

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

In re Application of)	
)	
COMMANDER COMMUNICATIONS CORP.)	Facility ID No. 19864
)	
For a Construction Permit for the Modification of)	File No. BPH-20180716AAC
Station WRTM-FM, Sharon, Mississippi)	

To: Chief, Audio Division, Media Bureau

REPLY TO OPPOSITIONS

On November 7, 2018, CC Licenses, LLC (then as debtor in possession) (“CCL”), the licensee of Section 73.207-protected WNSL(FM), 100.3 MHz, Laurel, Mississippi, FCC Facility ID No. 16784, submitted an Informal Objection pursuant to Section 73.3587 of the Commission’s Rules (the “Objection”) to the above-captioned application, File No. BPH-20180716AAC (the “Permit Application”) of Commander Communications Corp. (“Commander”) for a construction permit for the modification of station WRTM-FM, 100.5 MHz, Sharon, Mississippi, FCC Facility ID No. 19864. Commander, as have others, has submitted an Opposition to CCL’s Objection. 1/

Given that CCL’s Objection cited on-point precedent that the grant of the waivers requested by the WRTM-FM Permit Application would be contrary to well-grounded Commission policy and would result in an adverse modification of CCL’s license to operate

1/ Oppositions to CCL’s Objection filed in this application proceeding were submitted by Commander, SSR Communications, Inc. (“SSR”) and Max One Communications, Inc. (collectively, the “Oppositions”).

WNSL(FM) without due process, and would prejudice a pending proceeding of general applicability, that is, MB Docket No. 18-184, 2/ CCL did not believe that a reply, which is optional under the Commission's pleading rules, would be necessary for the Commission to follow such precedent and deny the waivers of the WRTM-FM Permit Application. Nevertheless, there have been on-going statements submitted in MB Docket No. 18-184 on the WRTM-FM Permit Application waiver requests, and if that Application was granted, the consequences would be administratively burdensome to the Commission, as well as lacking due process for current broadcasters. Therefore, CCL is taking the opportunity at this time to file this Reply (which is permitted at any time) to the Oppositions.

As a refresher, it is noted that CCL's Objection laid out in detail that to act favorably on the WRTM-FM Permit Application, which its proponents admit "mirror[s] the technical facilities of a FM Class C4 authorization as proposed in a Petition for Rulemaking, filed by SSR Communications, Inc. on January 22, 2013 (RM-11727)," 3/ the Commission would be impermissibly prejudging the MB Docket 18-184 NOI proceeding. The bedrock principle not to prejudge rulemaking proceedings of general applicability by granting individual, premature waivers was stressed by the Audio Division decision cited by CCL in its Objection:

2/ See *In the Matter of Proposals for a New FM Radio Broadcast Class C4 and to Modify the Requirements for Designating Short-Spaced Assignments*, Notice of Inquiry, FCC 18-69, MB Docket No. 18-184 (rel. Jun. 5, 2018) (the "NOI").

3/ See Permit Application at Attachment 34; see also SSR Opposition to Informal Objection (WRTM-FM Permit Application is for "the equivalent of a FM Class C4 facility as a model for the Commission to evaluate while the overall proceeding was being contemplated").

the “SSR Application Dismissal.” 4/ The SSR Application Dismissal stopped an SSR attempt to impose involuntary Section 73.215 status on WFFX(FM), Hattiesburg, Mississippi, which is a CCL Class C0 station co-located with WNSL(FM), the CCL station at risk here. Specifically, with the SSR Application Dismissal, the Audio Division denied SSR’s requested waiver of Section 73.215(b)(2)(ii) against WFFX(FM), dismissing SSR’s modification application for WYAB(FM), Pocahontas, Mississippi, concluding:

Any change to the rule that affects the level or manner of protection of stations authorized under Section 73.207 must be made in the context of a notice and comment rulemaking proceeding....we cannot consider waiver requests that so directly affect the fundamental underpinnings of the rule section (like protection of the other station to some lesser standard, as SSR advocates). 5/

Yet, Commander in its Opposition ineffectively tries to distance the WRTM-FM Permit Application from the SSR Application Dismissal by asserting that the SSR Application Dismissal matter is a “completely unrelated application” with “different parties and different facts.” 6/ While it is the case that SSR was the applicant, for its licensed station WYAB(FM), involved in the SSR Application Dismissal, while SSR is *merely* the prime proponent (and presumed architect) of the WTRM-FM Permit Application, that is hardly a significant difference given that both proposals have sought the involuntary downgrading of a CCL station located on the same tower from a fully-spaced, fully-protected Section 73.207 station, to a contour-protected

4/ See Letter from Dale Bickel, Senior Engineer, Audio Division, Media Bureau, to Matthew Wesolowski, File No. BMPH-20150309AF, Facility ID No. 77646 (Jun. 25, 2015) (the “SSR Application Dismissal”) (copy attached at Attachment A to the CCL Objection and, for convenience, copy attached here at Attachment I).

5/ See *id.* at 4.

6/ See Commander Opposition at 1, 3.

Section 73.215 station by individual waiver rather than a general rulemaking. Indeed, Commander does admit that SSR's WYAB(FM) and Commander's WRTM-FM applications both requested waivers of Section 73.215, which Commander contends is "neither... particularly unusual or unprecedented." ^{7/}

Actually, waivers of Section 73.215(a) are highly unusual and rarely granted, with waivers of the spacing minimums of subsection (e) of Section 73.215 – as would be required for the WRTM-FM Permit Application ^{8/} – even more extraordinary. After the adoption of Section 73.215, the Commission explained in *Greater Media Radio Company, Inc.* ^{9/} that:

The Commission acknowledged in the contour protection reconsideration that waiver of the contour protection requirements under Section 73.215(a) may be appropriate in "a very small number of cases . . . to permit greater power in a short-spaced station's direction where it is demonstrated that such a facility is necessary to allow use of a multiplexed transmitting antenna and that its authorization would otherwise serve the public interest, for example, by allowing retention of existing service to an underserved area." ^{10/}

Greater Media Radio Company, Inc. further established that the high bar for prior waivers of Section 73.207 – including the demonstration of the unsuitability of the station's present site – would apply to waivers of Section 73.215(e)'s spacing requirements. ^{11/} The extremely rare, and perhaps singular, example of a Section 73.215(e) waiver is found in *R&S Media* (KBNH(FM),

^{7/} See *id.* at 3.

