

SUMMARY

Tyler Broadcasting Corporation ("TBC"), hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding. TBC once again demonstrates that its proposal to reallocate Channel 227C1 from Ada to Newcastle, Oklahoma, complies with the Commission's rules and policies, and would serve the public interest.

In its NPRM, the Commission noted that neither Ada nor Newcastle were located in the Oklahoma City Urbanized Area. However, the Commission cited its recently enacted policy, previously unannounced, which requires that a station seeking to change its community of license to one which is outside an Urbanized Area but whose signal would place a city-grade, 70 dBu, signal over 50% or more of an Urbanized Area, make a showing that the new community of license is sufficiently independent of the larger nearby city. TBC provides extensive evidence that Newcastle is an independent community that does not rely upon Oklahoma City for assistance, and that Newcastle should not be credited with all the services licensed to communities located in the Oklahoma City Urbanized Area.

TBC once again demonstrates that the public interest will be served by a grant of its proposal. TBC restates its intention to reimburse the licensee of KIMY, Watonga, Oklahoma, for the reasonable and prudent expenses associated with the proposed change of the station's channel from Channel 228A to Channel 230A.

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Before the
Federal Communications Commission

Washington, D.C. 20554

| | | |
|--|---|----------------------|
| In the Matter of |) | MM Docket No. 95-175 |
| |) | RM-8707 |
| Amendment of Section 73.202(b) |) | |
| (Table of Allotments) |) | |
| FM Broadcast Stations |) | |
| |) | |
| (Ada, Newcastle and Watonga, Oklahoma) |) | |

TO: Chief, Allocations Branch
Policy and Rules Division

COMMENTS IN SUPPORT OF NOTICE OF PROPOSED RULE MAKING

Tyler Broadcasting Corporation ("TBC"), licensee of KTLS(FM), Ada, Oklahoma,¹ by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, hereby submits its Comments in support of the Notice of Proposed Rulemaking, DA 95-2367, released December 6, 1995 ("NPRM"), in the above-captioned proceeding.² In support whereof, the following is shown:

I. Background

1. In its Petition for Rulemaking ("Petition"), TBC requested that the Commission amend Section 73.202(b) of the Rules to (a) delete Channel 227C1 from Ada, Oklahoma; (b) add Channel 227C1 to Newcastle, Oklahoma; and (c) modify the license for

¹ At the time it filed its Petition for Rulemaking in this proceeding, TBC was the proposed assignee of KTLS(FM). See File No. BALH-950609GO. On August 8, 1995, the assignment of license of KTLS(FM) was granted by the Commission and the assignment was consummated on September 29, 1995.

² The Commission's NPRM set a deadline of January 29, 1996, for the filing of Comments in this proceeding. Therefore, these Comments are timely filed.

KTLS(FM) to specify "Newcastle, Oklahoma" as the station's city of license. TBC also sought to substitute Channel 230A for Channel 228A at Watonga, Oklahoma and requested the Commission to order KIMY operating on Channel 230A at Watonga, to show cause why the station's license should not be modified for operation on Channel 228A. TBC demonstrated that such changes would serve the public interest, would comply with §1.420(i) of the Commission's Rules, and would satisfy the Commission's policy concerning modification of a station's license to specify a new community of license. See, Modification of FM and TV Authorizations, 4 FCC Rcd 4870 [66 RR 2d 877] (1989)("New Community of License").

2. The Commission issued its NPRM, seeking comment on TBC's proposal and ordering KIMY to show cause why its license should not be modified. In its NPRM, the Commission stated its belief that TBC's proposal warrants consideration "because the allotment of Channel 227C1 to Newcastle could provide the community with its first local aural service without depriving Ada of its sole local aural broadcast service." The Commission noted that TBC's proposal complies with §1.420(i) rules concerning specifications of new communities of license for FM station; however, the Commission took an unusual additional step.

