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Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

APR 21 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	MM Docket No. <u>91-58</u>
	)	
Amendment of Section 73.202(b)	)	RM-7419
Table of Allotments	)	
FM Broadcast Stations	)	RM-7797
(Caldwell, Texas, et al)	)	RM-7798

To: The Commission

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

On March 15, 2000, Roy E. Henderson ("Henderson") filed a Petition for Reconsideration in this case. On March 30, 2000 an Opposition was filed by Bryan Broadcasting Subsidiary, Inc. ("Bryan"). The instant Reply is filed pursuant to Section 1.429 (e) (f) and (g) and Section 1.4(b) (1) of the Commission's Rules and directed to that Opposition.

**I. Henderson's Tower Proposal Should be Credited and Recognized as Reasonable and Acceptable to FAA**

The first matter addressed by Bryan is the reliability of Henderson's tower proposal. It has been Henderson's position that his tower, proposed to be located on the same piece of property as an existing taller tower, long approved (since 1983) by the FAA, would reasonably be at least as acceptable to the FAA as that adjacent taller tower. In July of 1996 Henderson submitted a Declaration from his Professional Engineer (who is also familiar with FAA rules as a licensed pilot) who stated under penalty of perjury that he had discussed the tower matter with a representative of the FAA who had indicated to him that there

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would be no problem in approving the additional tower so long as it was not taller than the existing tower (which it is not). Moreover, it has subsequently been found that yet another tower, a much taller tower than the existing "Chet Fry tower" has also been approved approximately 6 miles southeast of Henderson's tower and 6 miles closer to the nearest airport, leaving Henderson's proposed tower bracketed between two taller towers already approved by the FAA.

Against this, Bryan submits an affidavit by its Engineering Consultant who attests that it is "possible" for one tower to be in compliance with approval criteria while another located a hundred feet away may not be. Based upon this theoretical claim, Bryan suggests that the actual approvals of real existing towers as claimed by Henderson should have no weight. This is simply absurd. It is no different than saying "theoretically" it "could" be possible to throw a match into the gas tank of a car and have nothing happen. "Theoretically" that is correct since just by looking at the car you could not say for certain that it had ever been filled with gasoline. In a practical sense though, it is more than reasonable to assume that the tank had at one time contained gasoline and that a match thrown into that tank would cause an explosion. That is certainly a reasonable and reliable assumption.

Similarly, with an existing broadcast tower approved at one point on a piece of land and another smaller tower proposed on the same property slightly over one mile away, and with yet

another even taller broadcast tower approved six miles south of the proposed tower, toward the closest airport, effectively bracketing the proposed tower between the two taller towers approved by the FAA, 1/ it may be theoretically possible to suggest that the proposed tower might not be approved but such a suggestion flies in the face of common sense and the reasonable and reliable certainty that in this circumstance and this case, the tower proposed by Henderson would in fact be entirely acceptable to the FAA and approved by that agency.

**II. Henderson's New Proposed Site Is in full Compliance  
With All FCC Rules, Including 73.315(a).**

In his Petition for Reconsideration, Henderson noted that a radio station operating on channel 236, 95.1Mhz in Victoria, Texas, 2/ had asked for and received FCC permission to reduce its power and classification from a Class C1 to a Class C3 station. As stated in its "Amendment Narrative" filed with its request, it was seeking an "instant down-grade" to operate as a class C3 station with 13,000 watts. The request was granted by the Commission by c.p. BPH-990121IE issued August 13, 1999.

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1/ See the attached Engineering Statement which includes a map showing the location of the two approved towers and Henderson's proposed tower located adjacent to one and between the two.

2/ The "old" call letters of this station were "KVIC(FM)" but they were changed effective February 1, 2000, to "KRNX(FM)", the call letters by which we will refer to this station in this pleading. It is noted that this station was referred to incorrectly as "KAMG(FM)" (call letters of its companion AM station) by Henderson in his Petition for Reconsideration and referred to incorrectly by Bryan in its Opposition as the old call letters "KVIC(FM)". Both were referring to the station formerly known as "KVIC(FM)" and changed to KRNX(FM) as of February 1, 2000.

It was Henderson's previous understanding that the actual reduction of power at KRNX(FM) in Victoria took place on or about February 17, 2000, and with that reduction, Henderson on February 24, 2000, filed an application to move his transmitter site and upgrade his proposed channel operation for Caldwell on 236C2 consistent with the additional area provided by the KRNX(FM) reduction in power, this new site being totally compliant with all FCC rules including 73.315(a) and providing superior improved service to the city of Caldwell. The application was accepted for filing on March 31, 2000, by Public Notice 24703.

