REQUEST FOR WAIVER OF THE COMMISSION'S RULES

Pursuant to Section 1.3 of the Commission's Rules, Applicant hereby requests waivers of Sections 73.207, 73.210, and 73.215(a)(2), in order to accommodate the herein-described engineering modifications that, taken together, would mirror 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). This proposal was also the subject of a Commission Notice of Inquiry, FCC 18-69, released June 5, 2018.

As detailed below, the requested waivers would allow Applicant's broadcast station to obtain a large net increase in potential listeners *without impacting the primary service areas of other neighboring stations, primary or secondary.* Furthermore, grant of the waivers would increase the efficient use of spectrum by decreasing the overprotection of stations which have operated with substantially less than station class reference facilities for decades. Nonetheless, as noted above, grant of this application with the waivers requested would have no adverse impact on any other stations, nor would it create any other adverse effect.

The Commission has full authority to waive its own rules when circumstances dictate that the interest of the public is better served by a waiver than by strict enforcement of its rules. *NetworkIP v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). Indeed, the Commission is required by longstanding principles to give careful consideration to waiver requests which are clearly stated and supported with evidence. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) [subsequent history omitted]. Admittedly the Commission's discretion to grant a waiver in the public interest is not unlimited, but rather is bounded by the requirement that the Commission be able to articulate nature of the special circumstances that support such a grant. *NetworkIP,* 548 F.3d at 127. This requirement presents no impediment here, however, as the waiver sought applies only to a certain, well-defined set of circumstances.

Those circumstances are as follows:

1.1) WYAB is a Zone II Class A FM station.

1.2) Approval of the requested facilities would not displace any LPFM station or any FM translator station.

1.3) The proposed modification of WYAB contemplates no change in community of license.

1.4) Each adjacent station now licensed pursuant to Section 73.207 but which Applicant seeks to treat as a Section 73.215 facility has operated under its reference maximum effective radiated power level and antenna height (or

equivalent thereof) for the preceding 30 year period.

1.5) No adjacent Section 73.207 station which applicant seeks to treat as a Section 73.215 facility will receive predicted interference, even when regarded as a hypothetical maximum-class Section 73.207 facility.

1.6) No adjacent Section 73.207 station which applicant seeks to treat as a Section 73.215 facility will be "boxed in" to its current antenna location, as an interference buffer representing the *greater* of 3 dB or 10 kilometers will be applied to the contour overlap calcluations of any potentially affected station.

1.7) No adjacent Section 73.207 station which Applicant seeks to treat as a Section 73.215 facility has an antenna site which is co-located with a television station affected by the Commission's Auction 1000 spectrum "repack" initiative.

Clearly, the combination of all of these circumstances, which together operate to eliminate possible adverse consequences of grant of the requested waivers, serve to define special circumstances favoring a waiver. These circumstances are objectively defined and not only are articulable but are clearly articulated. The existence in combination of all of these circumstances limits the ability of other stations to request similar waivers.[1] They also define a situation in which Applicant has labored at a disadvantage, unable to maximize its facilities to allow efficient use of the spectrum, solely due to fictional consideration. Because of these matters, consideration and grant of the requested waivers are entirely warranted.

As an initial matter, grant of the requested waivers would plainly result in an outcome beneficial to the public interest. Through implementation of the facilities proposed in the attached application, Station WYAB will be able to increase the population served within its F(50,50) 60 dBu protected service area from 299,412 persons to 371,529 persons, for a *net improvement of 24.1%*. These gains can be achieved without impacting the primary service area of any neighboring full power or secondary station (i.e., no LPFM or FM translator station will be affected). Likewise, no neighboring full power FM station would receive any interference or

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1Although Applicant acknowledges that certain other Class A facilities may also experience all of the same circumstances, it submits that the number will be relatively few, and a particular station's inclusion in or exclusion from such a group may readily be discerned based on objective facts so that future parties would be on notice of the requirements to obtain a similar waiver. To the extent that future applicants meet the same criteria and would also advance the public interest, the Commission should favorably consider other waiver requests.

other adverse effects upon its current operation due to grant of the requested waivers. Furthermore, the increased power levels would enable WYAB better to serve its existing listeners with a clearer and better signal and more reliable service. This benefit would have no countervailing public interest detriment, as no other station would be adversely affected.

