

LAW OFFICES
HALEY BADER & POTTS P.L.C.

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1638

TELEPHONE (703) 841-0606

FAX (703) 841-2345

E-MAIL: haleybp@haleybp.com

JOHN CRIGLER
E-MAIL: jcrigler@haleybp.com

ORIGINAL

DOCKET FILE COPY ORIGINAL

OUR FILE NO.
0764-101-63

September 11, 1997

RECEIVED

SEP 11 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

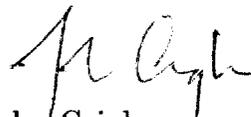
Re: Application for Review
Community Wireless of Park City

Dear Mr. Caton:

Transmitted herewith, on behalf of Community Wireless of Park City, are the original and fourteen copies of its Application For Review of a ruling by the Chief, Allocations Branch, Mass Media Bureau, dismissing a Petition For Rule Making.

Please refer any questions concerning this matter directly to this office.

Respectfully submitted,


John Crigler

JC:dh
Enclosure

No. 1000000000_0+14
10/1/97

DOCKET FILE COPY ORIGINAL

Before The

Federal Communications Commission

Washington, D.C. 20554

In The Matter Of)
)
Dismissal of Petition)
for Rule Making)

Docket No.

RECEIVED

SEP 11 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

APPLICATION FOR REVIEW

Community Wireless of Park City, Inc.
September 11, 1997

HALEY BADER & POTTS P.L.C.
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

SUMMARY

Community Wireless of Park City, Inc. (“CWPC”) seeks review of a Letter Ruling that dismissed CWPC’s Petition for Rule Making (“Petition”).

The Letter Ruling incorrectly concluded that reserved frequencies are not “unique” for allocations purposes and therefore never qualify for an “incompatible channel swap” pursuant to Section 1.420(g) of the Commission’s Rules. This ruling denies CWPC the ability to improve service to the public by upgrading three modest noncommercial stations.

In treating the novel questions raised by CWPC’s Petition, the Letter Ruling misinterprets Section 1.420(g) and establishes precedent that should be reversed. Review and reversal of the Letter Ruling is therefore appropriate.

noncommercially on nonreserved Channel 223A (92.5 MHz). All three stations are now limited to extremely modest facilities: KPCW operates with 105 watts ERP at 3 meters HAAT; KCPW operates with 750 watts ERP at *minus* 170 meters HAAT; and KCUA operates with 110 watts ERP at *minus* 313 meters HAAT. Confining CWPC to these facilities is a disservice to CWPC and the listening public. CWPC's Petition would enable it to improve all three stations.

CWPC's Petition proposed that CWPW be allowed to exchange the frequencies on which it operates its Salt Lake City and Coalville stations. As shown in the Engineering Statement that accompanied CWPC's Petition, the proposal would permit KCPW to upgrade to 6 kilowatts at 100 meters HAAT; KCUA to upgrade from minimum Class A facilities to near maximum Class 3 facilities (400 watts at 647 HAAT); and KPCW to upgrade facilities to maximum Class A facilities. Attachment B illustrates the dramatic changes that could be effected by the proposed frequency exchange. More specific details are set forth in Engineering Statement attached to the Petition.

CWPC's proposal is novel, if not unique. Few noncommercial licensees currently operate on both commercial and noncommercial frequencies.¹ Neither CWPC nor the Chief, Allocations Branch found any

¹ According to CWPC's research, based upon a study of the Corporation for Public Broadcasting's on-line directory of noncommercial stations (www.cpb.org), there are only approximately 11 such licensees in the country.

precedent in which a licensee has proposed to exchange a reserved and nonreserved FM frequency licensed to the same entity. CWPC submits, however, that the proposed exchange serves the public interest and satisfies the requirements of Section 1.420(g)(3) of the Commission's Rules.