^{8/} See CCL Objection at 3 (establishing that grant of the WRTM-FM Permit Application would require also a waiver of the distance separation values of Section 73.215(e) with respect to WNSL(FM), assuming WNSL(FM) was involuntarily deemed a Section 73.215 station).

^{9/} 15 FCC Rcd 7090 (1999).

^{10/} *Id.* at ¶ 11 (citing *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, on reconsideration, 6 FCC Rcd 5356, 5360 n. 27 (1991)).

Homedale, Idaho), where the applicant had to demonstrate that the station's original site was no longer available, that suitable non-short-spaced sites were unavailable, that the selected site was the least short-spaced of all available sites, and that the waiver would be in the public interest.

12/ In the SSR Application Dismissal, the Audio Division highlighted the extraordinary circumstances of *R&S Media*, including that new service would be established in substantial "white space" areas containing no other FM radio service (amounting to 1/3 of the proposed new service area) as well as providing second service to "gray areas" that had only one current radio service. 13/

None of the *R&S Media* compelling public interest factors are asserted here:

WRTM-FM's current transmitter site certainly is available, as the WRTM-FM Permit Application specifies the same transmitter site; no showing of non-short spaced sites or that this site is the least short-spaced site has been made by WRTM-FM; and no white or gray population areas would obtain new service by the proposal, with the population gains to be only to well-served areas. As noted in the SSR Application Dismissal, "expansion of service alone has

[Footnote continued]

11/ *Id.* at ¶ 13.

12/ See *R&S Media*, Memorandum Opinion and Order and Order to Show Cause, 19 FCC Rcd 6300 (Med. Bur. 2004); *R & S Media*, Memorandum Opinion and Order, File Nos. BMPH-20000229ABO, BLH-20031229ABR (Med. Bur. rel. Feb. 14, 2005) (available under CDBS records for Facility ID No. 87812). *R&S Media* also established that, before the Commission could grant a station's application with waivers of Sections 73.215(a) and (e), that the impacted station must first be afforded an opportunity to respond to a Section 316 order to show cause. See 19 FCC Rcd at 6306-07 [¶¶19-20]. As noted by CCL in its Objection, clearly, **here also the Commission would need to provide CCL with a Section 316 opportunity to be heard before taking action to diminish the WNSL(FM) protected contour by grant of the WRTM-FM Permit Application.**

long been regarded by the Commission as an insufficient basis for waiver of interference prohibitions.” ^{14/}

WNSL(FM) here, like WFFX(FM) in the SSR Application Dismissal proceeding, “has not given up any right to be protected to the reference maximum facilities for the station’s class (C0)” and until the targeted station “formally gives up its rights under Section 73.207 (by licensing itself under the contour protection rule, Section 73.215), all other stations are required to protect it under Section 73.207 or Section 73.215.” ^{15/} In sum, the Audio Division found in the SSR Application Dismissal that “maintaining strict adherence to rule section 73.215 serves the public interest better than SSR’s proposal, in that it preserves intact WFFX’s [the Section 73.207 station] current future ability to upgrade that station’s facilities.” ^{16/}

No matter Commander’s protestations of “unrelated applications” and “different parties and different facts,” the value of caselaw precedent is that the precedent’s statement of *governing principles* applies to similarly situated, but not necessarily identical, circumstances and parties, and to be controlling, does not, of course, require the stations or the parties to be the same, nor every factor to be identical. The only discernable, yet immaterial, differences between the two matters is: (1) now there is an NOI proceeding, versus a pending petition for rulemaking, that the station is anxious to preempt; and (2) a somewhat larger population would be served by

[Footnote continued]

^{13/} See SSR Application Dismissal at 4.

^{14/} See *id.* at 3 (citing *Stoner Broadcasting System, Inc.*, 49 FCC 3d 1011, 1012 (1974)).

^{15/} See *id.*

^{16/} *Id.* at 4.

this modification, albeit likewise to an already well-served area without a compelling need. The bottom line is that the circumstances of significance beneath the SSR Application Dismissal are uncannily similar to those presented by the WRTM-FM Permit Application, and the governing principles requiring dismissal are equally appropriate.

Interim Commission-imposed processing policies that are applicable across the board are not completely unprecedented, but are distinguishable from a waiver that would give special treatment for one party. When interim action was necessary for the Commission to “keep the trains moving” for the constant torrent of radio assignment and transfer applications, the Commission did, in a rare act, adopt interim radio ownership guidelines, stating:

At the same time, we are mindful of the concern that our policy not expressly or implicitly prejudice, or be viewed as prejudging, our ultimate decision in this proceeding. In that regard, we believe that any fundamental changes we make to our policy and procedures governing radio station combinations should be the result of the record in this rulemaking proceeding, and should not be implemented as an interim measure. 17/

The primary justification asserted in the Oppositions justifying grant of the WRTM-FM Permit Application is that an FCC “staffer suggested it would be helpful for a single station to file for the equivalent of a FM Class C4 facility as a model for the Commission to evaluate while the overall proceeding was being contemplated. Commander’s WRTM-FM is this model station.” 18/ CCL was not present at such meeting and therefore cannot ascertain whether the portrayal of this staff suggestion is accurate, but even taking it at face value, seeing a

17/ See *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets*, Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, FCC 01-329, at ¶ 84(rel. Nov. 9, 2001).

concrete example of how a station might obtain the still-theoretical Class C4 status does not mean the Commission should actually *grant* an unprecedented waiver while the theory is still under evaluation. Keeping the example merely theoretical is even more necessary here, where the requested Class C4 status would require the involuntary Section 73.215 designation of a licensed station, thereby downgrading its authorization and requiring Section 316 proceedings, as would be the case for WNSL(FM).

REC Networks, in its Informal Objection to the precursor to the current WRTM-FM Permit Application, 19/ observed:

[I]f the FCC grants these facilities either through waiver or through STA, it is creating a culture where any proposed service (including the upgrade of LPFM stations to 250 watts) could be achievable through a waiver or STA process even in the absence of a natural disaster. Is this the road we want to go down? ...While we can understand why this waiver request was filed, it appears to be an attempt to ‘jump the gun’ and waive the rules to create a new service class without the full due process of a rulemaking proceeding. We note that at this time, the proposed Class C4 and §73.215 are merely in a *Notice of Inquiry* and not in a *Notice of Proposed Rulemaking*. There is currently not even an expectation that the Commission will even forward either of these proposals to an NPRM. 20/

[Footnote continued]

18/ See SSR Opposition to Informal Objection at 1; *see also* Commander Opposition to Informal Objection at 2.

