

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

In the Matter of )  
 )  
 Amendment of Section 73.202(b) )  
 Table of Allotments )  
 FM Broadcast Station )  
 (Detroit Lakes and )  
 Barnesville, Minnesota) )

MM Docket No. 00-53  
 RM-9823

RECEIVED  
 MAY 30 2000  
 FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

To: Chief, Allocations Branch

### REPLY TO COMMENTS AND COUNTERPROPOSAL

T&J Broadcasting, Inc. ("T&J"), licensee of FM broadcast station KRVI(FM), Detroit Lakes, Minnesota ("KRVI"), by its attorneys, and pursuant to Sections 1.415 and 1.420 of the Commission's Rules and Regulations, hereby replies to both the Comments of Triad Broadcasting Co., L.L.C. ("Triad") and the Comments and Counterproposal of Enderlin Broadcasting Company ("EBC").<sup>1</sup>

### INTRODUCTION

On March 24, 2000, the Commission released its Notice of Proposed Rulemaking ("NPRM") by which it proposed to amend its FM Table of Allotments by reallocating Channel 236C1 from Detroit Lakes, Minnesota to Barnesville, Minnesota as the community's first local aural transmission service and modifying Station KRVI's license accordingly.

Both Triad and EBC have attempted to contest the Bureau's proposal. Triad's argument can be distilled into two main points: (1) the Bureau's current allotment policy and the proposed reallocation to Barnesville are allegedly inconsistent with Section 307(b) of the Communications

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<sup>1</sup> Because these Reply Comments are being filed by the May 30, 2000 deadline for Reply Comments, they are timely filed.

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Act; and (2) T&J allegedly failed to establish that Barnesville is independent of the Fargo-Moorhead Urbanized Area. EBC, in its comments and counterproposal and a late-filed erratum, proposes to allocate Channel 233C1 to Enderlin, North Dakota, allocate Channel 236C1 to Barnesville, Minnesota and specify the current KRVI coordinates as the reference points for that allotment.

As detailed below, Triad's arguments are legally flawed; EBC's counterproposal is procedurally flawed. Thus, the Commission should promptly proceed with its current proposal to reallocate Channel 236C1 from Detroit Lakes, Minnesota to Barnesville, Minnesota, specify the coordinates of T&J's proposed site and proceed to adopt a Report and Order implementing the NPRM. Notwithstanding EBC's procedural failure, T&J has determined that Channel 256C1 can be allotted to Enderlin if Channel 296C1 is substituted for Channel 256C1 at Gackle, North Dakota.

## **DISCUSSION**

### **I. The Bureau's Current Allotment Policy and the Proposed Reallotment are Consistent with Section 307(b) of the Communications Act**

In a futile attempt to persuade the Commission that the proposed reallotment to Barnesville is contrary to the public interest, Triad devotes a majority of its comments to a long-winded historical discussion of the Commission's treatment of Section 307(b) issues. In its tortured explanation of past and present cases, Triad attempts to assert that the Commission's current allotment policy is inconsistent with the mandate of Section 307(b). It claims that the Bureau has artificially manipulated the 307(b) policies. This assertion is simply a baseless attempt to overturn Commission precedent and deny the proposed reallotment.

Section 307(b) requires that when “considering applications for licenses ... the Commission shall make such distribution of license, frequencies, hours of operations, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.” 47 U.S.C. § 307(b). The Commission has not strayed from the mandate of Section 307(b).

With the enactment of Section 307(b), the Commission was left with broad discretion to enforce the statutory requirement of “fair, efficient, and equitable distribution of radio service.”<sup>2</sup> As the Commission has stated, “Congressional intent in enacting Section 307(b) ... was to provide the Commission with greater discretion in distribution frequencies...” See Essex, California, 4 FCC Rcd 8084 (1989). In exercising this discretion, the Commission chose to favor communities which would receive a first or second local service, but recognized that in exceptional circumstances a first local service preference would not be warranted. In the cases of RKO General, Inc. (KFRC), 5 FCC Rcd 3222 (1990) and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988) (“Tuck”), the Commission clarified the type of evidence it would consider in determining whether a community should be denied a first local service preference in its quest to assure fairness in the practical implementation of Section 307(b).<sup>3</sup> Its policies have consistently

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<sup>2</sup> Prior to the enactment of the Radio Act of 1927, licensees tended to locate their facilities in larger cities, and congressional debate expressed a concern that local communities were being deprived of information and programming serving local needs. See 68 Cong. Rec. 2568, 2569. Committee and conference reports on the Communications Act of 1934, however, contain scant discussion of the need for local service - thus leaving the Commission with wide discretion to enforce the statutory requirements of 307(b).

