document, dated August 1, 1999, and neither includes nor references the Concord-Clear Channel September 16, 2001, Assumption Agreement. Furthermore, Secret's September 17, 2001, transmittal letter does not mention the TBA's assignment to Clear Channel.<sup>30</sup> Ringer also notes that the September 11, 2001, Asset Purchase Agreement ("Sales Contract") for the proposed assignment contemplates that Clear Channel would commence programming WFCB(FM) under a separate Local Marketing Agreement ("LMA") with Secret on January 2, 2002.<sup>31</sup>

16. **Discussion.** In ascertaining whether an unauthorized transfer of control has occurred, we look to whether a new entity has the right to determine the basic operating policies of the licensee or station,<sup>32</sup> with particular attention to three areas of station operation: programming, personnel, and finances.<sup>33</sup> Licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations relating to those three areas, as long as they continue to set the policies guiding those operations and remain ultimately in control of them.<sup>34</sup> The Commission has expressly found that LMA or TBA arrangements, properly conditioned, do not by themselves establish that a transfer of control has taken place.<sup>35</sup> The facts alleged by Ringer do not establish a prima facie case that Clear Channel has engaged in an unauthorized transfer of control of WFCB(FM), Concord, or any other Commission licensee.

17. The documentary record and sworn declarations on behalf of Clear Channel, Secret and Concord substantiate that Clear Channel intended to assume, and did assume, the Concord TBA on September 16, 2001. For example, the Assumption Agreement itself, submitted on December 5, 2001, as Exhibit 3 of the Clear Channel Opposition, states that it "is made as of September 16, 2001" between Concord and Clear Channel. In addition, attached to Clear Channel's February 21, 2002, Opposition to

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<sup>29</sup> The Assumption Agreement was provided as Exhibit 3 to the Clear Channel Opposition.

<sup>30</sup> See Secret Opposition, Exhibit C.

<sup>31</sup> Section 1.8 of the Sales Contract states: "Simultaneously with the execution of this Agreement, [Secret] and [Clear Channel] are entering into a Local Marketing Agreement (the "LMA") with respect to the Station, with a beginning date of January 2, 2002 . . . (the "Beginning Date"), pursuant to which, among other things, and subject to the terms and conditions of the LMA, [Clear Channel] will provide programming for, and be entitled to receive the revenues from the sale of advertising time on, the Station. The Concord TBA will terminate on the Beginning Date."

<sup>32</sup> See, e.g., *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 87 (1981), *recon. denied*, 50 R.R.2d 1346 (1982); *WHDH, Inc.*, 17 F.C.C.2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

<sup>33</sup> See, e.g., *id.*

<sup>34</sup> See *WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995); *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981); *The Alabama Educational Television Commission*, 33 F.C.C.2d 495, 508 (1972).

<sup>35</sup> See *Solar Broadcasting Company, Inc.*, 17 FCC Rcd 5467, 5486 (2002) (licensee's participation in LMA does not *per se* constitute a premature transfer of control); *WGPR, Inc.*, 10 FCC Rcd at 8141 (participation in LMA not *per se* violative of the Communications Act or any Commission rule or policy).

Motion for Document Disclosure is a Declaration of Richard Wolf, Vice President of Clear Channel, explicitly stating that he executed the Assumption Agreement on behalf of Clear Channel on September 16, 2001. Also attached to that Opposition is a September 14, 2001, transmittal letter from Lee W. Shubert, Esq., counsel for Concord, to Richard Wolf, enclosing copies of the Assumption Agreement as executed by Concord. While Ringer notes language from Section 1.8 of the Sales Contract referring to a January 2, 2002, beginning date for a Secret-Clear Channel LMA, Ringer's citation omits the first sentence of Section 1.8, stating Secret's approval of the assumption by Clear Channel of the Secret-Concord TBA.<sup>36</sup> Additionally, Clear Channel's assumption of the Concord TBA was disclosed in Exhibit 4 of the Application.<sup>37</sup>

