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

RECEIVED  
JUL 16 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) RM- \_\_\_\_\_  
Table of Allotments )  
FM Broadcast Stations )  
(Elkhorn City, Kentucky and )  
Clinchco, Virginia) )

To: Chief, Allocations Branch

**OPPOSITION TO  
PETITION FOR RULE MAKING**

Dickenson County Broadcasting Corporation ("DCBC"), by its attorneys, hereby respectfully submits its Opposition to the Petition for Rule Making (the "Petition"), filed by East Kentucky Broadcasting Company ("EKBC"), on July 2, 1997,<sup>1</sup> that proposes changes in the Commission's Table of Assignments (Section 73.202(b) of the Rules). In opposition thereto, it is stated as follows:

**I. Background**

DCBC is licensee of WDIC-FM operating on Channel 221A at Clinchco, Virginia.<sup>2</sup> EKBC is licensee of WPKE-FM, operating on channel 276A at Elkhorn City, Kentucky. EKBC proposes the allotment of Channel 221A to Elkhorn City, the allotment of Channel 276A to

<sup>1</sup>Pursuant to 47 C.F.R. § 1.45(a), this opposition is timely filed by July 16, 1997.

<sup>2</sup>This is not the first time DCBC has been asked to change its operating channel. By *Report and Order, Pikeville, Kentucky, Clinchco, Virginia, and Matewan, West Virginia*, 56 Fed. Reg. 30511, published July 3, 1991, the Commission substituted Channel 221A for 226A at Clinchco, and modified WDIC-FM's license to operate on Channel 221A.

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MMB

Clinchco, Virginia, and the modification of the licenses of WDIC-FM and WPKE-FM to operate on the exchanged channels. DCBC strongly objects to EKBC's proposal.

## **II. EKBC Does Not Address an Alternative Method of Increasing Power**

The Technical Report attached to EKBC's Petition describes EKBC's proposal as one requiring "an incompatible swap" by substituting WDIC-FM's channel assignment on Channel 221A for WPKE-FM's Channel 276A in order to achieve maximum power (i.e., 6 kilowatts) for a Class A facility at WPKE-FM's present transmitter site. But the Petition does not provide any support for the basic predicate of the Petition that this incompatible swap is required. The Commission's rules provide other ways for a Class A FM to increase power, rather than to substitute channels through an "incompatible swap." The Petition never even mentions that such an alternative procedure exists or that WPKE has attempted or been unsuccessful in pursuing this alternative procedure.<sup>3</sup> Attachment A is a Technical Statement that shows that EKBC could employ a directional antenna to protect WELC-FM, Welch, West Virginia, and have the equivalent of 6 kilowatts (320 Watts at 426 meters HAAT) in virtually all directions except toward Welch where the limit would be 250 Watts. EKBC states in its Technical Report (p. 1) that ". . . WPKE-FM attempted to improve its facility through the use of a directional antenna.

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<sup>3</sup>One procedure would involve EKBC "securing the consent of the licensees of co-channel and adjacent channel stations which might be affected. . ." to increase power to 6 kilowatts. *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Station*, 6 FCC Rcd, 3417 n. 5 (1991). That procedure would not burden the FCC's rulemaking process. EKBC never mentions that as a first step, without going through the rulemaking process, WPKE-FM might be able to increase power to 6 kilowatts by obtaining consent to do so from the licensee of WELC-FM, Welch, West Virginia. This may not be a possible option in light of EKBC's unbuilt construction permit, discussed *infra*, but EKBC is silent as to whether this is a possible alternative for it.

However, that avenue resulted in a substantial deterioration of the existing service in several directions rather than the anticipated improvement.” EKBC does not mention that it holds a valid construction permit (File No. BPH-940510IC) (Attachment B) to operate with 320 watts ERP at 426 meters height above average terrain with a reduction to 80 watts at 60° True. Exhibit E-2 submitted with BPH-940510IC (Attachment C) shows a null in that direction, but natural attenuation by terrain also creates signal nulls. EKBC has not shown how the degree of signal alteration caused by a directional antenna results “in a substantial deterioration of the existing service.” How could it, when the facilities are still unconstructed? Further, EKBC did not show the increase (if any) in population coverage between its authorized directional facilities and the nondirectional use of Channel 221A at Elkhorn City.

