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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 24, 1998

BY HAND DELIVERY
Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Motion to Dismiss or to Strike Joint Reply Comments and Reply Comments
MM Docket No. 97-91; RM-9221
Lewisville, Gainesville, Robinson, Corsicana, Jacksboro, and Mineral Wells, Texas

Dear Ms. Salas:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc. are an original and four copies of its "Motion to Dismiss or to Strike Joint Reply Comments and Reply Comments" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Sincerely,

Andrew S. Kersting

Enclosure
cc: Certificate of Service (w/ encl.)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-91
Table of Allotments,	)	RM-8854
FM Broadcast Stations	)	
(Lewisville, Gainesville, Robinson,	)	
Corsicana, Jacksboro, and	)	
Mineral Wells, Texas)	)	

To: Chief, Allocations Branch

MOTION TO DISMISS OR TO STRIKE JOINT REPLY COMMENTS AND REPLY COMMENTS

Metro Broadcasters-Texas, Inc. ("Metro"), licensee of Station KHYI(FM), Howe, Texas, by counsel and pursuant to Section 1.41 of the Commission's rules,[1] hereby moves to dismiss or to strike the "Joint Reply Comments of Heftel Broadcasting Corporation and Jerry Snyder and Associates, Inc." ("Joint Reply Comments"), the "Reply Comments of Jerry Snyder and Associates, Inc." ("Snyder Reply Comments"), and the "Further Reply Comments" of Heftel Broadcasting Corporation ("Heftel"), all of which were filed February 12, 1998, in the above-captioned proceeding. In support of this motion, the following is stated:

I. Introduction.

In response to a petition for rulemaking, filed July 26, 1996, by Heftel,[2] the Allocations Branch issued a *Notice of Proposed Rule Making and Order to Show Cause*, 12 FCC Rcd 3059

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[1] To the extent it is necessary, Metro hereby requests leave to file this motion.

[2] Heftel is the permittee of Station KECS(FM), Channel 300C2, Gainesville, Texas, and licensee of Station KICI-FM, Channel 300C1, Corsicana, Texas. Unless otherwise indicated, all communities referenced herein are located in the state of Texas.

(Chief, Allocations Branch 1997) ("*NPRM*"), on March 14, 1997, proposing, *inter alia*, (i) the substitution of Channel 300C1 for Channel 300 C2 at Gainesville; (ii) the reallotment of Channel 300C1 to Lewisville and modification of Heftel's construction permit for Station KECS to specify operation on Channel 300C1 at Lewisville; (iii) the substitution of Channel 300A for Channel 300C1 at Corsicana; and (iv) the reallotment of Channel 300A to Robinson and the modification of Heftel's license for Station KICI-FM to specify operation on Channel 300A at Robinson.

On May 5, 1997, the deadline for filing initial comments in this proceeding, Heftel filed comments in which it requested the Commission to adopt the proposal set forth in the *NPRM*. Metro filed a counterproposal on the same day proposing, instead, the substitution of Channel 237C2 for Channel 237C3 at Howe. Additional comments were filed by Snyder and Hunt Broadcasting, Inc.[3]

II. The Recent "Reply Comments" Filed by Heftel and Snyder Should be Dismissed or Stricken Because They Are Not in the Nature of a Reply, But, Instead, are Intended to Cure the Technical Defect in Heftel's Proposal.

As demonstrated in Metro's comments and reply comments filed in this proceeding,[4] the proposal set forth in the *NPRM* should not be adopted and Heftel's petition should be dismissed because the petitioner failed to protect the existing Channel 240C1 allotment at Mineral Wells. *See* 47 CFR §202(b); *Report and Order* in MM Docket No. 90-555, 7 FCC Rcd 1791 (1992). Accordingly, the Joint Reply Comments filed by Heftel and Snyder, the Snyder Reply Comments,

---

[3] Graham Newspapers, Inc. filed comments on May 6, 1997, one day after the initial comment deadline.

