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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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OCT 18 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF:	)	
	)	
AMENDMENT OF SECTION 73.202(b)	)	**MM Docket No. 00-87**
TABLE OF ALLOTMENTS	)	**RM-9870**
FM BROADCAST STATIONS	)	**RM-9961**
(BRIGHTWOOD, MADRAS, BEND	)	
AND PRINEVILLE OREGON)	)	

TO: John Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MOTION TO STRIKE

Muddy Broadcasting Company ("MBC"), by its counsel, respectfully requests that the Commission strike the unauthorized pleading (styled "Reply Comments") filed in the above-referenced Rulemaking by Madras Broadcasting on October 5, 2000 (the "Unauthorized Pleading"). Madras Broadcasting's Unauthorized Pleading is a thinly disguised surrebuttal to MBC's Reply in Opposition to Counterproposal of Madras Broadcasting, filed July 25, 2000, and is therefore fatally defective. In addition, the Unauthorized Pleading improperly raises new arguments that should have been addressed by Madras earlier in this proceeding. Moreover, the Unauthorized Pleading includes an engineering study that is riddled with technical errors. Accordingly, the Commission should strike Madras Broadcasting's Unauthorized Pleading from the record of this proceeding, and give it no substantive weight.

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BACKGROUND

On March 16, 2000, MBC filed a Petition for Rulemaking which requested the Commission to initiate a rulemaking to amend its FM Table of Allocations, 47 C.F.R. § 73.202, to allocate Channel 251C3 as the first local transmission service in Brightwood, Oregon. On May 19, 2000, the Commission issued a Notice of Proposed Rule Making, MM Docket No. 00-87, RM-9870, DA 00-1111, proposing to adopt the requested allocation. On July 10, 2000, MBC filed Comments in support of the proposed allocation to Brightwood, and reiterated its interest in the channel.

On the same date, Madras submitted a Counterproposal, requesting that the Commission make channel substitutions to existing allocations at Bend and Prineville, Oregon, and to allocate Channel 251C1 to Madras, Oregon. Madras made no attempt to accommodate the needs of Brightwood and adjoining communities for a first transmission service by proposing an alternative allocation that would serve both Madras and Brightwood.

On July 25, 2000, the date established in MM Docket No. 00-87 for the submission of reply comments in this proceeding, MBC responded to the Madras counterproposal. MBC demonstrated that:

1. There are no other channels that could be allocated to serve Brightwood;
2. There are a multitude of channels that could be allocated to serve Madras;
3. The Madras counterproposal contained disruptive and unnecessary channel substitutions;
4. The Brightwood allocation would serve significantly more population;
5. Brightwood is one of several closely clustered and interdependent communities, comprising "Hoodland," which should be considered when comparing community sizes;
6. Madras is not lacking in primary service; and,
7. The Madras allocation site may not be suitable to serve Madras.

Comments supporting the Brightwood allocation were also filed on July 25, 2000, by the Hoodland Fire District No. 74 and by the Mt. Hood Area Chamber of Commerce.

On September 20, 2000, the Commission issued a Public Notice, Report No. 2440, which stated that the Counterproposal filed on July 10, 2000, by Madras "WILL BE TREATED AS A COUNTERPROPOSAL IN MM DOCKET NO. 00-87. **REPLY COMMENTS TO THIS COUNTERPROPOSAL** SHOULD BE SUBMITTED IN THIS DOCKET NO LATER THAN 15 DAYS . . . AFTER THE DATE OF THIS PUBLIC NOTICE." (Emphasis added.) On the deadline, October 5, 2000, MBC submitted a reply incorporating by reference the points made in its July 25 pleading, and pointed out additional FM channels that would permit service to be provided to Madras, if that is what the counter-proponent truly wanted (rather than simply blocking the Brightwood allocation).