In relevant part, Section 1.420(g)(3) provides as follows:

The Commission may modify the license or permit of an FM station to another class of channel... in the course of the rule making proceeding... if any of the following conditions are met:

- (3) With respect to FM, the modification of license or permit would occur on a mutually exclusive higher class adjacent or co-channel.

CWPC's Petition demonstrates that CWPC's proposal meets these requirements. Specifically, the Petition shows that the proposed allotment and license modification would permit KCUA to be upgraded from a Class A to a Class C3 station. The proposed modification of the KCPW license is "mutually exclusive" in that no third party could file an acceptable application for the allotment proposed.

CWPC discussed its Petition with the Allocations Branch before filing and supplemented its Petition on January 27, 1997 and May 7, 1997 to address legal concerns of staff. In spite of these efforts, the Allocations Branch dismissed CWPC's Petition by the Letter Ruling dated August 12, 1997.

The Letter Ruling is based upon three discreet grounds. First, it contends that the proposed exchange does not meet technical allocations criteria established for “incompatible channel swaps.” Second, it contends that the exchange does not propose an “upgrade.” Third, it contends that the proposed exchange adversely implicates policies articulated in *Intraband Television Channel Exchanges*, 59 RR2d 1563.

DISCUSSION

1. CWPC’s Proposal Satisfies Criteria for Incompatible Channel Swaps

In 1986, the Commission modified its rules to permit FM permittees or licensees operating on allotted channels to upgrade their facilities on higher class adjacent or co-channel frequencies. In adopting the policy now embodied in Section 1.420(g), the Commission also agreed to consider “variations of the rule” on a case-by-case basis. 60 RR2d at 120. As an example of an acceptable variation, the Commission offered the following scenario: a Class A licensee operating on Channel 240A proposes to upgrade on Channel 271C2 and to exchange channels with another licensee operating on Channel 270A in another community. The Commission regarded this scenario as “consistent with the rationale permitting channel upgrades because Channel 271C2 is not available in the *Ashbaker* sense for application by other interested parties...” 60 RR2nd at 120.

The Letter Ruling, in effect, holds that the exchanged proposed by CWPC is not an acceptable variation of this rule because one of the channels involved is a reserved channel. In the words of the Letter Ruling:

An incompatible channel swap occurs only where each of the swapped nonadjacent allotted, commercial channels of a particular channel is unique; each is the only channel that may be substituted at its site to create mutual exclusivity between the channels at issue. A reserved NCE channel can never be regarded as unique, since it is not assigned on the basis of preset levels of facilities or classes. An analysis of the interference potential, or any other aspect of the operation of a reserved NCE channel is evaluated on the basis of a theoretically infinite number of actual facility levels - - not on the basis of present maximum levels of facilities as is the case for allotted channels. Thus, an incompatible channel swap cannot exist for an exchange between reserved NCE channels, not capable of uniqueness for allotment purposes, or between a reserved NCE and an allotted, commercial channel, as CWPC's proposes.

While it is, of course, true that commercial and noncommercial stations are licensed by different allocation methods, it does not follow that noncommercial frequencies are any less "unique" than commercial frequencies, nor that proposals for the use of reserved frequencies may not be "mutually exclusive." The Commission has for decades been designating for hearing mutually exclusive applications for noncommercial frequencies. Although commercial frequencies are allotted to particular communities by rule making before being made

available for application, the coordinates assigned to the frequency in the rule making are “unique” only in the sense of being the initial coordinates for the station. Commercial licensees are free to modify those coordinates to encompass a “theoretically infinite number of actual facility levels,” provided they meet other technical requirements (e.g., mileage separation and city grade coverage requirements). CWPC based its predictions of the improved coverage that would be possible from its stations on the use of specific “unique” sites, which it believed to be reasonably available to it. Although it seemed premature to submit applications for these facilities *before* the Commission authorized CWPC to effect the proposed channel exchange, CWPC would be happy to disclose the “unique” coordinates from which the upgrades would be accomplished, or even to submit applications for those facilities if, in the Commission’s view, this would facilitate the proposed channel exchange.