[4] Metro filed comments and reply comments in this proceeding on May 5 and May 20, 1997, respectively. Metro also filed reply comments in response to a *Public Notice*, Report No. 2251 (released January 28, 1998) ("*Public Notice*"), announcing that Snyder's pending application for the Channel 240C1 facility at Mineral Wells (BPH-961125IG) is being considered as a counterproposal in this proceeding.

and Heftel's Further Reply Comments should be dismissed or stricken from the record in this proceeding because they are not in the nature of a reply to Snyder's pending application for a construction permit for the Channel 240C1 facility at Mineral Wells, but, rather, are merely an attempt to cure the fatal deficiency in Heftel's proposal.[5]

It is well established that proposals are required to be "technically correct and substantially complete" at the time they are filed. *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090, 2093 (Chief, Policy and Rules Division 1997). *See also Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181, 13182 (Chief, Allocations Branch 1997); *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406, n.3 (Chief, Allocations Branch 1997). In *Berlin, De Forest, Markesan and Wautoma, Wisconsin*, 10 FCC Rcd 7733 (Chief, Allocations Branch 1995), the Commission refused to consider a counterproposal that was short-spaced to a transmitter site specified in a construction permit for another station. Although the proponent provided a letter from the permittee of the short-spaced station stating that he was willing to move his transmitter to a new site and seek authority pursuant to Section 73.215 of the Commission's rules in order to accommodate the counterproposal, the proponent failed to include a technical showing demonstrating the existence of a suitable site that complied with the Commission's minimum separation requirements. As a result, the Commission rejected the counterproposal, finding that it was not "technically correct and substantially complete" at the time it was filed, which is necessary

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[5] The *Public Notice* issued by the Commission on January 28, 1998, apparently failed to take into account the existence of the Channel 240C1 allotment at Mineral Wells, which has existed since April 20, 1992, and accepted BPH-961125IG as a competing expression of interest. The *Public Notice* was unnecessary due to the existence of the allotment, which precludes consideration of Heftel's rulemaking petition. Accordingly, the *Public Notice* should not be considered to have conferred timeliness on the Heftel-Snyder settlement pleadings filed on February 12, 1998.

to afford all parties an opportunity to fully respond to the counterproposal in their reply comments. 10 FCC Rcd at 7733 n.2.

Similarly, in *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181, the Commission determined that a counterproposal was not technically correct and substantially complete when filed because it was short-spaced to the licensed site of another station. The Chief, Allocations Branch, noted that proposals and counterproposals must be capable of being effectuated at the time they are filed, and, as of the initial comment deadline, cannot be contingent upon future actions of third parties. *Id.* at 13182-83. Also, in *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406, a counterproposal was found not to be technically correct and substantially complete when filed because it was 0.7 km short-spaced to a transmitter site specified in a pending application (and subsequent construction permit) of another station. The Chief also rejected the proponent's attempt to amend its proposal to specify a new community that was not specified in the petition, noting that counterproponents are not permitted to file curative amendments. *Id.* at 2407 n.3. *See also Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd at 2093 (Chief, Policy and Rules Division, rejected a counterproposal as not being technically correct and substantially complete when filed because it was short-spaced to the licensed site of another station).

In this case, Heftel's initial proposal, which the petitioner neglected to amend on or before the initial comment deadline, failed to protect the existing Channel 240C1 allotment at Mineral Wells. *See* 47 CFR §73.202(b); *Report and Order* in MM Docket No. 90-555, 7 FCC Rcd 1791 (1992). As set forth in the *NPRM* at ¶1, the substitution and allotment of Channel 300C1 to Lewisville is dependent upon the substitution and allotment of Channel 300A to Robinson. The allotment of Channel 300A to Robinson requires the substitution of Channel 237A for Channel 299A

at Jacksboro, which, in turn, requires the downgrade of Channel 240C1 at Mineral Wells to Channel 240C3. *See* Heftel Comments, filed May 5, 1997, p. 11 n.7.