3. When a station seeks to change its community of license from a community outside an urbanized area to a community within an urbanized area, the Commission requires a special showing that the new community is sufficiently independent from the nearby larger community in order for the Commission to determine whether a preference

for first local service is warranted. (New Community of License, supra). The Commission in the NPRM found that neither Ada nor Newcastle are located within an Urbanized Area. However, in FM Table of Allotments (Headland, Alabama and Chattahoochee, Florida), 10 FCC Rcd 10352 (1995), the Commission determined for the first time that, when a station seeks to change its community of license to one which is outside an urbanized area but whose signal would place a city-grade (70 dBu) signal over 50% or more of an Urbanized Area, the rulemaking proponent must make the same showing as currently required by those parties seeking to move to a community within an Urbanized Area.³ According to the Commission's calculations, if Channel 227C1 is allotted to Newcastle, KTLS(FM) will provide 95% of the Oklahoma City Urbanized Area with a 70 dBu signal. Therefore, the Commission is requiring TBC to provide a special showing that its proposal warrants a first local service preference.⁴ As will be demonstrated herein, a first local service preference is warranted in this case.

³ It would appear that the FCC in this process has reestablished the doctrine of presumption that the intent of an FM applicant is to serve a larger community nearby that it had previously abandoned in Teche Broadcasting Corp., 35 RR 2d 487 (Rev. Bd. 1975). (The Berwick doctrine.)

⁴ TBC believes that the Commission has erred in imposing this new requirement without proper notice and an opportunity for public to comment. See, Reeder v. FCC, 865 F. 2d 1298 (D.C. Cir. 1989), where the Court held that the Commission may not change its policy regarding rule making procedures without giving notice of its intent to do so providing for adequate opportunity for comment. Therefore, TBC preserves herein its right to raise the issue of legality of this novel Commission action in any subsequent forum or proceeding.

II. TBC's Proposal Will Serve the Public Interest

4. The proposed reallocation of Channel 227C1 from Ada to Newcastle, Oklahoma, is permissible under Section 1.420(i) of the Rules, which authorizes the Commission to modify the license or permit of an FM station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's present allotment. Under the rule, two factors must exist in order to change a station's city of license in a rule making proceeding: (1) the channel changes must be mutually exclusive, and (2) the rule making must not deprive a community of an existing service representing its only local transmission service. TBC's proposal meets both conditions. The proposals for Ada and Newcastle are mutually exclusive, and Ada presently has three commercial radio stations: KADA(AM), 1230 kHz; KADA-FM, (Channel 244A) and KTLS(FM). Ada also is served by a television station, KTEN, Channel 10.⁵ In addition, unused Channel 22 is allotted to Ada as an educational TV channel. Therefore, reallocation of Channel 227C1 to Newcastle would not deprive Ada of its only local transmission service.

5. In making the determination of whether to permit a modification of a station's community of license, the Commission will "take into account the totality of the service improvements resulting from a proposed change in community of license in determining whether an allotment proposal should be approved." New Community of License. TBC's

⁵ The original Petition stated that Ada was served by four commercial broadcast stations, KADA(AM), KADA-FM, KYKC(FM) and KTLS(FM). It was later discovered that KYKC(FM) was actually licensed to Byng, Oklahoma. On November 27, 1995, an Erratum was filed to correct this error.

proposal will continue to provide regional service to Ada, while providing first local service to Newcastle. The Commission's priorities for assigning FM allotments are set out in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 [51 RR 2d 807] (1982). They are: (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). Here, the provision of first local service to Newcastle is preferred to second local service to Ada. The service improvements that will result from TBC's proposal weigh heavily in favor of granting its requested changes.

III. TBC's Proposed Reallocation of Channel 227C1 to Newcastle Deserves A First Local Service Preference

6. In its NPRM, the Commission requested TBC to provide a showing that its proposal deserves a preference for providing first local service to Newcastle. Herein, TBC demonstrates under the factors set out in Faye & Richard Tuck, 3 FCC Rcd 5374, 65 RR 2d 402, 407 (1988) that Newcastle is a wholly independent community and is not interdependent on Oklahoma City in any sense of the word.

