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May 17, 2004

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MAY 17 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

RE: Opposition to Petition for Rulemaking - MB Docket 04-81
Patagonia, Arizona - Channel 251A

Dear Ms. Dortch:

Desert West Air Ranchers Corporation, by and through its attorneys, hereby submits this Opposition to the Petition for Rulemaking filed by Calvary Chapel of Tucson in the above-referenced proceeding.

Should there be any questions regarding this Petition, please contact undersigned counsel.

Sincerely,



Susan A. Marshall
Lee G. Petro

Counsel for Desert West Air
Ranchers Corporation

Enclosures

cc: As shown in Certificate of Service

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Before the
Federal Communications Commission
Washington, D.C. 20554

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MAY 17 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of: }
 }
Amendment of Section 73.202(b), }
Table of Allotments, }
FM Broadcast Stations }
 }
(Patagonia, Arizona) }

MB Docket No.: 04-81
RM-10876

TO: CHIEF, MEDIA BUREAU

OPPOSITION TO
PETITION FOR RULEMAKING

Desert West Air Ranchers Corporation ("Desert West"), by and through its attorneys, hereby submits this Opposition to the reservation of Channel 251A, Patagonia, Arizona, for noncommercial use. Calvary Chapel of Tucson submitted a Petition for Rulemaking on November 20, 2003 (the "Petition"), in response to the *Public Notice*¹ establishing a filing window for reserving existing, vacant commercial FM allotments. On March 26, 2004, the FCC released a Notice of Proposed Rulemaking proposing the reservation of the allotment for NCE use.²

As discussed in the attached Engineering Study of Hatfield and Dawson Consulting Engineers, the Petition must be denied. Specifically, the Engineering Study provided by Calvary Chapel in support of the Petition does not meet the threshold requirement that the proposed reservation would provide a first or second NCE service to more than 10% of the proposed service area. Calvary Chapel failed

¹ *Media Bureau Opens Window to Permit Noncommercial Educational Reservation Showings for Certain Vacant FM Allotments*, Public Notice, DA 03-2990 (rel. Sept. 30, 2003) (the "Public Notice").

² *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Various)*, 19 FCC Rcd 5333 (2004).

to consider the provision of NCE service by KUAZ(AM), Tucson, Arizona, a licensed noncommercial AM station. Moreover, Calvary Chapel did not consider the noncommercial FM service provided by KUAT-FM, Tucson, Arizona, and KNOG(FM), Nogales, Arizona. The failure to consider these three NCE services directly undermines the showing prepared by Calvary Chapel, and must result in the dismissal of the Petition.

Therefore, Desert West Air Rancher Corporation respectfully requests that the Commission dismiss or deny the Petition for Rulemaking seeking to reserve Channel 251A at Patagonia, Arizona.

Respectfully submitted,

DESERT WEST AIR RANCHERS CORPORATION

By 

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May 17, 2004

EXHIBIT A
ENGINEERING STATEMENT

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Engineering Statement

This Engineering Statement has been prepared on behalf of Desert West Air Ranchers Corp., in support of comments filed in MB Docket No. 04-81. In this proceeding, Calvary Chapel of Tucson ("Calvary" or "Petitioner") has requested that the Commission reserve Channel 251A at Patagonia, Arizona, for non-commercial use.

In support of their petition, Calvary has included an engineering showing which purports to demonstrate that the reservation proposal would provide a first and/or second NCE radio service to at least ten percent of the population within the 60 dBu contour of the proposed station. The petitioner has erred by excluding a certain NCE radio station from their service analysis. A full analysis shows that the reservation of Channel 251A at Patagonia would provide a first or second NCE radio service to only 6 percent of the population to be served by that station. Thus, this allotment does not qualify for reservation, and Calvary's reservation request should be denied.

Background

In the *Reexamination of the Comparative Standards for Noncommercial Educational Applicants ("NCE Report and Order")* 15 FCC Rcd 7386 (2000), the Commission established revised criteria by which a rulemaking proponent may reserve an FM allotment for NCE use. Under the expanded criteria, a proponent must demonstrate a) that it is technically precluded from using a reserved channel and b) that the proposal would provide a first and/or second NCE radio service to at least 10 percent of the population within the 60 dBu contour of the proposed station. Originally, the Commission limited this expanded reservation criteria to future allotment proceedings, but subsequently extended the expanded criteria to existing vacant FM allotments for which a Notice of Proposed Rulemaking had been released prior to August 7, 2000. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants ("NCE Second Report and Order")* 18 FCC Rcd 6691 (2003).

