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

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JAN 03 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.622(b))	MM Docket No. _____
DTV Table of Allotments)	RM No. _____
Television Broadcast Stations)	Facility ID No. 127530
(Mililani Town, Hawaii))	

TO: Magalie Roman Salas, Secretary
for direction to
Clay Pendarvis, Chief
Television Branch
Video Services Division
Mass Media Bureau

PETITION FOR RECONSIDERATION

1. Lightning Bolt Broadcasting Company, Inc. ("Lightning Bolt") hereby seeks reconsideration of the dismissal of its above-captioned Petition for Rule Making, Facility ID No. 127530. That dismissal was reflected in a letter, dated December 4, 2001, from Clay Pendarvis, Chief, Television Branch, to undersigned counsel for Lightning Bolt. As set forth below, the dismissal runs directly counter to a specific Congressional directive aimed at assuring fair disposition of long-pending applications; it also runs counter to the Commission's very longstanding policy in favor of providing first local television service to communities without such service.

2. Lightning Bolt and nine other applicants filed applications for Channel 60 in Mililani Town between September 20, 1996 and March 31, 1997. Nine of those applications were filed at the invitation of the Commission as set out in a cut-off list, Report No. A-198,

released February 12, 1997.

3. Several months later, Congress enacted the Balanced Budget Act of 1997 in which it authorized the Commission to issue broadcast licenses through an auction process. *See* 47 U.S.C. §309(j). In so doing, however, Congress recognized that imposition of the innovative auction mechanism on applicants who had applied prior to the legislative creation of the possible use of auctions would not be appropriate, particularly if such mutually exclusive applicants could be encouraged to settle. Congress felt so strongly about this that it *mandated* the Commission to "waive any provisions of its regulations" which might be necessary in order to permit settlements among applicants whose applications had been filed prior to July, 1997. *See* 47 U.S.C. §309(l)(3).

4. In so doing, Congress specified that such settlements should be filed within 180 days of the August 15, 1997 enactment of the Balanced Budget Act of 1997, *i.e.*, by February 11, 1998. *Id.* However, approximately one month prior to the February 11, 1998 deadline, the Commission changed the ground rules substantially for the Mililani Town applicants by announcing that their applications, as originally filed, could not be granted unless amended to specify an alternate channel. *Reallocation of Television Channels 60-69*, 12 FCC Rcd 22953, 22971-72 (released January 6, 1998). The deadline for such amendments was not specified by the Commission, but instead was left to a later public notice which would open a "window opportunity" during which applicants could propose alternate channels. *Id.*

5. That later public notice was issued almost two years later, on November 22, 1999. *Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations*, DA 99-2605, released

November 22, 1999. The deadline for filing proposals was July 17, 2000.^{1/} In connection with that "window opportunity", Lightning Bolt entered into an agreement with the nine other Mililani Town applicants pursuant to which all competing applicants would merge into a single applicant which would utilize Lightning Bolt's application. On July 17, 2000 -- the deadline for filing proposals to relocate out of the 60-69 band -- Lightning Bolt filed a petition for approval of the applicants' settlement agreement, along with an amendment to its application and a separate petition for rule making proposing allotment of Channel 17 in lieu of Channel 60 at Mililani Town. It is the dismissal of that petition for rule making which is the subject of the instant petition for reconsideration.

6. As noted above, Congress clearly and unequivocally required that the Commission "waive any provision of its regulations" necessary to approve a settlement among applicants on file prior to July 1, 1997 -- a universe of applicants which included all of the Mililani Town applicants. While Congress anticipated that such settlements would be filed by February 11, 1998, the Mililani Town applicants were effectively prevented *by the Commission* from meeting that deadline. As of January 6, 1998, the Mililani Town applicants had been told only that their applications as then pending could not and would not be granted, and that an amendment of a major component of their proposals -- *i.e.*, their proposed operating channel -- would be necessary at some unspecified future time. 12 FCC Rcd at 22971-72. But the applicants were not given the opportunity to amend their

^{1/} The deadline for proposals necessitated by the Channel 60-69 relocation was initially March 17, 2000. See Public Notice, DA 99-2605, released November 22, 1999. However, that deadline was extended by Public Notice, DA 00-536, released March 9, 2000. Technically, that later public notice specified an extended deadline of July 15, 2000. But July 15, 2000 fell on a Saturday, as a result of which the actual deadline was the following Monday, July 17, 2000. See Section 1.4(j) of the Commission's Rules.

applications until some two years later.