<sup>3</sup> The three criteria are: (1) signal population coverage; (2) the size and proximity of the suburban community relative to the larger central city; and (3) the interdependence of the suburban community with the central city, as determined by analyzing eight separate factors.

been employed to effectuate the Congressional intent embodied in Section 307(b).

It is axiomatic that the Commission's allotment priorities and policies have been applied consistent with and in furtherance of the goals of Section 307(b) of the Act. In each case cited by Triad, the Commission carefully examined the proposals in light of its longstanding allotment priorities and only granted the reallocations when they advanced these priorities. T&J acknowledges that the cases cited by Triad indeed differ in their outcomes, but a careful inspection of each case reveals internal consistency in the application of the Commission's policies. In each case the Commission acknowledged the importance of a first local service preference but was diligent in analyzing the specific evidence to ensure that a specified community was not a mere appendage of a greater urbanized area.

Furthermore, it is absurd to compare and decipher the factual differences between several old and newer cases, as Triad attempts to do -- each case presents the Commission with a novel situation to analyze. No two cases are identical. The Commission is not bound to follow its action in previous cases but must consider each case upon its individual grounds. See Courier Post Pub. Co. v. FCC, 70 App. DC 80 (1939); see also Office of Communication of the United Church of Christ v. FCC, 911 F.2d 813, 818 (1990) ("reliance on [old] case law attempts to lock the Commission into its old policy by reading its old analysis into the statute. To allow such an interpretation would rob the FCC of the discretion with which Congress has clearly entrusted it.").

The Commission has frequently stated that its policy is to apply the allotment priorities in

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See Tuck, 3 FCC Rcd at 5377-78.

a flexible manner.<sup>4</sup> It has affirmed its commitment to decide proposals “on a case by case basis, based on whether or not the proposed changes, taken as a whole, would advance our allotment priorities.”<sup>5</sup> The allotment priorities were never intended to be applied in a rigid and mechanical fashion. There is no ironclad threshold requirement. See In re Applications of Debra D. Carrigan, 100 FCC 2d 721, 725 (1985) (the Commission’s priorities were “not intended to be a mathematically definite regulation to be applied in every proceeding irrespective of other relevant factors”). The Commission must decide the instant case on its own unique merits.

To reiterate, the pure objective of Section 307(b) is to provide a fair, efficient and equitable distribution of radio services. With the instant proposal, the Commission has employed its policies to effectuate the mandate of Section 307(b). It is not blindly applying its allotment criteria as Triad suggests. As the Commission acknowledged in the NPRM, after assaying all of the evidence presented, the reallocation of Channel 236C1 from Detroit Lakes to Barnesville will provide a first local service at Barnesville, an “independent community”, while not depriving Detroit Lakes of its sole local aural service -- this is undoubtedly a “fair, efficient and equitable distribution of radio services.”

## **II. T&J has established that Barnesville is independent of the Fargo-Moorhead Urbanized Area**

Triad acknowledges that under existing Commission precedent T&J was not required to submit a Tuck showing. However, the Commission accepted T&J’s Tuck analysis and stated

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<sup>4</sup> See Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989).

<sup>5</sup> Id. at ¶ 28.

that “T&J has provided sufficient information to show that Barnesville is an independent community.” NPRM at ¶ 4. Even after explicitly acknowledging that a Tuck analysis was not required, Triad then attempts to undermine the Commission’s finding of independence and its discretion to make this determination.

