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CHICAGO, ILLINOIS

March 21, 1995

BY HAND DELIVERY

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Re: **WT Docket No. 95-5**

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Kelley Communications, Inc. are an original and nine (9) copies of its Comments on the Notice of Public Rule Making issued in WT Docket No. 95-5.

You are requested to date-stamp the enclosed "S&R" copy of this filing and return it to the courier delivering this package.

If any additional information is desired in connection with this filing, please contact the undersigned.

Respectfully submitted,


A.B. Cruz III

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Streamlining the Commission's Antenna)
Structure Clearance Procedure)
)
and)
)
Revision of Part 17 of the Commission's)
Rules Concerning Construction, Marking)
and Lighting of Antenna Structures)

WT Docket No. 95-5

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To: The Commission

COMMENTS OF KELLEY COMMUNICATIONS, INC.

KELLEY COMMUNICATIONS, INC.

A.B. Cruz III
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March 21, 1995

Its Attorney

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SUMMARY

Kelley Communications, Inc. ("Kelley") supports the Federal Communications Commission's ("FCC" or the "Commission") efforts to streamline the process by which it regulates the clearance and placement of antenna structures. Kelley urges the Commission to impose a strict duty on all FCC applicants, licensees and permittees to provide accurate and complete information to the Commission regarding their antenna structures. Although Kelley takes no position on the Commission's proposal to shift primary responsibility for antenna structure compliance from licensees to antenna structure owners, it believes that the duty to report accurate antenna structure information should be vigorously enforced.

Kelley asserts that the Commission has, in its regulation of certain radio services, announced compliance standards that are inconsistent or unreasonably lenient. Kelley urges the Commission to establish compliance standards that are sufficiently stringent and applied uniformly across the various radio services so that the Commission can maintain an accurate antenna structure database and ensure that safety to air navigation is achieved. Kelley notes that determining accurate antenna structure locations and heights can be accomplished using relatively inexpensive methods and a minimal amount of diligence on the part of applicants, licensees and permittees. Accordingly, requiring that all antenna structure location information be reported to the nearest second of latitude/longitude and antenna height to the nearest meter, will not significantly overburden applicants, licensees or permittees.

Kelley recommends that the Commission adopt strict, rule-based antenna compliance standards that mirror those already found in Part 17 of the Commission's Rules. Kelley also urges the Commission not to allow "good faith" exceptions to these compliance standards and to apply these standards uniformly across the various radio services.

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To: The Commission

COMMENTS OF KELLEY COMMUNICATIONS, INC.

Kelley Communications, Inc. ("Kelley"), by its attorney, pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") Rules, hereby respectfully submits its Comments in response to the Notice of Proposed Rule Making ("Notice") adopted in the above-referenced proceeding^{1/} in which the Commission proposes to streamline its antenna structure clearance process and revise its rules pertaining to antenna structures.

I. INTRODUCTION

As discussed in the Notice, the Commission and the Federal Aviation Administration ("FAA") have the statutory responsibility to ensure that antenna

^{1/} Notice of Proposed Rule Making, WT Docket No. 95-5, FCC 95-16 (released January 20, 1995).

structures do not present a hazard to air safety.^{2/} Currently, under the Commission's Rules, FCC applicants proposing to construct or modify an antenna structure that is greater than 200 feet in height or may interfere with a nearby airport runway must notify the FAA by filing an FAA Form 7460-1. Using the information provided on that form, the FAA makes a determination whether or not the antenna structure poses a potential hazard to air navigation. If it does, the FCC takes the FAA's recommendations and imposes specific requirements on the applicant with respect to the construction, marking and/or lighting of the antenna structure.

The Commission initiated this proceeding to examine the feasibility of modifying its antenna structure clearance process in an effort to significantly improve the speed of disposal of certain Commission authorizations while reducing burdens on the communications industry. In particular, the Commission proposes to revise FCC Form 854 to be the application that antenna structure owners -- not licensees or permittees -- would file to register their antenna structures. The Commission believes that such a registration process will streamline the regulatory process thereby cutting costs incurred by the public and Federal government, improving safety to air navigation, and helping speed resolution of interference complaints.