ARGUMENT

A. Madras Broadcasting's Pleading is Unauthorized and Procedurally Defective

In its Public Notice, the Commission invited interested parties to file "reply comments to . . . [the Madras] . . . Counterproposal." It did not request surrebuttals to the replies filed by parties other than Madras. Yet this is exactly what Madras has sought to do.

The Commission's Public Notice was intended to have parties favoring or opposing the Madras counterproposal submit their responses to that pleading. Clearly the Commission did not intend to provide Madras Broadcasting with the opportunity to present new arguments and evidence that should have been presented in its initial Counterproposal. Otherwise, MBC and other interested parties would be denied an opportunity to respond to the veracity of the new claims made by Madras, and the Commission would be denied the benefit of a complete and fair record. Essentially, Madras Broadcasting has attempted to circumvent the Commission's

procedural rules by trying to take "two bites of the apple" in a manner not contemplated by the Commission when it made its request for reply comments.

Even a cursory review of the Madras Unauthorized Pleading will show that its thrust is not to respond to the counterproposal. Rather, the pleading is devoted to Madras' unavailing attempts to respond to the arguments put forth by MBC, the Hoodland Fire District No. 74 and by the Mt. Hood Area Chamber of Commerce. Thus, the pleading is no more or less than an unauthorized surrebuttal to the reply pleadings filed on July 25, 2000. The FCC rules do not contemplate such replies to replies, and Madras' Unauthorized Pleading should be stricken from the record of this proceeding.

In addition, Madras Broadcasting raises new arguments in its Unauthorized Pleading never before raised by Madras in this proceeding. Specifically, Madras Broadcasting makes a number of statements challenging the community status of Brightwood that could have been raised earlier in this proceeding. There is no reason that these unsupported assertions could not have been raised in comments, or in Madras Broadcasting's Counterproposal, when they could have been reviewed an analyzed within the regular pleading cycle. They apparently have been presented at this late date to avoid scrutiny and rebuttal.

Contrary to the new claims raised by Madras Broadcasting, in its Counterproposal Madras Broadcasting refers to Brightwood as being a "community" that would receive its "first local service" if allotted a channel. *Counterproposal*, at 3. Moreover, in its Petition, MBC amply demonstrated that Brightwood is a community worthy of an FM allotment. It is also important to note that the Commission in its Notice of Proposed Rulemaking referred to Brightwood as a "community" and did not request additional information from MBC regarding

this status. *NPRM*, at 5. Accordingly, the Commission should now strike as moot any attempt by Madras to challenge the community status of Brightwood.

B. The Commission Should Strike the Unauthorized Pleading Filed by Madras Broadcasting as Technically Defective

In its Unauthorized Pleading, Madras Broadcasting submitted an engineering study which is based upon inconsistent elevation data. The enclosed **Exhibit 1** is a photocopy of *Figure 1 - Line of Sight Study* contained in Madras Broadcasting's Unauthorized Pleading. This map shows a terrain profile from the channel 291C1 reference site previously suggested by MBC, to the reference coordinates for the town of Madras. The lower right hand corner of this terrain profile map is enlarged to show that a ground elevation of 2238 feet (682m) was used for the study. This elevation is within a few feet of the figure used by MBC in its examination of the pertinent 7.5 minute U.S.G.S. map.

Enclosed as **Exhibit 2** is a copy of *Figure 2 - Line of Sight Study* included as part of the Madras Broadcasting Unauthorized Pleading. This map shows a terrain profile from the Madras Broadcasting Counterproposal site to the reference coordinates for the town of Madras. It clearly shows that a ground elevation of 2398.294 feet (731m) was used when calculating the <u>same coordinates in Madras as contained in *Figure 1*</u>. This is a discrepancy of 160 feet (49m) - enough to create a considerable discrepancy favorable to Madras Broadcasting's claims regarding the actual tower height required for line-of-sight service. It appears that *Figure 2* may have relied on the ground elevation estimate provided by the 3-second terrain data, while *Figure 1* relied on an examination of the pertinent 7.5 minute U.S.G.S. topographic map, resulting in the inconsistent data. Clearly, Madras Broadcasting should have used the more accurate endpoint elevation data provided by a 7.5 minute topographical map in preparing <u>both</u> *Figures 1 and 2,* or

at a minimum should have been consistent in their data sources. They did neither, resulting in a failure to compare "apples to apples," and skewing the elevation figures in their favor.