A further benefit is improvement in the efficiency of the use of scarce spectrum through recognition of the actual limits of station licenses. Title III, Part I, Section 301 of the Communications Act of 1934, as amended, states in its first sentence as follows:

> *It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.*

47 U.S.C. §301. Applicant respectfully asserts that the most common historical arguments used in justifying continued overprotection of underbuilt signals, such as tower site flexibility, undefined future relocation or expansion opportunities, zoning considerations, FAA constraints, high expenses, *et cetera*, precisely represent construed rights beyond the terms of a licensee's authorization that are plainly contrary to the Communications Act of 1934. In other words, if a tower siting "buffer zone" is to be extended to a licensee by the Commission, then it should be enumerated in the licensee's authorization. Nonetheless, Applicant has included such herein in the form of an interference buffer constituting the greater of an additional 3 dB in interfering singal contour protection or 10 kilometers in additional spacing. Overprotection of underbuilt stations is a matter of past Commission policy, not necessarily supported by any engineering reason congruent with the tenets of the Communications Act of 1934. Indeed, such underbuilt stations are effectively engaging in nothing more than warehousing of spectrum, in a manner contrary to Commission policies. The Commission's staff has explicitly found that "continued warehousing" of spectrum in the face of "long-standing competing demand is plainly contrary to the public interest." *Brian M. Madden, Esq.,* 25 FCC Rcd 4765, 4768 (MB 2010). Continued overprotection for one licensee's *potential unspecified relocation or upgrade plans* should not stifle the *immediate and specific* upgrade plans of an adjacent, competing applicant. By remaining as an underbuilt station for a period of three decades, a station has already

demonstrated that it has no fixed plan ever to provide its full potential service. No zoning problem, FAA issue, or cost consideration could not be resolved within 30 years if the desire is truly there to build out fully.

With the added interference buffer described herein, no potential exists for an underbuilt station to become "boxed in" to its present site. Such a situation is virtually impossible here.[2] Moreover, in the Commission's decision denying reconsideration in *Revitalization of the AM Radio Service*, FCC 18-64, released May 22, 2018, the Commission concluded that an argument related to potential "boxing in" of LPFM stations "failed to demonstrate that the remote possibility of any harm to LPFM outweighs the substantial benefits of increased flexibility for cross-service translators." *Id.* at ¶ 13. That precise relationship exists in this situation. A full power station's "boxing in" is a remote possibility, and hypothetical, future harm to said station does not outweigh the present, substantial benefits of increased flexibility for, in this case, a Zone II FM Class A station. The nebulous hope of possible future improvements to an underbuilt station no longer can outweigh the real and present plans for tangible and immediate improvement in the service provided by an already maximized Class A station. Additionally, affected underbuilt stations otherwise subject to the provisions of Section 73.207 will still enjoy such status towards all other facilities, with exception to neighboring "FM Class C4 waiver" facilities, not unlike the manner in which station WRKH 96.1 FM at Mobile, Alabama retains its Section 73.207 status towards all other stations, with the lone exception of WBBN 95.9 FM at Taylorsville, Mississippi.

As noted above, Applicant recognizes that the Commission is currently examining the possibility of establishing a Class C4 within its rules. Grant of the requested waiver is nonetheless necessary because grant of such a waiver can take place much more quickly, and provide more immediate relief, than would be possible if Applicant were to await the completion of the docket opened by the Commission's recent Notice of Inquiry. In this instance, waiting for Class C4 to be added to the Commission's rule would require waiting not only for the conclusion of the pending proceeding, but also the institution and completion of a rule making proceeding,

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2Even if a similarly situated applicant were granted equivalent waivers in the future, the likelihood that other stations would be "boxed in" is quite small, as only eligible Zone II Class A FM facilities would meet the criteria for grant of waiver requests similar to those specified herein. No other station classification would enjoy such flexibility, drastically limiting the amount of "boxing in" a "FM Class C4" waiver could exact.

all of which inevitably will occupy at least many months. In the meantime, however, grant of the requested waivers would allow the Commission to obtain valuable information related to implementation of Class C4 facilities, which information would relevant to the Notice of Inquiry now pending. It also will allow a Class A station immediately to improve its service to the public, and hopefully its economic status during the pendency of the proceeding. Through observation of the benefits of and any unexpected issues which might arise from implementation of a Class C4 facility, the Commission can better weigh the advantages and disadvantages of implementing Class C4 before it adopts a permanent rule. The ability to gain such empirical data is another public interest benefit supporting grant of the requested waivers.