7. So Congress, in the Balanced Budget Act of 1997, defined a universe of applications to which Congress extended the protection of Section 309(l). That universe consisted of all pending mutually exclusive applications which had been filed, and cut-off, by July 1, 1997. That universe unquestionably included all of the Mililani Town applications.

8. But then, through its action in the Channel 60-69 relocation proceeding, the Commission divided the Congressionally-defined universe into two separate groups -- those applicants which had specified Channels 60-69, and those which had not. The Commission then imposed on the former group a completely distinct set of obligations subject to an initially unspecified deadline, a deadline which was not announced for almost two years and which ultimately did not occur for another seven months thereafter. While the Commission may be within its statutory authority to create sub-classifications within the Congressionally-defined universe for certain limited regulatory purposes, the Commission cannot lawfully deprive one or another of those sub-classifications of the rights guaranteed them by statute by virtue of their membership in the Congressionally-defined universe.

9. Under these circumstances, the February 11, 1998 deadline for submitting settlements must be deemed to have been extended for that very limited class of applications subject to the Channel 60-69 relocation requirement. The Commission cannot legitimately hold such applicants to the February, 1998 settlement deadline when, as of that deadline, the Commission had by its own unilateral action placed those applications in an administrative limbo, a state of suspended animation in which the applicants were both powerless to continue to prosecute their applications as originally filed and powerless to amend them in a manner to permit further prosecution. The Commission could not reasonably expect such

applicants to settle when those applicants did not and could not, as of the preliminary February 11, 1998 deadline, know even what channel they would be permitted to propose, much less when (if at all) they might expect some favorable action.

10. By placing this narrow class of applicants (and their applications) in this state of suspended animation, the Commission prevented them from availing themselves of the opportunity which Congress specifically and expressly provided for precisely such applicants. In so doing, the Commission acted contrary to Congress's direct instruction. This the Commission cannot do.

11. Of course, the Commission's action could be seen as consistent with the statutory mandate of Section 309(l) *IF* the Commission were to treat the February 11, 1998 deadline for settlements as having been stayed relative to all applications subject to the Channel 60-69 relocation requirement. That effective stay would have been in place until the close of the "window opportunity" in which to file proposals to comply with the relocation requirement, *i.e.*, July 17, 2000. In other words, as long as all applicants on file prior to July 1, 1997 -- *i.e.*, the universe of applicants to which Congress specifically afforded the settlement opportunity with the benefit of the mandated waiver of any Commission rules -- are given equivalent opportunity to avail themselves of that Congressional mandate, then the will of Congress may be said to have been met by the agency.

12. As a practical matter, then, with respect to applicants which originally proposed use of Channels 60-69, the 180-day period for submitting settlements must be deemed to have remained open until July 17, 2000, *i.e.*, the final date on which reallocation proposals could be filed to relocate out of the 60-69 band. Applicants which did file reallocation proposals by that deadline must be given the benefit of Section 309(l).

13. As noted above, Lightning Bolt (on behalf of itself and all the other Mililani Town applicants) did in fact submit a reallocation proposal within the time frame specified by the Commission. It is that proposal which the Commission's staff has dismissed for failure to comply with the rules.

14. But as discussed above, Lightning Bolt is entitled to the protection of Section 309(l)(3) of the Communications Act. And that section specifically mandates that the Commission shall "waive ANY provisions of its regulations necessary" (emphasis added) to permit settlements relating to the mutually exclusive applications filed prior to July, 1997. Thus, to the extent that Lightning Bolt's proposal may arguably have failed to comply with *any* rules, those rules were *required, by Congress*, to be waived to permit the acceptance of the proposal and the consequent grant of the Mililani Town settlement. As a result, the dismissal of Lightning Bolt's proposal was a clear violation of a clear Congressional requirement. As such, the dismissal cannot stand.