18. Given the evidence of disclosure noted above, we conclude that Secret's omission of the Assumption Agreement with its September 17, 2001, filing pursuant to Section 73.3613 indicates inattentiveness rather than any intent to deceive the Commission. The totality of evidence indicates that Clear Channel openly assumed the Concord TBA for WFCB(FM) on September 16, 2001. Secret's subsequent January 29, 2002, Section 73.3613 filing of the Secret-Clear Channel LMA states that it "supercedes a prior [TBA] for the Station."<sup>38</sup> Secret explains that the prior TBA, dated August 31, 1999, was originally between Secret and Concord but, as contemplated in the Sales Contract, Clear Channel assumed the obligations and was assigned the rights of Concord under that agreement. Copies of both the Secret-Concord TBA and the Assumption Agreement, Secret states, "dated September 16, 2001 (five days after execution of the [Sales Contract]), are on file with the Commission."<sup>39</sup> Clear Channel thus became involved, openly, in the day-to-day operations of WFCB(FM) as of September 16, 2001.

19. Furthermore, the Concord TBA comports with Commission policy.<sup>40</sup> Section 10, for example, expressly provides for complete licensee control of the station. Section 11 provides for meaningful licensee management and staff presence and for direct licensee payment of station expenses. Additionally, the record includes denials by Secret and Concord of Ringer's allegations of abdication of control to Clear Channel. Secret's Opposition states that it is owned and controlled by Frank E. Wood, an experienced and respected broadcaster with the requisite qualifications to assign WFCB(FM). Secret also states that it determines all WFCB(FM) policy and maintains full authority and control over all station operations, including programming, personnel and finances, also as set forth in the TBA.<sup>41</sup> While noting that it is not a party to the proposed transaction, Concord details in its Opposition the extensive broadcast

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<sup>36</sup> Section 1.8 states: "Seller hereby approves the assignment to Buyer of the rights, and the Assumption by Buyer of the obligations, of [Concord] under the [TBA] between Seller and [Concord] dated August 31, 1999 ("the Concord TBA") and will cooperate with Buyer in obtaining such assignment."

<sup>37</sup> Exhibit 4 states, in pertinent part: "... as part of this transaction, the proposed assignee is assuming the broker's rights and obligations under a time brokerage agreement dated as of August 31, 1999 by and between Secret Communications II, L.L.C. and Concord Media Group, Inc." While Exhibit 4 does not specify the starting date of the assumption, its language is consistent with representations from Clear Channel, Secret and Concord regarding Clear Channel's September 16, 2001, assumption of the Concord TBA.

<sup>38</sup> See Transmittal Letter from Collette M. Capretz, Esq., Section 73.3613 Filing, on behalf of Secret Communications II, LLC, January 29, 2002, at 1.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997).

<sup>41</sup> Secret Opposition at page 6.



experience of its president, sole shareholder and director, Mark Jorgenson, and asserts that Concord alone is directly responsible for the programming, personnel and finances at Concord stations and conducts all broadcast operations in full compliance with Commission rules.

20. With respect to Ringer's allegation concerning the June 1, 2000, EEO Election Statement, Clear Channel responds that the inclusion of WFCB(FM) was inadvertent error. Clear Channel provides a copy of a revised EEO Election Statement, submitted to the Commission on June 28, 2000, which deleted WFCB(FM) from the list of stations covered by the particular EEO Election Statement.

21. Clear Channel explains similar inaccuracies in other submitted year 2000 EEO Election Statements and Employment Reports in the Youngstown, Pensacola, Jacksonville, Catskill and Hudson radio markets, attributing them to an all-encompassing database and faulty reporting procedures. Specifically, Clear Channel acknowledges that, when listing attributable stations on these Statements and Reports, it obtained the employment information from an internal database that included stations it owned, stations it operated under TBAs, as well as stations for which it sold advertising under nonattributable joint sales agreements. In efforts to prepare "283 employment reports for a simultaneous filing, its personnel did not attempt to separate stations under JSAs from owned stations and stations under [TBAs]." <sup>42</sup> Reporting errors were compounded when clerical personnel selected the filing designee from among licensees listed in this general station database. <sup>43</sup> Clear Channel states however, that it sold advertising on these stations under joint sales agreements during the year 2000, and thus had employees at the stations. <sup>44</sup> Consequently, Clear Channel argues, "it was not illegal for [it] to report those employees on a Form 395-B, though [it] was arguably not required to do so." <sup>45</sup>