In addition, The Commission proposes to update Part 17 of its Rules so that it is consistent with recent changes to certain FAA Advisory Circulars. Finally, in the Notice, the Commission expressed its intent to implement new rules that would hold

^{2/} See 47 U.S.C. § 303(q); 14 U.S.C. § 1501.

antenna structure owners primarily responsible for compliance with Commission painting and lighting specifications.

The Commission believes that its proposals in this proceeding will speed its processing of requests that seek to change antenna structure technical parameters, will eliminate lengthy searches of multiple databases, will facilitate the detection and correction of discrepancies in antenna structure parameters, and will allow for the identification of each antenna structure owner so that the Commission can enforce the Congressionally-mandated provisions relating to antenna structure owners. The Commission, by its Notice, seeks comments on the foregoing proposals, as well as any matter pertaining to antenna structures used by FCC licensees or permittees.

Kelley supports the Commission's efforts in this proceeding, and looks forward to a regulatory scheme that includes a streamlined antenna structure registration process that results in cost savings for the public and the FCC, while not jeopardizing safety to air navigation. Accordingly, Kelley is pleased to have this opportunity to submit the following Comments in response to the Notice.

II. COMMENTS

Kelley focuses its Comments in this proceeding on the issue of the accuracy of antenna structure parameters reported to the Commission by FCC applicants, licensees and permittees. In its Notice, the Commission seeks comments on the following:

Nearly all of the Commission's application forms ask for antenna structure location in terms of degrees, minutes, and seconds and height in meters. What would be the advantages and/or disadvantages of amending Part 17 to require that owners specify location to the nearest second and height to the nearest meter? What methods could be used to

make measurements of this accuracy and what would be the cost to each owner? Is this accuracy needed for all antenna structures or should the Commission consider each radio service separately?

Notice at ¶ 16(I). As discussed in greater detail below, Kelley believes that in order for the Commission to achieve its stated goal of regulatory efficiency, while avoiding any compromise to aviation safety, it is imperative that the Commission ensure that the antenna structure database contain only antenna structure information that is accurate and can be relied upon. To achieve this, Kelley strongly urges the Commission to require every FCC applicant, licensee and permittee to report antenna structure information to the nearest second in latitudinal/longitudinal coordinates (i.e., approximately 100 feet in the continental United States), and the nearest meter in height. Kelley believes that the wide availability, relative low cost and level of accuracy of today's site surveys and the Global Positioning System ("GPS") technology allow for such degrees of accuracy to be reported by all FCC applicants, licensees and permittees. Regardless of whom the Commission ultimately decides to hold primarily responsible for antenna structure compliance, Kelley firmly believes that the antenna structure database envisioned by the Commission will only be as effective and useful as the accuracy of the data it contains. Accordingly, the Commission's Rules and policies must reflect the requirement for the reporting of accurate antenna structure information, and hold applicants, licensees and permittees accountable for the antenna structure information they file with the FCC.

A. The Commission Cannot Achieve Its Goals of Accuracy, Efficiency Uniformity and Safety Until It Resolves "Competing" Compliance Standards.

1. The Commission Must Avoid "Garbage In - Garbage Out"

In its effort to create a single accurate and efficient antenna structure database, the Commission must be wary of the "garbage in - garbage out" phenomenon. Put simply, a computer-based record is only as good as the degree of accuracy and consistency of the data entered into the record. Accordingly, the Commission must not only ensure that applicants, licensees and permittees provide accurate antenna structure information, but that its Rules regarding antenna structure compliance are consistent among the various radio services. Because FCC licensees and permittees of the various radio services often use the same antenna structures, antenna structure compliance rules should be applied and enforced uniformly across the radio services. Without consistency among what is required of and reported by the applicants, licensees and permittees in the various radio services, the Commission would be hard-pressed to ever achieve its goals of accuracy, efficiency, uniformity and the preservation of air safety.

2. Case In Point: The Wireless Telecommunication Bureau's Licensing Division's "One-Mile Rule" Is Inconsistent, Unreasonable and Unsafe.