In establishing these new reservation criteria, the Commission drew no distinction between existing NCE station operating on reserved non-commercial channels, reserved commercial channels, non-reserved commercial channels, or even AM frequencies.

[A]n NCE entity can show that the need for an NCE station is greater than the need for a commercial station. . .by showing that. . .

(B) the NCE proponent would provide a first or second radio or television NCE service to 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour (radio) or Grade B contour (TV). New NCE service to fewer than 2,000 people would be considered insignificant for purposes of this determination.

NCE Report and Order at 114.

The *NCE Report and Order* goes on in Paragraph 115 to note that "No AM stations are reserved for NCE use." It should be noted, however, that this statement is made in the context of a determination that the new NCE reservation procedure will not be applied to the reservation of AM channels for NCE use. Therefore, this statement does not contradict the fact that there are numerous AM stations which are operated as NCE stations, and which should therefore be considered in any evaluation of first and second NCE service.

Nor does Paragraph 114 limit the first and second NCE service evaluation to "incoming" NCE FM 60 dBu service contours. The only reference to the 60 dBu service contour is for the FM allocation which is under consideration for reservation. Evaluation is to be made with respect to stations which already provide "NCE service" to the area in question. Therefore, it is appropriate to include in this evaluation any AM stations in the area which are operated as NCE stations, and which provide NCE service to the proposed allocation's 60 dBu service contour.

The resulting rule in Section 73.202 reads in pertinent part:

An entity that would be eligible to operate a noncommercial educational broadcast station can, in conjunction with an initial petition for rulemaking filed pursuant to Part 1, Subpart C of the Commission's rules, request that a nonreserved FM channel . . . be allotted as reserved only for noncommercial educational broadcasting by demonstrating . . . the applicant is technically precluded from using the reserved band by existing stations or previously filed applications and the proposed station would provide a first or second noncommercial educational radio service to 2,000 or more people who constitute 10% of the population within the proposed allocation's 60 dBu service contour.

Again, no distinction is drawn which would imply that any full-service NCE station should be excluded from the analysis, including those operating on reserved commercial channels, on non-reserved commercial channels, or on AM frequencies.

Summary of Petitioner's Evaluation

Petitioner concludes from their analysis that the reservation of Channel 251A at Patagonia will provide a first or second NCE service to 100% of the 37,730 persons within the 60 dBu contour of the hypothetical facility.

Petitioner has greatly exaggerated the extent of first and/or second NCE service which would be provided by reservation of Channel 251A at Patagonia. A close review of the engineering showings included in the Petitioners' filing reveals that they have ignored the presence of NCE station KUAZ-AM.

NCE Status of KUAZ-AM

AM station KUAZ operates on 1550 kHz at Tucson, Arizona. The station is owned by the Arizona Board of Regents, which operates it as a non-commercial AM station in conjunction with KUAZ-FM Tucson, KUAT-FM Tucson, and KUAT-TV Tucson.

Hatfield & Dawson Consulting Engineers

First and Second NCE Service Evaluation

A full and complete first and second NCE service evaluation has been performed for Channel 251A at Patagonia, including consideration of the NCE service provided by KUAZ-AM. The following stations have been found to provide NCE service to the 60 dBu service area of Channel 251A at Patagonia:

KUAZ-AM	1550 kHz	Tucson
KUAT-FM	213C	Tucson
KNOG-FM	216A	Nogales

The attached map exhibit depicts the service contours of these NCE stations. The Patagonia Channel 251A allotment would provide service to 37,730 persons within the 60 dBu contour. Of these, only 2,271 persons would receive their first or second NCE radio service. This is just 6% of the total service population of the Patagonia Channel 251A allotment. Therefore, on the basis of the first and second NCE service test, the Channel 251A allotment at Patagonia is not eligible for NCE reservation.