22. The identified errors in the Employment Reports and EEO Election Statements indicate carelessness by Clear Channel in providing the Commission with information. We cannot conclude that these filing errors raise a substantial and material question of fact as to whether Clear Channel unlawfully controls WFCB(FM), Concord or YRL, as Ringer concludes it does. <sup>46</sup> We find, however, that Clear

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<sup>42</sup> Clear Channel Opposition at page 9.

<sup>43</sup> Clear Channel also notes that its Employment Reports were paper filed and differ from the electronic versions supplied with the Petition in a significant respect. Whereas the electronic version records the stations by call sign under a single licensee heading, the paper forms indicate the actual licensee beside each station entry. Thus, the more limited format of the electronic version conveys the impression that one entity, *i.e.*, Clear Channel, is the licensee of all stations listed. Clear Channel's paper-filed forms did in fact attribute every listed station (including stations owned by Concord and YRL) to its licensee.

<sup>44</sup> The specific stations referred to by Ringer, which Clear Channel states that it sold advertising time pursuant to JSAs during the year 2000, are: WYCL(FM), Pensacola, FL in the Pensacola market; WTNX(FM), Sharpville, PA and WPAO, Farrell, PA in the Youngstown market; WJGR, WZAZ(FM), WZNZ, Jacksonville, FL and WBGB(FM), Ponte Vedra Beach, FL in the Jacksonville market; WCKL and WCTW(FM), Catskill, NY; and WHUC and WZCR(FM), Hudson, NY. Clear Channel Opposition at 8.

<sup>45</sup> Clear Channel Opposition at 9 n.18. Licensees were to file one 2000 Annual Employment Report (Form 395-B) for all *commonly owned* stations in the same market that share at least one employee. *See* Instructions for Completion of FCC Form 395-B, Item 5. The layout of the Employment Report does not require filers to identify the specific station at which individuals are employed. It is impossible, therefore, to establish that Clear Channel reported employees other than those it employed to sell advertising under the JSAs.

<sup>46</sup> Given Clear Channel's relationship with WFCB(FM) and with the Youngstown, Pensacola, Jacksonville, Catskill and Hudson stations *vis-à-vis* joint sales arrangements, Ringer's submission of various EEO-related filings for these markets is insufficient to raise a substantial and material question of fact concerning unauthorized control or

Channel's acknowledged lack of diligence with respect to filing certain documents with the Commission warrants admonishment and we expect Clear Channel to ensure that it provides accurate information to the Commission in all future submissions. With regard to Ringer's allegation that Concord neglected to file the requisite Employment Report for WPAO(FM) or WTNX(FM), we find that, inasmuch as Concord was no longer involved with the TBA as of the October 2, 2000, filing date for the Employment Report, it was not obligated to file for either WPAO(FM) or WTNX(FM).<sup>47</sup>

23. Clear Channel's September 16, 2001, assumption of the TBA for WFCB(FM) provides a legitimate basis for its involvement with the station and an explanation for statements made by station employees in November 2001. A TBA broker is entitled to employ its own personnel at the brokered station, as long as such employees are subject to the ultimate control of the station licensee and as long as the licensee fulfills its own personnel obligations.<sup>48</sup> The employees interviewed by Colley were Clear Channel employees who reportedly misunderstood Clear Channel's legal relationship with WFCB(FM). We urge all licensees and brokers alike to ensure that all station personnel know which entity owns the station so that they may respond to inquiries from the public accurately. In this instance, the employee statements are insufficient to support Ringer's claims regarding an unauthorized transfer of control. The three employees subsequently submitted affidavits dated December 4, 2001 (filed with the Clear Channel Opposition), and recollected speaking to an unidentified caller inquiring about WFCB(FM)'s ownership.<sup>49</sup> Each employee attests to understanding that Clear Channel does not own the station but, rather, operates it under an LMA, although two employees acknowledge being previously unaware of the distinction.<sup>50</sup>

