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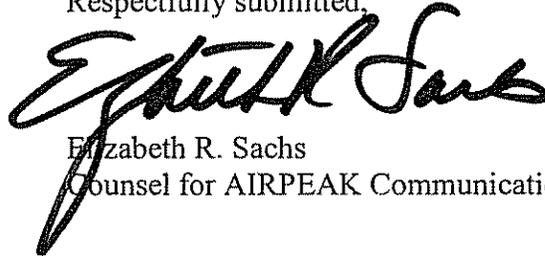
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
AIRPEAK Communications, LLC ) WT Docket No. 02-55  
800 MHz ESMR Election )

To: Chief, Wireless Telecommunications Bureau

**REQUEST FOR WAIVER**

Respectfully submitted,



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## SUMMARY

AIRPEAK Communications, LLC operates a cellular architecture, Harmony network in several smaller markets including Reno, NV; Pasco/Kennewick, WA; and Albuquerque, NM. The Company is one of fewer than five non-Nextel entities operating cellular architecture systems in the 800 MHz band. It recently filed its 800 MHz ESMR Election with the Transition Administrator in which it elected to relocate its EA authorizations and identified site-based licenses to the ESMR portion of the 800 MHz band. It included in that filing certain stations for which the waiver relief described below is requested.

Specifically, AIRPEAK asks that the FCC include as eligible for relocation to the ESMR band, site-specific stations that meet the following criteria and that otherwise satisfy applicable FCC requirements:

- 1) Stations AIRPEAK had integrated into its ESMR network as of November 22, 2004 pursuant to FCC-approved lease authority, but for which FCC assignment consent had not been granted as of that date;
- 2) Stations that were being used “as part of a cellular-architecture system” and were capable of carrying traffic between units throughout the network, but that did not have another site close enough to create overlapping 40 dBu/V coverage contours and, thus, were not “capable of ‘hand-off’”;
- 3) Stations that were part of a larger transaction of which certain facilities had been deployed in AIRPEAK’s ESMR network as of November 22, 2004 but which themselves could not be deployed by the deadline and subsequently have been placed in operation in the ESMR network or are scheduled for ESMR deployment before November 22, 2005.

Additionally, AIRPEAK requests that site-based stations whose 22 dBu/V contours provide coverage to more than fifty percent (50%) of the EA population be exchanged for EA-wide, incumbent-free channels in the ESMR Band.



requested herein would serve the public interest.<sup>3</sup> Additionally, application of those rules would be inequitable, unduly burdensome and contrary to the public interest in light of AIRPEAK's unique factual circumstances. The Company clearly has no reasonable alternative to waiver relief.<sup>4</sup> Thus, AIRPEAK requests that the Commission grant the relief described *infra*.

## I. INTRODUCTION

AIRPEAK operates a cellular architecture, Harmony network in several smaller markets including Reno, NV; Pasco/Kennewick, WA; and Albuquerque, NM. The Harmony system uses an iDEN-derivative technology and provides integrated two-way dispatch, cellular telephone and alphanumeric messaging. The Company purchased its initial Harmony Mobile Switching Office, Enhanced Base Transceiver Systems ("EBTS") to be used at the cell sites, and subscriber units in 2000 and since then has expanded its operation to markets in several states. The Company is one of fewer than five non-Nextel entities operating cellular architecture systems in the 800 MHz band.<sup>5</sup> It recently filed its 800 MHz ESMR Election with the Transition Administrator ("TA") in which it elected to relocate its EA authorizations and identified site-based licenses to the ESMR portion of the 800 MHz band.<sup>6</sup> It included in that filing certain stations for which the waiver relief described below is requested.

Specifically, AIRPEAK asks that the FCC include as eligible for relocation to the ESMR band, site-specific stations that meet the following criteria and that otherwise satisfy applicable FCC requirements:

- 1) Stations AIRPEAK had integrated into its ESMR network as of November 22, 2004 pursuant to FCC-approved lease authority, but for which FCC assignment consent had not been granted as of that date;<sup>7</sup>

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<sup>3</sup> See 47 C.F.R. § 1.925(b)(3)(i).