Section 73.207(a) of the Commission's rules provides that the Commission will not accept petitions to amend the FM Table of Allotments unless the reference points meet all of the minimum distance separation requirements. 47 CFR §73.207(a). Channel 237A cannot be substituted for Channel 299A at Jacksboro in compliance with the minimum distance separation requirements. As demonstrated in Exhibit 1 to Heftel's Petition for Rulemaking, filed July 26, 1996, the proposed substitution of Channel 237A at Jacksboro is 15.3 kilometers short-spaced to the Channel 240C1 allotment at Mineral Wells. Although the construction permit for the Channel 240C1 facility at Mineral Wells expired some time ago,[6] Heftel nevertheless is required to protect the Channel 240C1 allotment. *See, e.g.*, *Eldorado and Lawton, Oklahoma*, 5 FCC Rcd 618 (Chief, Allocations Branch 1990) (subsequent history omitted). Indeed, the Commission does not delete a channel (or downgrade an existing allotment) where, as here, there is an expression of interest demonstrated by the filing of an application by the initial comment deadline, even where a construction permit has been forfeited and cancelled. *Driscoll, Gregory and Robstown, Texas*, 9 FCC Rcd 3580, n.3 (Chief, Allocations Branch, 1994) (subsequent history omitted). *See also Martin and Tiptonville, Tennessee*,

---

[6] As explained in Metro's comments, filed May 5, 1997, Snyder's efforts to construct its Class C1 facilities for KYXS(FM), Mineral Wells, were frustrated by the death of the property owner of Snyder's proposed transmitter site, and the fact that the property owner's widow and son were unwilling to make the property available to Snyder while the property was in the deceased's estate. Although Snyder's efforts to find an alternative site were unavailing, after the estate sold the land to a local municipal water district, Snyder entered into an arrangement with the water district to use a portion of the land for its transmitter site, and, on November 25, 1996 (prior to the issuance of the *NPRM*), filed its pending application to construct its new Class C1 facility. *See* Metro's Comments, pp. 2-3; Snyder's Comments, filed May 5, 1997, and accompanying Declaration of Jerry Snyder.

11 FCC Rcd 12695 (Chief, Allocations Branch 1996) (same). Because Heftel failed to protect the existing Channel 240C1 allotment at Mineral Wells in accordance with Section 73.207 of the Commission's rules, Heftel's proposal was not technically correct and substantially complete either at the time it was filed or as of the counterproposal deadline. Therefore, it must be dismissed. *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090; *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13181; *Frederiksted and Charlotte Amalie, Virgin Islands*, 12 FCC Rcd 2406.

As stated above, the reply comments filed by Heftel and Snyder on February 12, 1998, are not in any way responsive to Snyder's pending application, but, rather, constitute a belated attempt to cure the fatal, technical deficiency in Heftel's original proposal, which cannot be cured after the initial comment deadline. *Frederiksted*, 12 FCC Rcd at 2407 n.3. Acceptance of Heftel's late-filed proposal in this proceeding would undermine the integrity of the Commission's processes and prejudice the other timely-filed, acceptable proposals such as Metro's. *See Amor Family Broadcasting Group*, 918 F.2d 960, 963 (D.C. Cir. 1990).

III. The Curative Amendment Proposed in Heftel's and Snyder's Joint Reply Comments Constitutes a Buy-Out in Violation of Section 1.420(j) of the Commission's Rules.

Section 1.420(j) of the Commission's rules provides in pertinent part that, whenever a party seeks to either dismiss or withdraw an expression of interest in a particular facility, that party must file a request for approval of the dismissal or withdrawal with the Commission, submit a copy of the written agreement related to the dismissal or withdrawal, and certify that neither the withdrawing party nor its principals have received any money or other consideration in excess of the party's

legitimate and prudent expenses incurred in the preparation and filing of its expression of interest. 47 CFR §1.420(j). *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991). Heftel and Snyder contend that their recent attempt to cure the technical defect in Heftel's proposal does not constitute the withdrawal of Snyder's expression of interest in the Channel 240C1 facility at Mineral Wells because Snyder allegedly still intends to construct the Class C1 facility. Heftel and Snyder therefore claim that Section 1.420(j) of the rules does not apply to their proposal. Joint Reply Comments at 4. Despite the parties' characterization of their proposal, it is beyond peradventure that the sole motivation for Snyder's willingness to move to a reference site 43 kilometers (26.7 miles) southwest of Mineral Wells is the substantial monetary payment that Heftel has agreed to provide Snyder under the parties' "Compensation Agreement."[7] Indeed, the parties readily admit that the new reference site "will be less commercially viable" and will result "in a loss of population that would be served by Snyder if his present application (BPH-961125IG) were granted." *Id.* at 3.