24. Similarly, web page icons that read "Clear Channel Jacksonville Media Family" are not necessarily probative of Ringer's claims regarding an unauthorized transfer of control, in light of the Clear Channel – Concord JSA, in effect since July 1999. As stated above, our concern is whether the licensee wields ultimate control over station personnel, programming and finances. Ringer has not shown, for example, that the licensee of the Jacksonville station(s) has "decided lack of control over

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otherwise compel denial of the assignment application. Regarding Ringer's submission of additional Employment Reports in the Supplement (*see supra* note 28), we similarly find that such reports do not adequately support the inference he draws regarding unauthorized transfer of control of HBC stations to Clear Channel in these markets.

<sup>47</sup> See Concord Opposition at 7.

<sup>48</sup> See *WGPR, Inc.* 10 FCC Rcd 8140, 8143 (1995) (recognizing necessity for time broker's staff to become involved with licensee's facilities); *Michael Birdsill*, 7 FCC Rcd 7891 (M.M. Bur. 1992) (sharing of staff between brokered station and broker permitted); *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), *aff'd*, 10 FCC Rcd 3759 (1995) (defined a minimally acceptable meaningful staff presence at main studio); *see also Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2761 n.30 (1992) (rules require licensee to maintain control over station regardless of any time brokerage agreements that may exist).

<sup>49</sup> Clear Channel Opposition at Exhibit 5 - Declaration of Tammy Barker; Exhibit 6 - Declaration of Melissa Jacobs; and Exhibit 7 - Declaration of Tracy Taylor.

<sup>50</sup> Tammy Barker, an account executive, and Melissa Jacobs, a receptionist, each recalled saying that WKKJ(FM) was owned by Clear Channel. Barker and Jacobs state that, at the time however, they were unaware of the distinction between owning the station and operating it under an LMA. The third employee, station manager Tracy Taylor, stated that it was possible that during the course of the conversation she might have said to the caller that WFCB(FM) was owned by Clear Channel. "If I made such a statement," Taylor said, "it was because I saw no need – given the very unsophisticated nature of the call and the caller – to overcomplicate the conversation with a discussion of the distinction between 'owning' a station and operating a station under an LMA."

station finances”<sup>51</sup> or that the licensee has relinquished to Clear Channel more than the sale of advertising time for the Jacksonville stations.<sup>52</sup> While we recommend that licensees be attentive to their website depictions, we find that Ringer’s allegations based on internet website idiom are speculative and inadequate to raise a substantial and material question of fact concerning abdication of control by Concord.

25. In sum, based on the totality of the evidence before us and Commission precedent,<sup>53</sup> we find that Ringer presents insufficient evidence to raise substantial and material questions of fact concerning an unauthorized transfer of control of WFCB(FM), Concord or YRL.

### **Character**

26. Ringer claims that past actions of Clear Channel and its employees have demonstrated sufficiently bad character to preclude a finding that grant of the captioned application would serve the public interest. Ringer alleges that Clear Channel, as the largest radio company in the United States, uses its market power to bully its competitors and advertisers. Additionally, Ringer argues that Clear Channel uses entities it owns, such as Premiere Radio Network, a syndicator, and SFX Entertainment, a concert touring business and key marketing tool for rock music stations, to dominate rivals and diminish advertising competition. Ringer also cites the on-air behavior of Clear Channel employees as proof of Clear Channel’s bad character. Specifically, Ringer cites the on-air torture and killing of a wild boar by Clear Channel employee Bubba the Love Sponge (“Bubba”) on station WXTB(FM), Tampa, Florida. Ringer states that Bubba and the show’s producer were arrested and charged with felony animal cruelty and notes that another Clear Channel employee, at station KBPI(FM), Denver, Colorado, was recently convicted of animal cruelty.

