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JUL 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 24, 1998

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 97-107
RM-9023
Potts Camp and Saltillo, Mississippi

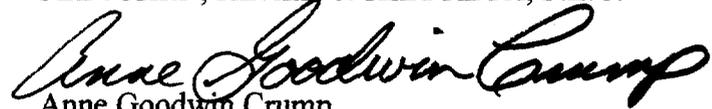
Dear Mr. Caton:

Transmitted herewith, on behalf of Olvie E. Sisk, licensee of Station WCNA(FM), Potts Camp, Mississippi, are an original and four copies of his "Application for Review" of the *Report and Order*, DA 98-1081, released June 19, 1998, in the above-referenced proceeding to reallocate Channel 240C3 from Potts Camp to Saltillo, Mississippi, and modify the license of WCNA(FM) to specify the new community.

Should any questions arise concerning this matter, please communicate with the undersigned.

Very truly yours,

FLETCHER, HEALD & HILDRETH, P.L.C.


Anne Goodwin Crump
Counsel for Olvie E. Sisk

Enclosures

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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM DOCKET NO. 97-107
Table of Allotments, FM Broadcast Stations.) RM-9023
(Potts Camp and Saltillo, Mississippi))

Directed to: The Commission

APPLICATION FOR REVIEW

Olvie E. Sisk ("Sisk"), licensee of Station WCNA(FM), which operates on Channel 240C3 at Potts Camp, Mississippi, by his attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits his Application for Review of the *Report and Order*, DA 98-1083, released June 19, 1998 ("*Report and Order*"), in the above-referenced proceeding. A summary of the *Report and Order* was published in the Federal Register on June 25, 1998. Accordingly, pursuant to Section 1.4(b)(1), this Application for Review is timely filed. As set forth herein, the *Report and Order* involves application of Commission policy in such a way as to create an irrational result which is irreconcilable with other case precedent. Therefore, in accordance with Section 1.115(b)(2) of the Commission's Rules, Commission review is warranted. With respect thereto, the following is stated:

1. On January 16, 1997, Sisk submitted his Petition for Rule Making, which requested the reallocation of Channel 240C3 from Potts Camp to Saltillo, Mississippi, and the modification of Station WCNA(FM)'s license accordingly. The Commission issued a *Notice of Proposed Rule Making*, 12 FCC Rcd 3712 (1997), proposing the changes requested by Sisk. In response, Sisk filed comments in support of the proposal. In his Comments, Sisk demonstrated that the

proposed reallocation would provide Saltillo with its first local transmission service and would greatly increase the population served by WCNA(FM), and that the community of Potts Camp had declined to a point at which its continued viability as a community is in doubt. Broadcasters & Publishers, Inc. filed a counterproposal which opposed the proposed reallocation. That counterproposal subsequently was found to be unacceptable. *See, Report and Order* at 1, n. 1.

2. Thereafter, the Commission issued its *Report and Order* which denied the proposed reallocation and modification of license. The Commission's staff found that since Potts Camp still has some residents, a handful of businesses, and some rudimentary governmental services, it remains a community for allotment purposes. *Report and Order* at 3. The Commission's staff further found that, pursuant to the FM allotment priorities, a comparison between Potts Camp and Saltillo normally would favor Saltillo as the community to receive a first local service. Nonetheless, because WCNA(FM) is an operating station, the staff found that the public interest benefits of the reallocation to Saltillo did not outweigh the loss of a transmission service to Potts Camp and the disruption of an existing service. *Report and Order* at 4. In reaching this conclusion, the staff relied upon the Commission's statement in establishing procedures for changes in community of license that "[t]he public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another...." *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990).

3. As the Commission's staff itself noted, however, the expectation of continued service may be offset by other public interest factors. *See, Id.* at 7096-97. Furthermore, the rigid

application of the policy disfavoring relocation of an existing on-air service is contrary to the policy applied to proposals to change the community of unbuilt stations. In such cases, the Commission has found, when a station has not yet gone on the air, the reallocation of a channel for a first local service does not raise the same concerns as to reliance on an operating station. *Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664 (M.Med. Bur. 1997). This emphasis on operational status creates perverse incentives, however. If a permittee is concerned about its ability to operate in a community in decline, all it need do is avoid building its proposed station until after it can obtain a change in community of license. In the interim, no one receives service. Essentially, the broadcaster who makes the investment and takes the risk in providing service to a smaller community is forced to remain in an economically non-sustainable community, while the laggard permittee that does not abide by its commitment to construct is rewarded with a change to a more lucrative community.