A presumption is thus created that the “incompatible swap” is not WPKE-FM’s real motive driving the Petition. *Washoe Shoshone Broadcasting*, 3 FCC Rcd. 3948, 3953 (Rev. Bd. 1988) (The failure to introduce relevant evidence in support of a party’s case supports the proposition that had the evidence been introduced, it “would have exposed facts unfavorable to the party.”) To allow the “incompatible swap” process to be used to obtain 6 kilowatts of power, where a directional antenna alteration is available (and an unbuilt permit is outstanding) as an alternative is to open the classic Pandora’s box thereby drowning the FCC’s limited resources in a sea of unnecessary rulemaking petitions.

### **III. The Petition is Premature and Therefore Cannot be Accepted at this Time.**

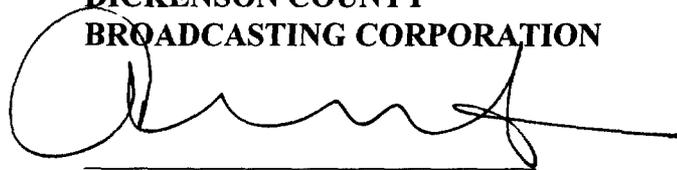
At ¶ 4, page 3 of the Petition, EKBC gives short shrift to the fact that there was filed on March 4, 1997, an application (FCC File No. BMPH-9703041A) to modify the facilities of WSMG(FM), Tusculum, Tennessee because in EKBC’s view, the WSMG application is

technically deficient. However, in *Conflicts between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992) (“*Conflicts*”), the FCC announced two policies. First, an application that is mutually exclusive with a subsequently filed rulemaking petition achieves cut-off protection, so that the subsequent rulemaking petition is unacceptable. Second, with the abolition of the “hard look” system of FM processing, the previously filed applicant has the right to amend its application to cure any minor technical deficiency. (*Conflicts*, n. 17). Therefore, unless and until the WSMG application is finally dismissed or denied, it is a bar to EKBC’s proposal. If WSMG amends its application to cure the deficiencies perceived by EKBC, and the WSMG application is granted, EKBC’s proposal may be forever barred. But, until the WSMG application is disposed of, EKBC’s Petition is premature and should be dismissed.

For the reasons given above, it is respectfully submitted that the Petition be dismissed as unacceptable.

Respectfully submitted,

**DICKENSON COUNTY  
BROADCASTING CORPORATION**



Gary S. Smithwick  
Robert W. Healy  
Its Counsel

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Washington, D.C. 20036  
(202) 785-2800  
July 16, 1997

**ATTACHMENT A**

**TECHNICAL RESPONSE  
TO PETITION FOR RULE MAKING  
Dickenson County Broadcasting Corp.  
WDIC-FM Radio Station  
Clinchco, Virginia  
July 1997**

This Technical Exhibit is in response of the Petition for Rulemaking by East Kentucky Broadcasting Company licensee of WPKE-FM in Elkhorn City, Kentucky. It is proposed to swap Channel 276A at Elkhorn City with Channel 221A at Clinchco, Virginia. In so doing WPKE could increase power to 6 kW and WDIC could continue to operate as a 6 kW facility.

Channel 276A cannot be assigned to Clinchco at this time due to a co-channel one step upgrade application for WSMG in Tusculum, Tennessee. WPKE stated in their Petition that they had filed an objection to the WSMG upgrade and felt that the application should be dismissed shortly if it had not already been dismissed. We checked with the staff processing this application and they stated the application is still pending. WSMG still has the opportunity to respond and make corrective amendments assuming they are required.

WPKE states that they are unable to increase power due to a grandfathered shortspace with WELC in Welch, West Virginia. WPKE states that by moving to Channel 221A they will clear this shortspace and then WELC could utilize the provisions of §73.215 for contour protection to upgrade their facilities.