7. Ordinarily, the Commission presumes that every community needs at least one local transmission service, as it is mandated to do under the "fair" allotment standard of Section 307(b) of the Communications Act. (47 U.S.C. §307(b)). However, in the case of a community located near a central city, the Commission presumes that the community's need for local self-expression will be met by the broadcast stations licensed to the nearby central city. This case does not involve the classic "central city, nearby dependent community" scenario. In fact, the overwhelming evidence in this case suggests

just the opposite; namely, that Newcastle is a separate, independent city that has no ties to Oklahoma City that would result in Newcastle being credited with all the signals located in the Oklahoma City Urbanized Area. The fact that the U.S. Census Bureau did not include Newcastle in the Oklahoma City Urbanized Area is strong evidence of Newcastle's independence. Furthermore, under every criterion the Commission has devised to determine whether a community is independent, Newcastle stands out as a separate community.

IV. The Evidence Conclusively Demonstrates That Newcastle Is an Independent Community

8. In its Petition For Rulemaking, TBC included evidence to support its position that Newcastle is a independent city. This evidence satisfies the Commission's tests for evaluating a community's independence from a nearby central city. The Commission has stated that, when evaluating independence, it will consider: (A) population coverage to both the proposed suburban community and adjacent central city; (B) size of the suburban community versus the size of the central city; and, most importantly, (C) the interdependence of the suburban community to the central city. See, Faye & Richard Tuck, supra. Under each of these factors, the facts show that Newcastle is independent from Oklahoma City.

A. Service To Newcastle Versus Service To Oklahoma City

9. In the Technical Exhibit included with TBC's Petition for Rulemaking (a copy of which is attached hereto as Exhibit 1), it was shown that the entire city limits of Newcastle will be served by the principal community contour (3.16 m/Vm) of KTLS.

While the Commission calculates that 95% of the Oklahoma City Urbanized Area will be covered by KTLS' 70 dBu signal, service to Oklahoma City is secondary in this case. All of the population of Newcastle will receive service from KTLS while only some of the Oklahoma City Urbanized Area will receive service. Therefore, with the allotment of Channel 227C1 to Newcastle, KTLS would very clearly be primarily serving the community of Newcastle.

B. Population of Newcastle Versus Oklahoma City

10. Under the second variable, the 1990 population of Oklahoma City is 444,719. The 1990 population of Newcastle was 4,214. Newcastle is a separate city with its own sizable population and has not been included in the Oklahoma City Urbanized Area, a determination which is made by the U.S. Census Bureau based upon population groupings. Therefore, Newcastle is not a "bedroom" suburb of Oklahoma City and is a separate independent community.

C. Newcastle's Independence From Oklahoma City

11. The most important of the Commission's criteria is whether the suburban community is interdependent with another nearby city. In assessing interdependence, the Commission considers the following factors:

1. The extent to which community residents work in the larger metropolitan area, rather than the specified community;
2. Whether the smaller community has its own newspaper or other media that cover the community's local needs and interests;

3. Whether community leaders and residents perceive the specified community as being an integral party of, or separate from, the larger metropolitan area;
4. Whether the specified community has its own local government and elected officials;
5. Whether the smaller community has its own telephone book provided by the local telephone company or zip code;
6. Whether the community has its own commercial establishments, health facilities, and transportation systems;
7. The extent to which the specified community and the central city are part of the same advertising markets;
8. The extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries.

Faye and Richard Tuck, 65 RR 2d at 409.

12. A petitioner does not have to demonstrate its proposed community's independence under all of the Commission's eight criteria. See, FM Table of Allotments (Headland, Alabama and Chattahoochee, Florida), 10 FCC Rcd 10352 (1995). Instead, the Commission balances the various factors to determine whether a community is independent. Where no evidence is available under one of the eight factors, the Commission presumes that the factor would favor independence. In this case, there is overwhelming evidence under each of the Commission's eight criteria that Newcastle is an independent community.