15. Lightning Bolt recognizes the difficult position in which the mandatory blanket waiver provision of Section 309(l)(3) places the Commission. In the interest of cooperating with the Commission to reach a prompt, mutually acceptable resolution of this situation, Lightning Bolt has identified Channel 48 as another channel which might be utilized in Mililani Town. The specifications for such use are set forth in a contingent alternate allotment proposal described in the Engineering Statement included as Attachment A hereto. To the extent that the Commission might view that alternate allotment proposal as preferable, Lightning Bolt would be willing to confer with the Commission's staff with the goal of securing prompt approval of one or the other of Lightning Bolt's proposals.

16. The public interest, as the Commission has consistently viewed that concept

for at least half a century, strongly supports the preservation and ultimate approval of the Lightning Bolt application. Mililani Town, the proposed community of license, presently has no other local television stations allotted to it. The provision of a first local commercial television service has always been among the highest of the Commission's allotment priorities. *See, e.g., Sixth Report and Order on Television Allocations*, 41 FCC 148 (1952). Indeed, as recently as the Commission Open Meeting on December 12, 2001, at which the Report and Order in GN Docket No. 01-14 was adopted, Commissioner Martin expressed continuing emphasis on the importance of providing first local service. Mililani Town, a community with a 2000 population of almost 30,000, plainly warrants such service.

17. Without question, Lightning Bolt belongs to the universe of applicants to whom Congress specifically and expressly extended extraordinary statutory protection in Section 309(l)(3). The dismissal of Lightning Bolt's proposed allotment is flatly inconsistent with that statutory protection. Accordingly, that dismissal must be reconsidered and reversed.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street
11th Floor
Arlington, Virginia 22209
(703) 812-0483

Counsel for Lightning Bolt
Broadcasting Company, Inc.

January 3, 2002

ATTACHMENT A

SMITH AND FISHER

EXHIBIT A

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of LIGHTNING BOLT BROADCASTING COMPANY, INC., in support of a contingent alternate proposal discussed in its Petition for Reconsideration relative to the dismissal of its original proposal to substitute DTV Channel 17 for NTSC Channel 60 in Mililani Town, Hawaii. Due to the possible use of Channel 17 spectrum for land mobile operations in Hawaii, we have subsequently determined that NTSC Channel 48 can be used with the same facility previously proposed for DTV Channel 17.

The proposed site, at 21° 23' 45", 158° 05' 58", is plotted in Exhibit B. A 26-meter communications tower exists there. For the purposes of our interference studies, we assumed that an MCI 8-bay omnidirectional antenna would be side-mounted on this tower, as shown in Exhibit C. The proposed effective antenna height is 716 meters AMSL, and the main-lobe maximum ERP is 200 kw. Proposed operating parameters are listed in Exhibit D, and Exhibit E provides the vertical radiation pattern for the proposed antenna.

It is important to note that the proposed site is located within close proximity to an FCC monitoring station. It is recognized that any application for the Channel 48 allotment that specifies the site specified herein must coordinate its proposal with the FCC in order to avoid objectionable interference to the monitoring station.

The predicted service contours are plotted in Exhibit F. As shown, the entire community of Mililani Town is contained within the proposed 80 db μ contour, as required by §73.683(a) of the Rules. Exhibit G is an interference study, which concludes that the

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EXHIBIT A

proposed facility meets the requirements of §73.610 of the Rules with respect to both NTSC and DTV facilities, except in one instance. Justification for a waiver of the Commission's spacing requirements is contained in Exhibit G.

It is thus requested that the FCC delete analog Channel 60 and substitute Channel 48 in Mililani Town, Hawaii, by changing §73.606(b) of its Table of [NTSC] Allotments, as follows:

<u>Community</u>	<u>Present Allotments</u>	<u>Proposed Allotments</u>
Mililani Town, Hawaii	<u>60z</u>	48-

I declare under penalty of perjury that the foregoing statements and the attached exhibits, which were prepared by me or under my immediate supervision, are true and correct to the best of my knowledge and belief.



