

PEPPER & CORAZZINI, LLP
ATTORNEYS AT LAW

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RECEIVED

JUN - 1 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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VINCENT A PEPPER
EXT. 235
VAP@COMMLAW.COM

June 1, 2000

John A. Karousos, Esq.
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., Room 3-A266
Washington, D.C. 20554

Dear Mr. Karousos:

This letter is transmitted on behalf of Windthorst Radio Broadcasting Company in response to your letter of May 24, 2000 referencing the Petition for Rulemaking filed on behalf of Windthorst Radio Broadcasting Company on March 28, 2000 seeking to allot Channel 230C3 to Windthorst, Texas as that community's first FM broadcast transmission service.

Your letter of May 24, 2000 indicates that the proposal is unacceptable for rulemaking. You indicate that a staff engineering analysis reflects that the proposal is short spaced to the vacant allotment for Channel 230C2 at Seymour, Texas and is short spaced to the pending application for station KSEY requesting Channel 230C2 at Seymour (File No. BPH-2000406ABD).

As your letter correctly indicates, the license for station KSEY, Seymour was amended to specify operation on Channel 230C2 in lieu of its then present, and still present, operation on Channel 232A. The Commission's decision is found in MM Docket No. 86-478; 2 FCC Rcd. 5640 (1987).

In spite of the allocation in 1987, over 12½ years ago, this allocation has never been implemented by KSEY. KSEY was afforded a period of 90 days from the November 9, 1987 effective date to file a construction permit application on FCC Form 301 for Class C2 facilities. KSEY filed a timely application (File No. BPH-880208ID)

to implement the channel change and upgrade. KSEY never implemented the construction permit and on September 20, 1991 the permit was cancelled by the Commission.

On June 10, 1993 Dennis Williams, then Chief, FM Branch, Audio Services Division, Mass Media Bureau, wrote the enclosed letter to the licensee of KSEY. It was in reliance upon this letter that the Petition for Rulemaking for Windthorst was filed. Mr. Williams' letter references the failure of KSEY to implement the Class C2 facilities in a timely manner as constituting "warehousing of unused spectrum to the preclusion of other potential users seeking to provide additional broadcast service to the public." Mr. Williams then advised the licensee:

"If KSEY-FM files a Form 301 application before any conflicting rulemaking is initiated, the application will take precedence. If filed later, the application will be subject to the outcome of the rulemaking proceeding."

Finally, Mr. Williams cautioned that the prompt filing of a Form 301 (in 1993) would reduce the risk of being downgraded by a rulemaking and suggested to the licensee that a copy of this letter be attached to any filing by the licensee to insure proper processing. The licensee was urged to consult with its engineering and legal counsel on this matter as soon as possible and it was indicated on the letter that legal counsel for the licensee received a copy of the letter.

The licensee has been engaged in all of the negative activities considered in Mr. Williams' letter. The licensee did not file an application to effectuate the 1987 rulemaking until April 6, 2000. Mr. Williams' letter of June 10, 1993 was not attached to the application, even though Mr. Williams made that "suggestion." Furthermore, at the time of the filing of the application by KSEY, there was already on file with the Commission the Petition of Windthorst Radio Broadcasting Company to allocate Channel 230C3 to Windthorst, Texas, thus coming squarely within the statement in the June 10, 1993 letter that if the KSEY Form 301 application to carry out the 1987 C2 upgrade was not filed prior to "any conflicting rulemaking" the application will be subject to the outcome of the rulemaking proceeding.

In view of the foregoing, it is respectfully requested that you reconsider your action of May 24, 2000 and reaccept the Petition of Windthorst Radio Broadcasting Company seeking the allotment of Channel 230C3 to Windthorst, Texas effective on the March 28, 2000 FCC stamped date.