It is well established that a licensee is under the duty to provide complete and accurate information to the Commission. See In re Application of Abacus Broadcasting Co., 8 FCC Rcd 5110, 5117 (Review Board, 1993) ("Abacus"). In Abacus, the Review Board stated:

The Commission must rely on information from those it regulates when carrying out its broad responsibilities, but it lacks the resources to independently verify a licensee's representations. Thus, when issuing a license it must be assured that a licensee's representations are reliable --

and that its licensees understand their duty to provide accurate and complete information.

Id. Thus, a licensee must be diligent and provide tower information that the Commission and the FAA can rely on. See Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966) ("Lorain Journal") ("It does not seem too much to ask that federal licensees be scrupulous in providing complete and meaningful information provided for in forms and regulations.").

Although the Commission and several of its divisions continue to apply close scrutiny in their enforcement of proper construction of antenna structures and to emphasize strongly the importance of licensee compliance in this critical area, the Wireless Telecommunications Bureau's Licensing Division seems to be sending an entirely different signal when it comes to its regulation of specialized mobile radio ("SMR") stations, by enforcing what is now commonly referred to as the "one-mile rule."

On August 18, 1994, the Licensing Division released its Order In the Matter of Lawrence E. Vaughn, Jr. 9 FCC Rcd 4438 (Licensing Division, 1994), recon. pending ("Vaughn"). In that decision, the Licensing Division, on the question of whether the SMR station in question was constructed in compliance with its FCC authorization, held that "the quantum of proof necessary to demonstrate that a station is not constructed in substantial accordance with its authorized coordinates is a showing that the station is not constructed within 1.6 kilometers (one mile) of those coordinates."^{3/} 9 FCC Rcd

^{3/} Kelley notes that SMR stations and their antennas are generally co-located.

4438 at ¶ 1 (emphasis added). The Vaughn one-mile standard is a complete repudiation of the high standards of licensee diligence announced in Abacus and Lorain Journal, as well as the objectives the Commission seeks to achieve in this proceeding.

Kelley believes this one-mile standard should be overturned or modified because it condones unreasonably large deviations between a station's actual location and the geographical coordinates specified on the FCC authorization for that station. As such, the Licensing Division's decision in Vaughn is squarely at odds with the public safety objectives of Part 17 of the Commission's Rules. Antenna structure locations that deviate up to and including one mile from their licensed coordinates pose potentially serious air traffic safety hazards. As the Commission notes in its Notice, it is imperative that Commission records contain antenna structure parameters that are as accurate as possible, since the FAA relies on the accuracy of reported tower coordinates in conducting its aeronautical studies. See 14 C.F.R. §§ 77.13, 77.17. If the FAA issues a Determination of No Hazard to Air Navigation based on station coordinates that are incorrect by significant distances up to and including one mile, then air safety could be compromised. See Exhibit A (expert opinion regarding impact of "one-mile rule" on air safety).

As noted above, the Commission, in addition to its initiating the instant proceeding to address this critical issue, has recently emphasized the importance of communications tower identification, safe location, marking, and lighting with regard to air traffic safety. See e.g., In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Memorandum Opinion and Order,

PP Docket No. 93-253, FCC 94-264 (released October 19, 1994) (Commission expresses concern about the promotion of safe location and identification of PCS antennas, particularly in areas around airports); Public Notice, Report No. D-768 (October 5, 1994) (Commission discusses air hazards caused by improperly marked and lighted communications towers). Clearly, the Licensing Division's decision in Vaughn is inconsistent with the Commission's goal of ensuring that the actions of its applicants, licensees or permittees do not compromise air safety.