In its attempt to rebut the Commission’s finding of independence, Triad compares the instant proposal with other cases in which the reallocation has been denied and engages in its own analysis of the Tuck criteria. First of all, as elucidated above, it is futile to compare and contrast the cases. As the D.C. Circuit acknowledged in New South Broadcasting Corporation, the Commission’s 307(b) policy is a “flexible tool to be molded and adapted to the particular circumstances of the individual case.” New South Broadcasting Corporation v. FCC, 879 F.2d 867 (D.C. Cir. 1989). Each individual proposal, including the instant proposal, should be analyzed on its own merits. The Commission has broad discretion under Section 307(b) to determine the public interest, and “nothing in the Communications Act prevents [the Commission] from defining the term ‘community’ differently in different contexts.” See Winter Park Communications v. FCC, 873 F.2d 347, 352.

Second, contrary to Triad’s assertion, T&J *has* adduced sufficient evidence demonstrating the independence of Barnesville and the merits of its proposal. In analyzing whether a particular grouping is to be classified as a community, all of the relevant facts in each case must be weighed and the Commission has repeatedly emphasized that the community need only be “*sufficiently*” independent from the Urbanized Area to warrant a first local service. In a futile effort to deny the instant proposal, Triad seems to be attempting to change Commission precedent and mandate a showing of *complete* independence. The Commission, however, has

never mandated that a community fulfill *all* of the delineated eight factors.

As detailed in its initial Petition, which T&J hereby incorporates by reference in its entirety, Barnesville is indeed *sufficiently* independent from the Fargo Moorhead Urbanized Area.<sup>6</sup> It is true, as Triad emphasizes, that Barnesville does not have commercial establishments like a health club, photocopying store or car wash nor does it have a “major hospital” or a shuttle or limousine service. T&J, however, satisfies a majority of the delineated eight factors which is sufficient to demonstrate a community’s independence. See Parker and St. Joe, Florida, 11 FCC Rcd 1095 (1996); Pleasanton, Bandera Hona, and Schertz, Texas, 2000 FCC LEXIS 731 (2000).

There are countless indications of Barnesville’s status as an independent community which Triad attempts to either minimize or blatantly ignore. For example, the community has its own government, which is administered by an elected mayor and six-member city council. It has municipally owned electric, telephone, cable and water and sewer services, as well as its own police department, volunteer fire department and ambulance service. In addition, the Barnesville community has its own post office and zip code and is served by seven different churches, numerous commercial businesses, two main parks, a day care center, clinic, nursing home and more than 30 community organizations. It may be true, as Triad asserts, that Barnesville residents travel to Fargo to purchase particular brands of clothing which they desire, but they are never forced to leave Barnesville. To the contrary, the Barnesville community sustains life in

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<sup>6</sup> T&J has never denied that the reallocation would provide a 70 dBu contour over a portion of the Fargo Urbanized Area and that Barnesville, with a population of 2,066, is located approximately 25 miles from Fargo, with a population of 74,111. However, the size and proximity of the specified community to the central city, and signal population coverage both have “less significance than evidence of interdependence.” See Tuck, 3 FCC Rcd 5374 at ¶ 28.

Barnesville itself with grocery stores, gas stations, dry cleaners, banks, convenience stores, clothing shops and countless other services. T&J acknowledges that Barnesville is indeed not a large town with every conceivable amenity and service, but it is nonetheless, as the above factors and countless others indicate, a small unique self-sufficient community worthy of its first local transmission service.

Finally, Triad's assertion that T&J's sole motivation in moving its transmitter is to cover more of the Fargo-Moorhead area is both nonsensical and untrue. Why would T&J seek to move its transmitter site to serve Fargo when it *already* serves the Fargo Urbanized Area? Contrary to Triad's absurd conjecture, T&J must relocate its transmitter site because it will be forced off its present tower by the DTV transition. When T&J realized it would be forced to leave its current site, it determined that its best course of action would be to relocate to its existing tower for KVOX(AM), licensed to T&J.

