

MCNAIR & SANFORD, P.A.

ATTORNEYS AND COUNSELORS AT LAW

MADISON OFFICE BUILDING/SUITE 400
1155 FIFTEENTH STREET, NORTHWEST
WASHINGTON, DC 20005

TELEPHONE 202/659-3900
FACSIMILE 202/659-5763

CHARLESTON OFFICE
140 EAST BAY STREET
POST OFFICE BOX 1431
CHARLESTON, SC 29402
TELEPHONE 803/723-7831
FACSIMILE 803/722-3227

COLUMBIA OFFICE
NATIONSBANK TOWER
1301 GERVAIS STREET
POST OFFICE BOX 11990
COLUMBIA, SC 29211
TELEPHONE 803/799-9800
FACSIMILE 803/799-9804

GEORGETOWN OFFICE
121 SCREVEN STREET
POST OFFICE DRAWER 418
GEORGETOWN, SC 29442
TELEPHONE 803/546-6102
FACSIMILE 803/546-0096

GREENVILLE OFFICE
NATIONSBANK PLAZA
SUITE 801
7 NORTH LAURENS STREET
GREENVILLE, SC 29601
TELEPHONE 803/271-4940
FACSIMILE 803/271-4015

RALEIGH OFFICE
RALEIGH FEDERAL BUILDING
ONE EXCHANGE PLAZA
SUITE 810
POST OFFICE BOX 2447
RALEIGH, NC 27602
TELEPHONE 919/890-4190
FACSIMILE 919/890-4180

SPARTANBURG OFFICE
SPARTAN CENTRE/SUITE 306
101 WEST ST. JOHN STREET
POST OFFICE BOX 5137
SPARTANBURG, SC 29304
TELEPHONE 803/542-1300
FACSIMILE 803/542-0705

RECEIVED

JUL 28 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 28, 1994

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

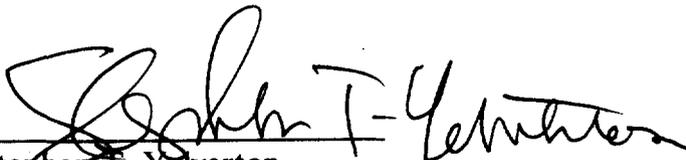
Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its opposition to a petition for leave to amend filed by ASF Broadcasting Corp., on July 19, 1994.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: 
Stephen T. Yelverton

Enclosure

B:CATON.150

No. of Copies rec'd 0+11
List A B C D E

DOCKET FILE COPY ORIGINAL RECEIVED

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

JUL 28 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:)

DAVID A. RINGER)

et al.,)

Applications for Construction)
Permit for a New FM Station,)
Channel 280A, Westerville,)
Ohio)

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: The Review Board

OPPOSITION TO ASF PETITION
FOR LEAVE TO AMEND

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____
Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th Street, N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 659-3900

July 28, 1994

B:CATON.150

OPPOSITION TO ASF PETITION FOR LEAVE TO AMEND

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this opposition to petition for leave to amend. On July 19, 1994, ASF Broadcasting Corp. ("ASF") filed a "Petition for Leave to Amend" and related amendment. In opposition, ORA offers the following comments.

In its petition for leave to amend, ASF seeks to amend its application to specify a new tower site and to provide the required engineering data. The engineering data submitted by ASF acknowledges that the new tower site is short-spaced to both Station WTTF(FM), Tiffin, Ohio, and Station WPAY(FM), Portsmouth, Ohio. ASF seeks to justify the short-spacing to Station WTTF by reliance on Section 73.213 (c)(1) and to justify the short-spacing to Station WPAY by reliance on Section 73.215.

However, ASF mistakenly relies upon Section 73.213 (c)(1). That provision is limited to facilities with no more than 3,000 watts ERP. ASF proposes operation at 6,000 watts ERP. ASF can not evade this provision by limiting power to 3,000 watts in the lobe toward Station WTTF. Section 73.213 (c)(1) explicitly states that it applies to Class A stations with no more than 3,000 watts. It does not state that it applies to 6,000 watt stations which reduce their power to 3,000 watts in one or several lobes.