19/ See REC Networks Informal Objection to WRTM-FM Modification Application, File No. BMPH-20180621AAK (June 24, 2018) (“REC Networks Objection”) (copy at Attachment II hereto). As explained at footnote 1 to CCL’s Objection, REC Networks filed an Informal Objection against Commander’s application for the modification of WRTM-FM’s outstanding construction permit, File No. BMPH-20180621AAK, which was dismissed for having been filed without a fee; that first modification application opposed by REC Networks specified the same facilities and submitted the same waiver request as the instant WRTM-FM Permit Application, and consequently REC Network’s objections apply equally here.

20/ See REC Networks Objection at 4.

The involuntary Section 73.215 status-change to WNSL(FM) and waiver of the Section 73.215(e) minimum distances required for action on the WRTM-FM Permit Application are just the sort of fundamental change to the Commission’s policy and procedures for FM band interference and spacing protections that must await the Commission’s record-based and deliberative conclusions in MB Docket No. 18-184. It remains the case that the involuntary Section 73.215 designation being sought by SSR and Commander for CCL’s WNSL(FM) by grant of the WRTM-FM Permit Application is a highly controversial aspect of the MB Docket No. 18-184 NOI proceeding. 21/ The Commission should not rush into creating waiver precedent here without thoroughly considering the record in the NOI proceeding that cautions against eviscerating Section 73.215 protections.

The WRTM-FM Permit Application seeks via waivers the pre-judgement of theoretical rule changes of general applicability with no unique, compelling public interest factors. As explained in the SSR Application Dismissal, “[t]he Communications Act does not require the Commission to grant applications favoring the narrow interest [of] one party.” 22/ As was the case for the SSR Application Dismissal matter, the Audio Division should here deny

21/ See, e.g., MB Docket No. 18-184: Comments of iHeartCommunications, Inc. on Notice of Inquiry (“the record is already well developed that ... the involuntary designation as Section 73.215 facilities of under-class maximum facilities FM stations – would be deleterious to the public interest”) (Aug. 13, 2018); National Association of Broadcasters Ex Parte Letter (presentation by officers of Beasley Media Group, Jackson Works, Inc., Tri State Communications, Inc., Cox Media Group and NAB: the forced reclassification of another station under Section 73.215 “would cause more additional congestion on the already crowded FM band, and increase the risk of interference among services” and “would unjustly hamper FM stations from subsequently improving their facilities or responding to changing technical, demographic and other conditions”) (Dec. 21, 2018). Note that CCL will also file concurrently a copy of this Reply in the MB Docket No. 18-184 proceeding via ECFS.

Commander's premature and insufficiently justified Section 73.215 rule waiver request and dismiss the WRTM-FM Permit Application.

Respectfully submitted,

CC LICENSES, LLC

By:



Marissa G. Repp

REPP LAW FIRM

1629 K Street, NW, Suite 300
Washington, DC 20006-1631
(202) 656-1619
marissa@repplawfirm.com

Its Attorney

July 30, 2019

[Footnote continued]

22/ See SSR Application Dismissal at 4.

ATTACHMENT I

Letter from Dale Bickel, Senior Engineer, Audio Division, Media Bureau,
to Matthew Wesolowski, WYAB(FM), Pocahontas, Mississippi,
Facility ID No. 77646, File No. BMPH-20150309AF, June 25, 2015
(the “SSR Application Dismissal”)

FEDERAL COMMUNICATIONS COMMISSION

**445 12th Street SW
WASHINGTON DC 20554**

June 25, 2015

Mr. Matthew Wesolowski
c/o SSR Communications, Inc. / WYAB
740 Highway 49, Suite R
Flora, MS 39071

In re: WYAB (FM); Pocahontas, MS
SSR Communications, Inc.
Facility ID No. 77646
CP application BMPH-20150309AFP

Dear Mr. Wesolowski:

This letter refers to the minor change construction permit application you filed on March 9, 2015 on behalf of SSR Communications, Inc. (:SSR") for station WYAB, Pocahontas, MS. The application proposes to change the presently authorized nondirectional WYAB parameters of 5.0 kW effective radiated power (ERP) at 99 meters antenna height above average terrain (HAAT), to maximum Class A facilities of 6.0 kW ERP / 100 meters HAAT, without a transmitter site change.¹

The WYAB transmitter site does not meet the minimum distance separation of 152 km required by Section 73.207 of the Commission's rules, being only 150.2 km distant from first-adjacent channel, Class C0 station WFFX, Hattiesburg, MS. Therefore, the current proposal requests processing under the provisions of the contour protection rule, Section 73.215. But because the proposal would create prohibited contour overlap, under strict application of that rule, a waiver of Section 73.215(b)(2)(ii) is requested.² More exactly, SSR seeks waiver to be allowed to contour protect WFFX based on that station's currently licensed parameters of 100 kW ERP/324 meters HAAT and not the Class C0 reference facilities of 100 kW ERP/450 meters HAAT as mandated by Section 73.215(b)(2)(ii).

Summary of the Waiver Request. SSR believes it has compelling grounds for waiver. SSR states that it has long been unable to upgrade to maximum Class A facilities because Section 73.215 requires WFFX to be considered as if it were operating with unrealistic hypothetical facilities. Class C0 reference facilities of 100 kW ERP/450 meters HAAT for WFFX do not exist, and while WFFX has had two recent opportunities to implement such facilities, it has not done so. SSR believes that the Commission should take WFFX's inaction into account when considering WYAB's situation. SSR conducted a survey of 130 stations that had filed for and then been unable to construct maximum class facilities, and only found five instances where a licensee had not constructed maximum facilities twice, WFFX being one of those. SSR opines that WFFX would be the only station in the country that could be affected by a waiver of the type sought here. SSR argues that, under the Communications Act, there is no legal requirement for the Commission to "provide additional protections to a licensee beyond the terms of its

¹ WYAB is licensed with 5.0 kW ERP/99 meters HAAT at Flora, MS under the contour protection rules of Section 73.215. The station holds construction permit BPH-20140826ACE for a change in community of license to Pocahontas, MS with no changes to the licensed station facilities, and there is no impediment to WYAB immediately filing a covering license application on FCC Form 302-FM for the community change. This modification application does not change that conclusion.