No such procedure seems necessary, however. As recognized by Section 1.420(g)(3), the essence of an “incompatible” channel exchange is that the channel proposed for allotment is “mutually exclusive with an existing channel.” The test of mutual exclusivity is whether the channel to be substituted for the allotted channel is available to third parties “in the *Ashbacker* sense.” 60 RR2d at 120. The Engineering Showing contained in CWPC’s Petition demonstrates that the allotment of Channel 223A to Salt Lake City is precluded by the operation of KCUA on Channel

223A at Coalville. Channel 223A at Salt Lake City is thus not available to third parties “in an *Ashbacker* sense” because only CWPC could operate on Channel 223A at Salt Lake City without causing prohibited interference to the current facilities of KCUA. See Petition, Engineering Statement.

One recent Commission decision not considered by the Letter Ruling is relevant to, but distinguishable from, CWPC’s proposal. In a *Memorandum Opinion and Order*, FCC 97-226 (released July 2, 1997), the Commission denied an application for review of the State University of New York (“SUNY”). SUNY had requested that nonreserved Channel 273A be allotted to Rosendale, New York and that the license of SUNY Station WFNP (NCE-FM) be modified to specify operation on nonreserved Channel 273A rather than on reserved Channel 204A, on which WFNP operated on a shared-time basis. SUNY sought review of a Notice of Proposed Rule Making that allotted Channel 273A to Rosendale but did not modify the WFNP license to specify operation on the channel.

SUNY’s proposal is clearly distinguishable from CWPC’s proposal. SUNY did not propose to exchange the frequencies on which two noncommercial stations operated, but to modify the license of a single noncommercial station operating on a reserved frequency to operate on a newly allotted nonreserved frequency. SUNY made no showing that the frequency requested for allotment was “unavailable in

an *Ashbacker* sense” to third party applicants. In fact, its application for review is based on the fact that third parties *could* apply for the frequency allotted.

Secondly, the Commission held that denial of the SUNY proposal “did not contravene Section 1.420(g) of the Rules” since Section 1.420(g) “was specifically intended to provide a rule making procedure to amend a Table of Allotments.” CWPC has invoked Section 1.420(g) for its intended purpose. Unlike SUNY, CWPC currently operates a station on a commercial channel. CWPC’s Petition proposes that this channel, Channel 223A be allotted to Salt Lake City and be deleted from Coalville. To make such an allotment possible, without the loss of any noncommercial service, it also proposes that the Commission concurrently modify the license of noncommercial Station KCUA to operate on reserved Channel 202.

Although CWPC believes that Section 1.420(g) is applicable to its proposal, it requests a waiver of Section 1.420(g), or Section 73.3573 (the rule pertaining to application for “major changes on reserved frequencies), in the event that the Commission prefers to grant the relief requested by waiving rather than strictly applying its Rules.

2. CWPC Proposes a Specific Channel Upgrade.

The Letter Ruling contends that CWPC “requests a mere channel swap” not a “specific channel upgrade.” This contention is

highly misleading. As CWPC has shown in considerable detail, the proposed channel exchange would permit KCUA, KPCW and KCPW all to upgrade facilities by dramatic levels. See Attachment A. In particular, KCUA would be permitted to improve from a minimum Class A facility to a Class C3 facility. The Allocations Branch reaches its conclusion that no upgrade will result from CWPC's proposal by simply ignoring proposed improvements to the reserved channels on which CWPC stations operate.²

Although CWPC did not submit applications for those improvements with its Petition, it did attempt to upgrade two of its stations by the application process prior to resorting to the Commission's rule making procedures. Those efforts were thwarted by the return of its application (BPED-950306MC) to change the reserved channel on which its Park City station, KPCW, operates. The FM Branch returned the application by letter dated July 12, 1995, on grounds that the application would create a small amount of prohibited overlap with a third-adjacent channel station. Although the FM Branch acknowledged that the overlap area was unpopulated, it denied CWPC's waiver request to permit any the overlap. CWPC thus turned to the Commission's rule making procedures as the only alternative means of improving its

stations. In light of the novelty of the situation, CWPC's counsel met with the Chief of the Allocations Branch, outlined the issues and was advised to file a Petition For Rule Making.