There is no known alleged problematic issue offered within the Notice of Inquiry that this waiver-based option would not address. Grant of the collective WYAB waivers proves a demand for the spectrum, guarantees no negative impact to secondary services and will not grant such services a primary status, will not box in or severely limit tower siting options to any neighboring Section 73.207-licensed station, will provide additional service to *over seventy thousand* new listeners, will not downgrade any neighboring FM Class C3 stations, will not create prohibited interference overlap or raise the noise floor excessively towards adjacent facilities, primary or secondary, and will be consistent with the Local Community Radio Act, as no actual new class of station will be created (as mentioned below, WYAB would appear as a limited FM Class C3 station in the Commission's engineering databases).

The waivers requested by this application are more particularly described as follows. First, Applicant asks the Commission to waive 73.207 of its Rules. Because no allocation or spacing table with a FM Class C4 entry has yet been formally defined, though such spacing standards were proposed within the context of RM-11727, no fully-spaced "FM Class C4" allotment site can be shown to exist pursuant to Section 73.207.[3]

Applicant also respectfully requests herein a waiver of Section 73.210, with regard to station classes. Although for the purposes of the Commission's FM and CDBS engineering

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3As a mechanical matter related to completion of the attached modification application, Applicant notes that there is no "C4" option under the Commission's LMS "Channel And Facility Information" Station Class question. Therefore, Applicant requests that the Commission allow that the Station Class question have a "C3" reply, and that the "Antenna Location Data" Proposed Allotment or Assignment coordinates may be left blank for the purposes of this application and its waiver proposal.

databases, the proposed facility would appear as a "FM Class C3" authorization, Applicant warrants and acknowledges that it will not enjoy the same privileges as that of a full FM Class C3 station. Therefore, Applicant asks the Commission to restrict its proposed authorization to a "FM Class C4" equivalent status, in that, Applicant may only specify a facility with a primary service contour distance greater than 28 km, but less than or equal to 33 km. If a superior technical facility becomes available in the future, Applicant will adhere to the engineering standards that exist for such under the current regulatory environment.

Applicant also asks for a waiver of Section 73.215(a)(2) to treat station WFFX 103.7 FM (Facility ID 54611) at Hattiesburg, Mississippi as if it were licensed with a Section 73.215 designation. WFFX has operated continually for more than 30 years with an antenna height above average terrain significantly below that of the reference value of its class (450 meters for a FM Class C0 facility). Although the original RM-11727 petition called for a ten year period after which 73.207 facilities could be treated as 73.215 stations, Applicant asserts that a *thirty year window is more than enough time* for a station to establish its intent, willingness, or ability to construct a full facility corresponding to its station class. After more than three decades of failing to construct a station representative of its class, Applicant asserts that WFFX has benefited from overprotection of its licensed contours, resulting in a condition of clear spectrum warehousing in the face of a legitimate competing specific service improvement application for otherwise unused space on the FM band. Applicant would not cause interference, hypothetical or predicted, to WFFX, nor is WFFX co-located with a television station subject to spectrum repackaging. As such, Applicant respectfully requests that it may treat station WFFX as a Section 73.215 facility for the purposes of this application.

EXHIBIT A: 73.215 SHOWING

Applicant's technical facilities are shortspaced to station WFFX 103.7 FM (Facility ID 54611) at Hattiesburg, Mississippi. As such, Applicant asks to treat WFFX, as well as its own authorization for WYAB 103.9 FM (Facility ID 77646) under the provisions of Section 73.215. Additionally, Applicant asks the Commission to consider the RM-11727 distance separation values of 73.215(e) with respect to WFFX (141 km between first-adjacent C4 and C0 authorizations, WYAB is 150.2 km from WFFX).

