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NOV 6 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: **Oswego and Granby, New York**  
**MM Docket No. 00-169; RN-9953**

Dear Ms. Salas:

Transmitted herewith for filing with the Commission on behalf of Galaxy Communications, L.P., licensee of radio Station WTKV(FM), Oswego, New York, are an original and four copies of its Opposition to the Motion for Stay in the above-referenced proceeding filed by Clear Channel Broadcasting Licenses, Inc.

In the event that there are any questions concerning this matter, please contact the undersigned.

Very truly yours,

  
Sally A. Buckman

SAB/gfe  
Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

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NOV 6 2001

In the Matter of )  
)  
Amendment of Section 73.202(b) )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Oswego and Granby, New York) )  
)

MM Docket No. 00-169  
RM-9953

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: Chief, Mass Media Bureau

**OPPOSITION TO MOTION FOR STAY**

Galaxy Communications, L.P. ("Galaxy"), licensee of radio station WTKV(FM), Oswego, New York, by its attorneys, hereby respectfully opposes the *Motion for Stay* of the above-referenced Report and Order in Oswego and Granby, New York, released September 21, 2001 ("*Order*")<sup>1</sup> filed by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel").

The *Order* granted Galaxy's request to amend Section 73.202(b) of the Commission's Rules to reallocate Channel 288A from Oswego to Granby, New York, as Granby's first local aural transmission service. As the *Order* explains, on the date that comments in the proceeding were due, Clear Channel filed an application to modify the facilities of WXBB(FM) (formerly Station WVOA)<sup>2</sup> by relocating the transmitter site. Because this application was mutually exclusive to the reallocation of Channel 288A to Granby in the *Order*, the Allocations Branch provided Clear Channel with 30 days from the effective date of the *Order* to amend its application.

<sup>1</sup> *Oswego and Granby, New York*, Report and Order, MM Docket No. 00-169 (Allocations Branch, rel. Sept. 21, 2001).

<sup>2</sup> FCC File No. BPH-20001106ABG.

Clear Channel now requests the Commission to stay the effectiveness of the *Order* pending the Commission's consideration of its concurrently filed *Petition For Reconsideration*. Clear Channel has failed to make the compelling showing that is necessary for the Commission to stay the effectiveness of the *Order*. Accordingly, Clear Channel's *Motion for Stay* should be denied.

**I. Clear Channel Fails to Satisfy the Long-Established Standard Used by the Commission In Evaluating Motions for Stay.**

Under longstanding Commission precedent it is clear that a party seeking to stay the effectiveness of a Commission order must satisfy a "high burden."<sup>3</sup> Specifically, a petitioner will succeed only if it can demonstrate: (1) there is a substantial likelihood that it will succeed on the merits; (2) it will suffer irreparable injury if the stay is not granted; (3) the injury which the party suffers will outweigh the harm to the adverse party; and (4) the stay will be in the public interest.<sup>4</sup> The rules governing FM allocations proceedings previously provided that a Commission allotment order would be automatically stayed upon the filing of a petition for reconsideration. In amending the rules to delete this automatic stay provision, the Commission explained that the rule had "regularly resulted in delay in the commencement of construction and the provision of expanded service to the public."<sup>5</sup> In this decision, the Commission explained that it would continue to consider stay requests on a case-by-case basis, but noted that entities requesting a stay would be required to meet the standard set forth above.<sup>6</sup>

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<sup>3</sup> *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, Report and Order, 11 FCC Rcd 9501, 9506 n.21 (rel. August 8, 1996).

<sup>4</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>5</sup> *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, Report and Order, 11 FCC Rcd 9501, 9506 n.21 (rel. August 8, 1996).

<sup>6</sup> *Id.*

As set forth below, Clear Channel has not satisfied this strict standard. In fact, Clear Channel presented the same substantive arguments contained in its *Petition for Reconsideration* in its Reply Comments with respect to the proposed reallocation filed November 21, 2000. The Commission considered and rejected these arguments. Because Clear Channel has not made the compelling showing necessary for the Commission to grant a stay of the *Order*, Clear Channel's motion should be denied.