In its Opposition, Bryan noted that grant of the new site proposed by Henderson was contingent upon implementation of the "downgrade" that had been requested by KRNX(FM). While recognizing that the Commission had granted the requested downgrade by action on August 13, 1999, Bryan stated with great confidence that "no license application has yet been filed". That being so, Bryan went on suggest that the proposed downgrade of KRNX(FM) was "not a certainty...that the licensee of Station [KRNX(FM)] could turn in its construction permit and continue to operate its licensed facility as a Class C1, which would again leave Henderson with no site..." Bryan then piously asks whether Henderson wanted everyone to be delayed "...while we see whether the Victoria licensee actually downgrades?" What utter Baloney that is. The only question raised there is whether Bryan knew the true facts when it made such statements.

Here are the true facts relating to the downgrade of KRNX(FM). When Henderson said he thought they had implemented the downgrade on February 17, 2000, he was wrong. They had actually done so on February 1, 2000, and the downgrade was memorialized by several coincident events. Following grant of authority to downgrade his station, the licensee of what used to be KVIC(FM) then also asked for authority to change his call letters at that station from KVIC(FM) to KRNX(FM), effective February 1, 2000. This request was granted by the Commission on January 26, 2000. At the same time a request was filed by this licensee to assign the "old" call letters of "KVIC(FM)" to another Class C1, 100,000 watt station he owned in the same market (KPLV(FM)) and this was also granted by the Commission.

On February 1, 2000, old KVIC(FM) reduced power from 100,000 watts to 13,000 watts, downgrading from C1 to C3 operation on channel 236C3 (95.1 MHZ), changed its call letters to KRNX(FM), and changed its format from "Adult Contemporary" to "Country".

On the same day, at the same time, KPLV(FM) changed its call letters to "KVIC(FM)", picked up the old KVIC(FM) adult contemporary format, and even picked up the same disc jockeys that had been used at old "KVIC(FM)". To the audience in that market, KVIC(FM) remained the same, same format, same disc jockeys, same power, just moved from 95.1Mhz to 93.1 Mhz.

We do not mean to imply that there was anything illegal or improper in such a change in identities between the two stations. What we do wish to call to the Commission's attention is that the

reduction of power at old KVIC was not a casual matter. It was very deliberate and coordinated with a change of call letters and a change of format at old KVIC on that same date of February 1, 2000, and with a similar change in format and call letters at a commonly held station in the same market on the same day.

Attached hereto is a Declaration by Clay Gish who physically visited station KRNX(FM) (formerly KVIC(FM)) on April 18, 2000. At that time he spoke with Cindy Cox, the General Manager of KRNX(FM) who confirmed to him, in response to his specific question, that KRNX(FM) had in fact reduced power to 13,000 watts, as authorized by its construction permit, on February 1, 2000. That was almost three months ago and we cannot explain why the licensee of that station has not yet decided to ask for program test authority or to file a license application to reflect its operation at its new power classification. Perhaps it was a mistaken belief that implementation of the construction permit and the modified operation of the station did not require program test authority or a new license application. If so, they were very wrong.

All we can say FOR A FACT is that the station that previously operated as KVIC(FM) on 95.1 Mhz as a class C1 operation on channel 236, did in fact on February 1, 2000, reduce power to operate with 13,000 watts as a class C3 operation on Channel 236, and that on that same day it also changed its format and changed its call letters from "KVIC(FM)" to "KRNX(FM)". We can also say that this actual reduction in power and

classification on channel 236 did in fact provide a new open area for location of Henderson's transmitter for operation on channel 236C2 as reflected in his site change application filed February 24, 2000.

Against this factual background, we can return again to Bryan's recognition that a license application 'had not yet been filed' by the Victoria station and its ruminations about 'what if they never filed a license application, what if the request for an "immediate down-grade" made in 1999 was no longer true and the licensee decided to "turn in its construction permit and continue to operate with its licensed facility as a Class C1...?"' At the time of these "what ifs" advanced by Bryan, old KVIC(FM) was already long gone from the scene, having changed its call letters and reduced its power TWO MONTHS before such musings. Once again, Bryan appears to have been blissfully oblivious to these facts.

### **III. Conclusion**

In carrying out its statutory functions it is necessary for the Commission on many occasions to attempt to "predict" performance rather than making judgments based upon actual facts or concrete performance. This has been acknowledged in the past by the Commission as a problem in cases pitting new applicants promising "everything" against an existing licensee running on the basis of his actual record of performance. It is so easy to make promises, that are sometimes not ever meant to be kept.