4. In the instant case, Sisk has demonstrated that the community of Potts Camp has neither any reliance on the service of WCNA(FM) nor any legitimate expectation of continued service. As demonstrated in Sisk's Comments and Reply Comments, Potts Camp is a community in decline. Indeed, the community has fallen off so far as to have reached virtual extinction. The latest U.S. Census shows that, as of 1990, the population had declined to only 483 persons from 549 in 1970. As set forth in Sisk's Comments, filed May 19, 1997, no building permits for new structures in Potts Camp were issued in all of 1996 or to that date in 1997. As set forth in Sisk's Reply Comments, filed June 3, 1997, only approximately ten businesses remained in Potts Camp at that time. Since then additional businesses have closed, including a video store and a pizza delivery restaurant, leaving only approximately six businesses

operational. Additionally, two businesses operate on a part-time basis opening only in the late afternoon. Furthermore, the only remaining stop light in Potts Camp has been removed, further indicating the lack of any traffic or commerce in the area. Additionally, as described in Sisk's Comments and Reply Comments, the few local governmental services which remain are available only on a part-time basis.

5. This pattern of decline must be contrasted with the growth and prosperity of Saltillo. The population of Saltillo has increased by 259 percent over the last 25 years to an estimated total of over 3,000 persons. As indicated in Sisk's Comments, between 1994 and May 1997, Saltillo issued 387 building permits, 85 of which were issued in the first five months of 1997. The community of Saltillo has four medical doctors and approximately 100 businesses. Seven new businesses were added during the first five months of 1997 alone. Saltillo has a new high school as well. Clearly, this pattern of growth contrasts sharply with the ever-dwindling business activity in Potts Camp.

6. Based upon all of the above evidence, it is clear that Potts Camp is a dying community. The Commission previously has reallocated channels from one community to another, even when the first community would lose its only local full-time service, in situations in which the first community had suffered a substantial decline in population and prosperity. *Noalmark Broadcasting Corp.*, 50 R.R.2d 755 (1981). The Commission's staff distinguished *Noalmark* on the grounds that, in that instance, the first community had no remaining population, businesses, or local government. In the instant case, while a tiny population, a handful of businesses, and a modicum of part-time local governmental services remain, it is quite clear that the community is in an irrevocable decline. While the Commission's staff cites *Cleveland and Ebenezer*,

Mississippi, 10 FCC Rcd 8807 (1995) for the proposition that these few remaining establishments indicate that Potts Camp has retained its community status, that case in fact provides further support for the conclusion that Potts Camp has declined to the point that the allotment should be removed. In *Cleveland and Ebenezer*, the Commission removed a sole local service based upon a lack of community status, despite the fact that the community in question had two churches, a retail store, a volunteer fire department, and a water system. In the case of Potts Camp, while the community does retain some part-time governmental services, a post office, and a few more businesses, it does not have any significant businesses or other services. Furthermore, those few businesses and institutions which remain continue to decline. While Potts Camp has not quite yet vanished off the face of the earth, it is coming perilously close to doing so. With the passage of time, it only continues its decline toward oblivion. Therefore, Potts Camp should not be considered to be a community worthy of a first local service preference for allotment purposes. Potts Camp cannot and does not support WCNA(FM).

7. Moreover, not only does Potts Camp's decline make it incapable of supporting a local radio service, the remaining remnants of the community have shown no interest in doing so. As set forth in his Reply Comments, Sisk conducted a survey of the remaining local businesses to determine the level of interest in radio advertising. Only three of the local businesses indicated any possibility that they might purchase radio advertising, and all of those businesses planned to spend less than \$1,000 per year on radio advertising. Among those three, all had used radio advertising in the past, but none had advertised on WCNA(FM). Clearly, therefore, those businesses placed no reliance on WCNA(FM) as a local station. Moreover, in the entire time in which the station has been on the air, WCNA(FM) has sold **no** advertising time in either Potts

Camp or Marshall County, the county in which it is located. Obviously, therefore, local businesses do not consider WCNA(FM) to be an important local media outlet for themselves or the residents of the area. WCNA(FM)'s salesperson has attempted on numerous occasions to make sales in Potts Camp and Marshall County.