² The proposed 60 dBu contour would overlap the 54 dBu interfering contour of WFFX, assuming WFFX to operate with reference Class C0 facilities of 100 kW ERP/449 meters HAAT, as required by the rule. Currently these contours are tangent.

license.” And SSR contends that the Commission has granted waivers of Section 73.215 in the past, citing specifically *R&S Media / KBNH (FM)*.³ SSR acknowledges that other requests for waiver of the provisions of Section 73.215 have been denied but suggests that the denials were due to the waiver requests not being sufficiently compelling to merit grant.

SSR advises that, if the waiver is granted, it could “within mere hours” effect the power increase through WYAB’s omnidirectional antenna and expand service by 5.0% population (14,930 persons) and 9.77% in area (from 2,285.2 sq. km to 2508.4 sq. km).

Discussion. The Commission created the minimum distance separation limits in Section 73.207 in 1962, assigning each station class a fixed spacing requirement in Section 73.207 that was based on a reference ERP/HAAT maximum established for that class. The Commission recognized that many stations might not be able to implement maximum class facilities immediately but concluded that the “provision of opportunity for expansion” was preferable to limiting station protection to lesser parameters.⁴ Significantly for the present discussion, the Commission set no time requirements and no limit on the number of attempts a station might take to achieve maximum facilities for the station class. This means that any station authorized under Section 73.207 remains entitled to protection to the reference maximum facilities permitted for the station class by operation of the spacing rules.

In 1989, the Commission adopted the rules in Section 73.215 to afford FM stations more opportunities to locate at transmitter sites spaced less than the separations required by Section 73.207.⁵ The Commission ensured that any station authorized under Section 73.207 would remain protected with that station’s ability to improve facilities at its transmitter site unimpaired, and it did so by requiring protection to the reference maximum facilities already established for the protected station’s class.⁶ It is clear from a reading of that proceeding (MM Docket 87-121) that no FM station is compelled to be licensed under Section 73.215 and to accept a limitation of service, but a station may *voluntarily* invoke Section 73.215 contour protection in exchange for the benefits that the use of a short-spaced site could confer. The voluntary aspect is emphasized by the fact that any licensee seeking to utilize Section 73.215 must clearly request such processing in its construction permit application.

³ *R&S Media/ KBNH (FM), Homedale, ID*, DA 04-960, 19 FCC Rcd 6300 (2004).

⁴ *Revision of FM Broadcast Rules, Particularly as to Technical and Allocation Standards*, First Report and Order, Docket 14185, FCC 62-866 (1962).

⁵ *Short-Spaced FM Station Assignments by Using Directional Antennas*, Report and Order, MM Docket 87-121, FCC 88-406, 4 FCC Rcd 1681 (1989); *reconsiderations granted in part and denied in part*, FCC 91-273, 6 FCC Rcd 5356 (1991).

⁶ *Short-Spaced FM Station Assignments by Using Directional Antennas*, Report and Order, MM Docket 87-121, FCC 88-406, 4 FCC Rcd 1681 (1989) at paragraph 42.

Against this historical background, as applied to the present application, two facts become apparent. First, the record shows that WFFX has not given up any right to be protected to the reference maximum facilities for the station's class (C0), no matter how many attempts it might have taken toward that goal or what lesser facilities it might have proposed in the meantime.⁷ Until WFFX formally gives up its rights under Section 73.207 (by licensing itself under the contour protection rule, Section 73.215), all other stations are required to protect it under Section 73.207 or Section 73.215. SSR and WYAB have no leverage to assign a different level of protection to WFFX.

Second, SSR has previously, repeatedly, and voluntarily accepted without complaint less-than-maximum Section 73.215 facilities for WYAB that do protect the reference maximum facilities of WFFX, in exchange for the benefit of short-spaced transmitter sites that do not comply with the spacing limits of Section 73.207 (including the current and proposed transmitter site).⁸ That tradeoff clearly suited SSR's business interest at the time, even if SSR privately dreamed of different station parameters. SSR cannot voluntarily accept the terms and conditions of a technical rule section, and then later complain of unfair treatment because continued adherence to that rule frustrates its desires. The use of Section 73.215 was SSR's private business decision, and such business decisions do not support waiver of a technical rule.

It is readily apparent that SSR's sole motivation in seeking waiver is the comparatively small population and area gains WYAB would benefit from by grant of the requested waiver.⁹ However, expansion of service alone has long been regarded by the Commission as an insufficient basis for waiver of interference prohibitions.¹⁰ We conclude that WYAB could obtain much of the same area and population gains through the use of a mild directional antenna, and maintain compliance with the rule.¹¹ We encourage SSR to do so.

⁷ SSR's review of 130 stations is based on the erroneous premise that a station authorized under Section 73.207 has a limited number of opportunities (here apparently one or two) to achieve maximum station facilities for the station class. SSR's survey is therefore of no value in support of SSR's waiver request.

In addition, SSR establishes that WFFX may be able to increase facilities in the future, by virtue of the fact that the FAA cleared a maximum acceptable tower height of 1,166 feet AGL for that station. WFFX's present tower height is said to be 1,000 feet.

⁸ Until January 2009, WYAB was licensed as a maximum Class A station under Section 73.215 with 6 kW ERP/100 meters HAAT (see license BLH-20080829AAS). WYAB was granted construction permit BPH-20090915AAQ for a new transmitter site specifying 6.0 kW ERP/88 meters HAAT on November 5, 2009; that facility was licensed February 10, 2009 (license BLH-20090129AOI). WYAB then was granted construction permit BMPH-20100505ANP to move to the present site, that facility, with parameters of 5.0 kW ERP/99 meters HAAT and employing Section 73.215, was licensed October 13, 2010 (license BLH-20100913ADJ). And finally, WYAB was granted construction permit BPH-20140826ACE on December 18, 2014 to change community of license only, all other parameters remaining as licensed. None of these voluntary minor change construction permit applications sought waiver of Section 73.215.

⁹ The prohibited contour overlap lies to the southeast of Jackson, MS. However, Jackson is not WYAB's community of license.

¹⁰ See, e.g., *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 3d 1011, 1012 (1974).

¹¹ We recognize that the fabrication and installation of a directional antenna would increase the cost to SSR, however, economic considerations are not taken into account when evaluating waivers of technical rules. SSR has not considered the possibility of a directional antenna in its waiver request, but given the small degree of protection required to comply with the rule, arguments against directional antenna use are not likely to be persuasive.

Staff calculations suggest that, by using a directional antenna, WYAB can achieve 92% of its proposed gain area and 42% of its proposed population gain, while maintaining compliance with Section 73.215.