<sup>4</sup> See 47 C.F.R. § 1.925(b)(3)(ii).

<sup>5</sup> See Regional Prioritization Plan of the 800 MHz Transition Administrator filed on January 31, 2005 at pp. 10-13.

<sup>6</sup> 800 MHz ESMR Election filed by AIRPEAK on January 24, 2005 ("ESMR Election").

<sup>7</sup> Supplemental Order at n. 192.

- 2) Stations that were being used “as part of a cellular-architecture system”<sup>8</sup> and were capable of carrying traffic between units throughout the network, but that did not have another site close enough to create overlapping 40 dBu/V coverage contours and, thus, were not “capable of ‘hand-off’”;<sup>9</sup>
- 3) Stations that were part of a larger transaction of which certain facilities had been deployed in AIRPEAK’s ESMR network as of November 22, 2004 but which themselves could not be deployed by the deadline and subsequently have been placed in operation in the ESMR network or are scheduled for ESMR deployment before November 22, 2005.

Additionally, AIRPEAK requests that site-based stations whose 22 dBu/V contours provide coverage to more than fifty percent (50%) of the EA population be exchanged for EA-wide, incumbent-free channels in the ESMR Band.

## **II. BACKGROUND**

The history of the 800 MHz rebanding proceeding is well-documented and need not be repeated here. From the outset, the submission by Nextel Communications, Inc. (“Nextel”) of its November 2001 “White Paper” which recommended displacing all non-public safety licensees from the 800 MHz band at their own expense, and through adoption of the Supplemental Order more than three years later, the Commission has endeavored to balance the competing interests of stakeholders and resolve the complex issues raised in this proceeding. The fundamental question was how to eliminate interference to public safety systems in the 800 MHz band caused by Commercial Mobile Radio Service (“CMRS”) systems utilizing a cellularized architecture, primarily, but not exclusively, the iDEN network operated by Nextel. While a number of approaches were considered, it had been assumed for some time prior to adoption of the 800 MHz Order that the FCC intended to bifurcate the band to separate these generally incompatible

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<sup>8</sup> 800 MHz Order at ¶ 163.

<sup>9</sup> Supplemental Order at ¶ 78 and n. 193.

technologies and allow Nextel to move its operations to what now is designated as the ESMR Band.<sup>10</sup>

What was uncertain was how the FCC would accommodate the very few entities other than Nextel that were operating cellular architecture networks in the 800 MHz band. Nextel argued against allowing companies other than itself and, more recently, Southern LINC to relocate to the cellularized side of whatever line of demarcation was drawn. It urged that licensees such as the Company remain in the non-cellularized portion of the band and seek waiver relief to the extent they wished to continue operating a cellularized system. Since AIRPEAK already had experienced interference problems with public safety entities, it was not likely that it would have been granted a waiver to continue operating in the non-ESMR portion of the band.

Thus, for the past several years the Company has operated in regulatory limbo – its operations unwelcome by both Nextel (in the ESMR Band) and public safety (in the non-ESMR band), the two major 800 MHz stakeholders. Until adoption of the 800 MHz Order, AIRPEAK could not be certain that its network would remain licensable in the band at all. In light of the extraordinary uncertainty about its future and the possibility that its entire investment might be lost, the Company slowed its pace of deployment, including putting all but the most minor acquisitions on hold and not pursuing transactions that had been included in its expansion plan.

The 800 MHz Order released in August 2004 at last established rules regarding the relocation of non-Nextel ESMR operations in the 800 MHz band. That Order specifically identified AIRPEAK as one of the “CMRS licensees other than Nextel using iDEN or iDEN-like

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<sup>10</sup> The Commission’s decision in this proceeding involved a number of matters and frequency bands that are not at issue herein.