The applicable provision is Section 73.231 (c)(2) which governs stations with facilities operating at greater than 3,000 watts. That provision requires an exhibit demonstrating the consent of the licensee which is short-spaced. However, ASF fails to include such an exhibit from Station WTTF. Accordingly, its amendment is fatally flawed and must therefore be rejected.

In any event, it would be highly unlikely that ASF could obtain the required consent from Station WTTF. As noted in the engineering exhibit attached hereto, ASF's proposed contours would overlap those of Station WTTF.

Section 73.213 (c)(2) also requires that if the short-spaced station is not a Class A facility (which is the case with Station WTTF) then the applicant must demonstrate that no fully-spaced tower sites are available. However, ASF fails to make such a showing. Accordingly, its amendment is deficient and must therefore be rejected on this basis alone.

ORA's application specifies a fully-spaced tower site. The application of Wilburn Industries, Inc. ("WII") was recently amended to specify the same fully-spaced tower site. Thus, ASF could not make a showing that no fully-spaced tower sites are available.

In an opposition to the WII amendment, filed July 22, 1994, Shellee F. Davis ("Davis") attempted to raise for the first time questions about the availability of the ORA and WII tower site. Davis contends that because the proposed tower site is located on farm land which is being leased to a tenant farmer for cultivating crops the site may not be available to ORA and WII. However, Davis failed to provide any information about the duration of the farm lease, or even whether it is a written or oral lease.

Leases of farmland for cultivation are typically oral and only for the duration of the crop year. Indeed, such "leases" are not actually leases in a strict legal sense, but merely a short-term rental of the land. Therefore, the owner of the land would have no legal impediment to terminating such a lease at the end of a crop year, with or without the consent of the tenant farmer. Thus, ORA or WII would be able to obtain possession of the farmland to use as a tower site at least within a year of grant of a construction permit and

well before expiration of the 18 month period for construction. Accordingly, there would be no substantial and material question as to the availability of the ORA and WII tower site. With a fully-spaced tower site available, ASF's amendment to propose a short-spaced tower site is required to be rejected, pursuant to Section 73.213 (c)(2).

ASF's amendment must also be rejected because of the proposed short-spacing to Station WPAY. This short-spacing is newly proposed and would not be "grandfathered" pursuant to Section 73.213.

Commission policy proscribes an applicant in a comparative hearing from proposing a short-spaced tower site if a fully-spaced tower site is available. North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1984). As previously noted, a fully-spaced tower site is available for use.

ASF's reliance upon Section 73.215 to justify the short-spacing to Station WPAY is woefully mistaken. Although that provision permits the use of directional antennas for short-spaced tower sites, their use is prohibited if a fully-spaced tower site is available. MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991). As previously noted, a fully-spaced site is available for use.

In an amendment, dated April 15, 1994, ASF reported that the tower site specified in its application had been sold. Although the tower site owner sent a letter to other applicants in this proceeding, dated March 2, 1994, stating that the site had been sold, ASF never informed the Commission when the site was sold or when it first became aware of the sale.

ORA opposes acceptance of the July 19, 1994, amendment of ASF until it informs the Commission as to when the initially specified tower site was sold and when it first became aware of that sale. Such information is required to be submitted in order to determine whether ASF timely reported the loss of its tower site within thirty (30) days, pursuant to Section 1.65, and also whether it has acted with "due diligence" in obtaining "reasonable assurance" for the new tower site. Imagists, 8 FCC Rcd 2763, 2765, para. 14 (1993), applicants should submit curative amendments no more than 30 days after they learn or should have learned of the need for an amendment and should explain and document any delays beyond 30 days.

ASF has simply failed to provide sufficient information about the sale of its former proposed tower site in order for the Commission to make an informed determination as to whether "good cause" has been demonstrated. See also, Capitol City Broadcasting Co., 6 FCC Rcd 5525 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 2629, para. 4, n. 2 (1992), amendment rejected where applicant failed to document claim of "good cause." If the amendment of ASF is rejected, its application is subject to immediate dismissal with prejudice from this proceeding. See, Shablom Broadcasting, Inc., 93 FCC2d 1027, 53 RR2d 1203 (Rev. Bd. 1983), aff'd mem. sub nom., Royce International Broadcasting v. FCC, 762 F.2d 138 (D.C. Cir. 1985), cert. denied, 474 U.S. 945 (1985).

