

DOCKET FILE COPY ORIGINAL

ORIGINAL

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

December 13, 2001

WWW.LSL-LAW.COM

E-MAIL
SBUCKMAN@LSL-LAW.COM

SALLY A. BUCKMAN
(202) 416-6762

RECEIVED

DEC 13 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; RM-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 eleven copies of its Opposition to the Petition for Reconsideration 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

No. of Copies rec'd 0 + 11
List ABCDE

ORIGINAL

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

RECEIVED

DEC 13 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Galaxy Communications, L.P. ("Galaxy"), licensee of radio station WTKV(FM),
Oswego, New York, by its attorneys, hereby respectfully opposes the *Petition for
Reconsideration* of the above-referenced Report and Order ("*Order*") filed on October 22, 2001
by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel").¹

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)² 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.

¹ Public Notice of the filing of Clear Channel's *Petition for Reconsideration* was published in the Federal Register
on November 28, 2001. Pursuant to Section 1.429(f) of the Commission's rules, the instant *Opposition* is timely
filed.

² FCC File No. BPH-20001106ABG.

Clear Channel now requests the Commission to reconsider the *Order*, claiming that the *Order* is inconsistent with Commission precedent because it granted the Granby reallocation and directed Clear Channel to amend its application to comply with the reallocation rather than adopting the proposal Clear Channel preferred that would have reallocated Channel 288A to Granby with a 4 kilometer site restriction and granted Clear Channel's modification application. However, despite Clear Channel's protestations to the contrary, the *Order* is consistent with Commission precedent and policy, and will serve the public interest. Clear Channel's *Petition for Reconsideration* fails to demonstrate that reconsideration of the *Order* is merited. Accordingly, the *Order* should be affirmed.

I. Background.

On July 28, 2000, Galaxy filed a *Petition for Rulemaking* to modify the FM Table of Allotments to change the community of license of its station, WTKV(FM), from Oswego to Granby, New York. On September 15, 2000, the Allocations Branch issued a *Notice of Proposed Rule Making* requesting comment on the reallocation. On the last day of the Comment period, Cram Communications, Inc. (the former licensee of WXBB(FM)), filed the modification application as well as comments and a counterproposal requesting the four kilometer site restriction. Galaxy also filed comments supporting the reallocation of Channel 288A to Granby. Both parties filed reply comments. In its *Reply Comments*, Galaxy proposed alternate reference coordinates for the Granby allotment that would maintain the maximum public interest benefits of its proposal and permit Clear Channel to amend its application to specify a different transmitter site, thus allowing both proposals to be implemented without compromising the resulting public interest benefits. Both Galaxy and Clear Channel filed supplemental reply comments in response to a public notice requesting comment on Clear Channel's

counterproposal. These supplemental reply comments, reiterated the positions espoused in the parties' comments and reply comments except that Clear Channel placed undue emphasis on the significance of what it called its "actual" transmitter site. On September 21, 2001, the Allocations Branch released the *Order*, which adopted the reference coordinates proposed in Galaxy's *Reply Comments* because they were less restrictive.

The Commission's determination in the *Order* correctly applied the priorities set out in the *Revision of FM Allotment Policies and Procedures* when it valued Galaxy's proposal to provide first local aural transmission service to Granby (priority 3) over Clear Channel's application providing other public interest benefits (priority 4). Clear Channel makes no attempt to discuss its allegation that the comparison of priorities evaluation is "inapplicable,"³ flatly asserting only that it is "the wrong standard."⁴ Such bald assertions fall far short of providing any basis to revisit the *Order*.

II. The *Order* is Consistent with Commission Precedent and Policy and Furthers the Public Interest.

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 with its first aural transmission service and increasing net service gains. In keeping with Commission precedent, the Branch properly compared the public interest benefit of Clear Channel's application with the public interest benefit of Galaxy's reallocation proposal, under the priorities established in *Revision of FM Assignment Policies and Procedures*.⁵ Contrary to Clear Channel's assertions, the Commission has repeatedly evaluated conflicts between allotment proposals to provide new service and applications considered as counterproposals under the four

³ *Petition for Reconsideration* at 6.