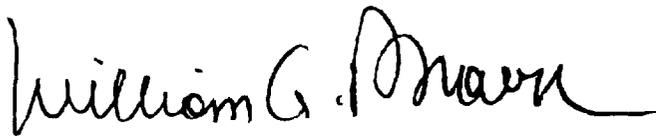
The WPKE Technical Report stated that they had attempted to improve its facility through the use of a directional antenna. However, the directional pattern resulted in substantial deterioration of the existing service. The petition for rulemaking did not give any details of their directional antenna.

Actually WPKE has a construction permit (BPH-940510IC) to increase power to a 6 kW equivalent facility<sup>1</sup>. The CP allows the use of a directional antenna with protection under §73.215 toward WELC. We do not understand the WPKE technical statement when it says "...that avenue resulted in a substantial deterioration of the existing service in several directions" The CP pattern shows a power increase from 120 Watts to 330 Watts in all directions with only one null between 10 to 100 degrees. The CP calls for a reduction in field gain to 50% in an azimuth toward WELC. Our study shows the WELC protected 60 dBu contour can be protected by a small power reduction in the WPKE signal of 70 Watts at 50°. The actual power reduction toward WELC can be on an azimuth of 45 to 60 degrees and the power allowed along this azimuth is 250 Watts with 320 Watts allowed in all other directions. We show in the attached Exhibit #1 the protected and interfering contours and point out the small area of overlap. We also have attached as Exhibits #2 and #3 the FM Over studies showing where the power can be reduced by 70 Watts to provide adequate protection to WELC.

There is no need for this rulemaking. If WPKE will proceed with their directional antenna and processing under Section 73.215, WPKE can improve their facilities as

they desire. The present WPKE CP allows WELC the same public interest benefits as proposed by WPKE in their Proposed Rulemaking. Plus WDIC will not be burdened by having to change frequencies and WSMG continues to have the opportunity to upgrade their facilities.