27. **Discussion.** Ringer fails to properly support his allegations that Clear Channel uses its market power to bully and abuse its competitors and advertisers. Section 309(d)(1) of the Communications Act states that “allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”<sup>54</sup> The allegation of conclusory facts based on information and belief is not sufficient to meet this pleading burden.<sup>55</sup> Ringer fails to provide any evidence concerning the ownership and revenues earned by other media entities or media outlets such as newspapers or local cable systems, nor any other evidence to substantiate his broad market power claim. We find no evidence in the record that raises a substantial and material question as to whether Clear Channel would dominate the local media advertising market post-

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<sup>51</sup> *Manahawkin Communications Corporation*, 17 FCC Rcd 342, 349-350 (2001), citing *Salem Broadcasting*, 6 FCC Rcd 4172, 4172-73 (M.M.Bur. 1991).

<sup>52</sup> *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12612-13 (1999).

<sup>53</sup> See *supra* ¶¶ 16-25 and accompanying notes.

<sup>54</sup> 47 U.S.C. § 309(d)(1).

<sup>55</sup> See *Stone v. FCC*, 466 F. 2d 316, 322 (D.C. Cir. 1972). See also *Pikes Peak Broadcasting Co.*, 12 FCC Rcd 4626, 4630 (1997) (newspaper article not acceptable substitute for Section 309(d) requirement that allegations in a petition to deny be supported by affidavit of person with personal knowledge of facts alleged). As support for the allegation, Ringer offered nothing more than two reprinted articles from an Internet media company website, www.salon.com, dated April 30, 2001, and May 30, 2001.

transaction.<sup>56</sup> Moreover, in assessing allegations related to business misconduct, such as those related to Clear Channel's alleged abuse of its market power, the Commission has stated that generally it will "not take cognizance of non-FCC misconduct involving criminally fraudulent misrepresentations, alleged criminal activity or anticompetitive misconduct unless it is adjudicated."<sup>57</sup>

28. Concerning Ringer's report that Bubba's on-air torture and killing of a boar on station WXTB(FM), Tampa, Florida, resulted in felony charges of animal cruelty, the staff has determined that on February 28, 2002, a Hillsborough County, Florida jury acquitted Bubba and his co-defendants of these charges.<sup>58</sup> Furthermore, on March 21, 2002, the Commission's Enforcement Bureau denied a complaint involving a broadcast related to the incident that Ringer cites. The Enforcement Bureau found that WXTB(FM) did not violate the Commission's indecency rule with respect to the broadcast of the "Roadkill Barbeque" contest, part of which involved the slaughter of the boar.<sup>59</sup> Ringer's allegation concerning animal cruelty on KBPI(FM) in Denver is not properly supported.<sup>60</sup> Independent staff investigation indicates, however, that the specific misconduct concerning the KBPI(FM) employee resulted in a misdemeanor conviction for animal cruelty.<sup>61</sup> Convictions for misconduct constituting felonies are most relevant to our evaluation of an applicant's character, but we retain the discretion to consider serious misdemeanor convictions where appropriate.<sup>62</sup> A pattern of on-air conduct that results in misdemeanor convictions for animal cruelty, for example, might be probative of a licensee's qualifications. Here, however, we find insufficient evidence of such a pattern to provide a basis for designating the application for hearing.

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<sup>56</sup> See *Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002) (finding no evidence on the record raising a substantial and material question of fact that Clear Channel would dominate a local media advertising market). See also *supra* ¶¶ 3 and 9.

<sup>57</sup> *Character Qualifications*, 102 F.C.C.2d at 1205. See also *WQED Pittsburgh*, 15 FCC Rcd 202, 205-06 (1999); *Character Policy*, 5 FCC Rcd at 3252-53, 7 FCC Rcd at 6565-66 (relevant non-FCC misconduct typically includes only adjudicated felonies, or adjudications of fraudulent misrepresentations to governmental units, or adjudicated criminal misconduct involving false statements or dishonesty). This does not absolutely preclude, however, our taking into account, under certain circumstances, non-FCC conduct (*i.e.*, conduct that by itself does not violate any specific Commission rules or policies). For example, business misconduct that is technically "non-FCC conduct" conceivably could be relevant in a competition analysis of a proposed radio transaction.