The loss of service that would result from moving the Channel 240C1 reference point to the location specified in Heftel's and Snyder's Joint Reply Comments is substantial. As demonstrated in the attached engineering statement prepared by Munn & Associates, Inc., the population figures for the present and proposed Class C1 facilities are as follows:

---

[7] Heftel and Snyder note that they have entered into the Compensation Agreement to "compensate Snyder not only for his costs in modifying his application to specify a new site, but also . . . for the loss of value of KYXS operating at the new reference point . . . ." Joint Reply Comments at 4 (footnote omitted).

Snyder's Pending Class C1 Application:	60 dBu population = 414,867 70 dBu population = 99,743
Class C1 From New Reference Point:	60 dBu population = 164,230 70 dBu population = 69,872

As demonstrated above, a maximum Class C1 facility operating from the reference point proposed in the Joint Reply Comments would serve only 39.6% of the population within its 60 dBu contour that would be served by the Class C1 facility proposed in Snyder's pending application. Similarly, the proposed Class C1 facility would serve only 70.1% of the population within the station's 70 dBu contour that would be served by the facility specified in Snyder's application. The substantial loss in population that would result from moving the Channel 240C1 facility to the reference point proposed in Heftel's and Snyder's Joint Reply Comments establishes that, contrary to the parties' contentions, the proposal to move the reference coordinates for the Channel 240C1 allotment at Mineral Wells constitutes nothing more than a pay-off to get Snyder out of way and permit Heftel to achieve its ultimate goal of moving Station KECS(FM) from Gainesville to Lewisville, upgrading the station from Channel 300C2 to Channel 300C1, and thereby permitting service to the Dallas Metroplex.[8] Therefore, even assuming, *arguendo*, the Commission were willing to consider Heftel's untimely attempt to cure its defective proposal, Heftel and Snyder must

[8] The joint commenters cite *Pinewood, South Carolina*, 5 FCC Rcd 7609, 7610 ¶11 (1990), in support of their attempt to "resolve" this proceeding by moving the reference coordinates of the Channel 240C1 allotment at Mineral Wells. However, *Pinewood* merely stands for the general proposition that the FCC may select a substitute channel to resolve conflicts between an initial proposal and any timely filed counterproposal, and that parties may suggest alternative channels which may lead to resolution of the proceeding after the initial comment deadline. *Id.* at 7610. *Pinewood* does not support the proposition that a defective technical proposal may be amended after the initial comment deadline, or that a petitioner may buy out a counterproponent for an amount in excess of its legitimate and prudent expenses, all to the prejudice of a party who has timely submitted a technically viable counterproposal.

submit a copy of their Compensation Agreement and demonstrate that, in accordance with Section 1.420(j) of the Commission's rules, Snyder (and its principals) will receive no more than its legitimate and prudent expenses incurred in the preparation and filing of its expression of interest in the Channel 240C1 allotment at Mineral Wells.

WHEREFORE, in light of the foregoing, Metro Broadcasters-Texas, Inc. respectfully requests that the Commission: (i) GRANT (to the extent necessary) its request for leave to file the instant motion; (ii) GRANT this motion and DISMISS or STRIKE the (a) Joint Reply Comments of Heftel Broadcasting Corporation and Jerry Snyder and Associates, Inc.; (b) Reply Comments of Jerry Snyder and Associates, Inc.; and (c) Further Reply Comments of Heftel Broadcasting Corporation; and (iii) GRANT Metro's counterproposal proposing the substitution of Channel 237C2 for Channel 237C3 at Howe, Texas, and modify the license of Station KHYI(FM), to specify operation on Channel 237C2 in lieu of Channel 237C3.

Respectfully submitted,

METRO BROADCASTERS-TEXAS, INC.

By: _____
Harry C. Martin
Andrew S. Kersting

Its Counsel

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February 24, 1998

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ENGINEERING REPORT

Calculation and Plot of
KYXS - Mineral Wells, Texas
Alternative Class C1 Facilities Coverage
Including Populations and Areas

February 1998

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E. Harold Munn, Jr. & Associates, Inc.
Broadcast Engineering Consultants
Coldwater, MI 49036

CERTIFICATION OF ENGINEER

The firm of E. Harold Munn, Jr. & Associates, Inc., Broadcast Engineering Consultants, with offices at 100 Airport Drive, Coldwater, Michigan, has been retained for the purpose of preparing the technical data forming this report.