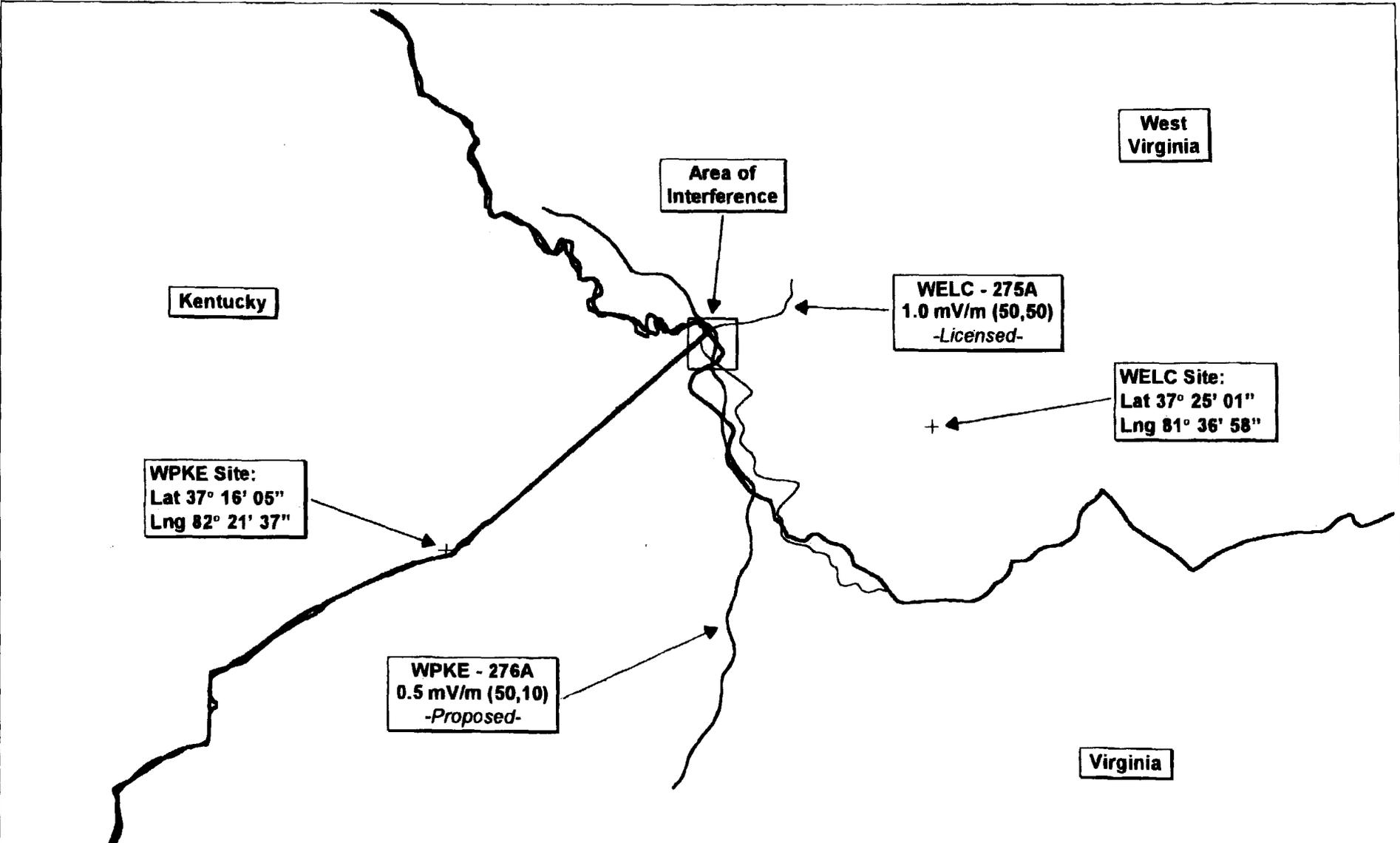
**Bromo Communications, Inc.**

A handwritten signature in black ink, appearing to read "William G. Brown". The signature is fluid and cursive, with a long horizontal stroke at the end.

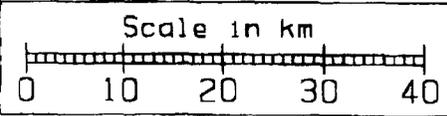
William G. Brown

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<sup>1</sup> Currently WPKE operates with 120 Watts with a height above average terrain of 418 meters. The WPKE CP allows a power of 320 Watts with a height above average terrain of 426 meters utilizing a directional antenna.



1: 742, 188



WPKEFM 276A	.33kW	889M AMSL
WELCFM 275A	1.8kW	680M AMSL

**EXHIBIT #1**  
**Technical Response**  
**To Petition for Rulemaking**  
**Dickenson County Broadcasting Corp.**  
**WDIC-FM Radio Station**  
 Clinchco, Virginia  
 July 1997

WELCFM- BLH900207KC  
 Channel = 275  
 Max ERP = 1.8 kW  
 RCAMSL = 680 M  
 N. Lat = 372501  
 W. Lng = 813658

WPKEFM- BLH7381  
 Channel = 276  
 Max ERP = .33 kW  
 RCAMSL = 889 M  
 N. Lat = 371605  
 W. Lng = 822137

Protected  
 60 dBu

Interfering  
 54 dBu

Azimuth (degrees)	ERP (kW)	HAAT (m)	Dist (km)	Azimuth (degrees)	ERP (kW)	HAAT (m)	Dist (km)	Actual (dBu)
280.0	1.800	137.8	24.8	63.3	0.330	398.0	46.4	52.4
281.0	1.800	138.0	24.8	62.9	0.330	401.6	46.7	52.4
282.0	1.800	145.6	25.4	62.0	0.330	408.9	46.5	52.6
283.0	1.800	157.6	26.3	60.8	0.330	417.1	46.1	53.0
284.0	1.800	172.9	27.5	59.5	0.330	420.7	45.6	53.3
285.0	1.800	191.2	28.7	57.9	0.330	417.0	45.1	53.4
286.0	1.800	210.8	30.1	56.1	0.330	418.8	44.5	53.6
287.0	1.800	230.9	31.6	54.2	0.330	441.0	44.0	54.4 **
288.0	1.800	246.1	32.6	52.7	0.330	464.0	43.9	55.0 **
289.0	1.800	253.9	33.1	51.7	0.330	472.8	44.1	55.1 **
290.0	1.800	257.7	33.3	51.1	0.330	474.5	44.5	55.0 **
291.0	1.800	255.6	33.2	50.8	0.330	474.3	45.0	54.7 **
292.0	1.800	252.2	33.0	50.7	0.330	474.2	45.6	54.5 **
293.0	1.800	248.2	32.7	50.7	0.330	474.2	46.2	54.3 **
294.0	1.800	242.9	32.4	50.7	0.330	474.2	46.9	54.0 **
295.0	1.800	234.4	31.8	51.0	0.330	474.5	47.7	53.7
296.0	1.800	223.8	31.1	51.5	0.330	473.7	48.5	53.4
297.0	1.800	212.1	30.2	52.2	0.330	469.4	49.3	53.0
298.0	1.800	200.2	29.4	52.8	0.330	462.7	50.2	52.5
299.0	1.800	189.4	28.6	53.4	0.330	454.0	50.9	52.0
300.0	1.800	180.8	28.0	53.7	0.330	449.1	51.6	51.6