In its July 19, 1994, amendment, ASF attempts to blame its over four month delay in filing a tower site amendment on the need to obtain additional funding from its non-voting stockholder, Thomas J. Beauvais, to cover the increased costs resulting from the new tower site location. In support, ASF submits a copy of a letter from Beauvais, dated June

30, 1994, indicating his willingness to provide the additional required funding. However, ASF fails to state when it first approached Beauvais about providing additional funding and to state why it took until June 30 to obtain this letter from Beauvais. See, Neil I. Saunders, 102 FCC2d 865 (Rev. Bd. 1985), rejection of amendment required where it is shown that applicant procrastinated in taking steps to amend.

Under established Commission precedent, a post-designation amendment can not be accepted if acceptance would require the specification of new issues and require additional hearings. See, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970). Until a current financial statement of Beauvais is submitted, it can not be determined if ASF is now financially qualified and that its financial re-certification in the July 14, 1994, amendment is valid and thus whether additional hearings would be required. Imagists; Capitol City Broadcasting Co., id., documentation of claims is required to support acceptance of amendment. See also, Pontchartrain Broadcasting Co., Inc. v. FCC, Case No. 93-1291, p. 5, decided Feb. 11, 1994, an amended financial proposal must be fully evaluated by the Commission.

The amendment of ASF must be rejected on another basis. The March 2, 1994, letter from the former tower site owner indicates that ASF never had "reasonable assurance" of that tower site. See, ORA's April 21, 1994, motion to enlarge the issues against ASF. The March 2, 1994, letter states in pertinent part that the tower site owner had only been "willing to negotiate" with WII a "possible" lease of the tower site. However, a mere possibility that a site will be available is not sufficient. William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); National Communications Industries, 6 FCC Rcd

1978, 1979, para. 9 (Rev. Bd. 1991), aff'd, 7 FCC Rcd 1703 (1992). More than a vague "willingness to deal" is needed to constitute "reasonable assurance." Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988). See also, ORA's exceptions, paras. 82-84, filed December 20, 1993.

It is axiomatic that an applicant must have "reasonable assurance" of the availability of its proposed tower site at the time of initially filing its application. Rem Malloy, 6 FCC Rcd 5843, 5846, para. 15 (Rev. Bd. 1991); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589, para. 7 (Rev. Bd. 1990); Radio Delaware Inc., 4 FCC Rcd 8630, 8631, para. 9 (Rev. Bd. 1989). Accordingly, unless ASF demonstrates that it had "reasonable assurance" of its former proposed tower site at the time of initially filing its application, a new tower site can not be approved. Colorado Television, Inc., 98 FCC2d 513, 518, n. 6, 56 RR2d 1080 (Rev. Bd. 1984), rejection of initially specified tower site requires rejection of amended tower site because the chain of "good cause" has long been broken.

ASF's amendment must also be rejected because it does not have "reasonable assurance" of the new proposed tower site. In a letter, dated May 17, 1994, the tower site owner only expressed a willingness to "enter into negotiations." As noted above, this does not meet Commission requirements. Progressive Communications, Inc., more than a vague "willingness to deal" in the future is needed to constitute "reasonable assurance."

ASF's amendment must be rejected because it has improperly attempted to revise its cost estimates with respect to matters unrelated to the change in tower site. In its initial cost estimates, ASF failed to budget for a proposed directional antenna (Dep. Tr. 72-76). ORA raised this matter in a motion to enlarge the issues, filed August 20, 1993, and timely

filed exceptions. See, ORA exceptions, paras. 62-64, filed December 20, 1993. ASF now attempts to sneak this item into its revised cost estimates without making the required "good cause" showing for amending its incomplete initial budget. Aspen FM, Inc., 6 FCC Rcd 1602, 1603, paras. 11-13 (1991).

ASF also attempts to improperly sneak into its revised cost estimates a provision for auxiliary power. This was not included in its initial budget (Tr. 242-244). Commission policy does not allow comparative credit for auxiliary power unless it is included in the cost estimates at the time of filing the application. Linda U. Kulisky, 8 FCC Rcd 6235, 6238, n. 1 (Rev. Bd. 1993). See also, ORA's exceptions, para. 61, filed December 20, 1993.