3. CWPC Would Not Deprive Any Community of Noncommercial Service

As the Letter Ruling acknowledges, the exchange proposed by CWPC is distinguishable from the exchanges considered in *Intraband Channel Exchanges*. Most significantly, CWPC does not propose to exchange UHF and VHF television channels, nor to exchange frequencies with a commercial operator. CWPC will remain the licensee of both the frequencies exchanged.

A considerable portion of the greater Salt Lake City area will receive tremendously enhanced noncommercial service as a result of CWPC's proposal. These benefits are of particular significance given the rapid growth of the area³ and the surge of tourism expected when Salt Lake City hosts the Olympics in the winter of 1998.

To the extent that it is applicable to CWPC's proposal, *Intraband Television Channel Exchanges*, favors the exchange proposed by CWPC.

² The Allocations Branch deals exclusively with problems related to allotted channels, it should be aware that reserved channels are divided into "classes," just as allotted channels are. See Section 73.506 of the Commission's Rules.

Intraband Television Channel Exchanges generally recognizes that channel exchanges may provide significant benefits to noncommercial stations and the listening public without prejudicing *Ashbaker* rights of third parties. The Commission noted that in considering such exchanges it would examine “the extent to which a noncommercial channel exchange proposal affects a station’s ability to continue to serve the viewing public.” Considerations of such a factor in this case, overwhelmingly favors adoption of CWPC’s proposed rule making. Like the exchanges permitted by *Intraband Television Channel Exchanges*, the exchange proposed by CWPC would provide “for more effective use of noncommercial educational channels.” 59 RR2d at 1462.

Although *Intraband Television Channel Exchanges* literally applies to the exchange of television channels between different commercial and noncommercial licensees serving the same community, its rationale applies to an exchange of frequencies by the same licensee in different communities. Contrary to the unsubstantiated views of the Letter Ruling, the exchange proposed by CWPC poses no risk to noncommercial service by Salt Lake City. The possibility that the reallocated Channel 223A could be used for commercial purposes is

³ A recent demographic study conducted by Woods & Poole Economics, predicts that Summit County, Utah will be the fastest growing county in the United States in the next 20 years. See *Deseret News*, Salt Lake City, August 9, 1997. CWPC’s proposal will permit both

entirely speculative. CWPC applied for Station KCPW in March 1990 and has operated that station on a noncommercial basis for almost five years.

CWPC Petition declined to seek reservation of Channel 223A for noncommercial purposes because CWPC proposes commercial operations on the channel, but because it understood that the Commission's policy is to reserve commercial frequencies "only where channels in the noncommercial educational band are not available due to TV Channel 6 interference or preclusion by a foreign allotment.

Memorandum Opinion and Order, Supra, at p. 5.

CONCLUSION

In dismissing CWPC's Petition For Rule Making, the Allocations Branch has adopted an unnecessarily narrow construction of the allocation considerations set forth in Section 1.420(g)(3) of the Commission's Rules. If affirmed, the Letter Ruling would deny to the few noncommercial licensees who operate on both reserved and nonreserved channels, an opportunity to maximize the efficiency of their stations. Its effect upon CWPC would be to confine it to the extremely modest facilities it now has. Neither Section 1.420(g)(3) nor Commission policy requires such a result. As discussed above, CWPC has demonstrated that the channels proposed to be exchanged are "mutually exclusive." No one except CWPC is capable of applying for the substituted channels,

since any third party would cause prohibited interference to existing stations.