**FM Over Study / WPKE at 6 kW**

**EXHIBIT #2**  
**Technical Response**  
**To Petition for Rulemaking**  
**Dickenson County Broadcasting Corp.**  
**WDIC-FM Radio Station**  
 Clinchco, Virginia  
 July 1997

**BROMO** BROADCAST  
 TECHNICAL CONSULTANTS  
**COMMUNICATIONS**

WELCFM- BLH900207KC  
 Channel = 275  
 Max ERP = 1.8 kW  
 RCAMSL = 680 M  
 N. Lat = 372501  
 W. Lng = 813658

WPKEFM- BLH7381  
 Channel = 276  
 Max ERP = .25 kW  
 RCAMSL = 889 M  
 N. Lat = 371605  
 W. Lng = 822137

Protected  
 60 dBu

Interfering  
 54 dBu

Azimuth (degrees)	ERP (kW)	HAAT (m)	Dist (km)	Azimuth (degrees)	ERP (kW)	HAAT (m)	Dist (km)	Actual (dBu)
280.0	1.800	137.8	24.8	63.3	0.250	398.0	46.4	51.1
281.0	1.800	138.0	24.8	62.9	0.250	401.6	46.7	51.1
282.0	1.800	145.6	25.4	62.0	0.250	408.9	46.5	51.4
283.0	1.800	157.6	26.3	60.8	0.250	417.1	46.1	51.8
284.0	1.800	172.9	27.5	59.5	0.250	420.7	45.6	52.0
285.0	1.800	191.2	28.7	57.9	0.250	417.0	45.1	52.2
286.0	1.800	210.8	30.1	56.1	0.250	418.8	44.5	52.4
287.0	1.800	230.9	31.6	54.2	0.250	441.0	44.0	53.2
288.0	1.800	246.1	32.6	52.7	0.250	464.0	43.9	53.7
289.0	1.800	253.9	33.1	51.7	0.250	472.8	44.1	53.9
290.0	1.800	257.7	33.3	51.1	0.250	474.5	44.5	53.8
291.0	1.800	255.6	33.2	50.8	0.250	474.3	45.0	53.5
292.0	1.800	252.2	33.0	50.7	0.250	474.2	45.6	53.3
293.0	1.800	248.2	32.7	50.7	0.250	474.2	46.2	53.0
294.0	1.800	242.9	32.4	50.7	0.250	474.2	46.9	52.8
295.0	1.800	234.4	31.8	51.0	0.250	474.5	47.7	52.5
296.0	1.800	223.8	31.1	51.5	0.250	473.7	48.5	52.2
297.0	1.800	212.1	30.2	52.2	0.250	469.4	49.3	51.8
298.0	1.800	200.2	29.4	52.8	0.250	462.7	50.2	51.3
299.0	1.800	189.4	28.6	53.4	0.250	454.0	50.9	50.8
300.0	1.800	180.8	28.0	53.7	0.250	449.1	51.6	50.4

**FM Over Study / WPKE Contour Protection**

**EXHIBIT #3**  
**Technical Response**  
**To Petition for Rulemaking**  
**Dickenson County Broadcasting Corp.**  
**WDIC-FM Radio Station**  
 Clinchco, Virginia  
 July 1997