Additionally, *Figure 2* misstates the ground elevation at the proposed transmitter reference site. The site map contained in **Exhibit 3** plainly shows that the ground elevation at this point (with linear extrapolation between topographical lines), is about 2962 feet (903m), not 2996 feet (913m) as contained in Madras's *Figure 2*. The result of the errors made by Madras Broadcasting is a considerable underestimation in the size of tower required for line-of-sight coverage to Madras contained in its Counterproposal. Indeed, as shown in the corrected terrain-profile map contained in **Exhibit 4**, the Madras Broadcasting Counterproposal site would require a 2740 foot (835m) tower to provide line-of-sight coverage to Madras - virtually identical (within 2%) to the tower height Madras Broadcasting claims "simply will not work" for the 291C1 alternative proposed by MBC.[1] The Engineering Comments supplied by Madras Broadcasting are simply incorrect in concluding that a 1250 to 1300 foot tower would be sufficient to provide city-grade service to Madras. Based on this flawed and misleading engineering information, the Commission must strike Madras Broadcasting's defective Unauthorized Pleading and the conclusions therein.

Moreover, despite the fact that Madras Broadcasting's assertions are based on flawed engineering, Channels 251C1 and 291C1 are virtually identical and should be judged on equal terms. Both Madras Broadcasting and MBC have stated in their comments that towers

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[1]Both Madras Broadcasting and MBC utilized 3-arc-second terrain data, with software from Softwright. MBC used English dimensions herein, to assist in comparisons with the Madras Broadcasting exhibits. MBC used terrain data intervals of 0.1km, or 0.06 miles, the standard data computation interval employed by TA Services-Institute for Telecommunications Sciences-National Institute for Science and Technology, often used by FCC staff.

exceeding 2000 feet above ground level are presumed by the FAA to be a navigation hazard. Madras Broadcasting claimed in its Unauthorized Pleading that the alternative channel, 291C1, "simply will not work, and therefore cannot be considered a valid alternative to channel 251C1." *Unauthorized Pleading* at 4. However, in reality both sites are equally suitable (or unsuitable), in regards to required tower heights, when an "apples to apples" comparison is made. If the Commission decides that the alternative channel 291C1 site is unsuitable due to line-of-sight issues, it must also rule that the Madras Broadcasting Counterproposal site is unsuitable. Conversely, if this line-of-sight issue is judged by the Commission to not be a fatal flaw for the Madras Broadcasting's Counterproposal site, it must rule likewise for the alternative channel 291C1 site. Either way, there would remain no mutual exclusivity preventing the allocation of Channel 251C3 to Brightwood as that communities' first local transmission service and Madras Broadcasting would have suitable sites to provide coverage to the community of Madras.

Significantly, Madras Broadcasting's proposal would require a disruption to existing service, would require two channel substitutions, and would preclude Brightwood from receiving its first local transmission service. Moreover, if the objective of Madras Broadcasting is to actually serve the community of Madras with local radio service, then there are several other lower class channels available that can provide excellent service.[2] In contrast, MBC's proposal would allow both communities an allotment – Brightwood on Channel 251C3 and Madras on any one of the alternative available channels – while Madras Broadcasting's Counterproposal

[2] Channels 227C3, 293A, and 227A, for example, can be allocated at developed radiofrequency sites with good line-of-sight to Madras. Channels 291C2, 299C3, 257C3 and 257A can also be allocated at locations much closer to the community, than the C1 Channels.

would deny the residents of Brightwood a first local transmission service. Accordingly, the Commission must reject the Madras Broadcasting Counterproposal and grant the instant Motion to Strike.