**A. Clear Channel Has Not Demonstrated That Its *Petition for Reconsideration* Is Likely to Be Granted.**

Clear Channel argues in its *Motion for Stay* that its *Petition for Reconsideration* is likely to succeed on the merits because the *Order* “simply ignored the Commission’s self-imposed obligation to accommodate, whenever possible, both a reallocation proposal and conflicting modification application,” and because the *Order* ignored the “clear policy distinctions in favor of an actual, bona fide permit site versus a set of theoretical reference coordinates.”<sup>7</sup>

Clear Channel’s statement that “Commission policy requires use of alternate reference coordinates for an allotment proposal if necessary to resolve a conflict with a timely modification application”<sup>8</sup> is misleading. The decision on which Clear Channel relies to support this statement—the *Reconsideration Order in the Allotments Conflicts Proceeding*—states only that: “[t]he staff will also *attempt* to resolve conflicts between a rulemaking petition and a later-filed FM application . . . whenever it is *possible* to do so *without prejudice* to a timely filed FM application or rulemaking petition.”<sup>9</sup> This

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<sup>7</sup> *Motion for Stay* at 2.

<sup>8</sup> *Petition for Reconsideration* at 7.

<sup>9</sup> *Conflicts Recon Order* at 4745 n.12 (emphasis added).

language places the decision squarely within the discretion of the Commission as to whether it can accommodate both requests without prejudice to either one.

Indeed, in *Kerman, California*, the Commission further explained its interpretation of the *Conflicts* order, emphasizing that ultimately it must grant the proposal that will best serve the public interest. “The *Conflicts* item should not be construed as narrowly applying the Commission’s remedial measures to eliminate inconsistencies between coordinates specified by applicants and those designated in rulemaking proceedings by modifying the rulemaking proposal to specify either an alternate site or channel where possible. *Rather, it has been, and continues to be the Commission’s policy to consider whichever allotment plan it determines to be more conducive to serving the public interest.*”<sup>10</sup>

In the *Order*, the Allocations Branch correctly determined that the reallocation of Channel 288A to Granby would further a long-held Commission public interest benefit of providing a community its first aural transmission service and increasing net service gains. Further, the Commission did not grant Galaxy its preferred reference coordinates, opting instead for reference coordinates that were less restrictive and that could provide Clear Channel with an opportunity to amend its application to eliminate the mutual exclusivity with the allotment.<sup>11</sup>

Clear Channel emphasizes repeatedly that its application represents an “actual” and “bona fide” transmitter site whereas Galaxy’s proposal constitutes merely “a set of theoretical reference coordinates.”<sup>12</sup> This distinction, however, is not relevant to the

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<sup>10</sup> FCC Rcd 2887 (Mar. 4, 1996) (emphasis added).

<sup>11</sup> *Oswego and Granby, New York*, Report and Order, MM Docket No. 00-169 (Allocations Branch, rel. Sept. 21, 2001).

<sup>12</sup> *Motion for Stay* at 3.

Commission's decision in this proceeding. The Commission has long held that an application represents "no more than the applicant's preference for a particular transmitter site" and that the "accommodation of an applicant's preference provides minimal public interest benefits, and thus virtually any conflicting proposal involving a net public interest benefit will be preferred."<sup>13</sup> In any case, since the *Order* was issued, Galaxy has taken steps to secure an "actual" transmitter site. As noted below, operation of Station WTKV from this site will provide substantial public interest benefits.

**B. Clear Channel Will Not Suffer Irreparable Injury if Its Motion is Not Granted.**

Clear Channel contends that, in the absence of a stay of the effectiveness of the *Order*, it will suffer irreparable injury. To support this claim, Clear Channel notes that its application will be dismissed if it is not amended by the deadline established in the *Order* and that if it does amend its application in accordance with the *Order*, it will lose the protection afforded to its preferred site while the *Petition for Reconsideration* is pending. Thus, the irreparable injury cited by Clear Channel is purely speculative and certainly does not rise to the standard consistently applied by the Commission that, for a harm to be considered "irreparable," it must be "great, imminent, and certain to occur."<sup>14</sup>