The Allocations Branch's theory about the "uniqueness" of commercial frequencies is misguided. All licensees, whether operating on commercial or noncommercial frequencies, are permitted to propose a "theoretically infinite number of actual facilities levels." They may increase or decrease power and HAAT and relocate transmitter sites, provided that applicable interference and coverage criteria are met. The Commission should not deny the public the obvious advantage of the proposed upgrade merely because commercial and noncommercial frequencies are licensed according to different allocation principles.

Nor should the Commission be persuaded that the proposed exchange is a "mere channel swap," not an effort to "upgrade" a station. As shown in considerable detail in CWPC's Petition For Rule Making, the channel exchange will permit dramatic upgrades in *three* noncommercial stations.

Finally, the proposed exchange is favored, not disfavored by the policies articulated in *Intraband Television Channel Exchanges*. That decision swept aside artificial restraints imposed by the Commission's rule making procedures where the end result was to benefit public broadcasting. Like the intraband exchanges permitted by that decision,

the proposed exchange will enhance rather than diminish
noncommercial service in Salt Lake City and surrounding areas.

Accordingly, CWPC requests that the Commission reverse the
Letter Ruling and adopt CWPC's Notice of Proposed Rule Making.

Respectfully submitted,

COMMUNITY WIRELESS OF PARK CITY

By: 
John Crigler
Its Attorney

HALEY BADER & POTTS P.L.C.
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

September 11, 1997

ATTACHMENT A

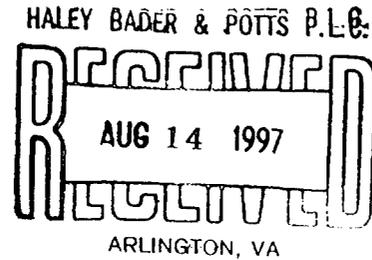


OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

AUG 12 1997

HALEY BADER & POTTS, P.L.C.
4350 North Fairfax Drive, Suite 900
Arlington, VA 22203-0606



ATTN: Mr. John Crigler, Esq.

Dear Mr. Crigler:

This is in response to the petition for rulemaking filed on June 5, 1996 on behalf of your client, Community Wireless of Park City ("CWPC"), and its draft supplement filed on January 27, 1997, your file numbers 0764-101-63 and 0764-101-60, respectively. This also responds to your letters of March 28, May 20, and June 10, 1997 requesting the status of your initial filing and offering to resolve any questions. CWPC requests modification of the FM Table of Allotments by deleting Channel 223A at Coalville, Utah; adding Channel 223A at Salt Lake City, Utah; and modifying the license of its Salt Lake City noncommercial Station KCPW, accordingly. This allotment request constitutes one-half of CWPC's requested exchange of commercial Channel 223A, operated noncommercially, but not reserved, at Coalville Station KCUA, for reserved Channel 202 at Salt Lake City, Station KCPW. To realize the other half of the exchange, CWPC requests modification of the license of Station KUCA, Coalville, to specify noncommercial operation on Channel 202, reserved for such use. CWPC is the licensee of the Coalville and Salt Lake City stations, as well as nearby noncommercial educational ("NCE") Station KPCW, Channel 220 at Park City, Utah.

Citing a need to improve service to its stations' "collective" listening areas, CWPC recounts its prior efforts to upgrade Coalville Station KCUA on Channel 223A, which have been stymied because of third-adjacent channel interference resulting from prohibited contour overlap between Station KCUA and Station KPCW at Park City. In order to upgrade its station and avoid interference and terrain shadowing, CWPC proposes that Coalville Station KCUA and Salt Lake City Station KCPW swap channels, which, you contend, would permit those two stations to be upgraded as well as Station KPCW at Park City. CWPC petitions the Commission to exchange the allotted channel at Coalville with the reserved NCE channel at Salt Lake City, stating that it will later request an upgrade of allotted, and not reserved, Channel 223A.