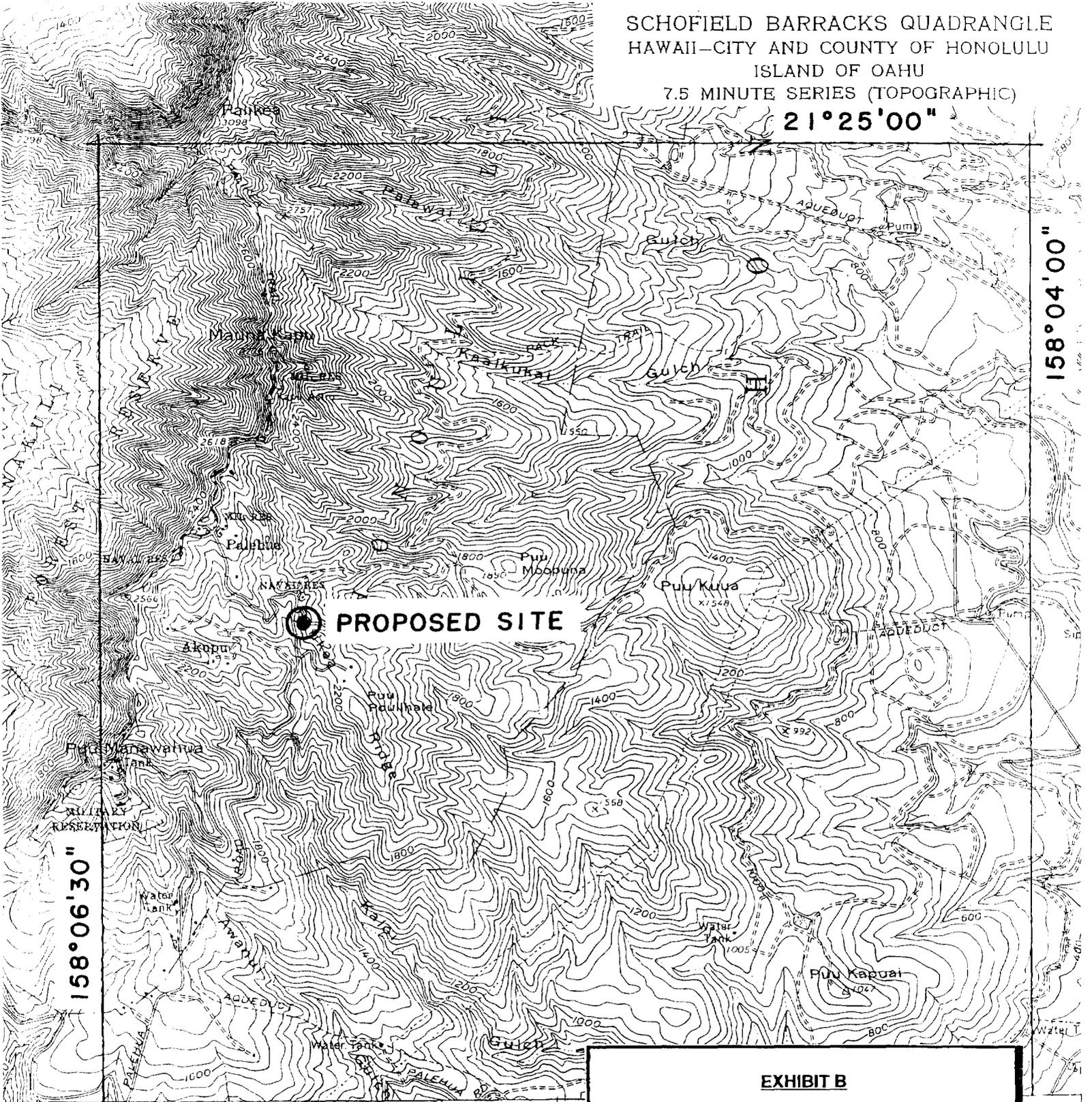
KEVIN T. FISHER

January 3, 2002

SCHOFIELD BARRACKS QUADRANGLE
HAWAII—CITY AND COUNTY OF HONOLULU
ISLAND OF OAHU
7.5 MINUTE SERIES (TOPOGRAPHIC)

21°25'00"

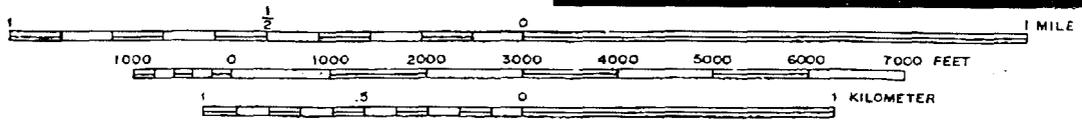
158°04'00"