The Section 73.215 requirements that require WYAB to protect WFFX as if the latter station were operating with “hypothetical” Class C0 reference facilities of 100 kW ERP/449 meters HAAT were adopted through a notice and comment rulemaking (MM Docket 87-121). The lack of prohibited contour overlap (or interference) that would be caused by a grant of WYAB’s waiver request is also a known result of the adopted rule.¹² These provisions are applied equally to all applications seeking use of contour protection for commercial FM stations. Any change to the rule that affects the level or manner of protection of stations authorized under Section 73.207 must be made in the context of a notice and comment rulemaking proceeding. SSR anticipates this conclusion through comments that it has participated in the filing of two petitions for rulemaking seeking revisions to Section 73.215 but that neither has ever advanced to the Notice of Proposed Rulemaking stage. We will not speculate on why the proposals have not moved forward, but we cannot consider waiver requests that so directly affect the fundamental underpinnings of the rule section (like protection of the other station to some lesser standard, as SSR advocates).

The sole apposite waiver precedent cited by SSR fails to support SSR’s waiver request, contrary to SSR’s contention, beyond the fact that that the case also involves rule section 73.215.¹³ Of primary interest in *R&S Media/ KBNH (FM), Homedale, ID* were considerations of second-adjacent channel prohibited contour overlap, new service to be established in substantial “white space” areas (containing no other FM radio service) and amounting to 1/3 of the proposed new service area, additional “gray area” (one current service) to receive a second service from that new station, and a demonstrated lack of other suitable sites to operate from even with lesser facilities. None of these factors is present in the present WYAB application.¹⁴ Compared against *R&S Media/ KBNH (FM)*, SSR’s proposal demonstrates no compelling aspects at all. SSR has not cited any cases involving similarly situated applicants.

Lastly, we come to SSR’s appeal to the Communications Act, in support of SSR’s contention that the Commission has the authority to grant SSR’s request. The Communications Act does not require the Commission to grant applications favoring the narrow interests on one party. Indeed, the Commission is bound by law and precedent to provide a fair distribution of radio service across the country, and it does so through in part through the FM commercial spacing and contour protection rules (Section 73.207 and Section 73.215, respectively). While the public interest is a factor to be considered in reviewing rulemakings and applications, the Commission’s perception of the public interest may differ materially from that of an applicant. In the present instance, and having considered all relevant factors, we find that that the proposal is neither unique nor compelling, and that maintaining strict adherence to rule section 73.215 serves the public interest better than SSR’s proposal, in that it preserves intact WFFX’s current future ability to upgrade that station’s facilities.

¹² Section 73.215 was specifically designed so that neither station could cause interference to the opposite station, no matter which station requested the use of contour protection. In the case of cochannel or first-adjacent channel nondirectional stations over uniform terrain, the smaller class station (here Class A) will nearly always receive prohibited contour overlap from the interfering contour of the maximum reference facilities of the protected station before the smaller station causes prohibited contour overlap to the larger station. This occurs by operation of the rule and is not unique to WYAB; it occurs nationwide. The same phenomenon can also be observed for noncommercial educational stations using contour protection under Section 73.509 of the Commission’s rules.

¹³ SSR cites to *Maricopa Community College District: Request for Experimental Authority to Relax Standards for Public Radio Underwriting Requirements*, DA 14-1661, 29 FCC Rcd 5180 (2014); *application for review denied*, FCC 14-187, 29 FCC Rcd 15042 (2014), as offering support of its application and waiver request. That matter did not involve a waiver request of any technical rule, and focused only on an issue (underwriting) that only affects noncommercial educational stations’ programming. *Maricopa* is irrelevant to the present application.

¹⁴ *Supra.* at Fn 3, *see also* the *MO&O*, released February 14, 2005 (http://licensing.fcc.gov/cgi-bin/prod/cdb/forms/prod/getimportletter_exh.cgi?import_letter_id=8486).

Conclusion. Based on the foregoing, SSR's request for waiver of Section 73.215(b)(2)(ii) IS DENIED, and application BPH-20150309AFP IS DISMISSED.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dale Bickel". The signature is written in a cursive, slightly slanted style.

Dale Bickel
Senior Engineer
Audio Division
Media Bureau

ATTACHMENT II

REC Networks Informal Objection to WRTM-FM Modification Application,
File No. BMPH-20180621AAK (June 24, 2018)



REC Networks / REC ネットワーク
J1 Radio/J1 ラジオ
11541 Riverton Wharf Rd
Mardela Springs, MD 21837
+1 202 621-2355
<http://www.recnet.com>
<http://www.J1FM.tokyo>

Michelle ("Michi") Bradley
太田道子
Founder of REC/Director of J1 Radio
REC 代表取締役
J1 ラジオ ディレクター
Tokyo: 03(4510)2365
mae@recnet.com

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St SW
Washington, DC 20554

In the matter of:

Commander Communications Corporation
FM Broadcast Class C4 & §74.215 Changes

Informal Objection
Ex parte letter

BMPH-20180621AAK
MB Docket 18-184
RM-11727

June 24, 2018

Dear Ms. Dortch:

On behalf of REC Networks (REC), I am making this statement for the record regarding the June 21, 2018 amendment to the above captioned broadcast construction permit modification application.¹ In that application, Commander Communications Corporation (CCC) is proposing to operate station WRTM-FM at 12 kW at 100 meters above average terrain from their currently authorized site (Commander Application) and requesting waivers in anticipation of the C4 service class proposed in MB Docket 18-184. In CDBS, this facility has been specified as a Class C3.

As a Class C3 station, WRTM-FM would be short-spaced to WNSL, Laurel, MS (BMLH-20060918AHV) where the station is located 141.7 km from. This comes short of the 163 km spacing that is required under §73.207 or 152 km under §73.215 of the Commission's Rules.² WRTM-FM is also short-spaced to WDMS, Greenville, MS, where WRTM-FM is 133.7 km away and must be 144 km under §73.207 of the Commission's Rules.³

¹ - This filing of this letter on the broadcast modification application should be considered an *Informal Objection* and filed in accordance with §73.3587 of the Commission's Rules.

² - See §73.207(b)(1) and §73.215(e).

³ - See Id.