⁴ *Id.* at 13.

⁵ 90 FCC 2d 88 (1982).

priorities set out in *Revision of FM Assignment Policies and Procedures*.⁶ For example, in *Bainbridge, Georgia*,⁷ the Allocations Branch compared an allotment proposal that provided the community of Bainbridge with its second local service with a conflicting modification application filed to implement a channel upgrade that proposed the applicant's existing transmitter site. As in the instant case, in *Bainbridge, Georgia*, the Allocations Branch evaluated the public interest benefits of both proposals under the policies stated in *Revision of FM Assignment Policies and Procedures*, and concluded that the public interest was better served by allocating the channel to Bainbridge to provide second local service than by permitting the applicant to use its existing site, which did not represent "anything more than a site preference."⁸

Despite precedent to the contrary, in its *Petition for Reconsideration*, Clear Channel adamantly claims that the Branch applied the wrong standard. Specifically, Clear Channel contends that the "*Conflicts* proceeding *affirmatively obligates* the Allocations Branch to use a set of non-prejudicial alternate reference coordinate [sic] if such coordinates would enable grant of both a reallocation proposal and a pending modification application. Later cases confirm that the policy announced in the *Conflicts* proceeding requires use of alternate reference coordinates for a proposed allotment"⁹ Clear Channel's discussion of relevant Commission policy and precedent is highly misleading because Clear Channel omits vital portions of the language from relevant precedent without proper notation and fails to acknowledge important public interest factors present in this case.¹⁰

The actual language in *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments* ("*Conflicts Recon Order*") which, according to Clear

⁶ See, e.g., *Bear Lake and Honor, Michigan*, 12 FCC Rcd 4933 (1997); *Bainbridge, Georgia*, 12 FCC Rcd 13399 (1997); *Berlin, DeForest, Markesan and Wautoma, Wisconsin*, 10 FCC Rcd 7733 (1995).

⁷ 12 FCC Rcd at 13400.

⁸ *Id.*

⁹ *Petition* at 11 (emphasis in original). See also *Petition* at 2; *Reply to Opposition to Motion for Stay* at 4.

¹⁰ See, e.g., *Petition for Reconsideration* at 7; *Reply to Opposition to Motion for Stay* at 4.

Channel, is the governing standard, provides: “[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.”¹¹ Thus, contrary to Clear Channel’s assertion, the Allocations Branch is not obligated in every instance to use alternate reference coordinates to resolve a conflict between a modification application and a reallocation. Rather, the decision is squarely within the discretion of the Commission as to whether it can accommodate both requests *without prejudice to either one*. The Allocations Branch satisfied the mandate of the *Conflicts Recon Order* when it weighed the prejudice to both Clear Channel and Galaxy in granting either party’s request. In any case, it should be emphasized that the Allocations Branch did not grant Galaxy its preferred reference coordinates, opting instead for reference coordinates that were less restrictive and that would provide Clear Channel with an opportunity to amend its application to eliminate the mutual exclusivity with the allotment.¹²

In its *Comments and Counterproposal*, Clear Channel proposed that the Commission assign Galaxy reference coordinates of 43-18-26 North Latitude and 76-27-23 West latitude to resolve the conflict between the parties.¹³ The Allocations Branch correctly considered and rejected Clear Channel’s proposal. Clear Channel asserts that its proposed reference coordinates constituted an “extremely minor change,”¹⁴ and thus did not prejudice Galaxy. Clear Channel’s narrow-minded reliance on distance measurements in evaluating the impact of a proposed change ignores the substantial decrease in service gains to area residents that would occur if Clear Channel’s proposal were implemented. Galaxy has located a transmitter site from which it can

¹¹ *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917 (1992), *on reconsideration*, 8 FCC Rcd 4743, 4745 n.12 (emphasis added) (1993) (“*Conflicts Recon Order*”).