As the Commission has stated, "the sinews of Section 307(b) law hold that every community of appreciable size ... is presumed by the Commission to need at least one radio station for local self-expression." In re Applications of Debra D. Carrigan, 100 FCC 2d 721, 727 (1985). T&J has supplied sufficient evidence to rebut the presumption of interdependence with Fargo and demonstrate that the Commission should not attribute the aural services licensed to Fargo to Barnesville. The Barnesville community deserves its own broadcast voice.

### **III. EBC's Counterproposal does not merit Commission consideration**

In EBC's initial comments and counterproposal, filed May 15, 2000, it neglected to include an expression of interest declaring its intent to file an application for Channel 233C1 at Enderlin, North Dakota if its proposal is adopted. It is well established that the Commission will

refrain from allotting an FM or TV channel to a community in the absence of an expression of interest.<sup>7</sup> See, e.g., Cross City, Florida, 1999 FCC LEXIS 2284 (1999) (dismissing an allotment proposal due to the absence of an expression of interest).

On May 18, 2000, three days after the deadline for comments, EBC submitted an erratum including a declaration of its intent to file an application for the Enderlin allotment. Section 1.415(d) of the Commission's Rules, however, does not contemplate the acceptance of pleadings filed beyond the comment period unless specifically requested or authorized by the Commission. Neither criteria is applicable here, and thus the Commission must reject EBC's late-filed erratum. Filing its expression of interest late is akin to never including this essential component in its comments.

As a result of this serious procedural deficiency, EBC's comments are not acceptable and no further consideration should be given.

**IV. Should the Commission accept EBC's late-filed counterproposal, it should substitute Channel 256C1 for Channel 233C1 at Enderlin**

In its counterproposal, EBC urged the Commission to allocate Channel 233C1 to Enderlin, North Dakota and Channel 236C1 to Barnesville, Minnesota by using the current KRVI transmitter site as the reference point. This counterproposal is not feasible because, as explained above, Station KRVI(FM) must move from its current tower site because of the DTV

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<sup>7</sup> The Commission has explained that the reason for this policy is that, "absent an expression of intent, a newly allotted channel could lie vacant after the Commission had expended limited resources conducting a rule making proceeding and after parties and submitted comments regarding a proposed channel." See Santa Isabel, Puerto Rico, and Christiansted, Virgin Islands, 3 FCC Rcd 2336, 2337 (1988).

transition.<sup>8</sup>

However, T&J has ascertained that Channel 256C1 is available as a substitute for Channel 233C1 at Enderlin. By substituting Channel 256C1 for Channel 233C1 at Enderlin, EBC's conflict with T&J's proposal could be eliminated. Attached hereto as Exhibit 1 is a technical study demonstrating that the substitution of Channel 256C1 for Channel 233C1 at Enderlin would comply with all applicable Commission rules. As detailed in the study, by substituting Channel 296C1 for the vacant Channel 256C1 at Gackle, North Dakota, the allotment would comply with the Commission's minimum distance separation requirements.

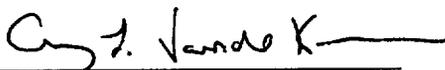
### CONCLUSION

Based on the foregoing, T&J Broadcasting, Inc. respectfully requests the Commission to finalize its proposal as set forth in the NPRM and promptly reallocate Channel 236C1 from Detroit Lakes, Minnesota to Barnesville, Minnesota and modify the license of KRVI(FM) accordingly.

Respectfully submitted,

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May 30, 2000

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<sup>8</sup> See page 8, supra.

T&J Broadcasting, Inc.  
Reply to Comments and Counterproposal  
KRVI(FM), Detroit Lakes, Minnesota

**EXHIBIT 1**

TECHNICAL STATEMENT  
IN SUPPORT OF REPLY COMMENTS  
IN THE MM DOCKET NO. 00-53  
DETROIT LAKES AND BARNESVILLE, MINNESOTA

This technical statement and associated exhibits were prepared on behalf of T&J Broadcasting, Inc. ("T&J"), licensee of FM broadcast station KRVI(FM), Detroit Lakes, Michigan, in support of reply comments in the Commission's Notice of Proposed Rule Making ("NPRM") in MM Docket No. 00-53. In response to a Petition for Rule Making filed by T&J, the Commission has proposed in MM Docket No. 00-53 to amend the FM Table of Allotments, Section 73.202 of the Commission's Rules, to reallocate channel 236C1 from Detroit Lakes, Minnesota to Barnesville, Minnesota. Comments and a counterproposal ("Counterproposal") were filed by Enderlin Broadcasting Company ("EBC") which proposed the allotment of channel 233C1 at Enderlin, North Dakota in lieu of the proposal set forth by T&J. The purpose of these reply comments is to demonstrate that channel 256C1 is available as a substitute for channel 233C1 at Enderlin, thus eliminating EBC's conflict with the T&J proposal.