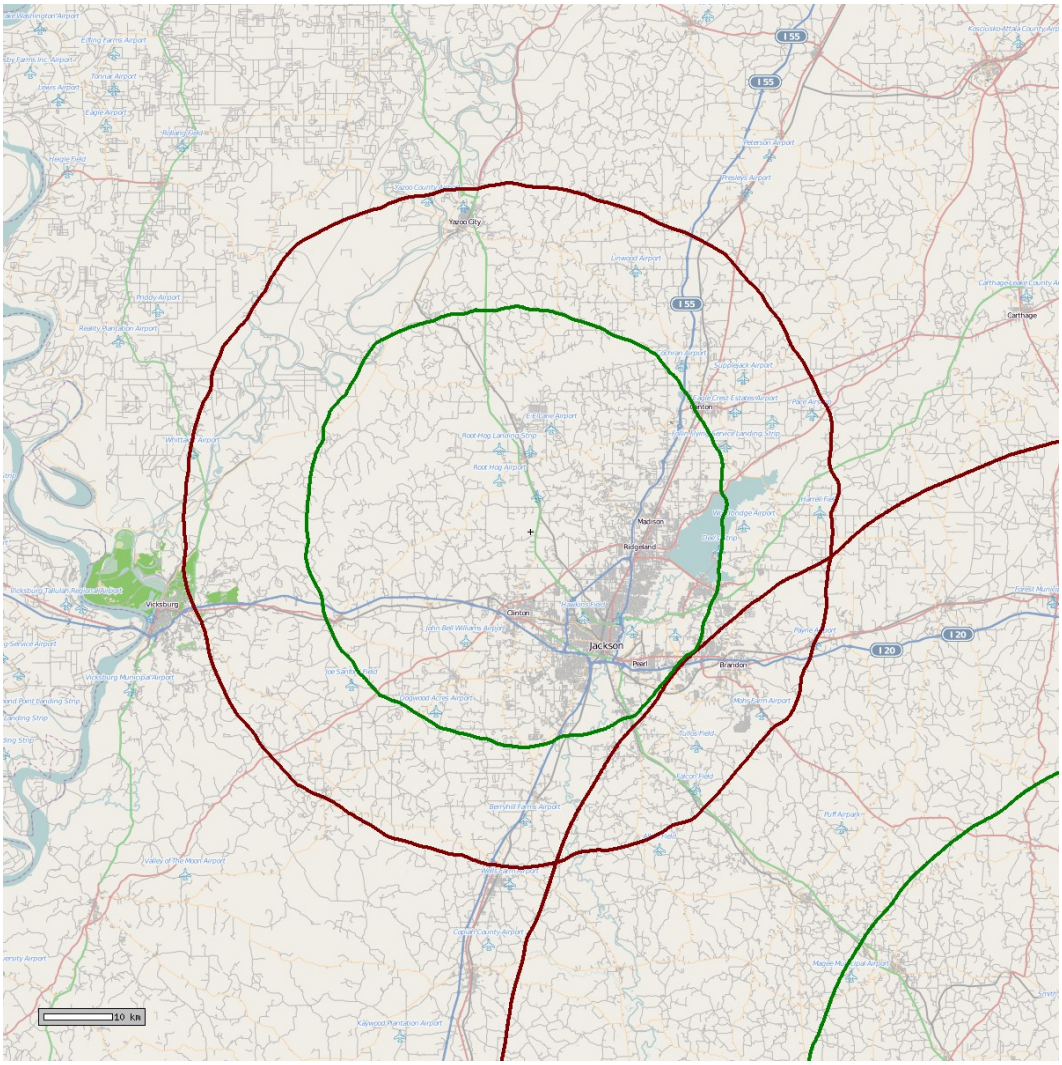


FIGURE 1: The F(50,50) 60 dBu service contour WYAB 103.9 (center, green) and actual F(50,10) ***51 dBu*** interfering countour of WFFX 103.7 FM (bottom right, dark red) are depicted above. As described herein, Applicant has depicted an an **additional 3 dB interference contour buffer** to the WFFX 103.7 FM licensed faciltiies. As shown above, no prohibited overlap exists.

EXHIBIT B: SECONDARY SERVICES SHOWING

Applicant has examined all potentially affected secondary services within a 20 km buffer zone of its proposed primary service area and found none.