<sup>58</sup> Hillsborough County Circuit Criminal Court, Consolidated Case # 01CF004899. There was no appeal of this adjudication, which is therefore final.

<sup>59</sup> *Letter to Peter Wood*, reference EB-01-IH-0089 (Chief, Investigations and Hearings Division, Enf. Bur., Mar. 21, 2002). See 18 U.S.C. § 1464 (prohibiting the utterance of "any obscene, indecent or profane language by means of radio communication"); 47 C.F.R. § 73.3999 (prohibiting the broadcast of "any material which is obscene" and restricting the broadcast of "any material which is indecent").

<sup>60</sup> Ringer did not provide more than a reprinted March 30, 2001, article from the Environment News Service internet site as evidence to support his allegation. See *supra* note 55.

<sup>61</sup> A jury convicted Steven Meade of animal cruelty and on March 12, 2001, he was sentenced to one year probation with conditions, including a \$500 fine. See *People of the State of Colorado v. Steven Meade*, Case No. 00M07340, Denver County Court, Criminal Division. There is no record of appeal of this adjudication.

<sup>62</sup> See *Character Policy*, 5 FCC Rcd at 3252.

### Misrepresentation

29. As discussed above, Ringer alleges that Clear Channel has falsified documents and made misrepresentations to the Commission in an attempt to show that its TBA with WFCB(FM) began on September 16, 2001. Ringer asserts that Clear Channel has engaged in a pattern of conduct intended to deceive and conceal from the Commission its control of “front companies” such as Concord and YRL. Additionally, Ringer argues that Clear Channel has lacked candor concerning its participation in preparing and filing Commission forms for its alleged front companies.

30. **Discussion.** We reject Ringer’s contention that Clear Channel’s claim to have assumed Concord’s TBA for WFCB(FM) on September 16, 2001, constituted misrepresentation, for, as stated above, the record supports Clear Channel’s assertion. Ringer has demonstrated that Clear Channel supplied inaccurate information to the Commission in the filing of various Election Statements and Employment Reports, as discussed above. Nevertheless, Ringer has not made the requisite “*prima facie* demonstration of deception and of a desire, motive or logical reason to mislead” that is the crux of misrepresentation.<sup>63</sup> Based on all the evidence on the record before us and on the above discussion, we conclude that Ringer has failed to present a substantial and material question of fact as to Clear Channel’s misrepresentation or as to its qualifications to be a licensee.

### Conclusion

31. Accordingly, finding the applicant qualified and that grant of the subject assignment application would serve the public interest, convenience and necessity, Ringer’s November 8, 2001 Petition to Deny, as supplemented on July 15, 2002, IS DENIED and the application for assignment of license of station WFCB(FM), Chillicothe, Ohio, (File No. BALH-20010918AAP) from Secret Communications II, LLC to Clear Channel Broadcasting Licenses, Inc. IS GRANTED. Furthermore, Clear Channel IS HEREBY ADMONISHED for its failure to provide accurate information to the Commission in its EEO-related submissions.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>63</sup> *Garrett, Andrews, & Letizia, Inc.*, 86 F.C.C.2d 1172, 1180 (Rev. Bd. 1981), *mod. on other grounds*, 88 F.C.C.2d 620 (1981) (burden on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from errors, inconsistencies or omissions accompanied by speculation that lacks factual support). *See also LUJ, Inc.*, 17 FCC Rcd at 16982; *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061, 12079-80 (2001) (substantial evidence of an intent to deceive necessary to support finding of misrepresentation); *WWOR-TV, Inc.*, 6 FCC Rcd 193, 206 (1990); *Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 639-40 (Rev. Bd. 1984) (submission of inaccurate statement does not indicate intent to deceive when accurate information previously supplied by party is a matter of record); *Superior Broadcasting of California*, 94 F.C.C.2d 904, 910 (Rev. Bd. 1983) (intent to deceive difficult to infer where facts are on public record and easily attainable by parties).