CWPC requests that any competing expressions of interest in the swap of Channel 223A for 202A at Salt Lake City be prohibited because the exchange constitutes an incompatible channel swap. We disagree. The concept of an

incompatible channel swap arose in the context of permitting the upgrade of commercial facilities on higher class adjacent or co-channel frequencies while not subjecting the licensee or permittee to the risk of losing its authorization. Although CWPC is correct that the Commission stated in *Modification of FM Broadcast Licenses*, 60 RR 2d 114 (1986) that it would consider analogous proposed substitutions at other communities necessary to create the mutually exclusive relationship as required by Rule Section 1.420(g), it is clear that only allotted Channels 221 to 300 qualify. Only these allotted, commercial channels (even when they may be reserved for NCE-FM use) are assigned by classes of station with facilities falling within specified class maximums and whose interference potential is evaluated assuming operation at maximum facilities for the class. The reserved NCE Channels 201 through 220 are not assigned on the basis of particular levels of facilities, but on the basis of the facilities to be actually used, which may be increased (or reduced) without regard to preset maximum (or minimum) levels of power and antenna height for a given class.

Moreover, an incompatible channel swap occurs only where each of the swapped non-adjacent allotted, commercial channels of a particular class is unique; each is the only channel that may be substituted at its site to create mutual exclusivity between the channels at issue. A reserved NCE channel can never be regarded as unique, since it is not assigned on the basis of preset levels of facilities or classes. Analysis of the interference potential, or any other aspect of the operation of a reserved NCE channel, is evaluated on the basis of a theoretically infinite number of actual facility levels -- not on the basis of preset maximum levels of facilities as is the case for allotted channels. Thus, an incompatible channel swap cannot exist for an exchange between reserved NCE channels, not capable of uniqueness for allotment purposes, or between a reserved NCE and an allotted, commercial channel, as CWPC proposes.

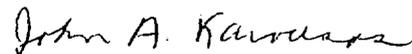
Additionally, CWPC does not propose a specific channel upgrade. Rather, it requests a mere channel swap, which, according to CWPC, would create the mutual exclusivity necessary to foreclose competing expressions of interest, and prospectively, to allow for the non-adjacent channel upgrade it ultimately seeks. However, the Commission created the concept of an incompatible channel swap only for non-adjacent channel upgrades, and CWPC's petition itself does not propose an *upgrade*. Therefore, even if CWPC's proposal involved only allotted channels, such concept would not be applicable.

Finally, the policies underlying intraband television channel exchanges, where competing expressions of interest are not allowed, does not favor and would tend to prohibit CWPC's proposal to exchange a commercial, allotted FM channel for an NCE FM reserved channel. Specifically, while you correctly outline why Intraband Television Channel Exchanges ("TV Channel Exchanges"), 59 RR 2d 1563 (authorization of TV channel exchanges within VHF or UHF band within the same

community) has an attenuated connection to the proposed FM channel exchange, there are policy concerns expressed in that proceeding that would tend to disqualify CWPC's proposal from consideration. The Commission's overriding concern in TV Channel Exchanges was that while it would permit such exchanges to take place within a given community, no community would be allowed to lose its public television service. See TV Channel Exchanges at 59 RR wed 146a. Shifting Channel 223A to Salt Lake City would place that community at an increased risk of loss of that NCE-FM service. Because Channel 223A is a non-reserved, commercial channel, the market dynamics of its possible use likely would change markedly, particularly considering that the channel then could be used to provide a commercial service to an area including Salt Lake City, and then could be upgraded to expand its urban area coverage.