ESMR technology in the 800 MHz band.”<sup>11</sup> It confirmed that such entities would have three relocation options, including the option of relocating to the ESMR Band where they would share spectrum with Nextel.<sup>12</sup> The 800 MHz Order also recognized that Nextel and other ESMR operators used a combination of EA geographic and site-specific licenses in their networks. The Commission concluded that the following rules would apply to non-Nextel/Southern LINC ESMR site-based licenses:

...we will give these [ESMR] licensees the option to relocate their site-based licenses along with their EA-licenses to the ESMR portion of the band. In order to transfer a site-based channel into the ESMR segment, a licensee must: (a) currently hold an EA license in the relevant market; and (b) be using the site-based license as part of a cellular-architecture system in that market as of the date of publication of this *Report and Order* in the Federal Register. Further, to create a more uniform licensing scheme, the transferred site-based license will be converted to an EA-wide, incumbent-free license in the ESMR portion of the band.<sup>13</sup>

AIRPEAK used its best efforts to accomplish within the three and one-half months between release and publication of the 800 MHz Order the acquisitions and deployments it deemed critical for ongoing network viability, actions that had been on hold for three years while the FCC considered whether the Company would be permitted to continue operating its Harmony network in the 800 MHz band. It accomplished much during that period as documented in its ESMR Election. However, it also encountered delays in the Commission’s licensing processes and in deploying certain stations it acquired to enhance its Harmony network.

On December 22, 2004, the FCC released the Supplemental Order in which it made certain changes in the ESMR election process *vis-à-vis* site-based stations, changes it described as a slight modification.<sup>14</sup> AIRPEAK respectfully disagrees. It may be that the Commission did

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<sup>11</sup> 800 MHz Order at ¶ 159.

<sup>12</sup> *Id.* at ¶ 162.

<sup>13</sup> *Id.* at ¶ 163.

<sup>14</sup> Supplemental Order at ¶ 78.

not have a full appreciation of the implications of certain of the revisions it adopted, but the impact on AIRPEAK would be profound.

The Supplemental Order included three distinct changes. First, although the FCC stated that it was reiterating the test for determining whether a site-based license could be relocated to the ESMR Band, it actually added a third condition that had not been part of the earlier test. In addition to requiring that the licensee (a) currently hold an EA license in the relevant market; and (b) be using the site-based license as part of a cellular-architecture system in the market as of the date of publication of the 800 MHz Order in the Federal Register, the Supplemental Order added, without explanation, that the station "... (c) must have been an operational part of the licensee's ESMR system, within the relevant EA."<sup>15</sup>

Second, the FCC went on to define the third condition as follows:

The site-based cell must have been an integral part of the EA licensee's ESMR system as of the date the *800 MHz R&O* was published in the Federal Register. A cell that is an integral part of a ESMR system is a cell that has a 40 dBu/V coverage contour overlapping the 40 dBu/V coverage contour of another cell integral to the ESMR system, and must be capable of "hand-off" of calls to and from the cell its 40 dBu/V coverage contour overlaps.<sup>16</sup>

Third, in a fundamental change from the 800 MHz Order, the FCC determined that site-based licenses would not be exchanged for EA-wide, incumbent-free authorizations and instead substituted the following provision:

Such a site-based cell may be moved into the ESMR spectrum, but is limited to the 40 dBu/V coverage contour it provided as of the date the *800 MHz R&O* was published in the Federal Register.<sup>17</sup>

Notably, these changes were adopted one month after the November 22, 2004 deadline for satisfying the ESMR site-based conversion requirements established in the 800 MHz Order.<sup>18</sup>

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<sup>15</sup> Supplemental Order at ¶ 78.

<sup>16</sup> *Id.* It is unclear whether the terms "operational" and "integral" in these two provisions are considered interchangeable in this context but AIRPEAK assumes that to be the FCC's intention.