Windthorst Radio Broadcasting Company pursuant to the terms of the Commission's letter of June 10, 1993 is entitled to have its Petition for Rulemaking considered on its merits before any consideration can be given to the late filed KSEY Form 301. Should the Petition for Rulemaking filed by Windthorst Radio Broadcasting

John A. Karousos, Esq.
June 1, 2000
Page 3

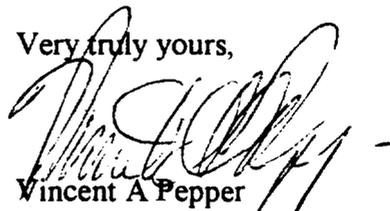
Company be found by the Commission to be meritorious then, and in that event, KSEY will either have to go off the air or seek authority from the Commission to continue its present operation on Channel 232A. The Commission's Public Notice indicating the acceptance for filing of the application on May 3, 2000 reflects the current operation of KSEY-FM as 94.3 MHz which is Channel 232A.

After 12½ years, the licensee has no equities. Almost seven years after the Commission's letter warning the licensee of this exact possibility and castigating the licensee for "warehousing" frequencies, the licensee has no equities.

It is respectfully requested that you reaccept the enclosing Windthorst Radio Broadcasting Company Petition for Rulemaking as of the stamped in date of March 28, 2000.

Should any further information be desired in connection with this matter, please communicate with this office.

Very truly yours,

A handwritten signature in black ink, appearing to read "Vincent A. Pepper", written over a horizontal line.

Vincent A Pepper

Enclosures (2)

cc: Mr. Mark V. Aulabaugh
Box 471
Seymour, TX 76380
[KSEY(FM) Licensee]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

JUN 11 9 52 AM '93

10 JUN 1993

IN REPLY REFER TO:
1800B3-DJF

Certified Mail - Return Receipt Requested

Mr. Wesley Yeager, Jr.
Radio Station KSEY-FM
P.O. Box 471
Seymour, TX 76380

Re: KSEY-FM; Seymour, TX
Wesley Yeager, Jr.
Upgrade to Class C2

Dear Licensee:

Pursuant to the Report and Order in MM Docket No. 86-478, 2 FCC Rcd 5640, 52 Fed. Reg. 01349, released September 22, 1987, and effective November 9, 1987, the Commission modified the allotment for KSEY-FM from Channel 232A to Channel 230C2. The Report and Order deleted the old channel 232A from the Table of Allotments (47 CFR § 73.202) and substituted Channel 230C2 therein. KSEY-FM was afforded a period of 90 days from the November 9, 1987 effective date to file a construction permit application on FCC Form 301 for Class C2 facilities.¹ Although the old Class A allotment was deleted, KSEY-FM was permitted to continue operating on the old channel [232] pending the grant of a Class C2 construction permit and the implementation of Class C2 operation.²

Because Docket 86-478 permanently changed the Table of Allotments (47 CFR § 73.202), KSEY-FM cannot indefinitely continue its operations on Channel 232, but instead must commence operations on Channel 230. Consequently, KSEY-FM IS DIRECTED TO FILE A CONSTRUCTION PERMIT APPLICATION ON FCC FORM 301 to specify operations on

¹ Because the rulemaking to upgrade KSEY-FM to Class C2 on Channel 230 [Docket 86-478] commenced prior to May 21, 1990, KSEY-FM is required to file only the minor change application filing fee with the Form 301 application, and need not submit the rulemaking fee. See Fee Collection Program, Gen. Docket 86-285, 5 FCC Rcd 3558, 55 Fed. Reg. 19148 (1990).

² On June 28, 1988, construction permit BPH-880208ID as extended by BMPH-900102JA was granted to implement the channel change and upgrade. Construction was to have been completed by October 22, 1990. However, on September 20, 1991, the permit was cancelled since construction was not complete, and an application for extension of time (Form 307) to construct was not received by the Commission.