**BROMO** BROADCAST  
 TECHNICAL CONSULTANTS  
**COMMUNICATIONS**

**ATTACHMENT B**



FEDERAL COMMUNICATIONS COMMISSION  
FM BROADCAST STATION CONSTRUCTION PERMIT

Official Mailing Address:

-----  
JUSTICE BROADCASTING GROUP, INC.  
901 15TH ST, NW, ST. 700  
WASHINGTON, DC 20005  
-----

Authorizing Official:  
*Arthur E. Doak*  
-----  
Arthur E. Doak  
Supervisory Engineer, FM Branch  
Audio Services Division  
Mass Media Bureau

Grant Date: **SEP 14 1994**

Call sign: WPKE-FM

This permit expires 3:00 am.  
local time 18 months after  
grant date specified above

Permit File No.: BPH-940510IC

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of permittee:

JUSTICE BROADCASTING GROUP, INC.

Station Location:

KY-ELKHORN CITY

Frequency (MHz): 103.1

Channel: 276

Class: A

Hours of Operation: Unlimited

Transmitter location (address or description):

KY-3.5 km southwest of Elkhorn City, Pike County

Transmitter: Type accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: (directional or non-directional): Directional

Antenna coordinates: North Latitude: 37 16 5.0  
West Longitude: 82 21 37.0

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the horizontal plane (kW) . . . . . :	0.320	0.320
Height of radiation center above ground (meters) . . . . . :	23.0	23.0
Height of radiation center above mean sea level (meters) . . . . . :	889.0	889.0
Height of radiation center above average terrain (meters) . . . . . :	426.0	426.0
Overall height of antenna structure above ground (including obstruction lighting, if any) . . . . . :	26.0 meters	

Obstruction marking and lighting specifications for antenna structure:

It is to be expressly understood that the issuance of these specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

None Required

## Special operating conditions or restrictions:

1. The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines.
2. \*\*\*\*\* This is a Section 73.215 contour protection grant \*\*\*\*\*  
\*\*\*\*\* as requested by this applicant \*\*\*\*\*
3. BEFORE PROGRAM TESTS ARE AUTHORIZED, permittee shall submit the results of a complete proof-of-performance to establish the horizontal plane radiation patterns for both the horizontally and vertically polarized radiation components. This proof-of-performance may be accomplished using the complete full size antenna, or individual bays therefrom, mounted on a supporting structure of identical dimensions and configuration as the proposed structure, including all braces, ladders, conduits, coaxial lines, and other appurtenances; or using a carefully manufactured scale model of the entire antenna, or individual bays therefrom, mounted on an equally scaled model of the proposed supporting structure, including all appurtenances. Engineering exhibits should include a description of the antenna testing facilities and equipment employed, including appropriate photographs or sketches and a description of the testing procedures, including scale factor, measurements frequency, and equipment calibration.
4. BEFORE PROGRAM TESTS ARE AUTHORIZED, permittee shall submit an affidavit from a licensed surveyor to establish that the directional antenna has been oriented at the proper azimuth.
5. BEFORE PROGRAM TESTS ARE AUTHORIZED, permittee/licensee shall submit an affidavit that the installation of the directional antenna system was overseen by a qualified engineer. This affidavit shall include a certification by the engineer that the antenna was installed pursuant to the manufacturer's instructions and list the qualifications of the certifying engineer.

The relative field strength of neither the measured horizontally nor vertically polarized radiation component shall exceed at any azimuth the value indicated on the composite radiation pattern authorized by this construction permit.

A relative field strength of 1.0 on the composite radiation pattern herein authorized corresponds to the following effective radiated power:

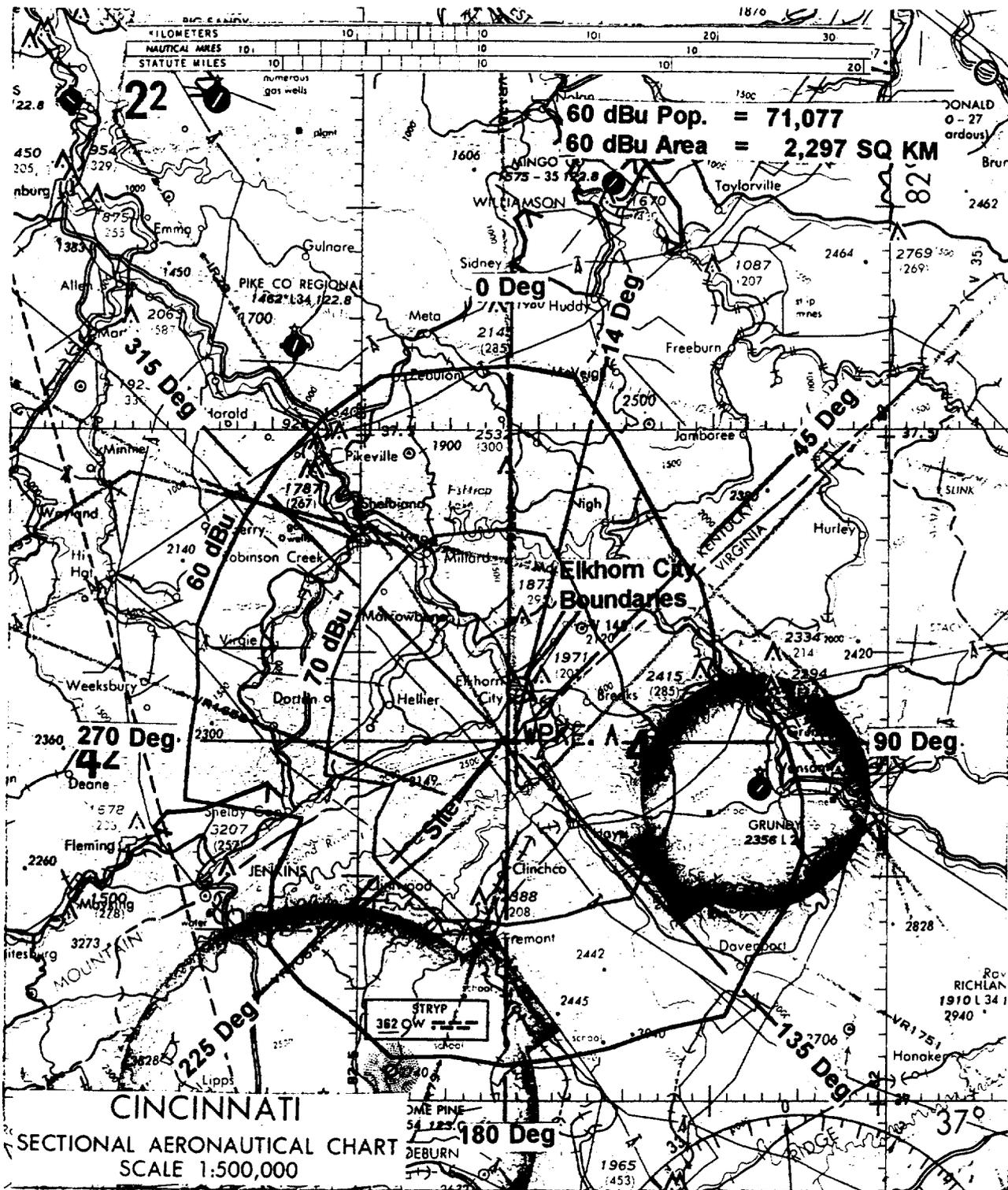
0.320 kilowatts.

.  
Principal minima and their associated field strength limits:  
.

60 degrees True: 0.080 kilowatts

**ATTACHMENT C**

# EXHIBIT E-2 SERVICE CONTOURS PLOT



**CERTIFICATE OF SERVICE**

I, Angela Y. Powell, a secretary in the law offices of Smithwick & Belendiuk, P.C., hereby certify that a copy of the foregoing Opposition to Petition for Rule Making was this the 16th day of July mailed to the following:

John F. Garziglia, Esq.  
Pepper & Corazzini, L.L.P.  
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J. Richard Carr, Esq.  
Law Office of J. Richard Carr  
P.O. Box 70725  
Chevy Chase, MD 20813-0725  
Counsel for Darrell Bryan (WSMG-FM)

Mr. Darrell Bryan  
WSMG-FM  
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Greenville, TN 37744

  
Angela Y. Powell