CONCLUSION

The Unauthorized Pleading filed by Madras Broadcasting should be stricken from the record. There is no reason why the assertions made by Madras Broadcasting in its Unauthorized Pleading could not have been raised earlier allowing interested parties an opportunity to respond to the new claims that were raised. Moreover, in its Unauthorized Pleading, Madras relies almost exclusively on a flawed engineering study in support of its contentions and raises new arguments that are factually incorrect. Based on the many deficiencies outlined above, MBC respectfully requests that the Commission strike the Unauthorized Pleading of Madras Broadcasting.

Respectfully submitted,

Muddy Broadcasting Company

By: _____
Clifford M. Harrington
Dawn M. Sciarrino
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Date: October 18, 2000

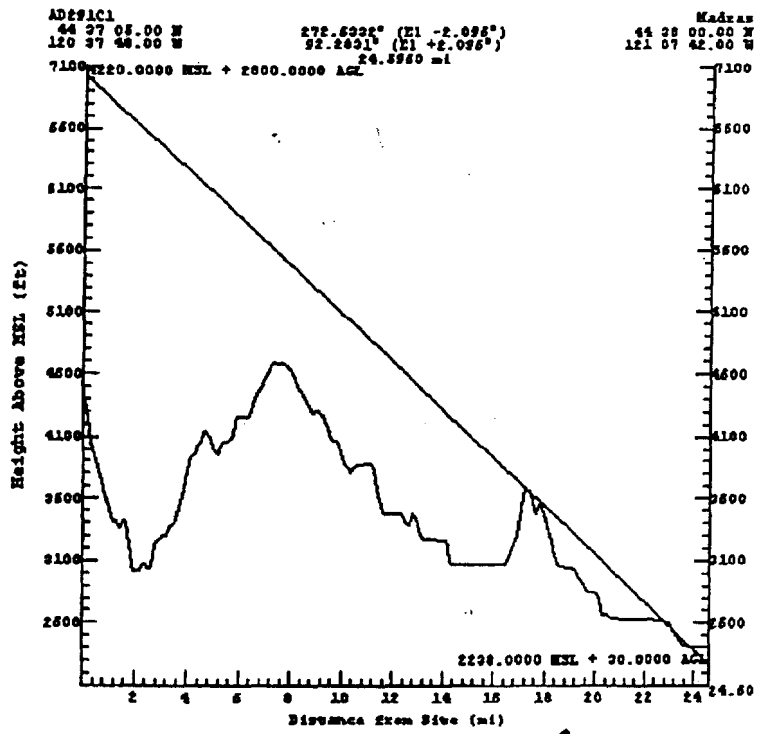
Document #: 1026625 v.1

Exhibit 1

EXHIBIT 1

Showing Madras Broadcasting's Figure 1
With Community of Madras at **2238 ft** AMSL