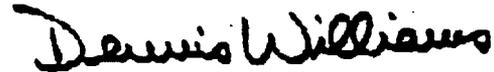
Channel 230.³ Continued operation for station KSEY-FM on Channel 232 will only be permitted so long as such operation does not impede the institution of new or upgraded service to the public. However, KSEY-FM is hereby warned that the Commission will consider proposals which conflict with KSEY-FM's Channel 232 operations. If granted, KSEY-FM will be required to terminate its Channel 232 operation at such time as the conflicting facility is ready to commence program test operations. Consequently, it is in KSEY-FM's best interest to implement the channel change as soon as possible.

Moreover, a Class C2 station, being larger than a Class A station, requires greater protection from encroachment by other stations. Thus, KSEY-FM is presently receiving the benefit of Class C2 protection while only providing the service of a Class A station. Failure to implement Class C2 facilities in a timely manner constitutes "warehousing" of unused spectrum to the preclusion of other potential users seeking to provide additional broadcast service to the public. Thus, your unfiled Class C2 allotment could result in your being made a party to an allocation rulemaking seeking to downgrade the Seymour, TX Channel 230 allotment. If KSEY-FM files a Form 301 application before any conflicting rulemaking is initiated, the application will take precedence. If filed later, the application will be subject to the outcome of the rulemaking proceeding. Report 1 Order, Docket 91-348, 7 FCC Rcd 4917, 57 Fed. Reg. 36018, released August 4, 1992. Consequently, prompt filing of a Form 301 construction permit application will reduce the risk of being downgraded via a rulemaking.

³ As a Class C2 station, KSEY-FM is fully spaced under 47 C.F.R. § 73.207 of the Commission's rules at its presently licensed transmitter site. To preserve Class C2 facilities, KSEY-FM would need to specify an effective radiated power (ERP) between 25.5 kW and 50.0 kW, assuming that the antenna height above average terrain (HAAT) remains less than 100 meters. If KSEY-FM wishes to downgrade to Class C3 facilities via FCC Form 301, KSEY-FM would need to specify an ERP between 6.1 kW and 25.0 kW, assuming that the HAAT remains less than 100 meters. Moreover, if KSEY-FM wishes to downgrade to Class A facilities using FCC Form 301, KSEY-FM could specify an ERP between 5.0 kW and 6.0 kW, assuming that the HAAT remains less than 100 meters. Finally, if KSEY-FM simply wishes to change frequency to Channel 230 utilizing its present facilities, thereby permanently remaining a Class A facility, it may instead file FCC Form 302-FM within 10 days of making the frequency change. The latter procedure is only applicable where no changes from the current parameters (effective radiated power, antenna radiation center heights, tower height, and coordinates) are proposed (excepting the change in frequency). No filing fee is required for this Form 302-FM modification-of-license application. Please note that if KSEY-FM chooses not to upgrade to Class C2 facilities, a statement must be included with any Form 301 or 302-FM application requesting that KSEY-FM be DOWNGRADED to the appropriate class.

Forms 301, 302-FM, 155 (the Fee Form to accompany the Form 301), and the Mass Media Services Fee Filing Guide can all be obtained from the Commission at (202)-632-3676. It is suggested that a copy of this letter be attached to any filing to insure proper processing. I urge you to consult with your engineering and legal counsel on this matter as soon as possible.

Sincerely,

A handwritten signature in black ink that reads "Dennis Williams". The signature is written in a cursive, slightly slanted style.

Dennis Williams
Chief, FM Branch
Audio Services Division
Mass Media Bureau

cc: Booth, Freret & Inlay

PEPPER & CORAZZINI, LLP
ATTORNEYS AT LAW

1776 K STREET, N.W., SUITE 200
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March 28, 2000

RECEIVED
MAR 28 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

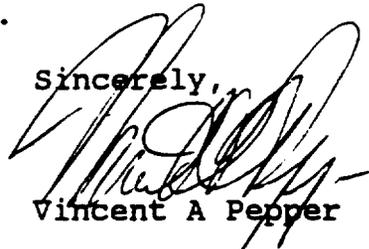
**Re: Amendment of Section 73.202(b)
FM Table of Allotments
(Windthorst, Texas)**

Dear Ms. Salas:

Transmitted herewith on behalf of Windthorst Radio Broadcasting Company is an original and four copies of its Petition for Rule Making seeking to allot Channel 230C3 to Windthorst, Texas, as that community's first FM broadcast transmission service.