1. Workplace Employment in Newcastle

13. Under the factor of workplace employment, Newcastle is home to hundreds of local businesses, restaurants, shopping centers and professional offices. Exhibit 2 attached hereto incorporates photographs of many of these businesses. Exhibit 3 attached hereto are the local telephone listings for Newcastle which list many of these businesses. These local businesses include many with the name "Newcastle" in their title: Newcastle Motel, Newcastle Antiques, Newcastle Tire and Brake Center, Newcastle Auto Sales, Newcastle Drug Co., Newcastle Flower and Gifts, Newcastle Drug, Friendly Newcastle Hardware, Newcastle Hardware Center, the Newcastle Pacer newspaper. Exhibit 4 attached hereto is a letter from Allen W. Benelli, Newcastle's City Manager. Mr. Benelli relates that:

Two Interstate Highways and five State Highways intersect our municipal boundaries, providing opportunities for a variety of residential and commercial developments. Commercial and industrial business focus on a variety of goods and services. For an international flair--Newcastle is home to EOSAT and Troy Wesnidge, Inc. EOSAT, or Earth Observation Satellite Company, provides satellite digital mapping for clients around the world. Troy Wesnidge, Inc. builds custom hand crafted furniture--and its list of clientele includes heads of state and celebrities alike. Local businesses include a Ford Automobile and Truck Dealership, a John Deere Tractor Dealership, a Walmart Discount Store, three branch banks with a fourth under construction, grocery stores, restaurants, and numerous service industry businesses.

Exhibit 4.

14. Employment in Newcastle is provided by these many businesses. Therefore, unlike a "bedroom" type community where the residents leave the community each day and commute to work at businesses located in a nearby central city, Newcastle has its own employment base which attracts workers from the area.

2. Other Media Outlets in Newcastle

15. Newcastle has its own weekly newspaper, the Newcastle Pacer. The Newcastle Pacer also publishes the Early Bird Express, which is distributed freely to more than 8,500 homes in Newcastle and surrounding communities. Exhibit 5 attached hereto is a photocopy of the first page of the January 4, 1996, edition of the Newcastle Pacer and a flyer promoting the newspaper and its companion, the Early Bird Express. The nearby communities of Tuttle and Blanchard rely on the Newcastle Pacer and Early Bird Express for coverage of local news. The fact that Newcastle supports its own newspaper is evidence that it is an independent community that deserves its own media voice.⁶

3. Perceptions of Community Leaders

16. Exhibits 4 and 6 attached hereto are letters from the City Manager and Mayor of Newcastle, respectively. In his letter, Mayor Lloyd A. Gramling states that "the citizens of this community consider themselves as citizens and residents of Newcastle and have strong ties to the community." Exhibit 5 at p. 2. City Manager Allen W. Benelli states that "Our citizens pride themselves on being residents of Newcastle....[o]ur residents appreciate the distinction between our community--and the Oklahoma City Metroplex."

17. This perception of independence is shared by the citizens of Newcastle. Exhibit 7 attached hereto are letters from residents of Newcastle, including the President

⁶ Noncommercial educational FM station KMSI(FM), licensed to Moore, Oklahoma, has its tower and an office within the Newcastle city limit. This does not, however, constitute first local service to Newcastle.

and Executive Secretary of the Newcastle Chamber of Commerce. Each of these individuals state that Newcastle is a separate community and that its citizens identify it as such. The citizens of Newcastle clearly value their independence and obviously do not view themselves as an integral part of any other city, especially Oklahoma City.

4. Local Government and Elected Officials

18. The City of Newcastle has its own local government, which provides numerous municipal services to its citizens. City Manager Benelli describes Newcastle's government as follows:

Newcastle was incorporated as a City in 1963 and operates as a Statutory Council-Manager form of city government, in accordance with Oklahoma State Statutes. Our City Council is comprised of five Council Members, elected to four year terms of office. Our Mayor, the Honorable Lloyd Gramling, is elected to office by a majority vote of the City Council; he has served as Mayor for over seven years. The City Council appoints the City Manager, who serves as Chief Executive Officer and Administrative Head of City Government.

Exhibit 4.

Therefore, Newcastle is politically independent from Oklahoma City.