Discussion re Petitioner's Preclusion Study

Even were the Patagonia Channel 251A allotment to be eligible for NCE reservation on the basis of the first and/or second NCE service evaluation (which it is not), the Petitioner has failed to demonstrate by its preclusion study that there is no reserved-band channel available for use at Patagonia.

Petitioner bases its conclusion that no reserved-band channel is available on the simple fact that each of the studied transmitter sites is "inside the KUAT-TV Channel 6 F(50,50), 47 dBuV/m Grade B contour and would cause interference to the TV Channel 6 station. Therefore, it has been demonstrated that all 20 NCE-FM channels would be precluded at this site."

That blanket statement is wholly insufficient to establish that no reserved-band channel is available for use at Patagonia. The mere presence of an unspecified area of interference caused to TV Channel 6 does not render a reserved-band channel unusable. In order to reach this conclusion, it would be necessary to demonstrate that the resulting interference area caused to KUAT-TV would encompass in excess of 3,000 persons, as per Section 73.525(c).

If the Petitioner's blithe rejection of all reserved-band channels due to TV Channel 6 interference is disregarded, then their preclusion analysis indicates that Channels 203A, 218A, and 219A should be available for use at Patagonia with minimum Class A facilities at the Channel 251A allotment site. Of these, Channel 203A may well be unavailable due to interference to TV Channel 6, since the relevant 53.5 dBu interfering contour from the minimum Class A facility encompasses a fairly wide area.

However, the relevant 79.5 dBu interfering contour for a Channel 218A minimum facility would encompass just 1,028 persons, and the relevant 83 dBu interfering contour for a Channel 219A minimum facility would encompass just 964 persons. These figures would satisfy Section 73.525(c)

as permissible levels of interference to KUAT-TV Channel 6. Petitioner has not indicated any other reasons why Channels 218A and 219A are unavailable for use at Patagonia with minimum Class A facilities.

Conclusion

The Petitioner, in its request to have Channel 251A at Patagonia reserved for NCE use, has submitted a flawed evaluation of the first and second NCE service which that reservation would provide. A correct and full evaluation, taking into consideration the presence of non-commercial station KUAZ-AM, reveals that the reservation of Channel 251A at Patagonia would provide a first and/or second NCE radio service to only 6% of the total service population of the allotment.

Furthermore, the Petitioner has failed to definitively demonstrate that no reserved-band channel would be available for use at Patagonia. Their blanket statement that the presence of KUAT-TV Channel 6 prevents the use of any reserved-band channel is flawed in that it ignores the fact that a reserved-band channel can be used within the Grade B contour of a TV Channel 6 station if the resulting interference area contains less than 3,000 persons.

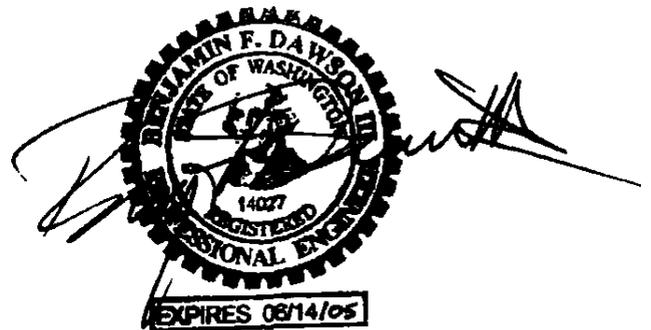
Therefore, the NCE reservation request in MB Docket 04-81 by Calvary Chapel of Tucson must be denied.

I hereby declare that the facts set out in the foregoing Engineering Statement, except those of which official notice may be taken, are true and correct.