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

Sincerely,



Vincent A Pepper

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 23 2000

In the Matter of)
)
Amendment of 73.202(b)) MM Docket No. _____
Table of Allotments)
FM Broadcast Stations)
(Windthorst, TX))
)

To: John Karousos, Chief
Allocations Branch
Mass Media Bureau

PETITION FOR RULE MAKING

Pursuant to 47 C.F.R. 1.401, Windthorst Radio Broadcasting Company respectfully petitions the FCC to institute a Rule Making proceeding to amend the FM Table of Allotments to add Channel 230C3 at Windthorst, Texas.

DISCUSSION

Petitioner respectfully submits that the public interest would be served by allocating Channel 230C3 to Windthorst, Texas, as that community's first FM broadcast transmission service.

Windthorst is an incorporated city of nearly 400 persons, located in Archer County, Texas, whose population increased 9.7% since the 1980 Census to a population of 7,973 persons in 1990. See Engineering Statement, attached hereto, at 1. Windthorst has its own school district -- with three campuses (high school,

junior high and elementary) --, its own fire department, St. Mary's Catholic Church and its own post office/zip code. As an incorporated city, Windthorst is governed by Mayor Sue Steinberger and City Manager Don Frerich.

Evidence of Windthorst's "growing needs" is the fact that school enrollment is up five percent in 1999-2000 over the prior school year.^{1/} Like other "communities" to which the FCC has allotted a "first" local FM service, Windthorst also has a local library and at least 68 commercial business establishments.^{2/} These retail businesses include Kotter Tires, D&L Sales, Windthorst Quick Stop, Oodles, Wolf's Mini Mart, Andy Roe's Windthorst Exxon, Blue Cow Cafe and Berend Brothers Store.

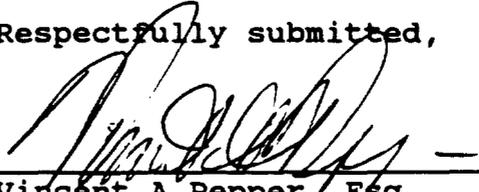
Attached hereto is an engineering report, which contains a channel study confirming that Channel 230C3 can be allocated to Windthorst, Texas, consistent with the FCC's separation rules. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1992).

^{1/} Source: Cindy Frerich, Office of Superintendent of Windthorst Independent School District.

^{2/} Source: Dun & Bradstreet, 1999.

Finally, should this Petition be granted, and Channel 230C3 be allotted to Windthorst, Texas, Petitioner will apply for Channel 230C3 and, after it is authorized, will promptly construct the new facility.

Respectfully submitted,



Vincent A Pepper Esq.
Counsel for Windthorst Radio
Broadcasting Company

Pepper & Corazzini, L.L.P.
Suite 200
1776 K Street, N.W.
Washington, DC 20006
202/296-0600

Dated: March 28, 2000

**ENGINEERING STATEMENT
IN SUPPORT OF
PETITION FOR RULE MAKING**

March 22, 2000

**Windthorst Radio Broadcasting Co.
FM Channel 230C3 □ 93.9 Megahertz
Windthorst, Texas**



**LAWRENCE L. MORTON ASSOCIATES
2967 BELDEN DRIVE
HOLLYWOOD HILLS, CALIFORNIA 90068-1901
(323) 467-5010 / FAX (323) 467-5848**

ENGINEERING STATEMENT

The information and data contained within this engineering statement were prepared on behalf of Windthorst Radio Broadcasting Co., in support of a Petition for Rule Making. The petitioner proposes to amend the FM Table of Allotments, 47 C.F.R. § 73.202(b) of the Commission's Rules, by allotting Channel 230C3 to Windthorst, Texas.