Compliance With FCC Rules

The attached Figure 1 is a tabulation of required separations pertinent to use of channel 256C1 from the allotment reference point. As shown, the allotment reference point complies with the Commission's minimum distance separation requirements contained in Section 73.207 with respect to all existing, authorized and proposed stations and allotments except for the vacant channel 256C allotment at Gackle, North Dakota. However, as indicated on Figure 3, channel 296C is available as a substitute for channel 256C at

Gackle from the channel 256C allotment reference point contained in the FCC's FM database.

Figure 2 is a map showing the fully-spaced area-to-locate for channel 256C1 at Enderlin in compliance with the Commission's minimum distance separation requirements and city coverage requirements based on maximum Class C1 facilities (ERP 100 kW/HAAT 299 m). The Enderlin city limits shown on Figure 2 were obtained from a map contained in the 1990 U.S. Census of Population. The channel 256C1 allotment reference point is also shown on Figure 2 and, as indicated, it is located within the fully-spaced area-to-locate. It is noted that channel 256C1 can be allotted to Enderlin with a site restriction of 31 kilometers west-southwest of Enderlin.

The proposed channel 256C1 reference point at Enderlin is located approximately 277 kilometers from nearest point of the U.S.-Canadian border; therefore, coordination with Canada may be necessary.

Figure 3 is a tabulation of required separations pertinent to use of channel 296C from the Gackle channel 256C allotment reference point listed in the FCC's FM database. As shown, the reference coordinates comply with the Commission's minimum distance separation requirements contained in Section 73.207 with respect to all existing, authorized and proposed stations and allotments except for KGWB on channel 296A at Wahpeton, North Dakota. However, as a result of the Report and Order in Docket No. 88-498, channel 295C2 was substituted for channel 296A at Wahpeton and the license of KGWB was modified to specify operation on channel 295C2. The Gackle channel 296C allotment reference point is fully-spaced to KGWB's channel 295C2 allotment reference point.

The proposed channel 296C1 reference point at Gackle is located approximately 264 kilometers from nearest point of the U.S.-Canadian border; therefore, coordination with Canada may be necessary.

Conclusion

Channel 256C1 can be substituted for channel 233C1 at Enderlin, in compliance with all applicable Commission Rules.



W. Jeffrey Reynolds

du Treil, Lundin & Rackley, Inc.  
201 Fletcher Avenue  
Sarasota, Florida 34237

May 26, 2000

FM SEPARATION STUDY

Job Title :Proposed Ch 256C1, Enderlin, ND Separation Buffer 50 km

Channel 256C1 ( 99.1 MHz) Coordinates : 46-30-47 97-58-22

Call Status	City State	FCC File No.	Channel Freq.	ERP(kW) HAAT(m)	Latitude Longitude	Bearing deg-Tru	Dist. (km)	Req. (km)
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KQWBFM	Moorhead		254C1	100.	46-45-35	74.8	108.11	82
LIC	MN	BLH820104AR	98.7	177.0	96-36-26		26.11	CLEAR

ALC	Gackle	Docket98-231	256C	.0	46-37-30 99-08-30	278.4	90.49	270
	ND		99.1				-179.51	<b>SHORT<sup>1</sup></b>

A filling Window for this channel will be opened in a subsequent order.

Accepted by Canada 990219.