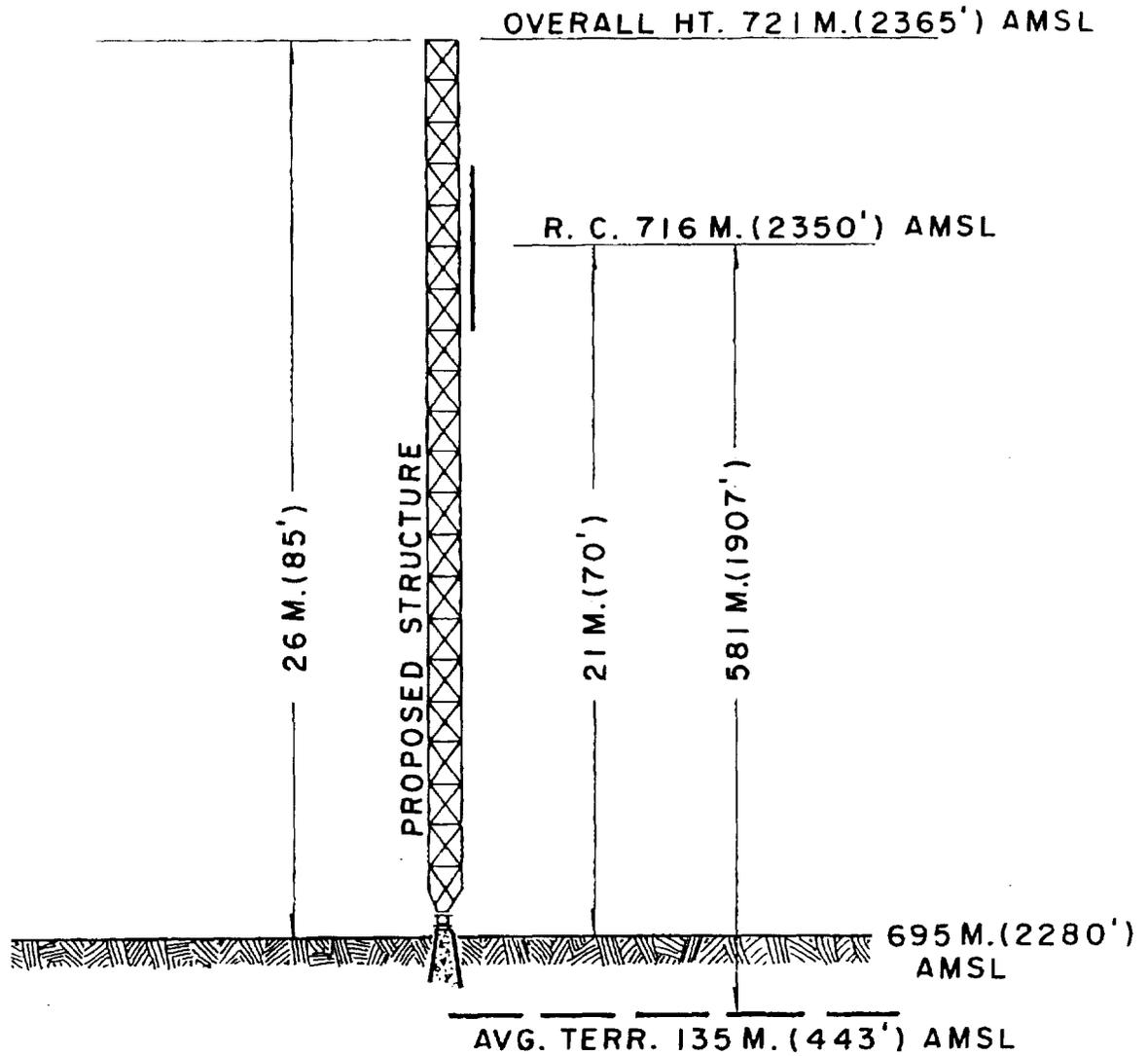
158°06'30"

21°22'30"

EXHIBIT B
LOCATION OF PROPOSED SITE
PROPOSED TELEVISION STATION
CHANNEL 48 - MILILANI TOWN, HAWAII
[AMENDMENT TO BPRM-20000717AFF]
SMITH AND FISHER