Line of Sight Study
For Channel 291C1
At Madras, Oregon



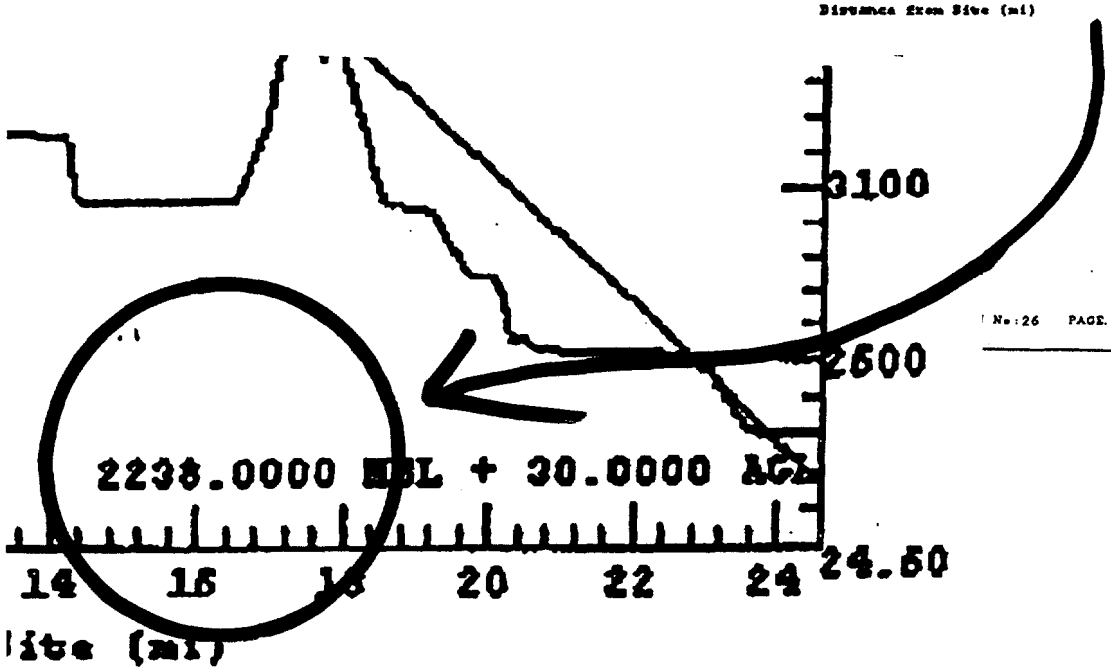


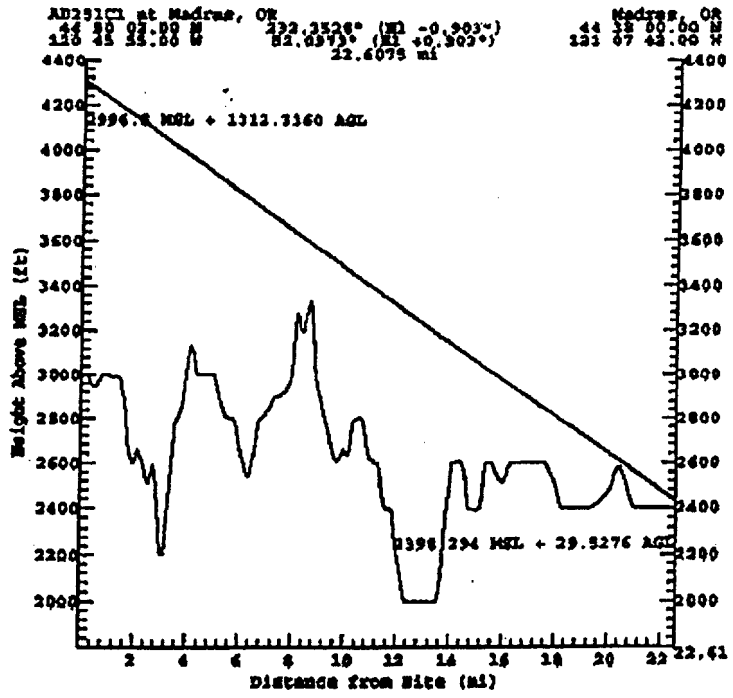
Figure 1

Exhibit 2

EXHIBIT 2

Showing Madras Broadcasting's Figure 2
With Community of Madras at **2398 ft** AMSL
(see Exhibit 4 for corrected terrain profile)