<sup>17</sup> *Id.*

**III. AIRPEAK'S REQUEST FOR WAIVER RELIEF IS CONSISTENT WITH THE FCC'S REQUIREMENTS, IS SUPPORTED BY THE RECORD AND WOULD SERVE THE PUBLIC INTEREST.**

AIRPEAK recognizes that this proceeding has been one of the most complex and difficult faced by the FCC. It appreciates that the FCC gave careful consideration to all alternatives before concluding that a wholesale band reconfiguration was required to address the interference problem and did so on the basis that all parties relocated would be assured comparable spectrum.<sup>19</sup> Implicit in this condition is the Commission's determination that no licensee's post-relocation position be inferior to its pre-relocation status.

The fate of non-Nextel ESMR operators has been particularly contentious. Although Nextel early on in the proceeding acknowledged that AIRPEAK (formerly Nevada Wireless) should be relocated to the ESMR band with the costs paid by Nextel, more recently Nextel has steadfastly opposed the right of ESMR operations like AIRPEAK to relocate to the ESMR band.<sup>20</sup> Given Nextel's dominant role in shaping the outcome of this proceeding, its opposition could have proved fatal to the Company's ongoing operation anywhere in the 800 MHz band, but for the FCC's commitment to crafting an equitable solution for all incumbents.

It is not possible to restore the business opportunities lost during this three-year long upheaval of AIRPEAK's business plan. In fact, the Company had to curtail the scope of its intended acquisitions since telescoping them into the three and one-half months permitted under the 800 MHz Order was not always possible. However, the Commission has ample authority to grant individualized waiver relief to avoid an inequitable result that is contrary to the FCC's

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<sup>18</sup> The Supplemental Order does not explain the genesis of any of these changes or why the FCC believes they are appropriate. Nonetheless, the modifications presumably are a *sua sponte* result of the Commission's further, internal deliberations as there are no *ex parte* filings in the record since adoption of the 800 MHz Order that suggest such changes are appropriate or even address these specific matters.

<sup>19</sup> 800 MHz Order at ¶ 201.

<sup>20</sup> Compare Reply Comments of the Consensus Parties, WT Docket No. 02-55, filed Feb. 25, 2003 and Letters from Regina M. Keeney, Esq., Counsel to Nextel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 02-55, filed Sept. 16, 2004 and Sept. 21, 2004.

avowed intent in this proceeding and that would serve the public interest by making the non-ESMR site-based spectrum the Company vacates available to public safety users.

A. Spectrum Operated in an ESMR Network Pursuant to FCC-Approved Spectrum Lease Authority as of November 22, 2004, Should be Eligible for Relocation to the ESMR Band.

Immediately upon release of the 800 MHz Order, AIRPEAK resumed acquisition negotiations with one party that had been on hold during the pendency of this proceeding. The Company also initiated negotiations with two other parties, each of which had site-specific spectrum in markets in which AIRPEAK hoped to enhance its channel position.<sup>21</sup> The Company moved aggressively to finalize these transactions in light of the FCC's impending, but unspecified, deadline for inclusion of site-specific authorizations. The 800 MHz Order was released on August 6, 2004 and assignment applications for all but four of the station licenses being acquired were filed with the FCC between September 30, 2004 and October 15, 2004.<sup>22</sup> Most of the assignment applications were granted on or before November 22, 2004, the deadline for inclusion. However, one application for seven call signs was filed on September 30, 2004, but was not granted until December 10, 2004.<sup>23</sup>

Recognizing that it is not possible to anticipate the Commission's routine processing time with precision, AIRPEAK also entered into Short-Term De Facto Spectrum Lease Agreements with the same parties. Pursuant to those agreements the Company leased the use of the spectrum in question pending FCC consent to the assignment applications. The lease applications were

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<sup>21</sup> AIRPEAK would have preferred to acquire additional EA licenses in these markets but all other EA authorizations are held by Nextel. The only spectrum available for purchase and inclusion in the Company's ESMR network was site-specific licenses.