NOT TO SCALE



SITE COORDINATES:

21° 23' 45"
158° 05' 58"

EXHIBIT C

ELEVATION OF ANTENNA STRUCTURE

PROPOSED TELEVISION STATION
CHANNEL 48 - MILILANI TOWN, HAWAII
[AMENDMENT TO BPRM-20000717AFF]

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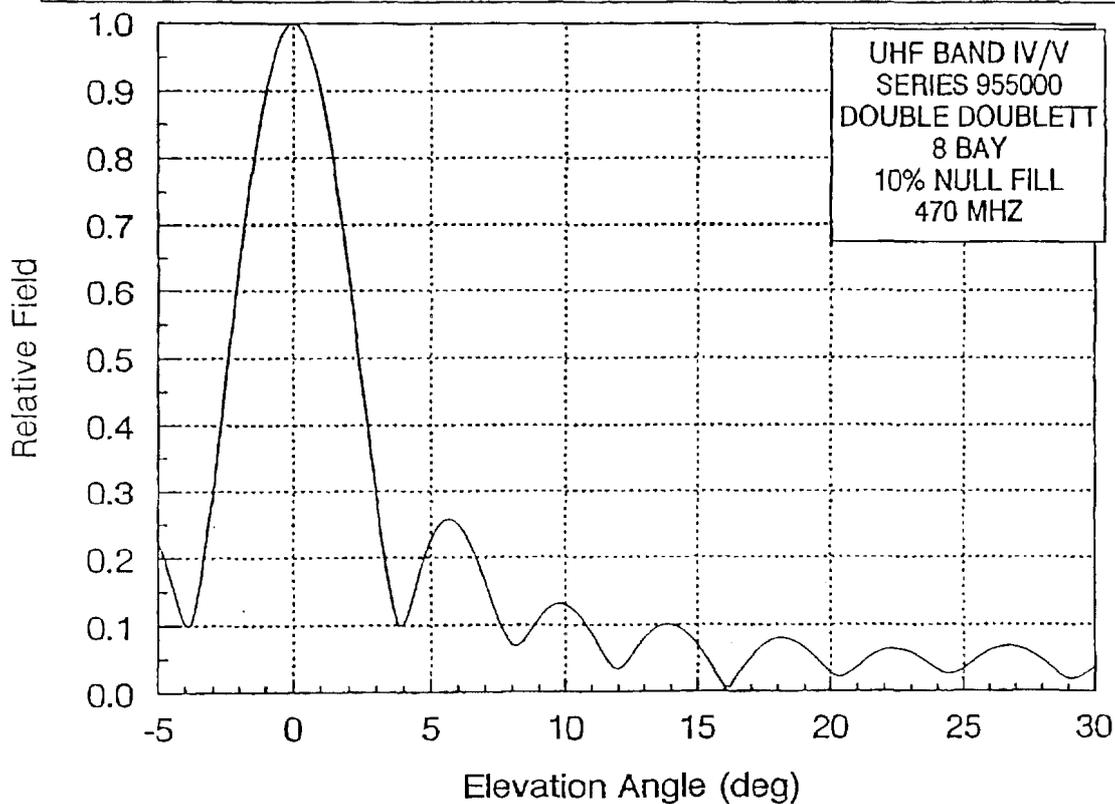
SMITH AND FISHER

EXHIBIT D

PROPOSED OPERATING PARAMETERS

PROPOSED DTV ALLOTMENT
CHANNEL 48 - MILILANI TOWN, HAWAII

Channel Number:	48
Zone:	2
Site Coordinates:	21-23-45N 158-05-58W
Antenna Structure Registration Number:	Not required
Tower Site Elevation (AMSL):	695 meters
Overall Tower Height Above Ground:	26 meters
Overall Tower Height Above (AMSL):	721 meters
Effective Antenna Height Above Ground:	21 meters
Effective Antenna Height (AMSL):	716 meters
Average Terrain Elevation (2-10 miles):	135 meters
Effective Antenna Height Above Average Terrain:	581 meters
Antenna Make and Model:	MCI 955118
Orientation:	Omnidirectional
Electrical Beam Tilt:	None
Polarization:	Horizontal
Effective Radiated Power (main-lobe, maximum):	200 kw