8. The Commission's staff brushed aside this showing, noting that economic issues generally are not relevant in the allotment or licensing context. *Report and Order* at 4-5, n. 8. The Commission's staff apparently overlooked the greater significance of the showing made, however. The facts and figures listed by Sisk were submitted not simply to show the financial peril of the station in its existing location, but to illustrate the complete lack of interest of the local residents in WCNA(FM) as a local station. The complete indifference of the local residents to the station is further illustrated by the latest Arbitron study for the area. That study showed that WCNA(FM) had so few listeners that the station does not even appear as a rated station. Since the local residents do not listen to the station, they cannot be said to rely upon its service in any meaningful sense. Rather, the primary orientation of the residents is towards Memphis.

9. Further, since local residents and businesses completely fail to provide any support whatsoever for WCNA(FM), they cannot be said to have any legitimate expectation of continued service. Obviously, a station cannot survive without revenues. WCNA(FM) does not receive any governmental funds nor other public benefits, nor can it directly assess any listeners. When community residents fail to listen to a station, and when local businesses fail to purchase any advertising time, it is quite clear that the station cannot long continue to provide service to that community. In this instance, WCNA(FM) has been losing an average of \$3,500 each month, up to as high as \$6,000 in a month. These continuing losses cannot long be sustained and will not

be. Thus, residents of the area cannot reasonably expect that service will continue.

10. If WCNA(FM) cannot relocate to a new community of license, it will be forced to go dark. At that point, Potts Camp will be left without any local transmission service, and the entire current service area will be deprived of service, not simply the currently proposed loss area. This loss of service will come with no countervailing public interest benefits. According to the Commission staff's calculations, the proposed reallocation of the station to Saltillo would result in a loss of service to 31,620 persons, with a net gain of service to 56,202 persons. *Report and Order* at 4. If, on the other hand, the station cannot relocate as proposed, the entire service area, encompassing some 70,840 persons, will lose service and no one will gain any new service. Clearly, such a result would not serve the public interest.

11. In these circumstances, the public interest benefits of the proposed reallocation overwhelmingly outweigh any hypothetical reliance upon WCNA(FM) by local residents. Further, the rigid application to this case of the Commission's policy which heavily weighs against removal of an existing service must be re-examined. The circumstances of this proceeding must be compared and contrasted with those in the *Chatom and Grove Hill, Alabama* proceeding. In that case, the Commission authorized the reallocation of a channel representing a community's only potential local transmission service to another community as a first local aural transmission service. The change in community and proposed service area there also created a loss area. Nonetheless, the Commission minimized the significance of the loss in service area and loss of a sole local aural transmission service due solely to the fact that the station in question was not yet on the air. Moreover, the additional public interest factors in *Chatom and Grove Hill* were less compelling than those in the instant case. There, the reallocation was from a

town with a population of 1,094 to one with a population of only 1,551. *Chatom and Grove Hill*, 12 FCC Rcd at 7664-65. Furthermore, the increase in population to be served was only 7,781 persons or 20.6 percent. Additionally, Chatom is a county seat and business center, while Grove Hill is not. In contrast, the instant proposal would result in a reallocation from a location with a population of 483 to a town with a population of over 3,000. Further, the net increase in population covered would be 56,202, or 79.3 percent. Here, the proposed new community of license is a business center, while the current community is dying. The difference in result between the *Chatom and Grove Hill* proceeding and the *Report and Order* in this proceeding, based solely upon the fact that WCNA(FM) is now operational, is irrational, creates bizarre incentives for permittees and licensees, and does not accomplish the Commission's goal of providing service to the public.

