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IN REPLY REFER TO:  
1800B3-RPC

September 27, 1996

Mr. John F. Garziglia, Esq.  
Counsel for Thunderbolt Broadcasting Company  
Pepper & Corazzini L.L.P.  
1776 K Street, Suite 200  
Washington, DC 20006

Re: WCDZ(FM), Dresden, TN  
BPH-951120IE

Dear Counsel:

The staff has under consideration the above-captioned minor change "one-step" application filed by Thunderbolt Broadcasting Company ("TBC") to upgrade from Channel 236A to Channel 236C3. By this letter we deny the requested waivers and dismiss the application.

#### Background

Sections 73.3573 and 73.203 require that an allotment site comply with the minimum separation requirements of Section 73.207. TBC's proposed allotment site is short-spaced under the requirements of § 73.207(a) with respect to co-channel Class C Station WGGC(FM), Glasgow, Kentucky and first-adjacent Class A Station WTRB(FM), Ripley, Tennessee.<sup>1</sup> TBC recognizes the violation with respect to WGGC(FM) and requests waiver of §§ 73.203 and 73.3573.<sup>2</sup> The proposal is silent with respect to the short-spacing to WTRB(FM).

#### Waiver Request

Procedural Requirement. In support of its waiver request, TBC argues that the only restriction preventing grant of its application is the inability to specify a hypothetical, fully-spaced allotment site. TBC argues that the requirement that a "one-step" applicant demonstrate the existence of a hypothetical fully spaced allotment site is merely a procedural "key" that unlocks the door, which is later discarded upon grant of the "one-step" application.

Protection of Class C facilities. TBC asserts that, it is unable to designate a fully spaced allotment site because the Commission's rules require TBC to presume full Class C facilities for WGGC(FM), even though it operates with close to minimum Class C facilities. TBC indicates that while WGGC(FM) is entitled to operate at minimum facilities for its class, it should not restrict other stations from making improvements that would better serve their communities of license

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<sup>1</sup> The required spacing toward WGGC(FM) is 237 kilometers, while the proposed spacing is 233.2 kilometers. The required spacing toward WTRB(FM) is 89 kilometers, while the proposed spacing is 88.2 kilometers.

<sup>2</sup> TBC's proposed transmitter site, which is the same as the proposed allotment site, is in compliance with the contour protection requirements of § 73.215. However, processing pursuant to § 73.215 does not apply to allotment sites.

and would have no impact on the operation of WGGC(FM).

No Prohibited Overlap. TBC indicates that granting the requested waivers would allow an upgrade that would cause no prohibited contour overlap. TBC asserts that the Commission's allotment policies were enacted long before the adoption of the contour protection provisions of § 73.215. TBC believes that in exceptional cases the allotment policies should be waived to allow better service in the public interest.

Hypothetical multi-step procedure. Additionally, TBC argues that it could upgrade its facilities without waiver by using a multi-step procedure. As the first step, WGGC(FM) would either move its transmitter site approximately five kilometers while retaining its Class C allotment, or downgrade its facilities at its present site. Following this, as a second step, WCDZ(FM) could then upgrade to Class C3 at its present site under the provisions of § 73.215. Then, as a third step, TBC indicates that WGGC(FM) could, if it had changed site, relocate back to its original site, or, if it had downgraded at its present site, upgrade back to its original class.

Case Precedent. As justification for waiver, TBC cites the Commission's decision in *Woodstock and Broadway, Virginia*.<sup>3</sup> TBC indicates that its situation is similar because: (1) the upgraded channel would not be available for competing applications; (2) the proposed facilities would comply with all facets of the Commission's rules; (3) the site is available since no site change is proposed; (4) no FAA approval is required since the existing site and tower would be used; and (5) the proposed facility is specified in the application.

Public Interest. Finally, TBC indicates that WCDZ(FM) is located near the New Madrid Seismic Zone where there is potential for significant earthquake activity and that WCDZ(FM) is well situated to broadcast emergency information. Further, TBC provides supplemental information regarding the Tennessee Lakes Flood Inundation Area and possible evacuation routes that are contained within the New Madrid Seismic Zone.

### Discussion

Procedural requirement. TBC requests, in essence, waiver of the Commission's longstanding allotment standards. The Commission has stated that the nationwide FM allotment scheme is constructed on two core technical requirements: (1) that allotment sites comply with the minimum spacing requirements of § 73.207 and (2) satisfy the community coverage requirements of § 73.315. The goals of the allotment scheme are to prevent overcrowding of FM stations and provide a consistent, fair, efficient, and equitable distribution of FM facilities as required by Section 307(b) of the Communications Act.<sup>4</sup> Further, the Commission has indicated that all applicants using the "one-step" process must satisfy the same allotment requirements as petitioners in an allotment rulemaking proceeding to amend the FM Table of Allotments.<sup>5</sup> Furthermore, the Commission has indicated that where a station seeks modification using the "one-step" process and is unable to demonstrate that a suitable allotment site exists that would satisfy the spacing and community

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<sup>3</sup> See *Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988).

<sup>4</sup> See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5358 (1991) (para. 13).