The report has been prepared by properly trained electronics specialists under the direction of the undersigned whose qualifications are a matter of record before the Federal Communications Commission.

I declare under penalty of perjury that the contents of this report are true and accurate to the best of my knowledge and belief.

February 23, 1998

E. HAROLD MUNN, JR. & ASSOCIATES, INC.

By Wayne S. Reese

Wayne S. Reese, President

100 Airport Drive, P. O. Box 220
Coldwater, Michigan 49036

Telephone: (517) 278-7339

DISCUSSION

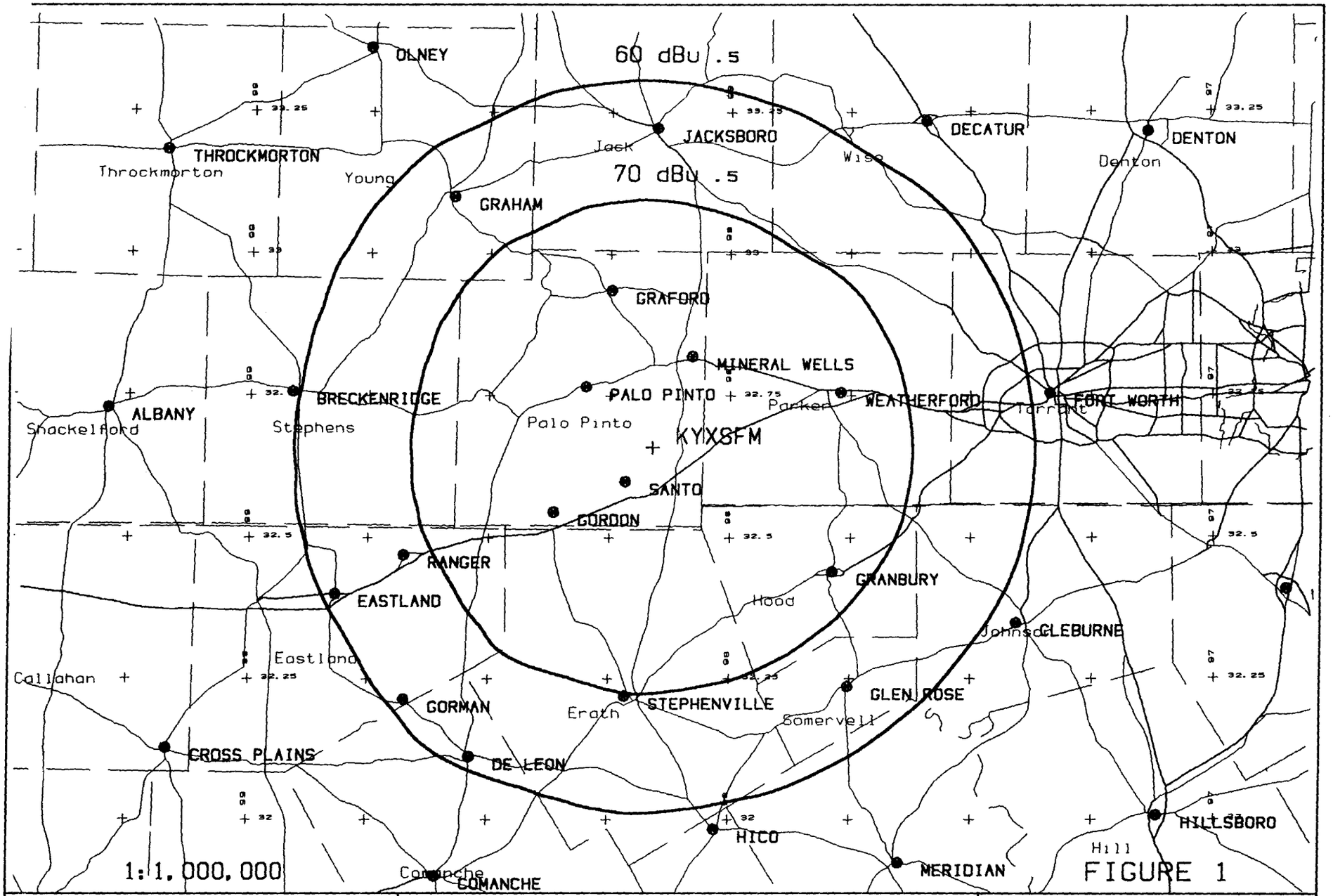
This firm was retained by Metro Broadcasters - Texas, Inc. to determine the population within the proposed 3.16 mV/m (70 dBu) and 1.0 mV/m (60 dBu) contours of KYXS, Mineral Wells, Texas, from two separate transmitter site locations.