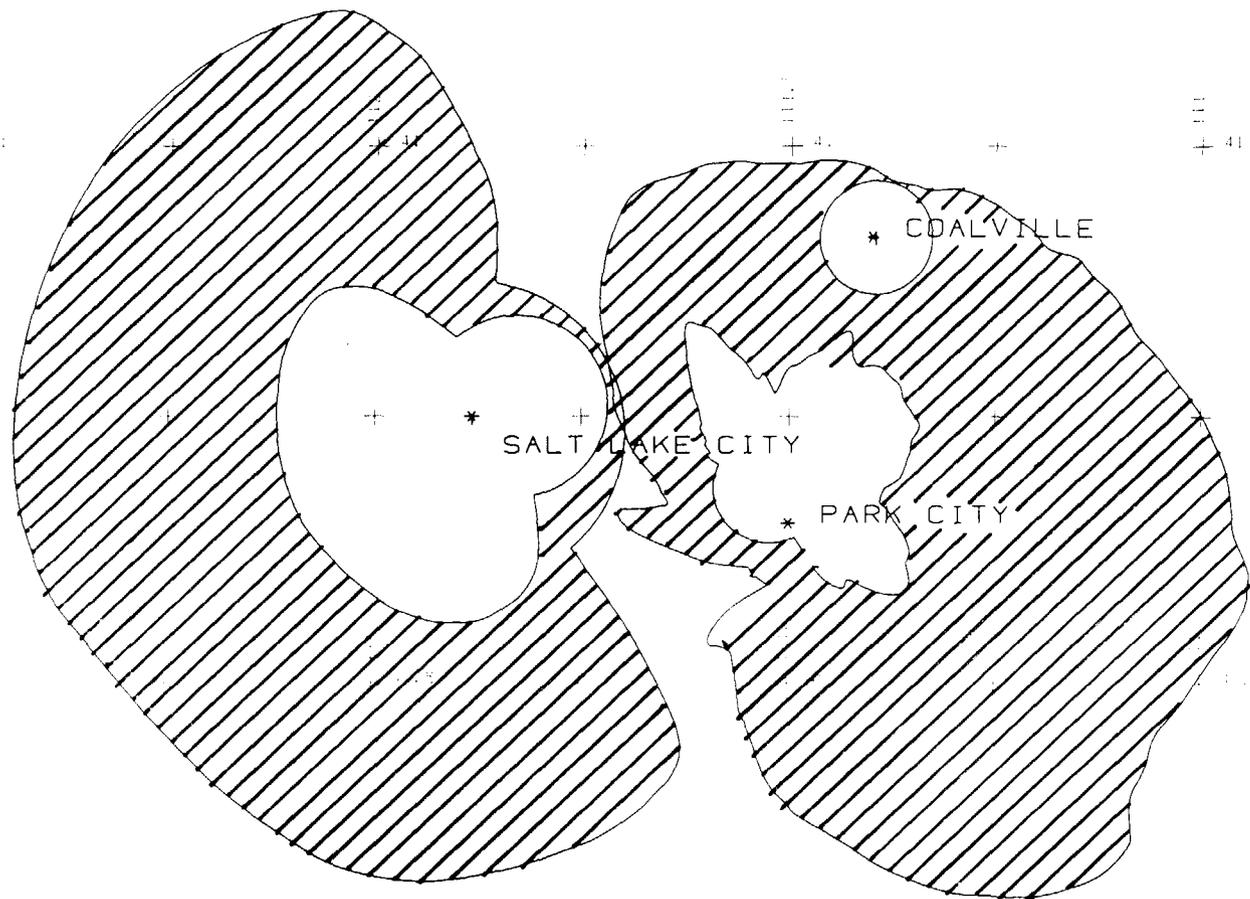
In view of the above, we dismiss your rulemaking proposal.

Sincerely,



John A. Karousos
Chief, Allocations Branch
Mass Media Bureau

ATTACHMENT B

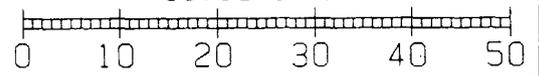


SALT LAKE CITY

COALVILLE

PARK CITY

Scale in km



Composite Coverage Improvement
Community Wireless of Park City

KCPW/KCUA/KPCW
G.F. Haertig - 09/97

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

Honorable Reed E. Hundt, Chairman *
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello *
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Rachelle B. Chong *
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness *
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

A handwritten signature in cursive script, appearing to read "Donald K. Hood", written in black ink on a white background.

September 11, 1997