-Micro Communications, Inc.Greiner Field * P.O. Box 4365 * Manchester, N.H. * USA
Tel. (603) 624-4351 * Fax (603) 624-4822**THEORETICAL ELEVATION PATTERN
IN RELATIVE FIELD****EXHIBIT E****ANTENNA ELEVATION PATTERN****PROPOSED TELEVISION STATION
CHANNEL 48 - MILILANI TOWN, HAWAII
[AMENDMENT TO BPRM-20000717AFF]**

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POPULATION (1990 CENSUS)
CITY-GRADE (80 DBU) : 876,151
GRADE A (74 DBU) : 876,151
GRADE B (64 DBU) : 876,151

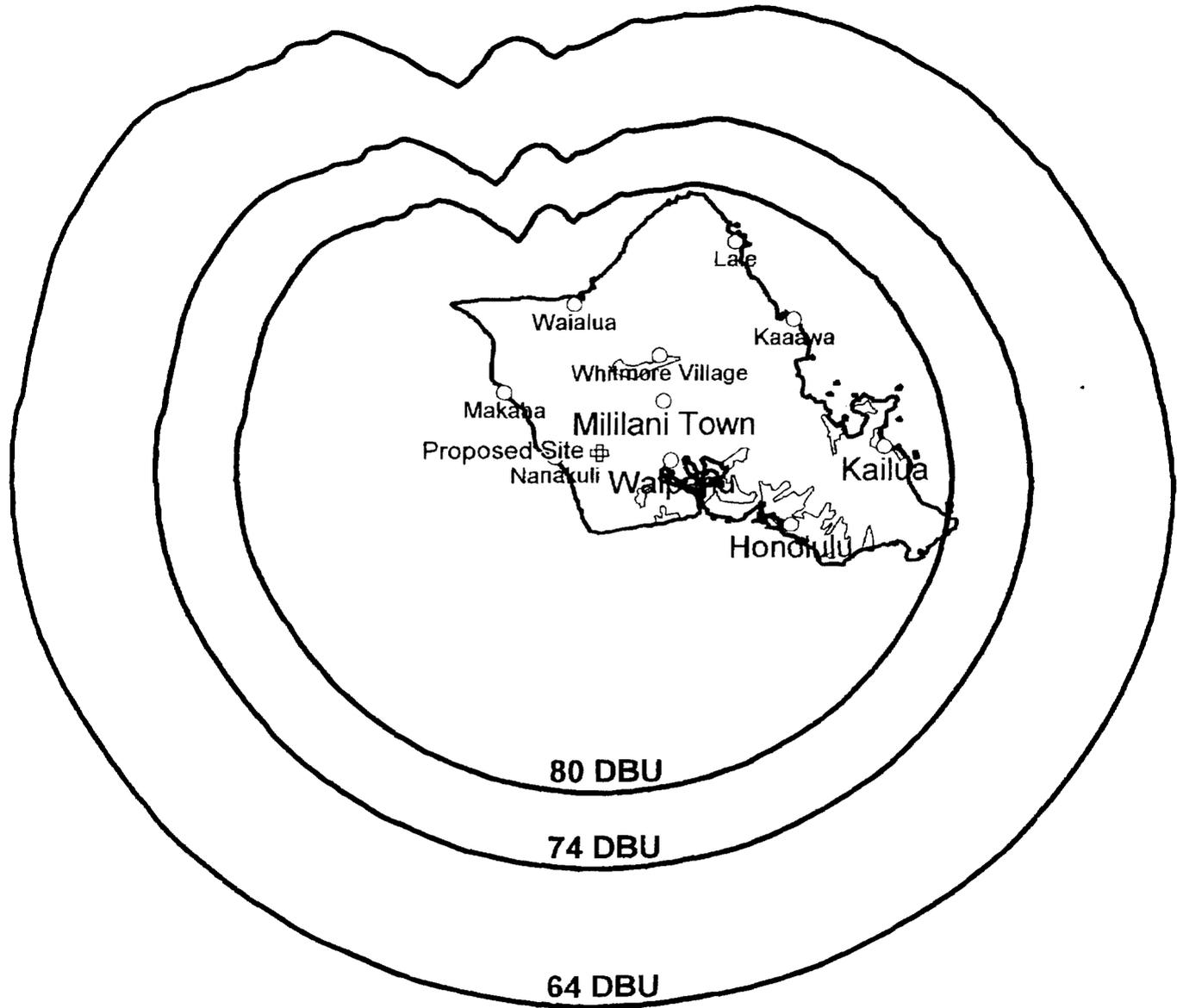


EXHIBIT F

PREDICTED SERVICE CONTOURS
PROPOSED TELEVISION STATION
CHANNEL 48 - MILILANI TOWN, HAWAII
[AMENDMENT TO BPRM-20000717AFF]