Normally, a proposal like this would be dismissed as defective due to the short-spacing.⁴ After a telephone consultation last Friday with Matt Wesolowski of SSR Communications (SSR) and also based on previous *ex parte* presentations made by SSR, the author of RM—11727, which was used to produce the Commission’s *Notice of Inquiry* in MB Docket 18-184.⁵ It appears that this application is a “test case” for a waiver process that was discussed in the various meetings SSR had with Commission staff.⁶

At this time, REC is not prepared to make any comments or opinions about the overall nature of the *Notice of Inquiry*, but we will reserve our right to do so prior to the to-be-announced comment and reply comment filing deadlines. We will note that in REC’s comments in RM-11727, we have advocated for the minimum distance separation between LPFM stations and the proposed Class C4 stations to be the same values in §73.807(a) as the values for LPFM stations for Class A full-service stations on co- and first-adjacent channels.⁷ REC and SSR have reached a mutual agreement to support this change. This means that while an upgrade from Class A to Class C4 could cause increased noise floor to an LPFM in some cases, it will not cause a situation where an LPFM station is suddenly short-spaced at their current location thus restricting moves where a move may still be feasible.

REC’s concern is regarding the use of Class C3 in CDBS for this proposed facility. It is our understanding that CDBS is equipped with edits that prohibit a Class A station from requesting more than 6 kW effective radiated power (ERP). Therefore, in order to clear the edit, the user has to select Class C3.

For LPFM stations, §73.807(a) specifies that LPFM stations will protect Class A licensed facilities, pending applications and allotments out to 67 km for co-channel and 56 km for first-adjacent channel. For protection to Class C3 stations, the rule specifies 78 km for co-channel and 67 km for first-adjacent channel.⁸ This means that a pending application for an upgrade from a Class A to Class C3 will add an additional 11 km of separation required. We note that there may be LPFM stations within that 11 km zone between the Class A and C3 limits will now be short-spaced nor can any LPFM station needing to move would be able to specify facilities that are short-spaced to a Class C3 station even though they would be properly spaced to a

⁴ - See §73.3566(a).

⁵ - We note that to assure that *ex parte* rules are being met, REC will be placing a copy of this letter in MB Docket 18-184 and RM-11727. In addition, a copy of this pleading will be sent to SSR via e-mail under a previously-reached agreement between SSR and REC.

⁶ - See *Notice of MB 18-184 / RM-11727 Ex-Parte Presentation*, SSR Communications, Inc., MB Docket 18-184. (Received: June 20, 2018). (“SSR ex-parte”)

⁷ - See RM-11727, *Comments of REC Networks*, pages 7 and 8.

⁸ - See 47 C.F.R. §73.807(a).

Class A facility.⁹ We note that for WRTM-FM, there are two LPFM stations (WVMK-LP and WDON-LP) that are within that zone (between 67 and 78 km from WRTM-FM).

REC is aware that this may be just a “test case” and that SSR has no intentions of filing any more of these applications. We are afraid that others may copy the points in their pleading and file applications on their own station, especially since this is only a *Notice of Inquiry* and not a *Notice of Proposed Rulemaking*.¹⁰ It is our understanding that this application will never be granted as a C3 however, being in the database as a C3 keeps a radius of 11 km of spectrum which could preclude LPFM stations from making some modifications where such a modification was possible with a co-channel or first-adjacent channel Class A station.

On page 2 of the instant waiver request, we do note that CCC states that “these gains can be achieved without *impacting* the primary service area of any neighboring full power or secondary station (i.e. no LPFM or translator station will be affected)” (*emphasis added*). In an attempt to demonstrate that, the applicant provides a contour map showing the protected contour of the full-service station versus the interfering contour of FM translator W262DE, Yazoo City, MS. What CCC did not show was the *impact* of this proposed upgrade to that translator. Currently, as a 6 kW Class-A facility, WRTM-FM does place a 54 dBu interfering contour over a portion of the 60 dBu service contour of W262DE affecting 675 persons. With the short-spaced waiver facilities being requested, the interfering contour over W262DE will increase in size to impact 16,655 persons. While this may not directly result in a displacement, these short-spaced facilities would definitely *impact* that translator by introducing new interference to over 16,000 potential listeners by a facility that is short-spaced under the current rules.

Overall, we are not as much concerned about this specific application as we would be of any potential copycat applicants filed by other licensees seeking an upgrade utilizing a similar waiver request, especially if there may be as long as a two-year period from NOI to NPRM to *Report and Order (R&O)*. Therefore, REC is asking for the following in this and any other future proceedings involving similar requests for a waiver in advance of MB Docket 18-184: All applications that were filed under the type of waiver request presented in the instant case, despite their short-spacings were issued as a Class C3 facility be considered for the purposes of §73.807(a) of the rules as a Class A station.

Therefore, in order to assure that these applications, which specify Class C3 facilities but do not meet the §73.207 or §73.215 minimum distance separation requirements for Class C3 and any kind of a grant that may take place prior to the adoption of rules in MB Docket 18-184,

⁹ - See *Id.* (“LPFM modification applications must either meet the distance separations [...] or if short-spaced, not lessen the spacing to subsequently authorized stations.”)

¹⁰ - When the original rules for §73.215 were first discussed, it started as a *Notice of Inquiry* released on May 26, 1987. See 2 FCC Rcd 3141. It would not go to NPRM until March 30, 1988, see 3 FCC Rcd 1820. The *Report and Order* would not get adopted until February 22, 1989, see 4 FCC Rcd 1681. A process of nearly two years.

REC is asking that for pending applications (including dismissed applications pending finality), that these proposed facilities be considered as Class A in respect to the LPFM station spacing requirements of §73.807(a) of the Commission's Rules. In the event that the Commission grants a construction permit or license application based on this waiver prior to the adoption of a *Report and Order* in MB Docket 18-184, REC is requesting that all permits and licenses carry a condition which states:

IN RESPECT TO THE DISTANCE SEPARATION REQUIREMENTS OF FULL-SERVICE FM STATIONS BY LOW POWER FM STATIONS IN ACCORDANCE WITH §73.807(A), THIS FACILITY IS TO BE PROTECTED AS A CLASS A FULL-SERVICE FM FACILITY. IF, FOLLOWING A REPORT AND ORDER IN MB DOCKET 18-184, THAT A NEW C4 STATION CLASS IS CREATED, THIS FACILITY IS TO BE PROTECTED AS A CLASS C4 FULL-SERVICE FM FACILITY.