The gross disparity between the Licensing Division's "one-mile rule" and the antenna structure compliance standards and enforcement policies of other FCC offices is difficult to understand or to reconcile especially when many SMR stations will soon be classified as commercial mobile radio services -- or CMRS -- and presumably subject regulations akin to those applicable to other mobile communications services such as cellular service. See generally, Third Report and Order, FCC Docket No. 93-252, FCC 94-212 (released September 23, 1994). In this regard, Kelley notes that the Commission recently issued a Notice of Apparent Liability for Forfeiture ("Notice") against an FCC licensee for violating various FCC rules relating to antenna tower construction -- including exceeding a tower height limit by a mere 21 feet. Centel Cellular of North Carolina Limited Partnership, Notice, FCC 94327 (December 16, 1994) at ¶ 4. In Centel, the Commission stressed that it demands "a very high standard of diligence on the part of licensees when constructing towers." Id. In light of the foregoing, Kelley questions how the Licensing Division can justify site location errors of up to and including one mile, especially when, with minimal effort or expense, an applicant, licensee or

permittee can determine or verify the location of a proposed or constructed antenna structure by having a site survey conducted by a land surveyor or by simply using a GPS instrument. Allowing site location errors of up to one mile is plainly unreasonable given the serious public safety issues at hand.

Interestingly, just eight months before its decision in Vaughn, the Licensing Division announced what Kelley believes was a clear, more reasonable compliance standard for SMR stations. Specifically, on January 11, 1994, the Licensing Division issued its Order in In the Matter of Fred B. Lott, 9 FCC Rcd 225 (Licensing Division, 1994) ("Lott"). In that decision, the Licensing Division announced a more strict compliance standard stating that "[a]s a rule of thumb, construction more than one second, (60 feet), away from the licensed location is not in accordance with the station's authorization."^{4/} 9 FCC Rcd 225 at ¶ 6 (emphasis added). Kelley believes that the one-second standard announced in Lott was and remains a compliance standard more in line with the Commission's interests in ensuring safety to air navigation. In addition, the Lott case is more in line with the Commission's well-established standards for licensee-provided information, as set forth in Lorain Journal.

In Vaughn, however, the allowable site location variance was expanded from 100 feet (or one second) to 5280 feet, without adequate explanation as to why the one-second standard was inappropriate or why an intermediate distance was not more

^{4/} One second in latitude is actually equivalent to approximately 100 feet -- not 60 feet. Also, the distance of one second in longitude varies depending on the latitude. Richard R. Hobbs, *Marine Navigation 1: Piloting*, Naval Institute Press, p. 20 (1977).

appropriate.^{5/} While it is generally accepted that surveying methods are not 100% accurate, their level of accuracy can be specified in terms of feet rather than in miles. In this regard, a one-second rule is much more reasonable and safe than a one-mile rule. If the Licensing Division continues to believe that a one-second standard is unacceptable or unrealistic, then Kelley suggests that the Licensing Division consider adopting an intermediate standard that would take into account such things as the accuracy of modern surveying techniques and GPS instruments, air safety concerns, potential station interference concerns, and the importance for licensees to comply with the Commission's Rules.

3. Current Methods of Measurement Allow For Extremely Accurate Antenna Structure Location Determinations

Modern surveying techniques and current GPS technology allow an FCC applicant, licensee and permittee to determine and report, with a extreme degree of accuracy, the location of a proposed or constructed antenna tower. Moreover, these methods of measurement are readily available and relatively inexpensive.

^{5/} In Vaughn, the Licensing Division somehow reached the conclusion that "[r]ule violations at distances less than [one mile] do not lend themselves to conclusive and expeditious action because of issues of method of measurement, intent, justifiable reliance, credibility, and good faith arise." 9 FCC Rcd at 4439, ¶ 8 (citations omitted). Kelley submits that today's "methods of measurements" allow for site locations to be determined and reported with far greater precision than is suggested by the Licensing Division's "one-mile rule." Kelley further believes that the applicant itself -- whether a tower owner or a licensee or permittee -- should be held responsible for confirming or verifying -- by survey or GPS determination -- the precise location of its antenna structure. This way, such factors as "intent, justifiable reliance, credibility, and good faith" are minimized or eliminated altogether. In the interest of air safety and to ensure that the FCC's antenna structure database is accurate and reliable, such factors should not mitigate compliance violations by users or owners of antenna structures.