12. In the instant case, the Commission is faced with a station which will be forced to go dark if it cannot relocate. The entire current service area then will lose service from the station. Once the license for the station is turned in or expires, a vacant allotment at Potts Camp will be created. Presumably, at some point in the future, parties will be allowed to file applications for a new construction permit for that allotment. Once a construction permit is granted, the new permittee then will have an opportunity to seek to change the station's community of license. The permittee will have no incentive to construct the station quickly and restore the lost service, however, because that action would preclude it from re-locating to a community in which the station would be viable. Until the new station is built, the new station would not be an existing service. Accordingly, as in *Chatom and Grove Hill*, a reallocation to Saltillo most likely would be approved. At that point, all the Commission would have accomplished would be to force

WCNA(FM) off the air, depriving the area of service, so that a new entity could later relocate the allotment as previously proposed by Sisk. In any event, Potts Camp will have lost its local service, both in the near term when WCNA(FM) is forced off the air, and in the long term, when a new permittee can make the same move proposed by Sisk. The Commission's policy will act as a major disincentive for broadcasters to provide service to smaller communities. Those who build will be forced to remain in an economically nonviable situation and face loss of their entire investment, while those who do not build are rewarded with a relocation to "greener pastures."

13. In other contexts, the Commission has recognized the economic difficulties confronting radio stations in today's ever more competitive market. For example, in reaching its previous decision to increase national and local ownership limits, the Commission noted the increase in the number of radio stations and the number of non-radio competitors, which has caused "a degree of market fragmentation that has dramatically changed financial conditions for the radio industry." *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2758 (1992), *recon. granted in part*, 7 FCC Rcd 6387 (1992), *further recon. granted in part* 9 FCC Rcd 7183 (1994). In reaching its conclusions, the Commission examined such economic data as radio revenue growth and radio's share of the local advertising market. Recognizing the changed financial landscape, the Commission modified its rules to allow for greater local and national ownership of radio stations. Likewise, the Commission has long considered economics in reaching decisions to grant waivers of the Commission's multiple ownership rules. Note 7 to Section 73.3555 specifically provides that the Commission will look favorably upon requests for waiver of the one-to-a-market rule that involve "failed" stations. Likewise, the Commission has taken financial conditions into account in considering other waiver requests. *See, e.g., EBE*

Communications Limited Partnership, 11 FCC Rcd 10845 (1996); *Maximum Media, Inc.*, 12 FCC Rcd 3391 (1997). Likewise, the Commission should take economic realities into account in the context of a proposed change in community of license. Failure to do so will lead only to an overall decline, not increase, in radio service provided to the public.

14. In sum, the Commission's current policies encourage permittees who might have a need to change communities of license to delay construction of their new stations as long as possible. Likewise, it appears that it is preferable to the Commission for a station to go dark than for the Commission to consider economic realities and allow for a change in community of license. In the instant proceeding, neither Potts Camp nor Saltillo is located in an urbanized area. Thus, the proposed reallocation does not seek to take a station from a rural to an urban area, but rather proposes the reallocation of the channel from one rural community to another. Saltillo is a prospering and growing community, while Potts Camp is dying. The proposed reallocation would allow WCNA(FM) to serve a vastly greater population, with a 79 percent increase in the number of persons served. Therefore, the proposed reallocation would result in a more efficient and equitable distribution of frequencies. This result clearly would serve the public interest.

WHEREFORE, the premises considered, Sisk respectfully requests that Channel 240C3 be reallocated from Potts Camp to Saltillo, Mississippi, and that the license for WCNA(FM) be modified to specify operation at Saltillo, Mississippi.

Respectfully submitted,

OLVIE E. SISK

By: _____

Frank R. Jazzo
Anne Goodwin Crump
His Attorneys

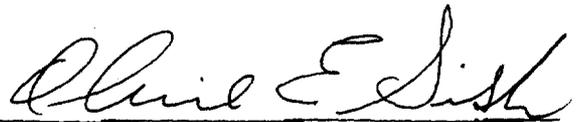
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DECLARATION

I, Olvie E. Sisk, hereby declare and state as follows:

I am the licensee of Station WCNA(FM), Potts Camp, Mississippi. I have read the foregoing Application for Review with regard to the *Report and Order*, DA 98-1083, released June 19, 1998, in MM Docket 97-107. I hereby declare, under penalty of perjury, that the facts recited therein are true and correct to the best of my knowledge and belief.

Dated this 22 day of July, 1998.



Olvie E. Sisk

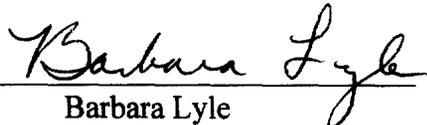
CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a copy of the foregoing "Application for Review" was sent this 24th day of July, 1998, by first-class United States mail, postage prepaid to:

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