April 17, 2003

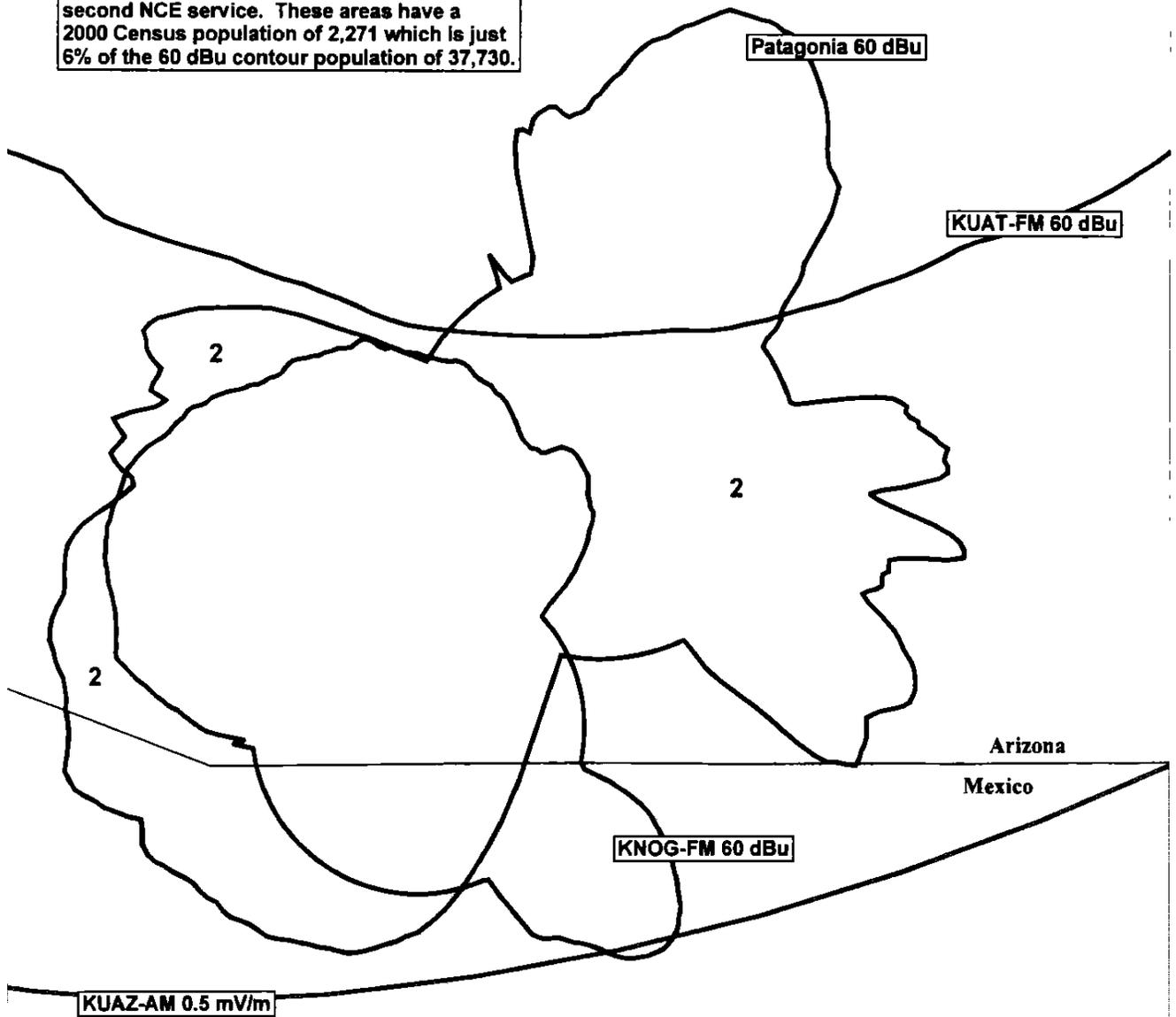


Erik C. Swanson



Benjamin F. Dawson III, P.E.

Numerals indicate areas where the reservation of Channel 251A Patagonia would provide the second NCE service. These areas have a 2000 Census population of 2,271 which is just 6% of the 60 dBu contour population of 37,730.



Patagonia 251A 1st/2nd NCE Study

0 7 14 21

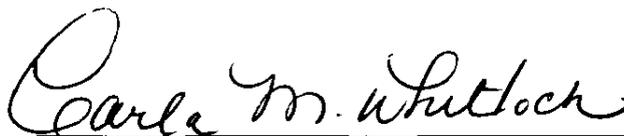
Kilometers

Hatfield & Dawson 5/2004

CERTIFICATE OF SERVICE

I, Carla M. Whitlock, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a copy of the foregoing "Opposition" was sent this 17th day of May, 2004, by first-class United States Mail, postage prepaid to:

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