As noted in the attached letter from Robert G. Barrilleaux (see Exhibit B), a professional land surveyor, most land surveyors today use "electronic total stations" to determine distance measurements and relative elevations. Using ground control points located on U.S. Geological Survey Quadrangle Maps (or "quad" map) a surveyor can determine the location of an antenna tower relating to the aforementioned ground control points, both horizontal and vertical. See letter from Robert G. Barrilleaux to A.B. Cruz III, Esq. dated March 3, 1995.

The level of accuracy of the above-described surveying method is dictated by the accuracy of the "quad" map. Specifically, although electronic total station surveying instruments have a maximum error of 0.0001 feet/feet, the "quad" maps has a normal horizontal accuracy of ± 0.5 seconds of arc, or 43.88 feet, at 30 degrees North latitude. Id. Moreover, the vertical accuracy of "quad" maps has historically been ± 1.0 feet. Id. Finally, as noted by Mr. Barrilleaux, the cost of an antenna tower location determination utilizing the foregoing methodology runs approximately \$150 to \$300 per site, depending on location and accessibility. Id.

The location-determination accuracy of today's GPS Receiver is also extremely high. In a recent survey of over 275 "over-the-counter" GPS receivers made by 54 different manufacturers, the level of accuracy reported for GPS receivers with list prices under \$1,000 ranged from 5 to 25 meters for "single-fix" determination. See 1995 GPS World Receiver Survey, GPS World, Jan. 1995, at 46. Furthermore, by employing "differential" or "post-processed differential" methods, the level of accuracy of these same GPS receivers can be greatly improved -- i.e., within 1 to 10 meters. Id.

Based on the foregoing, FCC applicants, licensees and permittees can, with minimal effort and at a minimal cost, determine antenna tower locations with significant accuracy. As discussed herein, the Commission should require applicants, licensees and permittees to confirm antenna tower locations and report accurate antenna tower information to the Commission.

B. The Commission Should Establish Additional Rule-Based Compliance Standards for Tower Location and Height.

1. Rule-Based Compliance Standards are Preferred as “Ascertainable Standards.”

The Commission should adopt rules in this proceeding that specify compliance standards (and subsequent penalties for noncompliance) that will be expected of applicants, licensees or permittees with regard to the quality of information concerning antenna tower location and height they submit to the Commission. While it is not mandated by the Administrative Procedure Act that every rule adopted by an agency be established through notice and comment rulemaking procedures, the important issues addressed in this docket call for special consideration. Clearly, special rules that define how precise a licensee must calculate and report its antenna structure coordinates and height are needed. If these important standards are left to the vagaries of ad hoc promulgation through compliance proceedings, the Commission will never develop a clear picture of the exact standards required of licensees in this regard. See Section II.A.2, supra, for a discussion of the Licensing Division’s inconsistent interpretation of the “substantial accordancy” standard. See generally Kenneth C.

Davis and Richard J. Pierce, Jr., Administrative Law Treatise § 6.8 (1994) (discussing the importance that agencies establish rule-based “ascertainable standards” for their constituencies).

Rule-based compliance standards are “ascertainable standards.” Unlike adjudicative rules such as the Vaughn “one-mile rule,” legislative rules are established with due consideration of several alternative points of view and factual submissions. The “one-mile rule” was developed for an entire class of licensees with input from only the parties involved in that case and was necessarily constrained by the factual situation before the Licensing Division. There are several other advantages the Commission would bring about by establishing rule-based compliance standards concerning tower information. First, the Commission could avoid the burdensome task of constantly redefining what is “substantial accordance” with respect to every factual situation that comes before it. Second, rule-based compliance standards would give licensees superior notice of the standards they and their facilities are expected to meet. Third, rule-based compliance standards are less subject to sources of unfairness such as selective enforcement or carved-out “exemptions” from adjudicative rules.^{6/}

The Commission has already set specific standards for tower painting and marking in Part 17 of its Rules. This makes sense. Likewise, it makes sense for the Commission to put in place similar standards with respect to antenna structure information (such as antenna height, tower coordinates, and physical address) provided

^{6/} For example, the Vaughn decision carves out an exception to the one-mile rule for “unique circumstances.” The Licensing Division did not define what is meant by “unique circumstances.”