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Scale 1:850,000



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EXHIBIT G-1

ALLOCATION AND INTERFERENCE STUDY

PROPOSED ALLOTMENT
CHANNEL 48 - MILILANI TOWN, HAWAII

An allocation study, based on the proposed use of NTSC Channel 48 at the site specified herein and the FCC's spacing requirements of Section 73.610 of the Rules, was conducted. The results, which are included as Exhibit G-2, indicate that the proposed facility meets the Commission's separation requirements to pertinent co-channel and adjacent-channel stations, except in one instance. KWBN operates on Channel 44 in Honolulu, Hawaii. The site proposed herein meets the spacing requirements to licensed KWBN, but not to an outstanding construction permit for KWBN to relocate the station. In BPET-20010823ABJ, KWBN is authorized to construct its transmitting facility at the site specified herein. Clearly, the instant proposal does not meet the FCC's 32-kilometer required spacing in regard to the KWBN Construction Permit, and a waiver of Section 73.610 of the Commission's Rules is requested.

In support of this waiver request, a study was undertaken to determine the extent of possible interference from the proposed Mililani Town facility. The instant proposal specifies operation on Channel 48, fourth-adjacent to KWBN. The nature of interference between two such stations is the generation of intermodulation products in areas where there are very high signal levels present for both stations. These products can impact the reception of local signals operating on channels on which those products land. The general algorithm used in these instances is $X=2A-B$, where X is the interference product (in MHz), A is the visual or aural carrier frequency (in MHz) of one intermodulation-producing station and B is the visual or aural carrier of

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EXHIBIT G-1

the other station under study. All combinations of the two stations' carriers are studied and the results examined with regard to the channels on which the interference products land.

In the case of the instant proposal, intermodulation Interference products are predicted to land on the following frequencies: 622.75, 627.25, 631.75, 636.25, 694.75, 699.25, 703.75, and 708.25 MHz. These frequencies fall within the spectrum of Channels 39, 40, 41, 51, 52, and 53. A review of the channel allotments in the Honolulu area reveal that there are no analog full-power or Class A LPTV stations operating on any of these potentially affected channels. While there are digital television allotments on some of the channels, there is no engineering evidence that reception of digital television signals is impacted by intermodulation interference products.

It is also important to note that there are no NTSC or DTV channels available for the Mililani Town allotment that meet all of the FCC's separation requirements. In addition, the short-spacing situation is temporary in nature. Once the transition to digital television is complete and all stations are operating on DTV channels, this waiver will no longer be required.

Therefore, a waiver of Section 73.610 of the Commission's Rules with respect to the short-spacing to KWBN's Construction Permit is respectfully requested and believed to be justified.

EXHIBIT G-2

Smith and Fisher

PROPOSED TELEVISION STATION
CH. 48 - MILILANI HAWAII

REFERENCE

21 23 45 N
158 05 58 W

ZONE = 2

DISPLAY DATES
DATA 12-28-01
SEARCH 01-02-02

..... Channel 48-, 674 MHz

Call	Channel	Location	Dist	Azi	FCC	Margin
KWBN	CP 44Z	Honolulu	HI 0.00	0.0	> 031.40	-31.40
960723	CP 50Z	Kailua	HI 36.29	101.5	> 031.40	4.89
KWBN	LI 44Z	Honolulu	HI 36.29	101.5	> 031.40	4.89
KMGT	CP 56Z	Waimanalo	HI 36.29	101.5	> 031.40	4.89
AL9606	AL 50Z	Kailua	HI 37.10	89.2	> 031.40	5.70
AL818	AL 33Z	Wailuku	HI 174.71	108.5	> 119.90	54.81