As discussed above, the Commission correctly concluded that Galaxy's proposal to reallocate Channel 288A to Granby was preferable to Clear Channel's application under the allotment priorities. Moreover, it should be emphasized that the Commission was under no obligation to permit Clear Channel to amend its application to resolve the mutual exclusivity with Galaxy's proposal. In a *Public Notice* providing examples of

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<sup>13</sup> *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, Report and Order, 8 FCC Rcd 4735, 4739 (rel. July 13, 1993)

<sup>14</sup> *Applications of Liberty Productions, et al. For a Construction Permit For a New FM Broadcast Station on Channel 243A at Biltmore Forest, North Carolina*, Order, MM Docket No. 88-577 (rel. Oct. 26, 2001).

how the Commission would generally resolve conflicts between applications and rulemaking proceedings, the Commission explained that in a situation such as the one presented in this case, the Commission could simply dismiss the conflicting application.<sup>15</sup> As emphasized above, the Commission views an application as merely a party's site preference. Even if Clear Channel's original application had been accepted, there is no guaranty that it would be granted. In addition, the irreparable injury Clear Channel posits—loss of protection for its preferred site in the event of a later-filed interfering application—is purely speculative, not imminent or certain. It is equally possible that a later-filed application could enable Clear Channel to find an alternative, preferential site that could ultimately be used. Thus, Clear Channel has failed to demonstrate that it will suffer any harm at all, much less that it would suffer an irreparable harm.

**C. A Grant of the Requested Stay Would Be Contrary To The Public Interest And Would Significantly Delay Galaxy's Ability to Proceed With the Reallocation Proposal.**

When the Commission eliminated the automatic stay for allotment proceedings in 1996 it explained that “the automatic stay rule has regularly resulted in delay in the commencement of construction and the provision of expanded service to the public.”<sup>16</sup> In this case, a stay would disserve the public interest and harm Galaxy by substantially delaying Galaxy's ability to finalize its plans to acquire a site, prepare and file the necessary modification application and construct the modified facilities that will provide first aural transmission service to Granby.

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<sup>15</sup> *Mass Media Bureau Offers Examples of the Treatment of Applications Filed Under the New “One Step” Process Including Treatment of Conflicts Between Petitions for Rule Making to Amend Part 73.202(b) and FM New and Major Change Applications*, Public Notice, 73 RR 2d 1474, 1475 (Aug. 31, 1993).

<sup>16</sup> 11 FCC Rcd 9501, 9506 n.21 (rel. August 8, 1996).

The provision of first aural transmission service is a public interest benefit that the Commission values highly.<sup>17</sup> As noted above, Galaxy has already begun to make arrangements to secure a transmitter site from which Station WTKV will provide service to Granby. Although it has not finalized arrangements for this site—particularly in light of the pending *Motion for Stay*—it is clear that construction of Station WTKV facilities at this site would provide substantial public interest benefits. As set forth in the attached Engineering Exhibit, operation from the proposed site would result in net service gains to 184,851 persons. Rather than weighing the relative harms that would be suffered by Galaxy and Clear Channel if a stay is granted as required by *Holiday Tours*, Clear Channel gratuitously contends that a stay will benefit Galaxy by eliminating the uncertainty posed by the filing of Clear Channel’s *Petition for Reconsideration*. Galaxy disagrees. Galaxy understands that if it moves forward to construct facilities to serve Granby, it will do so at its own risk. However, in light of the strong public interest benefits that will result from the modified WTKV facilities, it is willing to accept this risk.

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<sup>17</sup> *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1992).

**II. Conclusion**

For the reasons set forth above, Clear Channel has failed to satisfy the *Holiday Tours* test justifying a stay of the Commission's *Order*. Therefore, it is respectfully requested that the Commission deny Clear Channel's *Motion for Stay*.

Respectfully submitted,

GALAXY COMMUNICATIONS, L.P.