5. Telephone Book and Zip Code

19. The local telephone listings for Newcastle are published by the Pioneer Telephone Cooperative, Inc., and Southwestern Information Publishing. See Exhibit 3. Newcastle's residential and business phone listings are separate from the other communities listed in Pioneer's telephone directory. Oklahoma City listings are not included in this directory. In addition, Newcastle has its own post office and zip code ("73065") separate from Oklahoma City's zip codes. The fact that mail and telephone

service for Newcastle is not grouped with Oklahoma City is further evidence of Newcastle's independence.

6. Commercial Establishments, Health Facilities and Transportation

20. As previously noted, Newcastle is home to hundreds of local businesses, many of which bear the name "Newcastle" in their names. See Exhibits 2, 3, 4 and 6.

Newcastle has its own churches, civic organizations, shopping centers, library, and senior center. "Medical services include two clinics, one dentist, two chiropractors, two veterinarians, two vision/eyeglass centers, and a home health care service for elderly and indigent patients." Exhibit 4. Newcastle is home to the Newcastle Dental Clinic and the Newcastle Animal Hospital. Newcastle is a thriving community which continues to enhance the services it provides to its citizens. See Exhibit 4.

7. The Newcastle Advertising Market

21. Newcastle is included in the Oklahoma City Metro Market by Arbitron. However, Newcastle has such a wide array of its own local businesses and commerce that it constitutes its own niche advertising market. The existence of a separate weekly newspaper in Newcastle is evidence of this fact.

8. Municipal Services in Newcastle

22. Newcastle has the following departments and or Boards within its city government: "full-time Police Department, Volunteer Fire Department, Public Works Authority which includes streets, water and sewer systems, Vehicle Maintenance, Community Development Department, Parks and Recreation Board, Planning

Commission, Board of Adjustment, Municipal Judge, Municipal Court and City Attorney." Exhibit 6. Newcastle has mutual aid agreements with surrounding communities including Oklahoma City. Newcastle is actually called upon to assist these other communities from time to time. Exhibit 6. "Newcastle is a totally self-sufficient community, providing a wide array of city municipal services...." The City's full-time Public Works Department operates water and sewer treatment plants, street construction and upkeep, as well as contract sanitation services. See Exhibit 4. Newcastle has its own Public School System which provides primary education for grades kindergarten through high school. Exhibit 9 attached hereto is a letter from Dr. Earl J. Myers, Superintendent of the Newcastle Public Schools, wherein he describes the school system and his support for Newcastle having its own radio station. The Pioneer Library System operates a full service branch public library in Newcastle provided facilities. *Id.* Therefore, Newcastle does not depend upon Oklahoma City for the services it provides to its citizens.

Newcastle is truly an independent city.

23. As the totality of evidence clearly shows, Newcastle has developed the type of socioeconomic characteristics of a separate city that serves its citizens without reliance on outside communities. Newcastle is not a "bedroom" community of Oklahoma City and never has been. Newcastle is a thriving independent city which deserves its own local broadcast station. The Commission should acknowledge this, and grant TBC a first local service preference for its proposal to reallocate Channel 227C1 to Newcastle.

V. Other Public Interest Considerations

24. The proposed change of KTLS' community of license and relocation of its transmitter site will result in a gain area of 13,169 square kilometers (assuming maximum C1 facilities) and the area lost will be only 8,883.68 square kilometers. Inside the gain area, there is new population of 948,152 persons and inside the loss area there is a population of 100,393. Therefore, the proposed change will result in a substantial net gain in area (4,285.32 square kilometers) and population (847,759 persons). This fact, and the fact that the entire loss area is well-served by at least five primary aural services, demonstrate that TBC's proposal will serve the public interest. See, FM Table of Allotments (Douglas, GA, et al.), 10 FCC Rcd 7706, 7707 (1995)(where loss area received service from at least five full-time reception services, the Commission found the area to be "well-served").