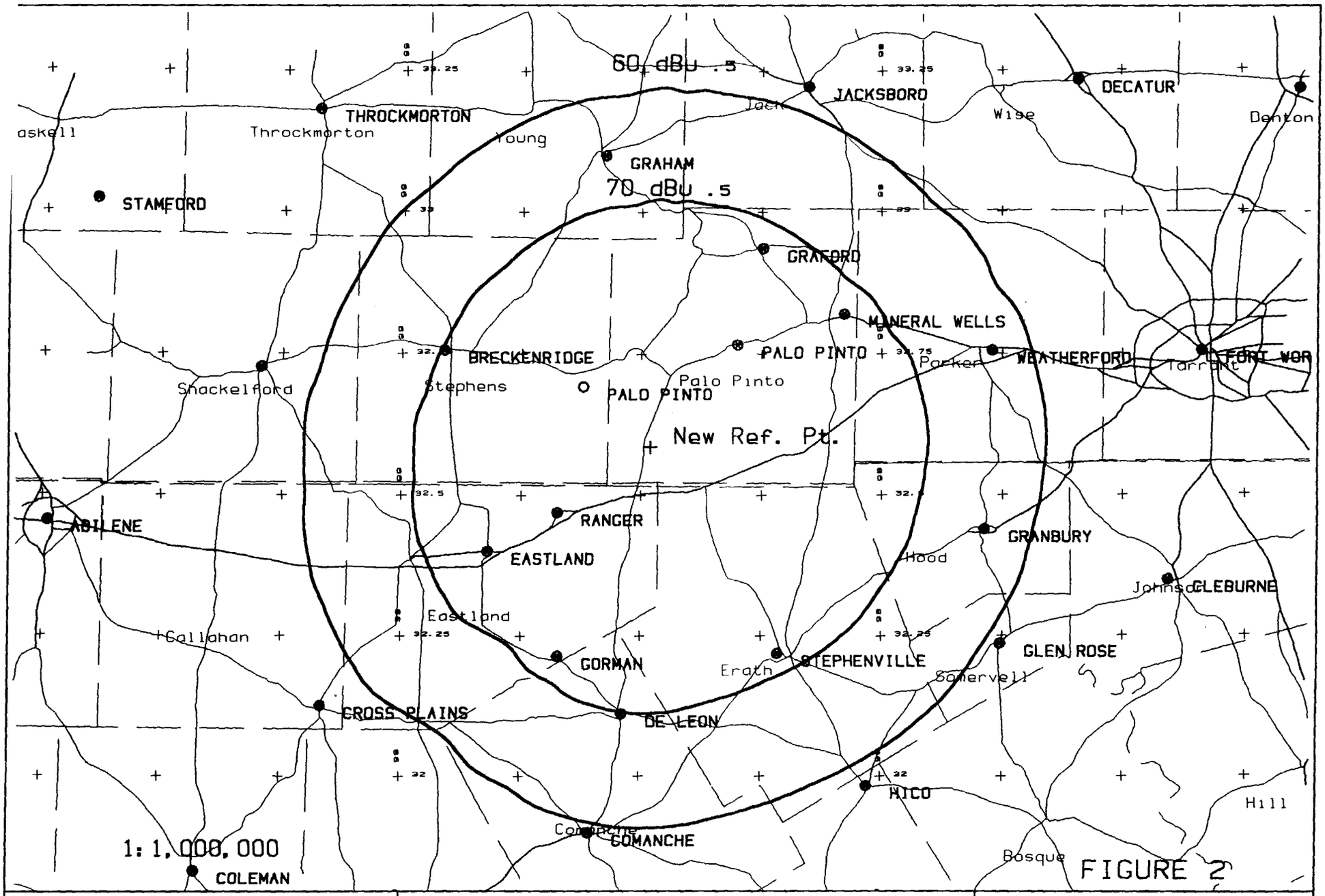
The licensee of KYXS has pending an application, BPH-961125IG, for upgrade from Class C3 to C1 from a location at NL 32°39′35″; WL 98°09′34″. The application proposes an effective radiated power (ERP) 23.5 kW at a height above average terrain (HAAT) of 512 meters. These are equivalent facilities to maximum Class C1 facilities of 100 kW at 299 meters HAAT. Figure 1 is a map showing the proposed coverage of the station with the facilities as proposed in the application.