What that too, if the Commission decides to even consider these waivers long before we have an actual rule in place for §73.215 or Class C4, then perhaps the proper forum for this kind of a change should not be a waiver request but instead through Special Temporary Authority (STA). We do ask though that any gain area outside the licensed facility be considered "secondary" and can only be granted in cases where the proposed facility does not create or increase interfering contour overlap with any authorized primary or "co-secondary" station including LPFM and FM translators. We also note that if the FCC grants these facilities either through waiver or through STA, it is creating a culture where any proposed service (including the upgrade of LPFM stations to 250 watts) could be achievable through a waiver or STA process even in the absence of a natural disaster. Is this the road we want to go down?

REC is concerned that during this proceeding, that this type of waiver request will be used to intentionally or unintentionally warehouse spectrum and preclude LPFM modification opportunities as a result of *prima facie* cases of defective applications caused by a Commission system (CDBS) limitation. Honoring these proposed facilities as Class A instead of Class C3 during the pendency of the underlying proceeding will assure that LPFM opportunities are not precluded due to distance separation. An objective of Class C4 that both REC and SSR agree on. In the alternate, we ask the Audio Division staff to dismiss any additional applications that are filed outside of the coordination with SSR in connection with the waiver concept introduced in their in-person and telephonic meetings with Commission Staff on June 18 and 20, 2018.¹¹

While we can understand why this waiver request was filed, it appears to be an attempt to "jump the gun" and waive the rules to create a new service class without the full due process of a rulemaking proceeding. We note that at this time, the proposed Class C4 and §73.215 are merely in a *Notice of Inquiry* and not in a *Notice of Proposed Rulemaking*. There is currently not even an expectation that the Commission will even forward either of these proposals to an NPRM.

¹¹ - Id.

Waiver requests face a high hurdle, even at the starting gate but we do acknowledge that all waiver requests should be given a hard look.¹² We have seen cases where the Commission has granted power levels beyond that of their authorized service class such as in *Hancock County Amateur Radio Association, Inc.* (WQRZ-LP) and *Wimberley Valley Radio* (KVVH-LP) where special temporary authority was granted due to natural disasters such as was the case for WQRZ-LP, where it was the only signal on the air in the area during Hurricane Katrina. Historically, grants of increased power have been given to AM broadcast stations facing interference from Cuba.¹³ While this waiver would help some listeners receive more reliable FM service, it would also be a detriment to listeners who currently rely on secondary FM translators that would be impacted by the grant of this waiver. As a side benefit to CCC, this will help them economically as they would have a stronger presence in the Jackson, MS Urbanized Area, a purely economic reason. This is a far cry from a hurricane, wildfire or interference from a foreign government.

REC has demonstrated that in this instant waiver request, this “experimental” short-spaced facility would cause increased interference to an FM translator.¹⁴ It is only appropriate that the *Notice of Inquiry* and any subsequent *Notice of Proposed Rulemaking* be first carried out and we have a full and complete record. This way, all parties interested in this proceeding will have due process and an opportunity to comment.

Therefore, we must oppose this waiver request and insist that any other attempts for waivers or STAs citing the pendency of Class C4 or the proposed changes to §73.215 must continue to recognize the facility as Class A throughout the pendency of the application and until after the time when the dismissal is finalized and if a grant was to take place, that facility continue to be regarded as a Class A facility in respect to LPFM stations.

Respectfully submitted,
/S/
Michelle Bradley
Founder
REC Networks

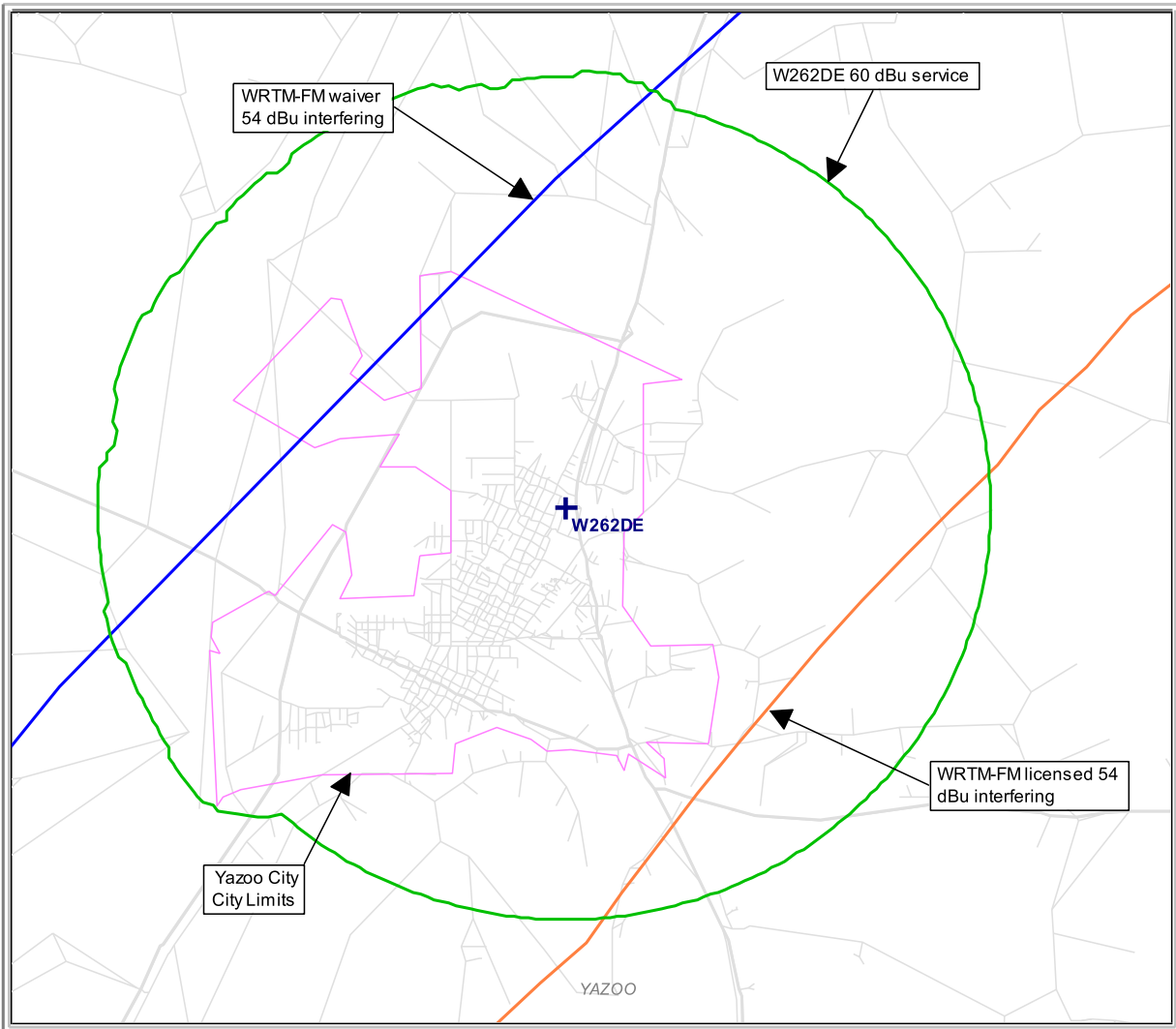
CC: Applicant (served via e-mail).