Which leads us to the present case. Rule 73.315(a) was adopted over 30 years ago to assure proper coverage and reception of an FM station's signal within its city of license. The bar for signal strength was set high since transmitters and receivers alike were primitive and subject to enormous amounts of interference. Times have changed and the standard of that rule is now far higher than needed to meet its original purpose. This has led to an "informal" relaxation of the rule by the Mass Media Bureau so that 80% is considered full compliance to them but not to Allocations, another Division at the Commission. Despite this informal change, the rule has never been changed on the books and remains as it did over 30 years ago.

Notwithstanding that, the Commission in this case believed what Bryan told it, that its proposal for College Station would be in 100% compliance with 73.315(a). Based upon that and upon the predicted failure of Henderson to meet 100% compliance with that rule, the Commission in its Decision released July 22, 1998 found in favor of Bryan. In so doing, the Commission failed for some unknown reason to acknowledge or consider pleadings before the Commission at that time that revealed that in fact, by Bryan's own admission, Bryan would not meet rule 73.315(a) and by a very large margin, far greater than Henderson's alleged deficiency. A fact, stated and admitted as such by Bryan, not a theoretical prediction.

In requesting remand from the Court, the Commission finally recognized this fact and referred to it then as being one of very

possible decisional significance, so much so in fact as to be sufficient grounds in and of itself to be the sole basis for the requested remand. But in its new Decision released February 15, 2000, the very same fact that had been the basis for the remand suddenly lost its importance. According to its new Decision, the fact of Bryan's admitted non-compliance with 73.315(a) no longer seemed of any significance or importance to the Commission.

In that same Decision, the Commission noted the allegations of misrepresentation by Bryan in this case, evidence of which had been submitted and documented by Henderson, and indicated that they would be "...considered in the context of [an] application proceeding". The allegations of deliberate misrepresentation by Bryan in this proceeding are much more than that, they are facts based upon Bryan's own actions and statements as fully and completely documented in Reply Comments filed in this proceeding by Henderson on June 18, 1999. You not only can put your finger on it but your whole hand. The facts presented there constitute the best evidence by which to judge Bryan's case, its representations, and its promises. The motivation for the wholesale deceptions and misrepresentations by Bryan in this case is palpable and patent for anyone to see who cares to look.

It is not logical or reasonable to ignore the clear facts that establish the acceptability of the Henderson tower to the FAA. Nor is it logical or reasonable to fail to consider the facts of misrepresentations of Bryan in this case and Bryan's true plan all along to locate its station at a point in

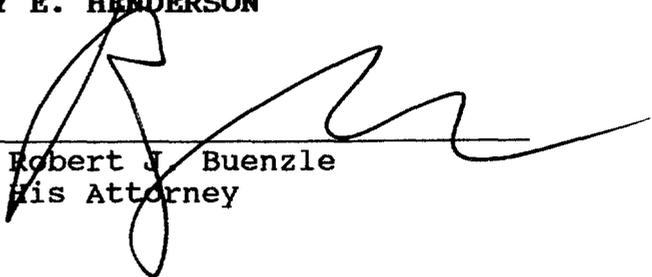
substantial non-compliance with 73.315(a). Given its past actions and representations to the Commission it is not logical or reasonable to now credit Bryan and believe that it has suddenly "seen the light" and will amend to a compliant site, that is, at least until the appeal is over.

Henderson has the better case for service to the public, and has always had. With the downgrade at Victoria, Henderson can even improve upon that and has filed an application to change sites to one that is fully compliant with 73.315(a). His proposal is bona-fide and made in good faith and should be credited. His proposal should be approved and Bryan's denied.

Respectfully Submitted,

**ROY E. HENDERSON**

by

  
Robert J. Buenzle  
His Attorney

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April 21, 2000

Reply To Opposition To  
Petition for Reconsideration of  
FCC Decision FCC 00-58, 2-15-2000  
MM Docket no. 91-58  
Caldwell, Texas et al  
April 21, 2000

**ATTACHMENT A**

**Declaration of Clay Gish**

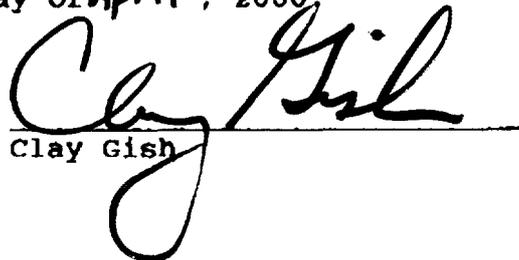
DECLARATION

Clay Gish, under penalty of perjury, hereby states and declares the following:

On Tuesday, April 18, 2000, I personally visited the offices of radio station KRNX(FM) in Victoria, Texas, (formerly "KVIC(FM)" but changed to "KRNX(FM)" as of February 1, 2000) to determine whether the station had reduced its operating power on 95.1 Mhz from 100,000 watts to 13,000 watts as authorized by the Federal Communications Commission. In examining the station files, I found a copy of the agreement between the licensee of KRNX(FM) and the licensee of KRNH(FM) in Comfort, Texas, calling for the cooperation between the stations on the reduction of power at KRNX(FM) and the increase in power at KRNH(FM) in Comfort, Texas. I also found the application by KRNX(FM) to reduce power, a copy of the FCC grant and construction permit authorizing the KRNX(FM) reduction of power dated August 13, 1999, and the FCC authorization for change of call letters effective 2-1-2000. Although I found no other application or report to the FCC subsequent to that date, I did discuss the matter with Cindy Cox, the General Manager of KRNX(FM) and in response to my question, she confirmed that the station had in fact commenced operation at the reduced power of 13,000 watts in accordance with its construction permit to operate as a Class C3 station, as of February 1, 2000, coincident with its change in call letters.

The above statements of fact are true and correct to the best of my own personal knowledge and belief.

Signed and dated this 18<sup>th</sup> day of April, 2000.

  
Clay Gish

Reply To Opposition To  
Petition for Reconsideration of  
FCC Decision FCC 00-58, 2-15-2000  
MM Docket no. 91-58  
Caldwell, Texas et al  
April 21, 2000

**ATTACHMENT B**

**Engineering Exhibit**

Roy E. Henderson  
Post Office Box 590209  
Houston, Texas 77259

Engineering Statement  
Caldwell, Texas  
MM Docket 91-58  
April 2000

(c) 2000  
F. W. Hannel, PE  
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STATE OF ILLINOIS            )  
                                  )  
COUNTY OF PEORIA            )            SS:

F. W. Hannel, after being duly sworn upon oath,  
deposes and states:

He is a registered Professional Engineer, by  
examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding Bachelor  
of Science and Master of Science degrees, both in Electrical  
Engineering;

His qualifications are a matter of public record and  
have been accepted in prior filings and appearances requiring  
scrutiny of his professional qualifications;

The attached Engineering Report was prepared by him  
personally or under his supervision and direction and;

The facts stated herein are true, correct, and  
complete to the best of his knowledge and belief.



April 19, 2000

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F. W. Hannel, P.E.

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Roy E. Henderson  
Post Office Box 590209  
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Engineering Statement  
Caldwell, Texas  
MM Docket 91-58  
April 2000

This firm has been retained by Roy E. Henderson, permittee of Radio Station KLTR(FM), Caldwell, Texas, to prepare this engineering statement in the above captioned proceeding. The Commission has issued a Memorandum Opinion and Order in the above captioned proceeding dated February 15, 2000, which again denied Henderson's proposed upgrade of Radio Station KLTR(FM) and Henderson filed a Reconsideration Petition that was opposed by Bryan Broadcasting License Subsidiary, Inc.

Initially, it should be noted again that the original basis for the rejection of the Henderson proposal for the upgrade of KLTR(FM) is that the Henderson proposal only covers 96% of the city, (missing a small portion of 4 percent area containing 25 persons outside the city grade contour), of Caldwell, Texas with a city grade signal, while the Commission believed the competing proposal provided city grade coverage to *all* of the community of College Station, Texas. In reality, however, the site actually specified by Bryan for implementation for the upgraded channel at College Station, Texas provided city grade coverage of only 91.6%, (omitting an area of 8.4 percent of the city containing 4,185 persons outside the city grade contour), of College Station, a far greater deficiency than the proposal for Caldwell. Although the original order found that the 4 percent deficiency in the Henderson proposal rendered it inferior to the Bryan proposal, the most recent Order finds that Henderson does not cover ANY of Caldwell, which is inconsistent with prior findings in this case.