<sup>5</sup> See *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4737 (1993) (para. 13).

coverage requirements for the station's channel and class, the application would be dismissed.<sup>6</sup> This policy is strictly enforced even where the applicant intends to utilize the more lenient spacing and contour protection requirements of § 73.215. There is no precedent for waiver of the allotment requirements. The allotment requirements are not merely a "procedural key" which can be discarded at the application stage but the foundation mechanism which the Commission uses to protect the integrity of FM station licenses. The Commission has generally held that to justify waiver of § 73.207 to create a sub-standard allotment, the showing must be compelling.<sup>7</sup> In these circumstances we decline to depart from our strict enforcement policy. Moreover, we note that TBC's proposed waiver would have far-reaching impact on our licensing policies. As a result, TBC's proposal would be best considered in the context of a formal rulemaking proceeding.

Protection of Class C facilities. TBC takes issue with the Commission's policy requiring protection of Class C stations to the maximum facilities for their class. It is longstanding Commission policy to allow stations the opportunity for future growth and expanded service within their specified station class rather than fixing a station's protected service at its currently authorized level. This is accomplished by protecting stations to the maximum allowable facilities. Thus, WGGC(FM) is entitled to such protection and to the right to commence future operations with full Class C facilities.

No Prohibited Overlap. For the reasons stated above, TBC's assertion that its proposal would not cause prohibited contour overlap is not persuasive. The Commission's allotment standards are not based upon a contour overlap methodology. The Commission will not consider § 73.215 as a factor in the allotment process.<sup>8</sup> In fact, the Commission has specifically precluded the use of § 73.215 as an allotment tool.<sup>9</sup>

Hypothetical Multi-Step Procedure. TBC's assertion that it could upgrade its facilities without a waiver by using a hypothetical multi-step procedure with Station WGGC(FM) is purely speculative. TBC has not submitted any engineering exhibits to support this assertion. Even presuming that such a scenario were technically possible, it would require WGGC(FM) to: (1) give up its protection rights as a Class C station, thereby permitting other stations to locate closer to it; (2) give up its radiation rights as a full Class C station, thereby, forfeiting the potential for future increased coverage; (3) give up its "grandfathered" short-spaced rights pursuant to § 73.213(a) with respect to WND(A)(FM), Huntsville, Alabama, thereby limiting its rights to relocate in that direction, and under some options; (4) require it to move further away from its community of license. Our records indicate that WGGC(FM) has not filed an application to change its transmitter site or downgrade its facilities. Furthermore, TBC has not submitted any indication of WGGC(FM)'s willingness to pursue any of the hypothetical options presented. We will not favorably entertain a waiver request premised on a speculative outcome of a series of applications that have not been filed with the Commission.<sup>10</sup>

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<sup>6</sup> *Id.* at 4737 (para.14)

<sup>7</sup> See *Bristol, Tennessee*, 46 RR 2d 650 (1979) (request to create a short-spaced substandard allotment denied).

<sup>8</sup> See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681, 1681 (1989) (para. 5).

<sup>9</sup> See *John M. Salov*, 8 FCC Rcd 172, 174 (1993) (para. 18).

<sup>10</sup> Any applications submitted must not violate the contingent application prohibition of § 73.3517.

Case Precedent. TBC's reliance upon *Woodstock and Broadway* is misplaced. In *Woodstock and Broadway* the Commission accepted a supplemental showing at the allotment stage that demonstrated city grade coverage from a fully spaced allotment site. TBC has not specified a fully spaced allotment site. Clearly, the narrow exception regarding the city grade coverage showing permitted in *Woodstock and Broadway* from a fully spaced allotment site does not apply to TBC's application.

Public Interest. TBC asserts that its upgrade would better serve the emergency information needs of the New Madrid Seismic Zone. However, our study reveals that TBC's existing operation on Channel 236A already serves part of the New Madrid Seismic Zone and that the portion of TBC's proposed new service area which lies within the New Madrid Seismic Zone is already served either fully or partially by 16 other FM stations.<sup>11</sup> Therefore, the portion of the New Madrid Seismic Zone that TBC proposes to serve for the first time is not underserved. We do not consider the additional emergency broadcast service that would result from an upgrade of WCDZ(FM) to be sufficiently compelling to overcome the Commission's traditional prohibition against the creation of short-spaced allotments.

### Conclusion

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, INC. v. FCC*, 406 F.d 644,666 (D.C. Cir. 1968) (per Curiam)). We have afforded TBC's waiver requests the "hard look" called for under the WAIT Doctrine, *WAIT Radio v. FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the justifications are insufficient to waive §§ 73.203 and 73.3573. Additionally, TBC did not address the short spacing with respect to WTRB(FM).

Accordingly, for the reasons stated above, the requests for waiver of 47 C.F.R. §§ 73.203 and 73.3573 ARE HEREBY DENIED and Application BPH-951120IE IS HEREBY DISMISSED for violation of the provisions of 47 C.F.R. §§ 73.203 and 73.3573 with respect to WGGC(FM) and WTRB(FM).<sup>12</sup> This action is taken pursuant to 47 C.F.R. § 0.283. Further, since TBC has failed to present adequate reasons which, if true, would justify the requested waivers, TBC is not entitled to an evidentiary hearing as a matter of law. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Sincerely,



Dennis Williams  
Assistant Chief  
Audio Services Division  
Mass Media Bureau

cc: Thunderbolt Broadcasting Company  
Lohnes and Culver

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<sup>11</sup> This does not include any AM or TV stations that also serve the area.

<sup>12</sup> See *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992) (para. 22). (The Commission will not permit corrective amendment of defects that result from staff denial of a waiver request.)