I. WINDTHORST, TEXAS

Windthorst is an incorporated city located within Archer County, Texas. The 1990 U.S. Census population of Windthorst was 367 persons. The 1990 U.S. Census population of Archer County was 7,973 persons, an increase of 9.7 percent above the 1980 U.S. Census population of 7,266 persons.

Windthorst has been assigned Postal ZIP Code 76389 by the U.S. Postal Service. The city has no aural broadcast services. The Bureau of the Census centroid geographic coordinates of Windthorst, referenced to the North American Datum of 1927, are:

North Latitude: 33 degrees, 34 minutes, 32 seconds
West Longitude: 98 degrees, 26 minutes, 12 seconds

Because of stations KICM(FM) on Channel 229C2 at Healdton, KZCD(FM) on Channel 231C2 at Lawton, KGDE(FM) on Channel 231C at Fort Worth, and a vacant allotment on Channel 229C2 at Krum, a site restriction is required for the Channel 230C3 allotment at Windthorst. At a point corresponding to the following geographic coordinates, which is 11.6 kilometers southwest of Windthorst, the Channel 230C3 allotment can be made at Windthorst in compliance with the minimum distance separation requirements 47 C.F.R. § 73.207.

North Latitude: 33 degrees, 29 minutes, 43 seconds
West Longitude: 98 degrees, 31 minutes, 00 seconds

From these reference geographic coordinates, Channel 230C3 is fully-spaced to all FCC assignments, allotments and proposals contained within the latest *FCC FM Engineering Database*. Figures one and two show the relative locations of Archer County within the State of Texas, and of the City of Windthorst within Archer County. Figures three and four show the incorporated city limits of Windthorst and the allotment reference site.

II. MINIMUM SPACING REQUIREMENTS

The following table lists the nearest assignments and allocations currently on file with the required distance separations for Channel 230C3.

As required by § 73.207 all minimum distance separation requirements are met from the Channel 230C3 allotment reference site proposed for Windthorst. All distances were computed by the methods outlined in § 73.208(c) of the Commission's Rules and were rounded to the nearest kilometer in accordance with § 73.208(c)(8).

ALLOCATION-PERTINENT STATIONS AND SPACING REQUIREMENTS OF § 73.207					
CALL LETTERS	CHANNEL /CLASS	NORTH LATITUDE	WEST LONGITUDE	ACTUAL DISTANCE	REQUIRED DISTANCE
KKNG-FM	227-C	35° 07' 58"	97° 37' 28"	199. Km	96. Km
KKMR	227-C2	32° 48' 29"	97° 07' 52"	150	56
KLXK	228-C3	33° 06' 51"	98° 19' 57"	46	43
KLXK	228-C2	32° 46' 55"	98° 56' 22"	88	56
KLBJ-FM	229-C	30° 18' 36"	97° 47' 33"	361	176
KXTQ-FM	229-C1	33° 30' 57"	101° 50' 54"	310	144
ALLOC	229-C2	33° 35' 10"	97° 12' 47"	122	117
KCRN-FM	230-C1	31° 42' 11"	100° 19' 20"	261	211
ALLOC	230-C2	33° 35' 24"	99° 15' 36"	70	177
KZCD	231-C2	34° 33' 00"	98° 32' 20"	117	117
KGDE	231-C	32° 35' 22"	96° 58' 10"	176	176
KYOX	232-C2	31° 54' 51"	98° 41' 48"	176	56
KSEY-FM	232-A	33° 35' 49"	99° 16' 42"	72	42
KDGE	233-C	33° 33' 36"	96° 57' 35"	145	96
KKDA-FM	283-C	32° 35' 22"	96° 58' 10"	176	31
KYYI	284-C	34° 05' 35"	98° 52' 44"	74	31