By:   
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(Admitted Illinois only)

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Its Attorneys

November 6, 2001

**ENGINEERING EXHIBIT**  
Gain in Service From  
Galaxy's Prospective Site for WTKV(FM)  
prepared for  
Galaxy Communications, L.P.  
WTKV(FM) Ch. 288A  
RM-9953 MM Docket 00-169  
Granby, New York

**Introduction**

Galaxy Communications, L.P. ("*Galaxy*") as licensee of FM radio station WTKV(FM) Ch. 288A, Oswego, New York, filed a petition for rulemaking to change WTKV's community of license to Granby, New York. By Report and Order in MM Docket 00-169 for RM-9953, released September 21, 2001, the Commission granted *Galaxy's* petition.

*Galaxy* has identified a prospective site for which it has reasonable assurance that it will be able to use for WTKV(FM) to allow *Galaxy* to move forward with its change in community of license. The instant engineering statement has been prepared on behalf of *Galaxy* to compare the licensed and prospective service areas of WTKV(FM) using an actual site as opposed to the hypothetical reference point reflected in the Report and Order.

**Coverage from Prospective Site for WTKV(FM), Ch. 288A Granby, New York**

*Galaxy* has identified a site located at North Latitude 43° 16' 22", West Longitude 76° 24' 04" (NAD 27). This site appears to meet all pertinent domestic minimum distance separation requirements except with respect to the pending application filed by WVOA/WXBB (Ch. 286B, DeRuyter, NY)(BPH-20001106ABG), which the Commission has directed Clear Channel Communications to amend, in the above referenced Report and Order in MM Docket 00-169.

Attached as **Figure 1** is a map depicting the predicted 1.0 mV/m (60 dB $\mu$ ) protected service contours for the prospective WTKV(FM) and licensed WTKV(FM) facilities. The prospective WTKV(FM) facility would utilize a non-directional antenna

Engineering Exhibit  
GAIN IN SERVICE FROM GALAXY'S PROSPECTIVE SITE FOR WTKV(FM)  
(page 2 of 2)

with an effective radiated power ("ERP") of 6.0 kW at an effective antenna height of 100m above average terrain ("AAT"). The map illustrates clearly the gain in effective service area achieved by moving the site further from the shore of Lake Erie. The table below sets forth the coverage statistics with the gain and loss data as shown on **Figure 1**.

	Population 2000 Census	Land area (sq km)
WTKV(FM) Prospective	280,860	2,356
WTKV(FM) Licensed	96,009	1,420
Loss Area	2,123	83
Gain Area	186,974	1,019

**Conclusion**

*Galaxy* has been granted the authority to change the community of license of station WTKV(FM) from Oswego to Granby. The move, which will not deprive Oswego of service by WTKV(FM), will result in a 195% increase in new population served (gain) with a corresponding, *de minimis* 2% loss.

**Certification**

I, Mark B. Peabody, hereby certify that the foregoing statement for WTKV(FM) and *Galaxy Communications, L.P.* was prepared by me or under my direction, that it is true and correct to the best of my knowledge and belief, and that my qualifications are a matter of record with the Federal Communications Commission.



Mark B. Peabody  
November 6, 2001

Cavell, Mertz & Davis, Inc.  
10300 Eaton Place Suite 200  
Fairfax, Virginia 22030  
(703) 591-0110