Finally, if the amendment of ASF is accepted, it must be frozen as to its initially proposed signal coverage. See, Nugget Broadcasting Co., 8 FCC Rcd 7121, para. 3 (1993).

WHEREFORE, in view of the foregoing, the Review Board is requested to deny the petition for leave to amend filed by ASF and to reject its tower site amendment.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th St., N.W.
Suite 400
Washington, D.C. 20005
202-659-3900

July 28, 1994
020970.00001 ORA.728

TECHNICAL EXHIBIT
OHIO RADIO ASSOCIATES, INC.
WESTERVILLE, OHIO

Technical Statement

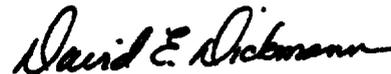
This technical statement and accompanying figures have been prepared on behalf of Ohio Radio Associates, Inc. (herein "Ohio"), applicant for a new FM station on channel 280A, to serve Westerville, Ohio. At Ohio's request, this firm was asked to determine whether, under the criteria of section 73.215 of the Federal Communication Commission's Rules, prohibited contour overlap would be caused to existing station WTTF-FM, channel 279B, Tiffin, Ohio by the proposed Westerville, Ohio, channel 280A facility of ASF Broadcasting Corporation (herein "ASF") as amended in June 1994.¹

The attached Figure 1 is a map showing the protected and interfering contours (based on §73.215) for WTTF-FM and the proposed ASF facility. A maximum class B facility with 50 kilowatts effective radiated power and an antenna height of 150 meters above average terrain was assumed for WTTF-FM. As can be seen from the map, there is predicted overlap of the ASF proposed 48 dBu [F(50,10)] interfering contour and the WTTF-FM 54 dBu [F(50,50)] protected contour. The extent of the contours was determined using the method of §73.313 of the FCC Rules based on the stations' effective radiated powers, antenna heights above mean sea level and transmitter site

¹The FCC File Number assigned to ASF's application is BPH-911230MB.