VI. The Substitution at Watonga

25. Channel 227C1 can be allotted to Newcastle at a reference point 7.9 kilometers south of Newcastle (North Latitude 35° 10' 44" and West Longitude 97° 36' 03") in compliance with the Commission's spacing constraints if Channel 230A is substituted for Channel 228A at Watonga, Oklahoma, and the license of KIMY(FM), Watonga, is modified to operate on Channel 230A. KIMY can utilize Channel 230A on its present tower. The present KIMY channel is grandfathered short-spaced under Section 73.213 of the Rules to KWFX(FM), Channel 228A, Woodward, Oklahoma, and, consequently, both KIMY and KWFX operate with only 3 kilowatts. Substituting Channel

230A for Channel 228A at Watonga would eliminate the short-spacing condition and allow KIMY to increase power to 6 kilowatts. Therefore, the public interest would be further served by the substitution of Channel 230A for Channel 228A at Watonga.

26. In its Petition for Rulemaking, TBC pledged to reimburse the licensee of KIMY, Vera L. Dunn, for her reasonable and prudent costs incurred in connection with making the channel change, under the principles of FM Table of Allotments (Circleville, Ohio), 8 FCC 2d 159 (1967). TBC hereby specifically restates its intention to make such a reimbursement to KIMY.⁷

VII. Conclusion and Expression of Continued Interest

27. TBC has amply demonstrated that Newcastle is an independent community that deserves its first local aural service. By allotting Channel 227C1 to Newcastle, the Commission will bring first service to Newcastle with no loss of reception service to the community of Ada. That much of the station's modified city grade contour will fall within the Oklahoma City Urbanized Area, is a meaningless technical fact that does not prevent the Commission from granting TBC's proposal. In FM Table of Allotments (Headland, AL and Chattahoochee, FL), the Commission granted a change of an FM station's community of license to a new community which would result in the FM station providing significant coverage to a nearby Urbanized Area. While in that case, the Commission found that there was a moderate degree of interdependence between the

⁷ On January 22, 1996, Ms. Dunn filed a "Contingent Objection" in this proceeding. TBC will treat this pleading as Ms. Dunn's Comments and respond to them in TBC's Reply Comments.

proposed community of license and the nearby larger city, it nevertheless granted the proposed change. In the instant case, the overwhelming evidence shows that there is no interdependence between Newcastle and Oklahoma City. Newcastle is independent of Oklahoma City, and is a city that prides itself on its independence. The Commission should recognize Newcastle, Oklahoma, as a separate community and allot Newcastle its first FM station channel.

WHEREFORE, TBC respectfully requests that the Commission grant its Petition For Rulemaking and amend Section 73.202(b) of its Rules, as follows:

| | <u>Oklahoma</u> | |
|-----------|-----------------|-----------------|
| | <u>Present</u> | <u>Proposed</u> |
| Ada | 227C1, 244A | 244A |
| Newcastle | None | 227C1 |
| Watonga | 228A | 230A |

TBC also requests the Commission to substitute Channel 230A for Channel 228A at Watonga, Oklahoma, and order Ms. Vera Dunn to modify the license of KIMY, Watonga, to operate on Channel 230A. Finally, TBC requests that the Commission modify the license of KTLS to operate on FM Channel 227C1 at Newcastle, Oklahoma. Upon allotment of Channel 227C1 to Newcastle and the allotment becoming effective, TBC will promptly file with the FCC an application for construction permit to modify

KTLS' license to operate as a Newcastle station and will take those steps necessary to operate KTLS on Channel 227C1 at Newcastle.