¹² *Oswego and Granby, New York*, Report and Order, MM Docket No. 00-169 (Allocations Branch, rel. Sept. 21, 2001).

¹³ *Comments and Counterproposal* at 3.

¹⁴ *Petition for Reconsideration* at 9-10.

operate Station WTKV consistent with the *Order*. As explained in the attached Engineering Statement prepared by Cavell, Mertz & Davis, Inc., operation from this site would result in net service gains of 184,851 persons.¹⁵ If it were forced to operate from a site within the restricted area Clear Channel has proposed these gains would plummet to approximately 70,000 people,¹⁶ far less than half of the gain in population that would result if Galaxy operated from its proposed site.

None of the cases Clear Channel cites in its *Petition for Reconsideration* involve situations like this case where imposition of a site restriction would prejudice the proponent of an allocation change by reducing substantially the public interest benefits that would result from a proposed allotment change. In fact, in *Kerman, California*, an opinion Clear Channel cites in support of its position, the Allocations Branch emphasized that: “[W]e must be guided by the overall public interest benefits to be attained by the proposals under consideration.”¹⁷ Thus, while Galaxy’s proposed site would allow Galaxy to provide first local aural service to Granby and realize net service gains of 184,851 people, virtually all of the service gains that would result from Clear Channel’s transmitter site move would occur within areas that are already extremely well served.¹⁸ In addition, Clear Channel’s proposal would result in a large loss area exceeding 40,000 persons, nearly 20% of its stated population gain.¹⁹ Commission policy disfavors service loss of this magnitude because “the public has a legitimate expectation that existing service will continue”²⁰ Of even greater concern is that Clear Channel’s proposal – while providing

¹⁵ See attached Engineering Statement, which was originally filed with Galaxy’s Opposition to Clear Channel’s *Motion for Stay*.

¹⁶ *Order* at 2.

¹⁷ *Kerman, California*, 11 FCC Rcd 2887, 2888 (1996).

¹⁸ *Reply Comments of Galaxy Communications* at 4.

¹⁹ *Id.* at 5.

²⁰ *DeRuyter and Chittenango, New York*, 13 FCC Rcd 4332 (1998).

better service to the already extremely well-served areas of Syracuse, Utica, and Rome – would create an underserved area to the south of DeRuyter.²¹

Clear Channel’s proposal also suffers from technical deficiencies. First, Clear Channel’s proposal will neutralize the lessening of the short-spacing between WTKV(FM) and Canadian Channel 289B, Kingston, Ontario, that would result from the implementation of Galaxy’s proposal. Secondly, Clear Channel will not provide line of sight coverage for all of DeRuyter as required by Section 73.315 of the Commission’s rules.²² Third, Clear Channel’s transmitter site change will nearly double the existing eight-kilometer short-spacing between WXBB(FM) and WBBS(FM), Fulton, New York,²³ with an obvious increase in interference between the stations.

On balance, first local aural service to Granby from Galaxy’s proposed site and the substantial gain area inherent in operation from that site provide far greater public interest benefits than Clear Channel’s proposal would provide. Thus, the *Order* was correct to deny Clear Channel’s proposal on this basis. Furthermore, the Allocations Branch did try to accommodate the requests of both parties while advancing the public interest. The *Order* 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 Commission’s allotment of Channel 288A in Granby to Galaxy.²⁴

III. Clear Channel’s Claims Regarding the Superiority of Its “Actual” Transmitter Site Are Irrelevant.

A substantial portion of Clear Channel’s *Petition for Reconsideration* relates to Clear Channel’s claim that its application is preferable to Galaxy’s proposal because the application

²¹ *Reply Comments of Galaxy Communications* at 5.

²² *Reply Comments of Galaxy Communications* at 5.

²³ WBBS(FM) most likely did not defend the interests of its listeners against the degraded service that would result from Clear Channel’s proposal because it is owned by a subsidiary of Clear Channel.

