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May 7, 2021

Albert Shuldiner, Esq.
Chief, Audio Division
Media Bureau
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

**RE: Response of Historic Takoma, Inc. to Commission Request for Information
REF NO. 1800B3-1B (Application for License to Cover W232DE, Potomac
Maryland - Informal Objection in FCC File No. BLFT-20190507ACA)**

Dear Mr. Shuldiner:

Historic Takoma, Inc. (“Takoma”), through counsel, hereby responds to the Audio Division’s Request for Information (“RFI”), issued April 20, 2021, Reference No 1800B3-1B.

The RFI asks Takoma if it wishes to update its 2017 adjudicated interference complaint regarding the FM translator, W232DE (FIN: 141566), Potomac, Maryland (“2017 Complaint”) in order to comport with new interference complaint rules¹ that only applied long after the matter was adjudicated and final.²

Insofar as the 2017 Interference Complaint was adjudicated in May 2018, and the translator’s licensee, WIN Radio Broadcasting Corp. (“WIN”), did not appeal,³ the resulting Shutdown Order conclusion is now final and unassailable: WIN “failed to eliminate the interference.”⁴

¹ *Amendment of Part 74 of the Commission’s Rules Regarding FM Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019), *recon denied* FCC 20-141, (2020) (“Revised Interference Complaint Rules”).

² The interference complaint was adjudicated in Takoma’s favor in a Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, to WIN Radio Broadcasting Corp, licensee of W232DE, Ref 1800B3-KV (May 8, 2018) (“Shutdown Order”)

³ See 47 C.F.R. Sec. 1.106 (Petition for Reconsideration) and 47 C.F.R. Sec. 1.115 (Application for Review), which impose strict timetables for appeal filing.

⁴ Shutdown Order at 4.

No supplement lies in this matter, as it was adjudicated, final, and closed⁵ by the time the Revised Interference Complaint Rule became effective in 2019. The adjudicated interference issues cannot be reopened now as the Administrative Procedure Act (“APA”) bars such retroactivity.⁶

Indeed, the RFI itself notes that the Commission ordered “all then remaining unadjudicated complaints would be decided under the [R]evised Translator Interference Rules once they became effective.”⁷ As they only became effective in the year following the Shutdown Order, the RFI itself acknowledges the APA’s retroactivity bar when it expressly stated that adjudicated complaints are not subject to Revised Translator Rules and related procedures.

In sum: the 2017 Complaint had been adjudicated in 2018 -- long before the Revised Translator Interference Rules of 2019. Therefore, no legitimate 2017 Complaint supplement can be submitted by Takoma, at this time. As a result, Takoma declines to provide one. The adjudication found WIN was causing interference and did nothing about it – and that’s final.

Even if such retroactivity comported with APA requirements (which it does not) and Takoma was willing to supplement the adjudicated interference complaint now (which it is not), the Commission would be undermining its own policies by considering supplements that overturn an adjudicated and final matter.

The Shutdown Order noted, WIN “failed to make any effort to resolve or address any of the WOWD-LP listener interference complaints”⁸ and “failed to submit a report or otherwise respond as directed by bureau”⁹ Re-opening adjudicated facts, as the RFI requests, would reward a party that ignored significant rules and important directives. It would encourage other

⁵ The Commission should, however, re-open those matters upon which the Shutdown Order did not opine because further inquiry was not, at the time, required to dispose of the case. Notably, the Shutdown Letter declared moot Takoma’s evidence, submitted April 23, 2018, demonstrating WIN had constructed a facility wholly different from the one authorized by the underlying W232DE construction permit in FCC File No. BPFT-20160129AUE when it began unauthorized program tests on the relocated W232DE. *Shutdown Order* at 3-4 and n.29. Although they were moot then, these issues have become relevant to the current adjudication and must be considered on the record of this matter.

⁶ The APA requires that rule making, absent specific statutory authority, must only have “future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. Sec. 551(4). Thus, a 2019 rule cannot legally provide a means to modify a 2018 adjudication.

⁷ RFI at 2.

⁸ Shutdown Order at 4.

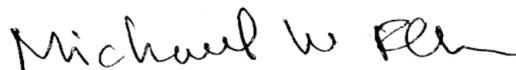
⁹ *Id.*

parties to act similarly as scofflaws who strategically ignore rules and Commission directives in order to stall proceedings for years, betting they'll run out the clock and get away with such rule violations as interference. No administrative agency can allow such gamesmanship to succeed – all the more so when an agency, such as the Commission, relies on licensees “‘high standards of punctilio,’ given the special status of licensees as trustees of a scarce public resource.”¹⁰ Given the Commission’s limited enforcement resources, it must not provide a blessed road map for future scofflaws to stall and evade until their misdeeds simply fade into the mists of time, allowing them to get away with rule violations that harm other stations and their listeners.

Moreover, the Commission must treat similarly situated parties similarly.¹¹ If it allows WIN to succeed with this kind of strategic gamesmanship, it must similarly allow others to strategically ignore rules and directives to run out the clock. If WIN gets away with such behavior here, the Commission must make similar forbearance available to other licensees as a matter of due process and fairness. That is no way to regulate precious and scarce spectrum.

The Commission must now move on to the second part of its inquiry here – and delete W232DE as its license has expired as a matter of law.¹² The matter has been left dangling for nearly three years, despite substantial evidence on the record. It is time to bring this dispute to a close, once and for all, lest it create a new standard strategy for licensees causing interference to evade interference rules and ignore mitigation responsibilities in order to seize spectrum to which they are otherwise not entitled.

Respectfully submitted,



Michael W. Richards
Counsel to Historic Takoma, Inc.

ATTACHMENTS

¹⁰ *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir., 1980) (citing *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946), *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830, (DC Cir. 1965), and *Sea Island Broadcasting v. FCC*, 627 F.2d 240 (DC Cir. 1980)).

¹¹ *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

¹² Takoma recognizes the RFI limits submissions in this initial phase of adjudication to interference complaint supplements. It therefore refrains from fuller briefing and argument on other issues to assist in the orderly disposition of this matter. Takoma’s deference to the Audio Division’s case management plan here does not imply Takoma concedes its rights to brief and argue those issues, at an appropriate point, later in this proceeding, when the Commission moves on to the later phases of its inquiry, here.

DECLARATION OF DIANA KOHN

1. My Name is Diana Kohn.
2. I am president of Historic Takoma, Inc, the licensee of WOWD-LP, Takoma Park, Maryland.
3. I am an authorized officer with personal knowledge of the representations provided in and verify, herewith, the truth and accuracy of any factual information included in the "Response of Historic Takoma, Inc. to Commission Request for Information," to which this declaration is attached.

Pursuant to 47 C.F.R. Section 1.16, I declare under penalty of perjury under laws of the United States of America that the foregoing is true and correct.

Executed on May 5, 2021.



DIANA KOHN

CERTIFICATE OF SERVICE

I, Michael W. Richards, counsel for Historic Takoma, Inc., hereby state that true copies of the **Response of Historic Takoma, Inc. to Commission Request for Information** were mailed first class, postage prepaid, unless otherwise indicated, this 7th day of May 2021 to:

J. Geoffrey Bentley, Esq.
Counsel to WIN RADIO BROADCASTING CORPORATION
Bentley Law Office
2700 Copper Creek Road.
Oak Hill, VA 20171

Albert Shuldiner, Esq.
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Michael W. Richards