**FIGURE 1**  
**COMPARISON OF 1.0 mV/m COVERAGE**  
**WTKV(FM) - AS LICENSED VS**  
**WTKV(FM) - PROSPECTIVE SITE**

prepared November 2001 for

**Galaxy Communications, L.P.**  
WTKV(FM) Ch. 288A Granby, New York

**Cavell, Mertz & Davis, Inc.**  
Consulting Engineers - Fairfax, Virginia

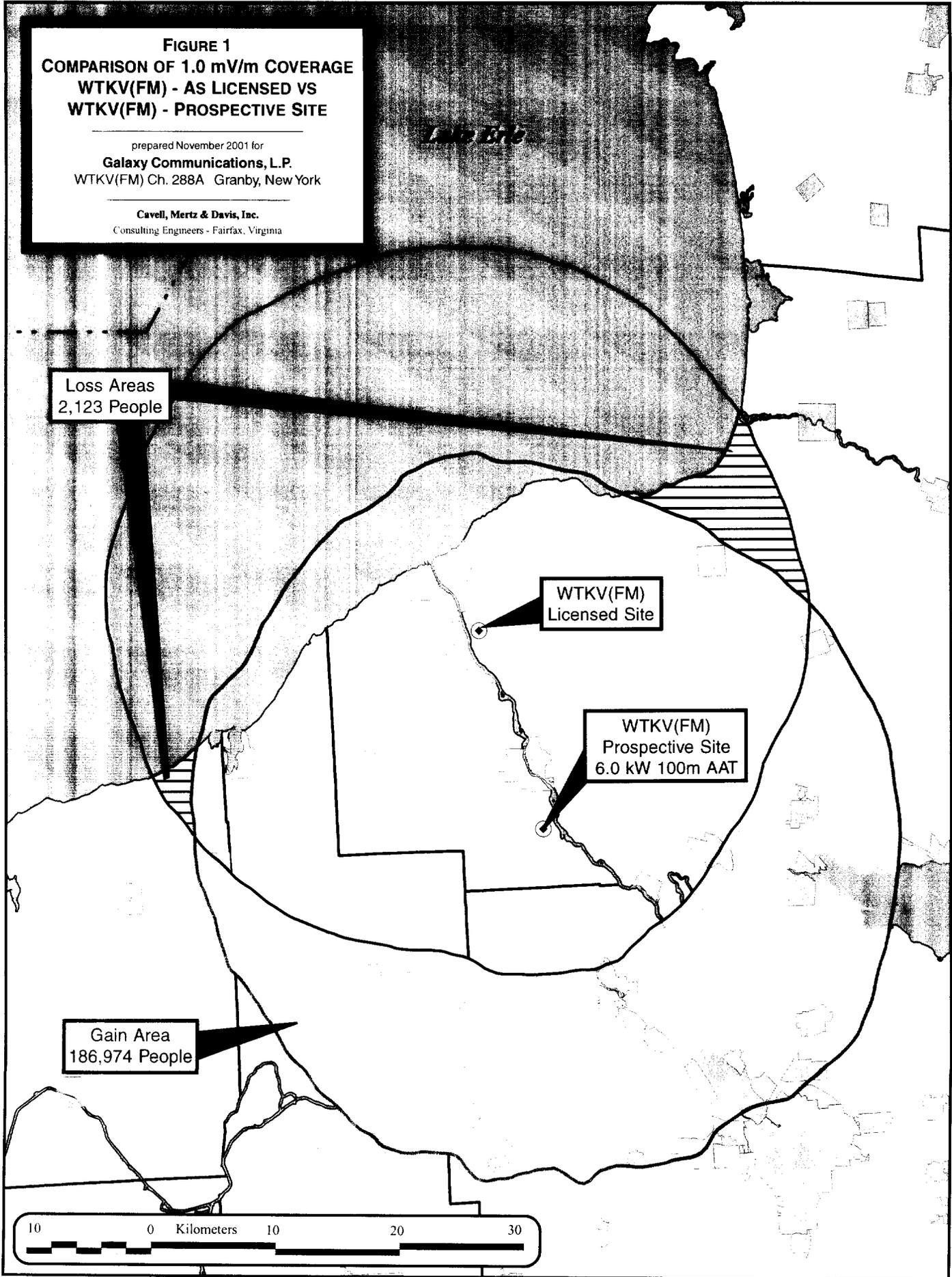
Loss Areas  
2,123 People

WTKV(FM)  
Licensed Site

WTKV(FM)  
Prospective Site  
6.0 kW 100m AAT

Gain Area  
186,974 People

10 0 Kilometers 10 20 30



**CERTIFICATE OF SERVICE**

I, Genevieve F. Edmonds, hereby certify that a true and correct copy of the foregoing Opposition To Motion For Stay was sent by first-class postage prepaid mail this 6th day of November, 2001 to the following:

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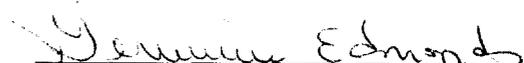
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\*By Hand Delivery