Page 2
Westerville, Ohio

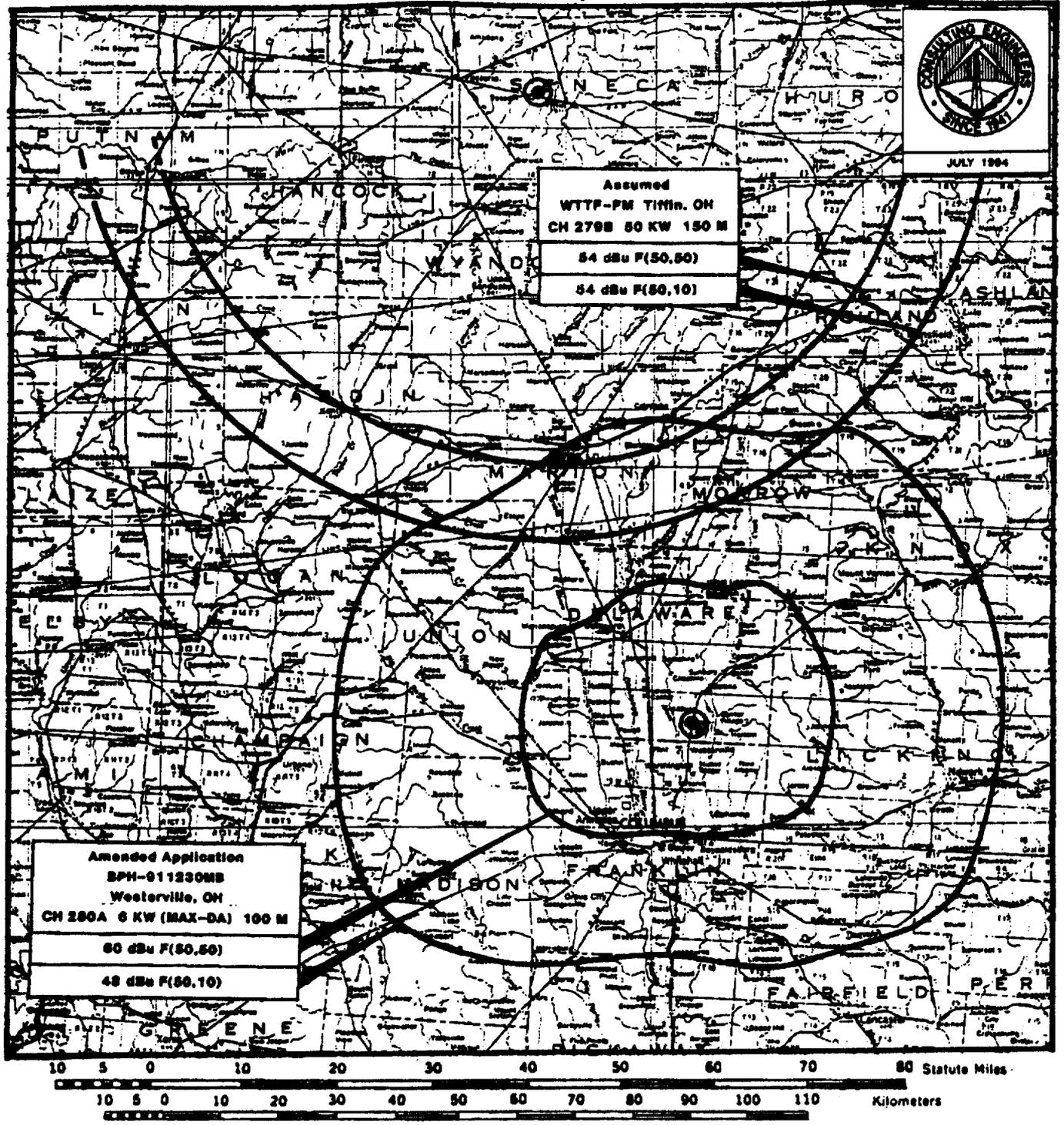
locations as found in the FCC records for the stations and tabulated in the attached Figure 2. Distances to the contours for WTTF-FM were determined along the standard eight radials (every 45° of azimuth beginning a 0° True North) and along the direct bearing toward the proposed ASF facility. Distances to the ASF contours were determined along 36 evenly spaced radials (every 10° of azimuth beginning at 0° True North) taking into account the effective radiated power in each radial direction determined from the ASF directional antenna pattern on file with the FCC. Terrain elevation data were obtained from the N.G.D.C. 30-second terrain database.



David E. Dickmann

du Treil, Lundin & Rackley, Inc.
240 N. Washington Blvd., Ste. 700
Sarasota, Florida 34236
(813) 366-2611

July 28, 1994



CONTOUR PROTECTION STUDY

Prepared for

OHIO RADIO ASSOCIATES, INC.

WESTERVILLE, OHIO

1

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

TECHNICAL EXHIBIT
OHIO RADIO ASSOCIATES, INC.
WESTERVILLE, OHIO

Tabulation of Station Facilities and Site Coordinates

<u>Station</u>	<u>ERP/RC-AMSL*</u>	<u>Site Coordinates</u>
Assumed WTFP-FM, CH 279B Tiffin, OH	50 kW, 383 m	41° 08' 20" North 83° 14' 45" West
Proposed, CH 280A BPH-911230MB (Amended June, 1994) Westerville, OH	6 kW (Max-DA), 383 m	40° 09' 33" North 82° 55' 21" West

*ERP is effective radiated power. RC-AMSL is height of the antenna radiation center above mean sea level.

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 28th day of July, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to ASF Petition for Leave to Amend" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

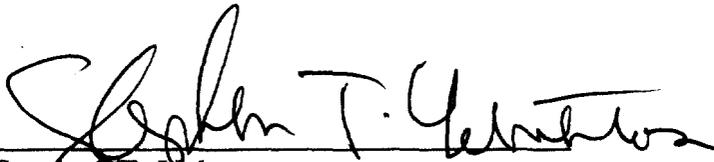
James Shook, Esquire
Hearing Branch
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

Arthur V. Belenduik, Esquire
Smithwick & Belenduik, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036
Counsel for David A. Ringer

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

Eric S. Kravetz, Esquire
Brown, Finn & Nietert, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
Counsel for Wilburn Industries, Inc.

Dan J. Alpert, Esquire
Law Office of Dan J. Alpert
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis


Stephen T. Yelverton

*Hand Delivery