to the Commission. Accordingly, Kelley urges the Commission to adopt compliance standards applicable to antenna towers that properly balance the benefits of increased accuracy and safety and the costs to licensees or tower owners.^{7/}

2. Violations of the Commission's Rules Involving Public Safety Should Be Considered "Strict Liability" Offenses.

The Commission should not consider such factors as intent, good faith, or reliance on others when enforcing its regulations concerning painting, marking, and location of antenna towers. Such considerations frustrate the important goals of public safety regulations by complicating enforcement and distinguishing between offenders on the basis of such nebulous concepts as "good faith" and "justifiable reliance."^{8/} The Licensing Division, appears to have fallen prey to this type of thinking. In particular, in the Vaughn decision, see Section II.A.2, supra, the Licensing Division adopted a blanket rule, providing that licensees are in "substantial accordant" with their station authorizations if they have constructed their stations within one mile of their authorized coordinates. The Licensing Division based part of its decision on a concern, that, at distances of less than one mile, factors such as intent, good faith, and justifiable reliance come into play. Vaughn, 9 FCC Rcd at ¶ 8. However, the Licensing Division neglected to define those terms. No "ascertainable standard" was given to SMR licensees. As a result, the purposes of the "substantial accordant" provision of FCC Rule Section 90.631(f) were rendered meaningless.

^{7/} The Vaughn decision did not address the issue of aviation safety.

^{8/} Kelley notes that currently violations of construction deadlines are enforced by the Commission without regard to intent.

Issues such as good faith, justifiable reliance, and intent, and their consideration in this context jeopardize the Commission's attempt to create a usable, accurate database for antenna tower information.^{9/} What does "good faith" mean? Does it mean that a licensee tried to calculate its tower information but made errors? If so, does the one-mile rule mean that a one-mile distance is the maximum tolerable error and that "good faith" is no longer imputed? Why would "good faith" bear any relationship to distance?^{10/} Similarly, what does "justifiable reliance" mean? Does it mean that the licensee never bothered to verify or confirm the antenna structure information itself, but should somehow be excused for its failure because it copied the information from another licensee with facilities at the same antenna structure. Finally, what does "intent" mean? Does it simply mean that the licensee simply never intended to violate the regulation? Such a simple application of "intent" would excuse most licensees from bearing any responsibility for their antenna structures.

Under the Licensing Division's current interpretation of "substantial accordance" the following scenario is possible: the original licensee on a given antenna structure may have made serious errors (up to one mile) in determining the tower's coordinates, but could be excused for making this error because of its "good faith" attempt to calculate the tower's location. The next eleven licensees who simply copy the antenna structure information from the original licensee could also be excused because they

^{9/} In fact, because of previous lax enforcement of "substantial accordance" issues much of the data currently in the Commission's records is unreliable.

^{10/} Surely the Licensing Division cannot suggest that a licensee that constructs its tower 0.9999 miles away from its licensed coordinates has any more "good faith" than a licensee that constructs its tower 1.0001 miles away.

have demonstrated “justifiable reliance.” Thus, errors are likely to be compounded several times under the Licensing Division’s scheme -- hardly constituting “streamlining.” The Commission should consider making violations of antenna structure regulations that impinge on public safety, strict liability offenses.

Finally, with respect to regulations that affect public safety, a violation should result in a forfeiture or other form of punishment regardless of the licensee’s intent. The USDA does not allow adulterated meat to reach the marketplace, irrespective of the producer’s “good faith” efforts to comply with USDA requirements. Similarly, a car that fails a safety inspection should not be allowed on the road simply because the driver “justifiably relied” on his mechanic to take care of the problem. In both cases, the critical requirements of public safety require the regulation to be enforced as stated, no exceptions allowed. Realizing that the regulation will be strictly enforced causes the regulated industry to conform, thus providing greater protection to the public. Accordingly, the true effectiveness of “strict liability” public safety regulations stem from the incentives they create and the dangers they prevent. Allowing “good faith” escape provisions only diminishes the amount of compliance that can be expected.