The entire argument on whether Woodstock is applicable to this case or not seems to hinge on whether or not the FAA would approve a tower at the allotment site

specified by Henderson.<sup>1</sup> In its opposition to the Henderson reconsideration proposal Bryan implies that even a tower located within 100 ft. of another tower triggers major concerns at the FAA regarding airspace safety. Specifically, Bryan states “Under the criteria utilized for obstruction evaluation by the FAA, particularly those related to instrument approach procedures, a difference of less than 100 feet in the location of a tower can make the difference between a structure being approved by the FAA and a structure being considered a hazard to air navigation.” Bryan goes on to state “It is for this reason, that the FAA requires that an entirely new aeronautical study be conducted for any change whatsoever in the geographic coordinates of a proposed tower, as well for any correction whatsoever in the geographic coordinates of an existing tower.” Somehow this is not the FAA with which this affiant has worked for 30 years.

It should be noted that this affiant has over 12,000 hours of flight time, is a multi engine instrument rated pilot, is quite familiar with the standards of the FAA regarding tower locations and has 30 years experience as both a pilot and a professional engineer dealing in FAA obstruction evaluations with FAA personnel. This affiant has *never* had a 100 ft. difference in tower location trigger any additional studies at the FAA.<sup>2</sup> In the case of the tower located approximately 1 mile from the Caldwell reference site the tower site coordinates were corrected when the FCC implemented the tower registration requirements. Its geographic coordinates were routinely corrected. No new study. No circularization. Nothing. Yet Bryan would have us believe that the mere correction of site location triggers all sorts of administrative procedures at the FAA.

Attached as Exhibit E-1 is a map showing the location of the existing tower northeast of the Caldwell allotment site, the allotment site, another tower southeast of

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<sup>1</sup> The Woodstock case was published in 1988, and the Commissions Rules were amended effective June 26, 1989 when Section 73.215 was added to the Commission’s Rules. Under 73.215, the Commission allowed licensees some flexibility in locating transmitter sites. In Woodstock only one site was available, and the Commission then required FAA approval for a tower at that community. With the implementation of Section 73.215, the Commission recognized that if other stations were protected from interference, then the technical integrity of the Rules was maintained through the use of protection contour. It is apparent that Section 73.215 was adopted to obviate the technical requirements of Woodstock.

the allotment site and Easterwood Field at College Station. Since this proceeding began, this affiant has maintained that Woodstock was not applicable to this case as the allotment site was within the shadow of an existing taller tower. As the map clearly shows, that shadow is apparent. As a further indication of the correctness of Henderson's position, the FAA also authorized the construction of a 198 meter tower 6 miles southeast of Henderson's allotment site, (96-ASW-0776), and that tower construction has been completed. As a final, and most compelling point, the 198 meter tower is taller than required at the Henderson site, and is in a direct line from the Henderson allotment site to the airport. All of the smoke screen statements of 100 ft. movements requiring a new FAA study at the Henderson allotment site are simply nonsense.

There are 5 instrument approach procedures published for Easterwood Field at College Station, Texas: ILS Runway 34, LOC backcourse 16, VOR/DME or GPS runway 28, VOR or GPS runway 10, NDB or GPS Runway 34. Not one of the approaches involve an MDA or approach path profile northwest of the airport where any of the towers shown would have any impact whatsoever. The FAA concluded that a 198 meter tower 7.5 miles northwest of Easterwood Field would not adversely affect aircraft operations. How can Bryan maintain that the Henderson tower site, one mile from a taller tower, located 13 miles away from the airport would somehow be a hazard to aircraft when, in fact, the FAA has approved a 198 meter tower located approximately half way between the allotment site and the airport. The aircraft hazard argument simply has no basis in fact. It is simply not credible that the FAA would have any problem with a tower 13 miles from an airport located in the shadow of another existing tower. Additionally, the FAA approved a tower approximately half way between the Henderson site and the airport and *that* tower was substantially taller than that required by Henderson. Simply put, there is not now, nor has there ever been, any FAA concerns with the proposed Henderson site.

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<sup>2</sup> Of course, it goes without saying that this affiant has never even proposed a tower that would be so located that a 100 ft. difference in location would move its impact from one of no hazard to one of a hazard determination.

There is a wide area where Henderson can locate a tower to provide service to the Community of Caldwell, Texas, in full compliance with all of the Commission's technical rules. While Bryan can argue theoretically that a 100 ft. move in a tower location 13 miles from an airport triggers all sorts of FAA concerns, that theoretical argument has no place in this proceeding. The facts in this case prove otherwise.