KZNC	Huron		256A	3.00	44-20-46	184.5	241.54	200
LIC	SD	BMLH950804KZ	99.1	56.0	98-12-34		41.54	CLEAR

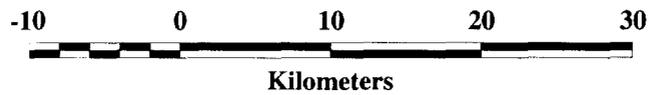
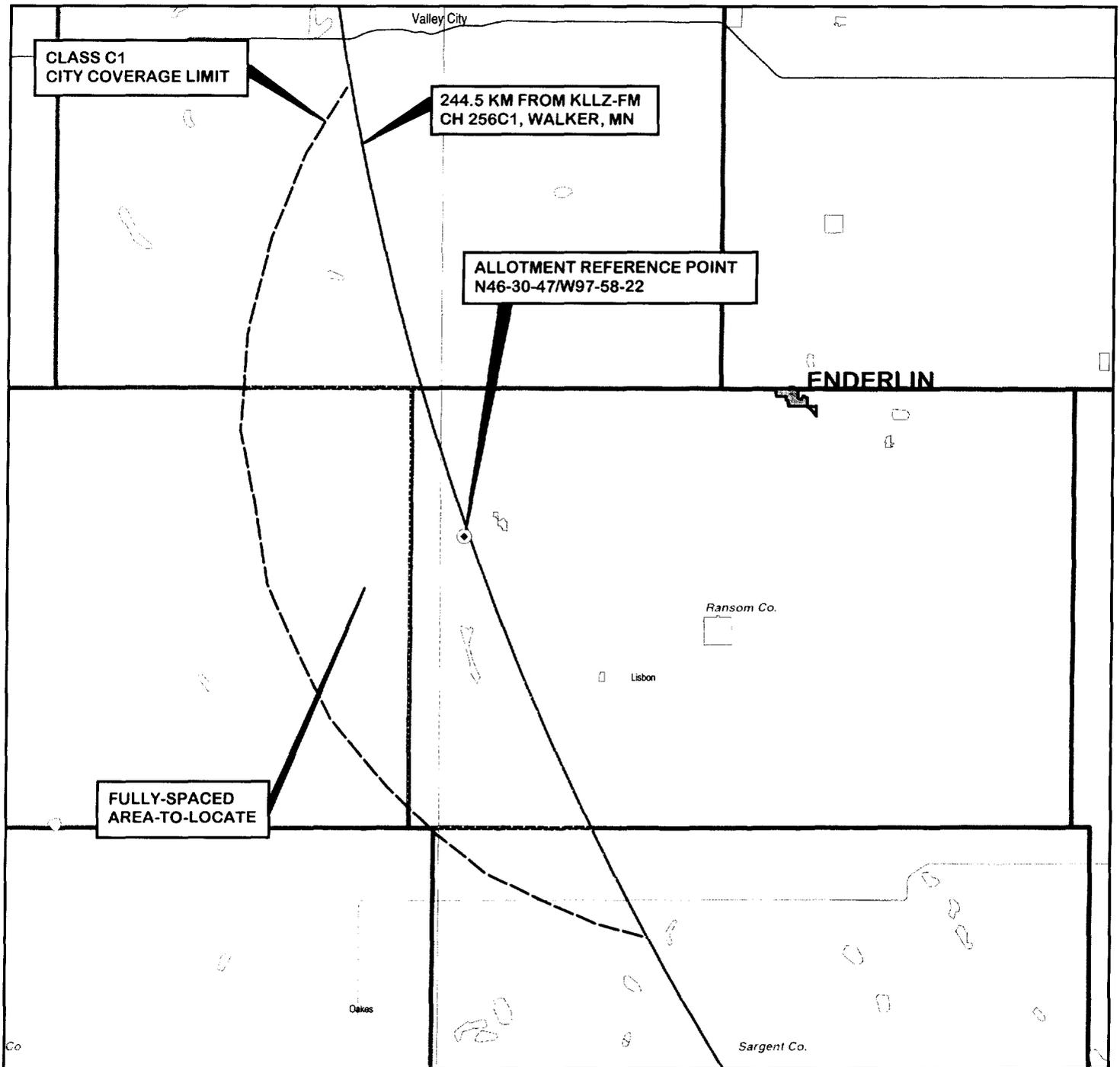
KLLZFM	Walker		256C1	100.	47-12-42	70.4	245.60	245
LIC	MN	BLH940302KA	99.1	150.0	94-55-02		0.60	CLOSE

ALC	Sisseton		258C2	.0	45-34-49 97-07-38	147.5	122.62	79
	SD		99.5				43.62	CLEAR

\*\* End of separation study for channel 256C1 \*\*

<sup>1</sup> Channel 296C is available as a substitute for the vacant channel 256C allotment at Gackle, SD. See Figure 3.