²⁴ *Oswego and Granby, New York*, Report and Order, MM Docket No. 00-169 (Allocations Branch, rel. Sept. 21, 2001).

proposes an “actual” and “bona fide” transmitter site whereas Galaxy’s proposal constitutes merely “a set of theoretical reference coordinates.”²⁵ This is a bogus argument; this distinction is clearly not relevant to the Allocation Branch’s decision in this proceeding. An allotment proposal, by its nature, is based on a theoretical set of site coordinates, whereas an application must propose an actual site. However, the Commission has long held that an application represents “no more than the applicant’s preference for a particular transmitter site” and that “[a]ccommodation 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.”²⁶ As discussed above, transmission from Galaxy’s proposed site will provide far more extensive public interest benefits than will result from Clear Channel’s proposal. Despite Clear Channel’s assertions to the contrary, Commission precedent clearly establishes that Clear Channel’s preference for one transmitter site over another adds little to the Commission’s consideration. In any case, since the *Order* was issued, Galaxy has taken steps to secure an “actual” transmitter site. As noted above and in the attached engineering statement, operation of Station WTKV from this site will provide substantial public interest benefits.

²⁵ *Petition for Reconsideration* at 2, 5, 8, 10, 15, 17, 18, 19.

²⁶ *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). See also *Bainbridge, Georgia*, 12 FCC Rcd 13399 (1997); *Andalusia, Alabama*, 49 FR 32201 (1984) (“an applicant’s preference for a specific transmitter site specified in an application serves only as an applicant’s private interest.”).

IV. Conclusion

For the reasons set forth above, Clear Channel has failed to demonstrate that there is a basis to reconsider the *Order*. Therefore, it is respectfully requested that the Commission deny Clear Channel's *Petition for Reconsideration* and affirm the *Order*.

Respectfully submitted,

GALAXY COMMUNICATIONS, L.P.

By: 
Sally A. Buckman
Jean F. Walker
(Admitted Illinois only)

Leventhal, Senter & Lerman PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006-1809
(202) 429-8970

Its Attorneys

December 13, 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 μ) 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