Respectfully submitted,

TYLER BROADCASTING CORPORATION

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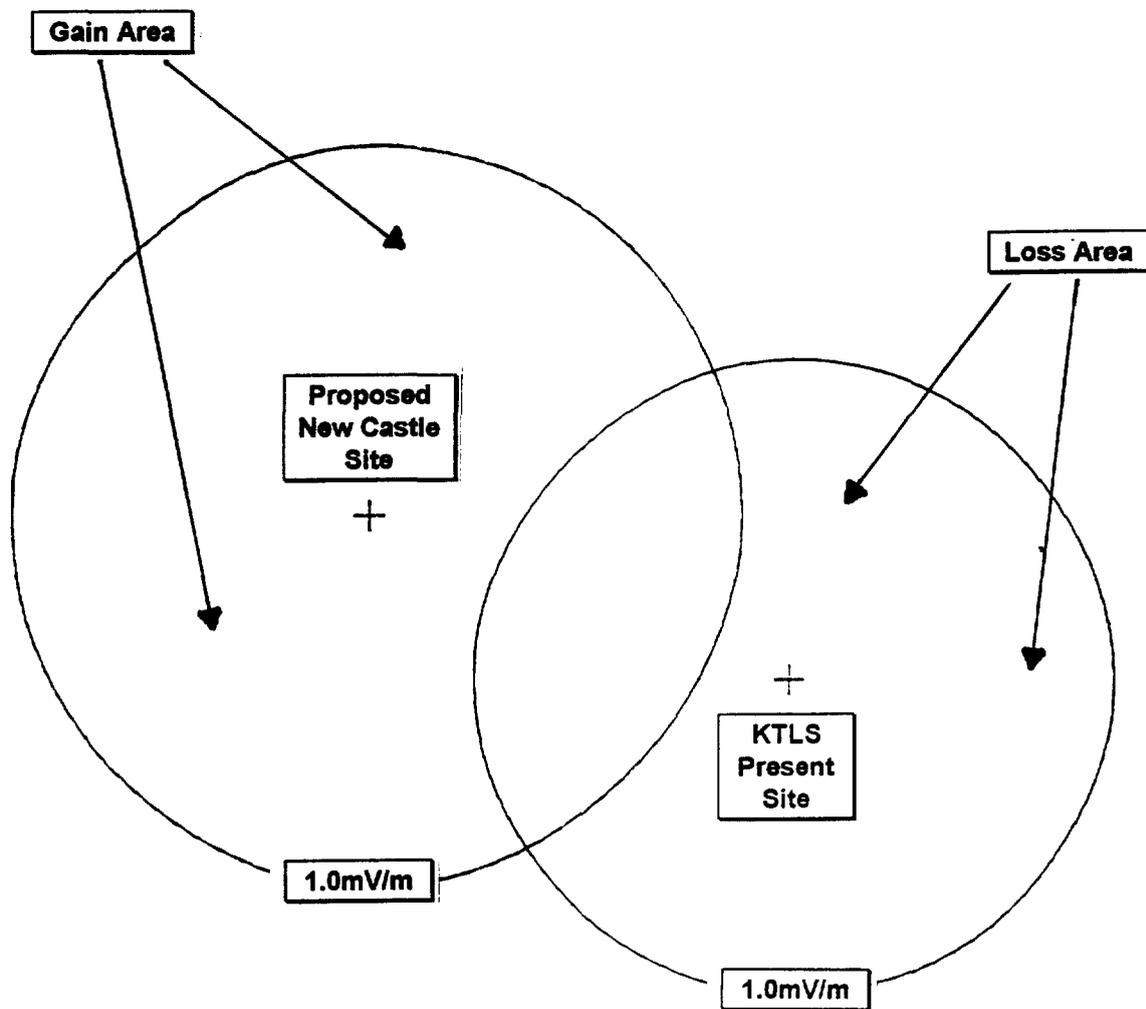
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January 29, 1996

KTLS\DF\COMMENTS

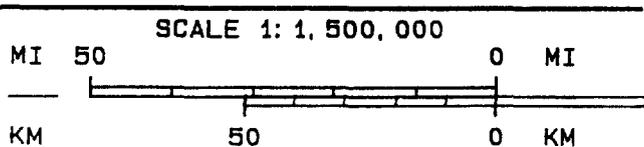
EXHIBIT 1

PORTIONS OF TECHNICAL EXHIBIT FILED
WITH PETITION FOR RULEMAKING



Gain/Loss Study

EXHIBIT #2
Proposed Rulemaking
CH 227C1 to Newcastle, OK
 KTLS Radio Station
 Ada, Oklahoma
 August 1995



BROMO BROADCAST
 COMMUNICATIONS TECHNICAL CONSULTANTS

EXHIBIT 2

PHOTOGRAPHS OF NEWCASTLE, OKLAHOMA