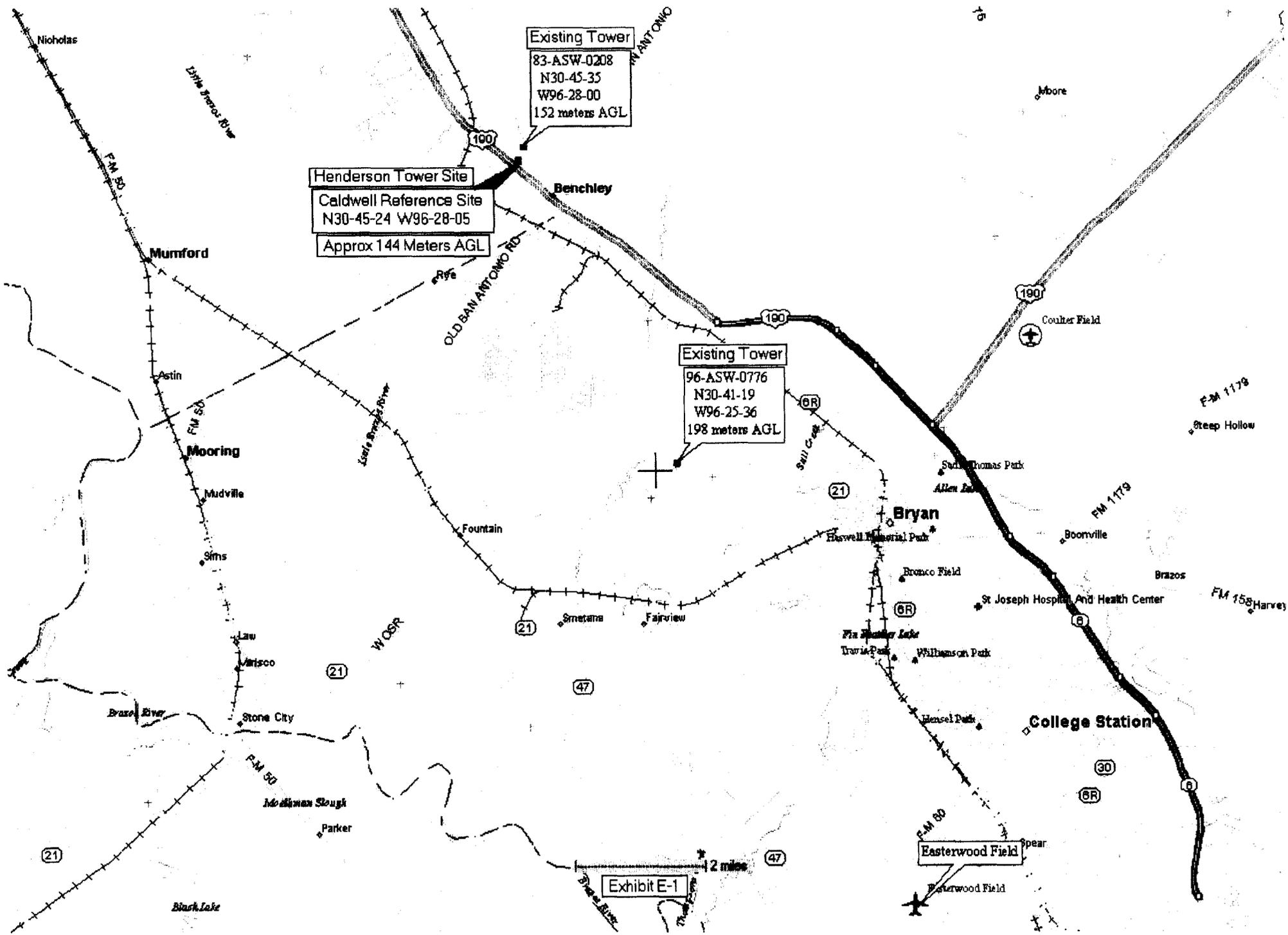


Exhibit E-1

1/2 mile

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION have been served by United States mail, postage prepaid this 21st day of April, 2000, upon the following:

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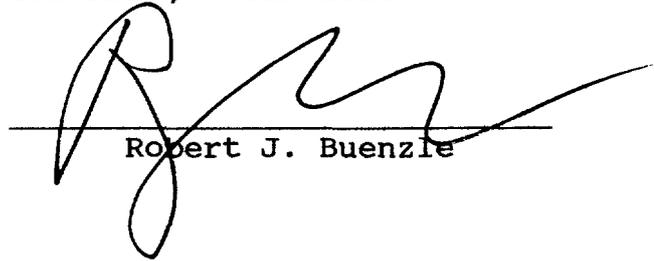
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Robert J. Buentzle

\* Served by Hand