To demonstrate its commitment to accurate recordkeeping and public safety, the Commission should ensure that antenna structure compliance standards are uniform across the various radio services and sufficiently stringent. The Commission should immediately begin enforcing current standards with an eye toward the well-established principle that licensees remain diligent and careful when submitting information to the

Commission. Whether to impose this duty on antenna tower owners is in the Commission's ultimate discretion, but the duty should remain at a high level. Under no circumstances should this important obligation be diluted. Public safety deserves no less.

CONCLUSION

For the reasons set forth above, Kelley urges the Commission to move forward with these important rule changes and improve its antenna structure clearance procedures. At the same time, Kelley cautions the Commission to carefully consider the quality and accuracy of information that is provided by FCC applicants, licensees and permittees.

Respectfully submitted,

KELLEY COMMUNICATIONS, INC.

By:  _____

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March 21, 1995

Its Attorney

EXHIBIT A

JIM MURRAY

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Oct. 10, 1994

Mr. A.B. Cruz III
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re: In the Matter of Fred B. Lott, released January 11, 1994, and In the Matter of Lawrence E. Vaughn, Jr., released August 18, 1994.

Dear Mr. Cruz,

This responds to your request to analyze the above referenced orders with respect to air safety. I am an aviation consultant specializing in air traffic control airspace, procedures, and automation issues. My air traffic control experience totals more than 36 years with the Federal Aviation Administration (FAA) and almost 3 years as a corporate Chief Systems Engineer. I held many staff and managerial positions during my career with the FAA, including Chief of the Airspace, Procedures and Automation Branch, FAA Great Lakes Region, from 1981-1984. In this position I was responsible and had signature authority for determinations of Hazard or No Hazard to Air Navigation resulting from aeronautical studies of proposed construction or alteration of structures on or near airports within the existing eight state regional boundary. These studies were completed under the provision of Part 77 of the Federal Aviation Regulations.

During my review of the above referenced decisions, I was alarmed when reading in paragraph 9 of Lawrence E. Vaughn, Jr that the FCC has "chosen the 1.6 kilometer benchmark because in other contexts in Part 90 we treat sites located within 1.6 km of specified coordinates as being at those coordinates."

I do not agree with the Vaughn 1.6 km benchmark for the following reasons: Construction at a site located as much as 1 mile from location for which the aeronautical study was conducted could result in a substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities.

When a study is conducted by FAA, it is made with respect to the exact location of the proposed structure in latitude and longitude coordinates to the nearest second.

Mr. A. B. Cruz III
Oct, 10, 1994
page 2.

An evaluation of whether or not the proposed structure has an effect on either instrument flight rules (IFR) or visual flight rules (VFR) aircraft operations is made based on that location. Application of FAA Part 77 Standards and Airport Imaginary Surfaces are applied based on that location. When adverse effects are found, a negotiation process takes place between the FAA and the proponent to find a more suitable location where there would be no adverse effect. A "Determination of No Hazard to Air Navigation" would be issued only after the study resulted in finding no substantial adverse effect on the safe and efficient use of the airspace.

If in fact the proposed structure were then built, for example, a mile away from the location that was deemed acceptable by FAA, I believe the FAA "Determination of No Hazard" would then be null and void. I have serious concern as to whether or not this new location could have an adverse effect on the navigable airspace. A new aeronautical study based on that new location would be necessary.

Concerning In the Matter of Fred B. Lott, I agree with the one second (60 feet) rule of thumb for construction in paragraph 6 (although distance varies and could be 80 to 100 feet depending on latitude). I agree with this position since the proponent, when notifying FAA of it's plans, using FAA Form 7460-1, Notice of Proposed Construction or Alteration, in accordance with 14 CFR 77.17, must list location coordinates to the nearest second. This is required on the form, and the location coordinates listed are the coordinates used by FAA to conduct it's aeronautical study. The one-second rule noted In the Matter of Fred B. Lott coincides with the to the "nearest second location" requirement specified on the FAA Form 7460-1.

In my opinion no change to the Lott one-second rule should have been made without joint consultation between the FAA, the FCC, and all interested parties.

Sincerely,


Jim Murray

Aviation Consultant