FIGURE 2



**AREA TO LOCATE  
CHANNEL 256C1  
ENDERLIN, NORTH DAKOTA**

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

FM SEPARATION STUDY

Job Title : Proposed Ch. 296C, Gackle, ND Separation Buffer 100 km

Channel 296C (107.1 MHz) Coordinates : 46-37-30 99-08-30

Call Status	City State	FCC File No.	Channel Freq.	ERP(kW) HAAT(m)	Latitude Longitude	Bearing deg-Tru	Dist. (km)	Req. (km)
KBFO	Aberdeen		294C1	100.	45-27-57	153.9	143.17	105
CPM	SD	BMPH990329IE	106.7	136.0	98-20-08		38.17	CLEAR
ALC	Wahpeton ND	Docket88-498	295C2	.0	46-32-41 96-37-33	91.7	193.04	188
Site Restricted-Effective 06-02-89-RSVD For KGWB PER D88-498								
KHRTFM	Minot		295C2	26.	48-09-48	317.3	236.15	188
CP	ND	BPH971015IC	106.9	105.0	101-17-55		48.15	CLEAR
One-Step Application from Channel 295A Accepted as Class B by Canada 980513								
KGWB	Wahpeton		296A	3.00	46-16-02	100.3	204.50	226
LIC	ND	BLH890602KB	107.1	100.0	96-31-52		-21.50	<b>SHORT<sup>1</sup></b>
*To Channel 295C2 Per D88-498								
K296DX	Perham		296D	.008	46-35-09	89.6	272.98	0
LIC	MN	BLFT871026TD	107.1	56.0	95-34-45		.00	TRANS
TRANSLATOR FOR KJKFM, FERGUS FALLS, MN.								
K296DT	Dickenson		296D	.135	46-55-17	278.2	276.26	0
LIC	ND	BLFT880627TF	107.1	152.0	102-43-58		.00	TRANS
TRANSLATOR FOR KSLT, SPEARFISH, SD.								
KKEQ	Fosston		296C2	50.0	47-36-08	67.0	294.27	249
LIC	MN	BLH931112KF	107.1	147.0	95-32-18		45.27	CLEAR
KDBX	Clear Lake		296C3	9.8	44-36-44	138.5	294.90	237
CPM	SD	BMPH980602IG	107.1	162.0	96-40-41		57.90	CLEAR
KMGK	Glenwood		296A	3.3	45-36-53	109.9	310.90	226
LIC	MN	BMLH900102KB	107.1	91.0	95-23-28		84.90	CLEAR
Petition for Reconsideration filed 990113								
ALC	Cannon Ball ND	Docket99-4	298C	.0	46-24-48 100-38-12	258.9	117.12	105
A Filling Window for this Channel will be opened in a subsequent order. Accepted by Canada as a Class C on 990408								

\*\* End of separation study for channel 296C \*\*

<sup>1</sup>As a result of the Report and Order in Docket No. 88-498, channel 295C2 was substituted for channel 296A at Wahpeton and the license of KGWB was modified to specify operation on channel 295C2. The Gackle channel 296C allotment reference point is fully-spaced to KGWB's channel 295C2 allotment reference point.

**CERTIFICATE OF SERVICE**

I, Renee Williams, a secretary in the law firm of Shaw Pittman., hereby certify that on this 30th day of May, 2000, copies of the foregoing **“REPLY TO COMMENTS AND COUNTERPROPOSAL”** were hand delivered or mailed first-class, postage pre-paid, to the following:

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