LINE OF SIGHT STUDY
MADRAS BROADCASTING
October, 2000
MM Docket 00-87



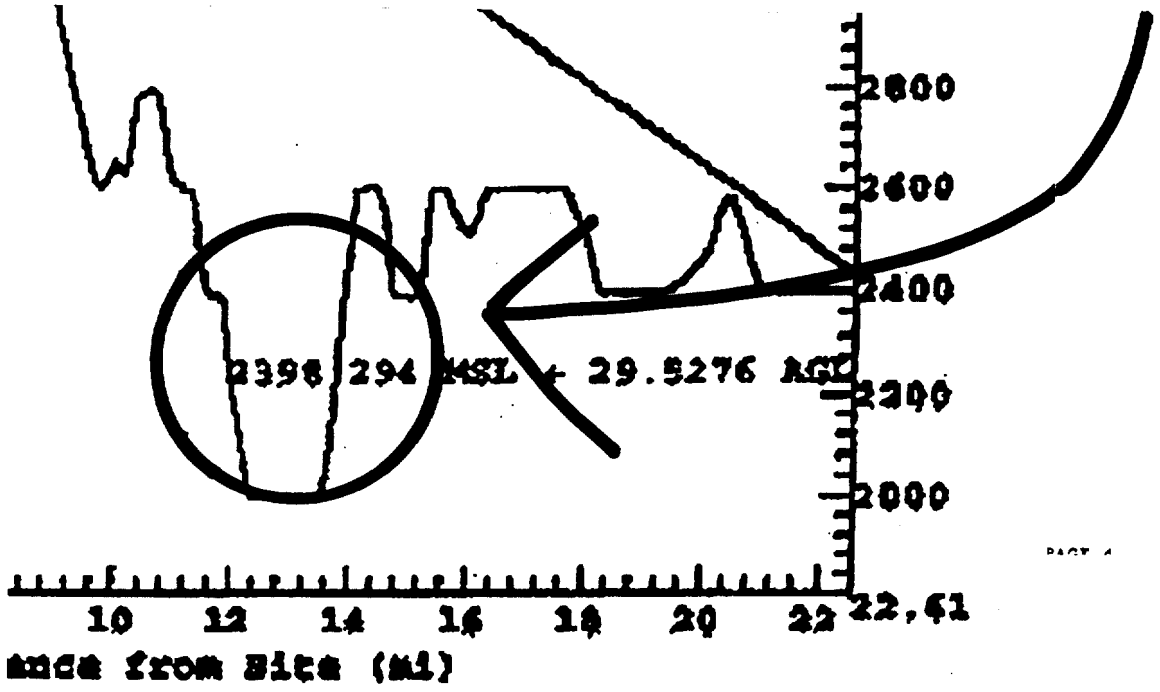


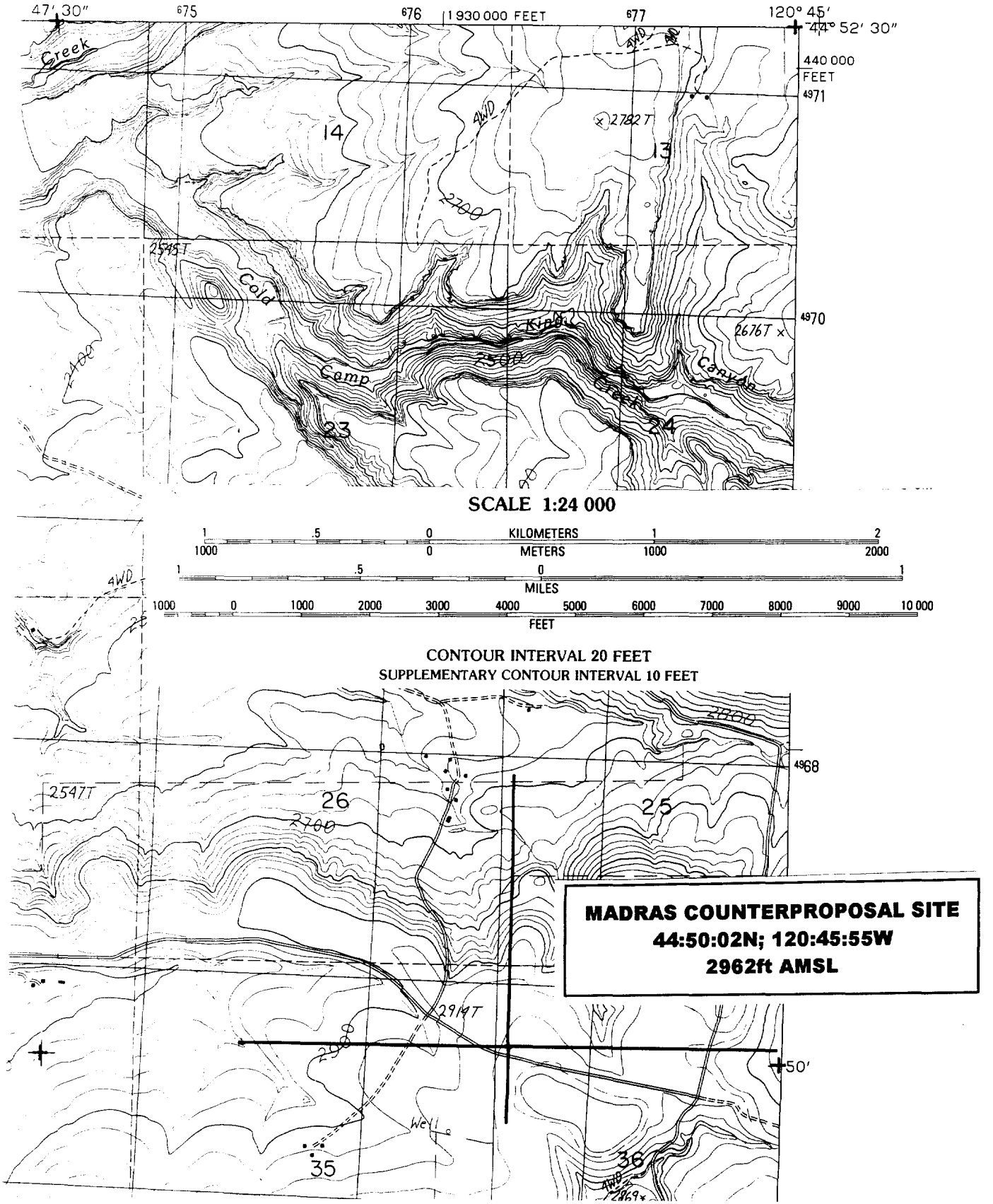
Figure 2

Exhibit 3

EXHIBIT 3

Showing Madras Broadcasting's Counterproposal Site
Actual Ground Elevation is ≈2962 ft AMSL
contour interval 20 ft, w/supplementary interval of 10ft

DEGNER CANYON QUADRANGLE
OREGON
7.5 MINUTE SERIES (TOPOGRAPHIC)



SCALE 1:24 000

1 .5 0 KILOMETERS 1 2
1000 0 METERS 1000 2000
1 .5 0 MILES 1
1000 0 1000 2000 3000 4000 5000 6000 7000 8000 9000 10 000 FEET