¹² - See *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F. 2d 1203 (1972), *cert. denied*, 93 S. Ct. 461 (1972). See also *Thomas Radio v. FCC*, 716 F. 2d 921, 924 (D.C. Cir. 1983).

¹³ - See *Lincoln Financial Media Company of Florida*, Special Temporary Authority, letter from Charles N. Miller, Engineer, Audio Division, Media Bureau. (Facility ID # 30837, December 27, 2011) (Permits a power increase from 5 kW to 25 kW due to station WAXY receiving interference from a cochannel Cuban station. Originally granted on December 23, 1981.)

¹⁴ - If the higher-powered operation was considered an “experimental” operation, it would result in objectional interference to the regular program transmissions of a broadcast station, in this case, W262DE. See 47 C.F.R. §5.205(b)

WRTM-FM impacts to W262DE Yazoo City, MS



R E C NETWORKS
CHANNEL REPORT

NAD27 LATITUDE: 32 - 31' 19.5" - LONGITUDE: 90 - 04' 35.7"
CHANNEL: 263 - CLASS: C3_215

CHAN	FREQ	CALL	LOCATION	CLS	DIST	REQ	CLEAR	BEAR
260	99.9	WSMS : CUMULUS LICENSING LLC	ARTESIA	MS C2	185.0	50.0	135.0	46.7
260	99.9	KGPQ : PINES BROADCASTING, INC.	MONTICELLO	AR C3	210.5	37.0	173.5	310.1
260	99.9	KTDY : TOWNSQUARE MEDIA OF LAFAYETTE, LLC	LAFAYETTE	LA C	303.9	90.0	213.9	212.4
260	99.9	WMXC : CC LICENSES, LLC, AS DEBTOR IN POSSESSION	MOBILE	AL C	294.5	90.0	204.5	133.2
261	100.1	WQXB : THE RAYANNA CORP.	GRENADA	MS C2	148.7	50.0	98.7	5.5
261	100.1	WIWT-LP : CHURCH IN JACKSON, INC.	JACKSON	MS L1	17.1	0.0	17.1	203.9
262	100.3	WNSL : CC LICENSES, LLC, AS DEBTOR IN POSSESSION	LAUREL	MS C0	141.7	152.0	-10.3	141.0
262	100.3	WVMK-LP : VICKSBURGS VOICE FOR EDUCATION AND HEALTH	VICKSBURG	MS L1	76.7	0.0	76.7	254.6
262	100.3	W262DE : ZOO-BEL BROADCASTING LLC	YAZOO CITY	MS D2	48.6	0.0	48.6	322.2
263	100.5	WBLE : BATESVILLE BROADCASTING CO., INC.	BATESVILLE	MS C2	208.0	166.0	42.0	7.8
263	100.5	WRTM-FM : COMMANDER COMMUNICATIONS CORPORATION	SHARON	MS A	0.0	119.0	-119.0	334.1
263	100.5	WRTM-FM : COMMANDER COMMUNICATIONS CORPORATION	SHARON	MS A	0.0	119.0	-119.0	334.1
263	100.5	WJQX : RADIO LICENSE HOLDING CBC, LLC	HELENA	AL C1	271.8	200.0	71.8	75.6
263	100.5	WRTM-FM : COMMANDER COMMUNICATIONS CORPORATION	SHARON	MS C3	0.0	142.0	-142.0	334.1
264	100.7	WDMS : HIGH PLAINS RADIO NETWORK, LLC	GREENVILLE	MS C1	133.7	133.0	0.7	318.6
265	100.9	WJXN-FM : FLINN BROADCASTING CORPORATION	UTICA	MS C2	57.6	50.0	7.6	205.4
266	101.1	WLIN-FM : BOSWELL MEDIA, LLC	DURANT	MS A	74.7	36.0	38.7	36.1
266	101.1	WWUU : FIRST NATCHEZ RADIO GROUP INC	WASHINGTON	MS A	163.4	36.0	127.4	229.2

ATTACHMENT II

REC Networks Informal Objection to WRTM-FM Modification Application,
File No. BMPH-20180621AAK (June 24, 2018)

CERTIFICATE OF SERVICE

I, Marissa G. Repp, do hereby certify that a copy of the foregoing Reply to Oppositions is being sent via first-class, U.S. Mail, postage prepaid, and additionally as a courtesy by e-mail, this 30th day of July, 2019, to the following:

Commander Communications Corp.
P.O. Box 31235
Jackson, MS 39286-1235
Attention: Carl Haynes
and e-mail at radioair@bellsouth.net
Licensee of WRTM-FM, Sharon, Mississippi

High Plains Radio Network, LLC
3218 Quincy Street
Plainview, TX 79072
Attention: Monte Spearman
and e-mail at monte@hprnetwork.com
Licensee of WDMS(FM), Greenville, Mississippi

Michelle Bradley
REC Networks
11541 Riverton Wharf Road
Mardela Springs, MD 21837
and e-mail at mae@recnet.com

Matthew K. Wesolowski
Chief Executive Officer
SSR Communications, Inc.
740 U.S. Highway 49 north
Suite R
Flora, MS 39071
and e-mail at matt@wyab.com

Torrie Marie Tottenkleban
President
Max One Communications, Inc.
P.O. BOX 936
Gulf Shores, AL 36547
and e-mail at torriek@hotmail.com

James Martin
President
Flagler Broadcasting, LLC
2405 East Moody Boulevard
Suite 402
Bunnell, FL 32110
and e-mail at jamesemartin@comcast.net

David Honig
President Emeritus
Multicultural Media, Telecom & Internet Council
1919 Pennsylvania Ave., N.W.
Suite 725
Washington, DC 20006
and e-mail at david@davidhonig.org



Marissa G. Repp