III. CONCLUSIONS

The results of this study demonstrate that the FM Table of Allotments in § 73.202(b) of the Commission's Rules may be amended in technical compliance with all applicable spacing rules. Therefore, the Petitioner, Windthorst Radio Broadcasting Co., respectfully requests the following change to the Table:

PRESENT
CITY **CHANNEL**
Windthorst, TX ----

PROPOSED
CITY **CHANNEL**
Windthorst, TX 230C3

The petitioner asserts that, upon allotment of Channel 230C3 to Windthorst and the lifting of the present freeze on new applications, an application for construction permit to build a new Class C3 facility will be filed promptly to serve Windthorst, Texas.

Respectfully Submitted,

**Lawrence L. Morton, P.E.
Consulting Engineer to the Petitioner
March 22, 2000**



Archer County

State of Texas

CENTER OF MAP:

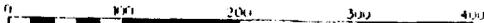
N LAT 31° 20' 56.00"

W LON 99° 39' 55.00"

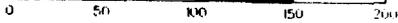
Scale 1 : 6,642,985

WINDHORST RADIO BROADCASTING CO.

KILOMETERS



STATUTE MILES



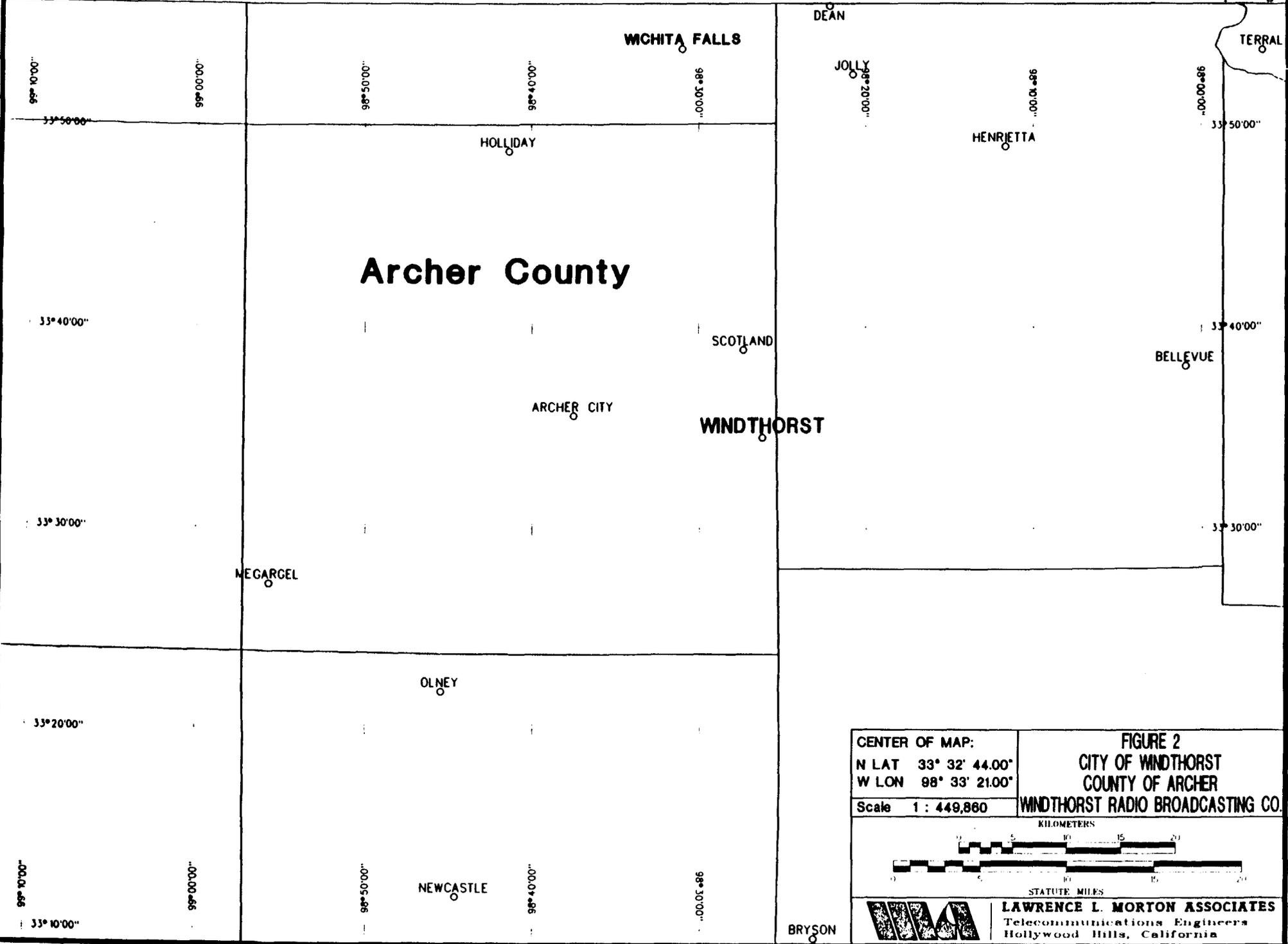
LAWRENCE L. MORTON ASSOCIATES
Telecommunications Engineers
Hollywood Hills, California