CONTOUR INTERVAL 20 FEET
SUPPLEMENTARY CONTOUR INTERVAL 10 FEET

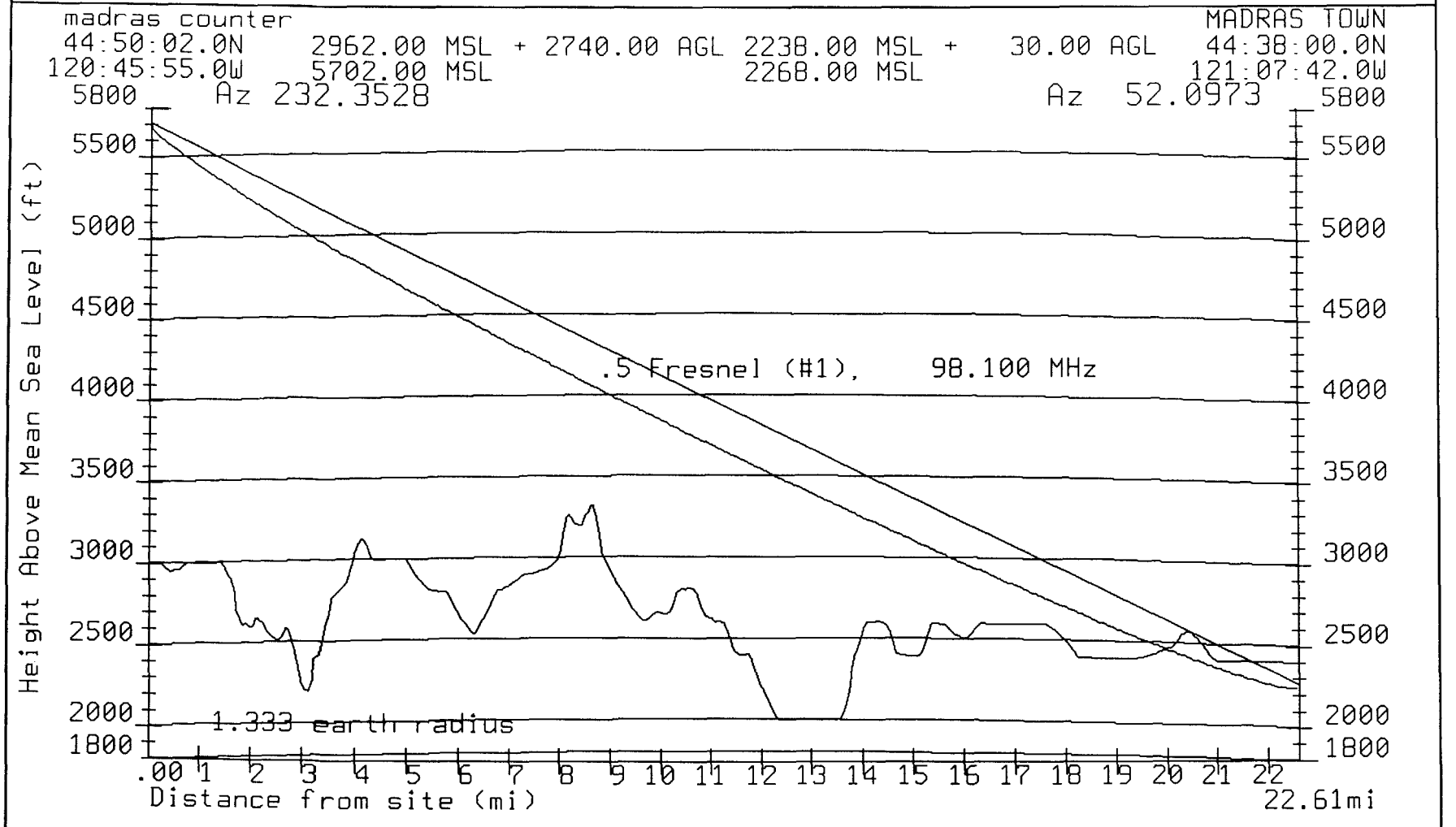
MADRAS COUNTERPROPOSAL SITE
44:50:02N; 120:45:55W
2962ft AMSL

Exhibit 4

EXHIBIT 4

Madras Broadcasting Counterproposal Site to Madras
Using Corrected Endpoint Data From 7.5 Minute U.S.G.S. Maps
-- 2740 ft. tower is required to provide line-of-sight --

MADRAS BROADCASTING COUNTERPROPOSAL
PROPOSED ALLOTMENT SITE TO MADRAS
October 15, 2000
job1484



Elevation values from:
3-second elevation data

CERTIFICATE OF SERVICE

I, Nora L. Luersen, a secretary in the law firm of Shaw Pittman, do hereby certify that true copies of the foregoing *"Motion to Strike"* were sent via U.S. Mail this 18th day of October, 2000, to the following:

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VIA HAND DELIVERY

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