In a recent rulemaking proceeding, MM Docket 97-91, by Heftel Broadcasting Corp., a change was proposed in the reference coordinates to be used for the Mineral Wells Class C1 allocation. The coordinates for this location are NL 32°35′08″; WL 98°28′50″. Figure 2 is a map showing the proposed coverage of KYXS from the reference point location using maximum Class C1 facilities of 100 kW at 299 meters HAAT.

Figure 3 is a tabulation of the populations and areas for the 1.0 mV/m contours for each location.

For the calculation of the FM contours, the authorized Center of Radiation and ERP values were utilized to compute the predicted 3.16 mV/m (70 dBu) and 1.0 mV/m (60 dBu) contours as provided in §73.313 of the Rules. The predicted FM contours shown in this report are based on the use of 360 equally spaced terrain radials beginning with 0° True. The populations have been determined for each contour by the use of *V-Soft Communications, Inc.* program ID Census. This program uses data taken from the 1990 Census. As in the calculation of the contours, 360 equally spaced radials were employed to actually determine the population within the contour.


60 dBu .5
70 dBu .5
OLNEY
THROCKMORTON
Throckmorton
Young
JACKSBORO
Jack
Wise
DECATUR
DENTON
Denton
GRAHAM
GRAFORD
MINERAL WELLS
PALO PINTO
Parker
WEATHERFORD
FORT WORTH
Tarrant
BRECKENRIDGE
Stephens
ALBANY
Shackelford
Palo Pinto
KYXSFM
SANTO
GORDON
RANGER
EASTLAND
Eastland
GRANBURY
Hood
CLEBURNE
Johnson
Callahan
GORMAN
Erath
STEPHENVILLE
GLEN ROSE
Somervell
CROSS PLAINS
DE LEON
HICO
HILLSBORO
Hill
MERIDIAN
Comanche
COMANCHE
1:1,000,000
FIGURE 1
Scale in km
0 10 20 30 40 50 60 70
KYXSFM 240C1 23.5kW @ 512m HAAT 785m AMSL
N. Lat. 32 39 35 W. Lng. 98 09 34
KYXS-FM Mineral Wells, TX
MUNN & ASSOC. - 02/98



Scale in km

0 10 20 30 40 50 60 70

KYXSFM 240C1 100kW @ 299m HAAT 647m AMSL
N. Lat. 32 35 08 W. Lng. 98 28 50

KYXSFM Mineral Wells, TX
MUNN & ASSOC. - 02/98

FIGURE 3

TABULATION OF POPULATION AND AREA

KYXS PENDING APPLICATION

CONTOUR	AREA	POPULATION
3.16 mV/m	7,418 km²	99,743
1.0 mV/m	16,309 km²	414,867

KYXS NEW REFERENCE COORDINATES

CONTOUR	AREA	POPULATION
3.16 mV/m	7,830 km²	69,872
1.0 mV/m	16,329 km²	164,230

The service area was determined by averaging the radius of the 1 mV/m contour on 360 bearings and using the following equation: Area = πr^2 The area calculation was generated by computer.

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 24th day of February, 1998, copies of the foregoing "Motion to Dismiss or to Strike Joint Reply Comments and Reply Comments" were hand delivered or mailed first-class, postage pre-paid, to the following:

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Barbara Lyle

Barbara Lyle

* Hand Delivered