FIGURE 1

COUNTY OF ARCHER
STATE OF TEXAS

Lambert Azimuthal Equal-Area

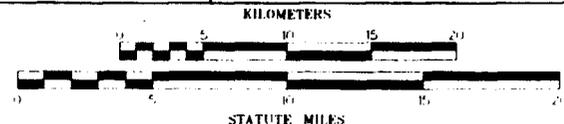
10' 00" Graticule Spacing



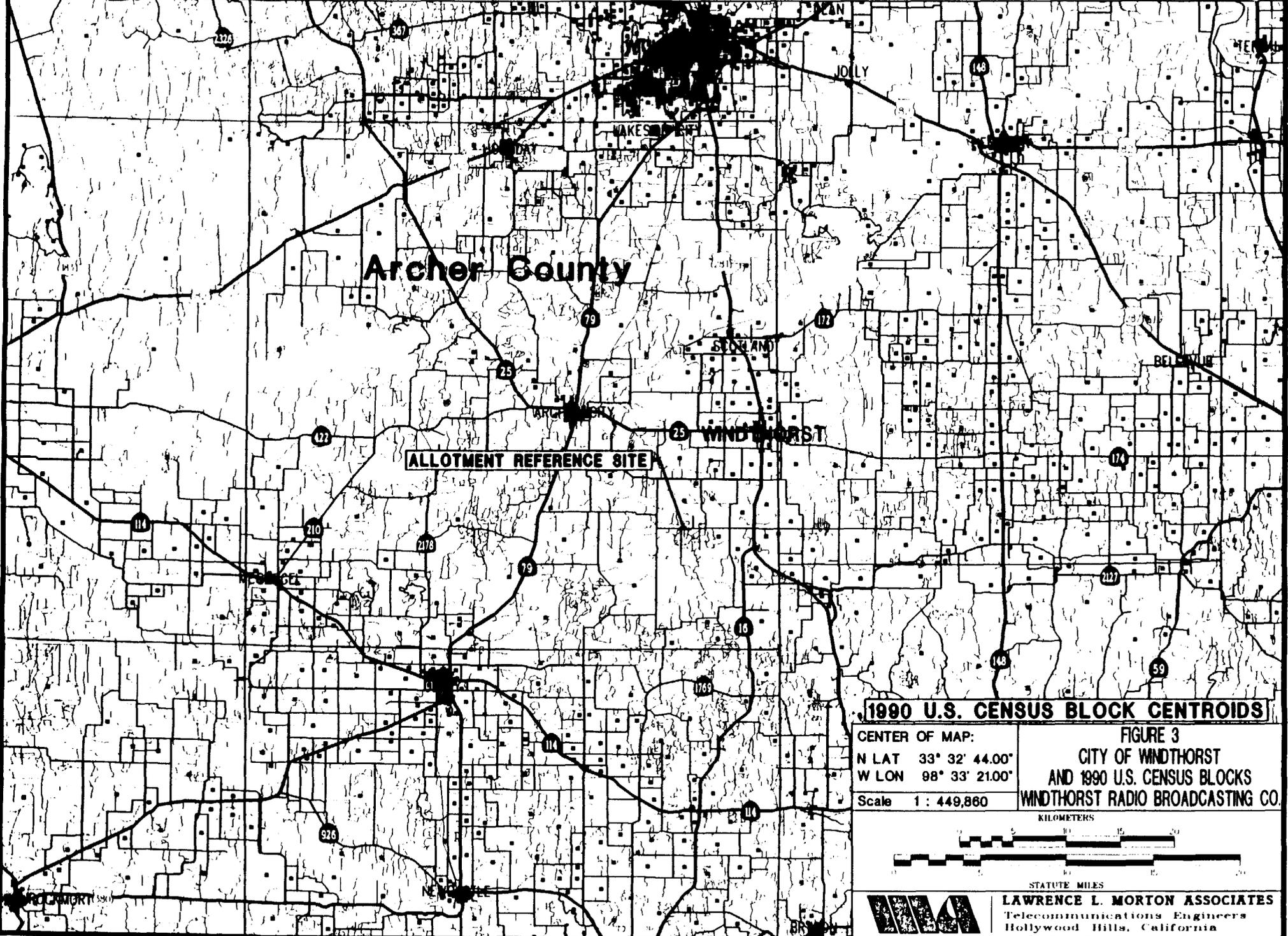
CENTER OF MAP:
 N LAT 33° 32' 44.00"
 W LON 98° 33' 21.00"

FIGURE 2
CITY OF WINDHORST
COUNTY OF ARCHER
WINDHORST RADIO BROADCASTING CO.

Scale 1 : 449,860



LAWRENCE L. MORTON ASSOCIATES
 Telecommunications Engineers
 Hollywood Hills, California



1990 U.S. CENSUS BLOCK CENTROIDS

CENTER OF MAP:
 N LAT 33° 32' 44.00"
 W LON 98° 33' 21.00"
 Scale 1 : 449,860

FIGURE 3
 CITY OF WINDHORST
 AND 1990 U.S. CENSUS BLOCKS
 WINDHORST RADIO BROADCASTING CO.



LAWRENCE L. MORTON ASSOCIATES
 Telecommunications Engineers
 Hollywood Hills, California

AFFIDAVIT

State of California)
) **ss:**
County of Los Angeles)

Lawrence L. Morton, being first duly sworn upon oath, deposes and says:

- That he is a qualified engineer,
- That he is a Registered Professional Engineer in the State of California,
- That he is a member of the Association of Federal Communications Consulting Engineers,
- That his qualifications are a matter of record with the Federal Communications Commission,
- That he has prepared many broadcast applications and engineering exhibits that have been filed with and granted by the Federal Communications Commission,
- That he has carried out such engineering work and that the results thereof are attached hereto and form part of this affidavit, and
- That the foregoing statement and the report regarding the aforementioned engineering work are true and correct of his own knowledge.

Date: March 22, 2000

ORIGINAL COPY SIGNED

Lawrence L. Morton, P.E.

On March 22, 2000, before me, Linda Lu, a Notary Public, in and for the State of California, personally appeared Lawrence L. Morton known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

My Commission expires 11/30/2001

ORIGINAL COPY NOTARIZED

Notary Public