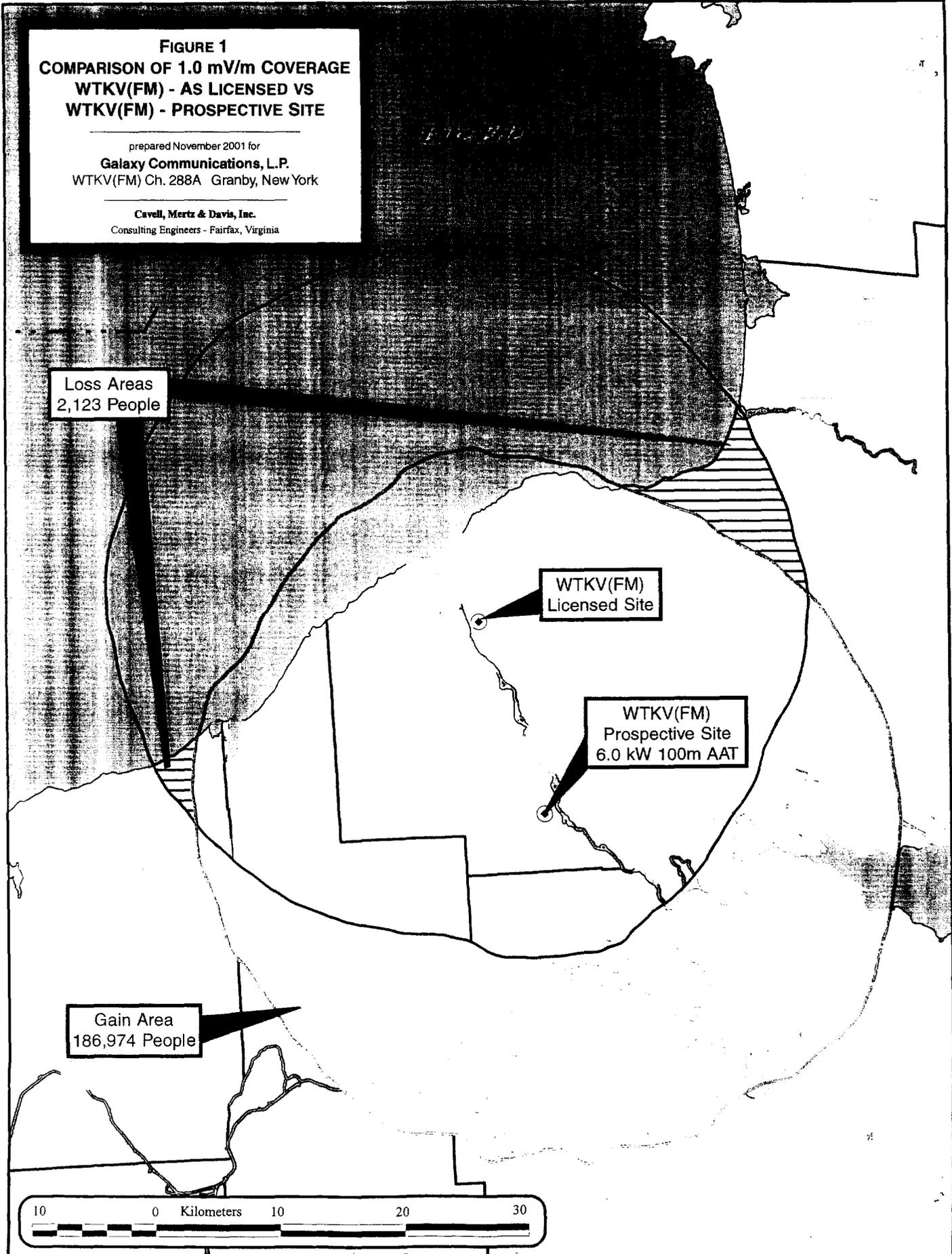
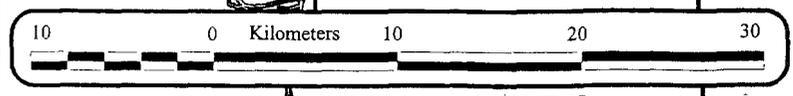
Cavell, Mertz & Davis, Inc.
Consulting Engineers - Fairfax, Virginia

Loss Areas
2,123 People

WTKV(FM)
Licensed Site

WTKV(FM)
Prospective Site
6.0 kW 100m AAT

Gain Area
186,974 People



CERTIFICATE OF SERVICE

I, Genevieve F. Edmonds, hereby certify that a true and correct copy of the foregoing Opposition To Petition For Reconsideration was sent by first-class postage prepaid mail this 13th day of December, 2001 to the following:

William F. LeBeau, Esq.
Hogan & Hartson, L.L.P.
555 13th Street, N.W.
Washington, DC 20004-1109

Marissa G. Repp, Esq.
Hogan & Hartson, L.L.P.
555 13th Street, N.W.
Washington, DC 20004-1109

Roy J. Stewart, Chief*
Mass Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 2C337
Washington, DC 20554

Robert H. Ratcliffe, Deputy Chief (Operations)*
Mass Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 2C334
Washington, DC 20554

Mary Beth Murphy, Chief*
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 2C360
Washington, DC 20554

James R. Cooke
Harris, Beach & Wilcox L.L.P.
1776 K Street, N.W.
Suite 300
Washington, DC 20006

Peter H. Doyle, Chief*
Audio Services Division
Federal Communications Commission
445 12th Street, S.W.
Room 2A320
Washington,, DC 20554

John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Federal Communications Commission
445 12th Street, S.W.
Room 3A320
Washington, DC 20554

Robert Hayne, Senior Attorney*
Allocations Branch
Policy and Rules Division
Federal Communications Commission
445 12th Street, S.W.
Room 3A320
Washington, DC 20554

R. Barthen Gorman*
Allocations Branch
Policy and Rules Division
Federal Communications Commission
445 12th Street, S.W.
Room 3A320
Washington, DC 20554


GENEVIEVE F. EDMONDS

*By Hand Delivery