<sup>22</sup> See n. 30 *infra*.

<sup>23</sup> That application, file number 000188410, was returned because the FCC did not have a record of receiving the construction notification for some channels on one of the call signs included. Application processing could not continue until the necessary information was collected, the required Schedule K and associated waiver request was filed with the FCC, and an amendment of the assignment application was filed advising the FCC that the necessary construction certification had been submitted.

filed and the FCC approved them well in advance of the November 22<sup>nd</sup> deadline. Except as otherwise noted below, AIRPEAK integrated the authorized spectrum into its ESMR network prior to the deadline. It was “using the site-based license[s] as part of the cellular-architecture system in that market” as of the relevant date, albeit pursuant to lease rather than assignment authority, and the spectrum should be eligible for relocation to the ESMR Band.<sup>24</sup>

A matter of such critical importance to the development of AIRPEAK’s network should not turn on the uncertain timing of FCC application processing. For example, AIRPEAK submitted two assignment applications on September 30, 2004. Neither application was returned, yet consent for one was granted on October 28<sup>th</sup> while the other was not approved until November 19<sup>th</sup>. Had the second been delayed by even four more days, it too would require waiver relief. This is not intended as criticism of the Commission’s licensing system, but rather highlights the fact that its timing is necessarily uncertain. It should not be the determinative factor for eligibility when, as here, AIRPEAK was diligent in submitting assignment applications, in securing FCC approval to use the spectrum pursuant to lease authority, and in deploying the spectrum in its ESMR network.

B. Site-Based Stations That Were Integrated into the ESMR Network Switch and Carrying Traffic Between Units Throughout the Network Should be Eligible for Conversion to the ESMR Band.

The Commission has correctly identified AIRPEAK as the operator of an ESMR network.<sup>25</sup> The Company acquired a number of EA authorizations at FCC auctions with the express intention of deploying a cellular architecture system in those markets. It purchased and began deployment of that network well before initiation of this proceeding and before there was any indication that spectrum below 862 MHz would not be usable in such a system. Each EBTS

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<sup>24</sup> 800 MHz Order at ¶ 159. See Attachment A for the stations deployed in the ESMR network pursuant to lease authority.

<sup>25</sup> 800 MHz Order at ¶ 159; Supplemental Order at ¶ 75.

it constructs is integrated into AIRPEAK's switch and is capable of carrying traffic between subscriber units in its area and those located elsewhere in the network.

As discussed *supra*, AIRPEAK moved promptly to secure additional spectrum once the 800 MHz Order confirmed that the Company's cellular architecture network would be permitted to continue operating in the 800 MHz band. This was a matter of urgency, since the period between release and publication of the Order represented the Company's final opportunity to acquire additional spectrum that could be migrated to the ESMR Band along with its existing channel holdings. It completed an acquisition it had placed on hold while the proceeding was pending and negotiated agreements with two other parties as well. In all instances, it was mindful of the requirements set out in the 800 MHz Order defining eligibility for conversion of site-based licenses. It acquired site-based stations only in a small number of markets in which it held an EA authorization and only in those in which its long-term plans dictated a need for additional capacity.<sup>26</sup>

Except as otherwise noted, all of the stations acquired by AIRPEAK qualified for relocation to the ESMR Band under the test set out in the 800 MHz Order. They were in markets in which the Company held an EA license and were "being used as part of a cellular-architecture system in that market" as of the November 22, 2004 deadline. However, the subsequent Supplemental Order adopted an additional condition. It defined site-based licenses as an integral part of the ESMR's system only if the 40 dBu/V contour of the site overlapped the 40 dBu/V contour of another site in the system and was capable of call "hand-off" between the sites.<sup>27</sup>

The three stations identified on Attachment B all serve small communities and were being used in AIRPEAK's ESMR network by the FCC's deadline. They were integrated into the

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<sup>26</sup> Again, only site-based licenses were available for acquisition since Nextel holds all remaining EA authorizations.

<sup>27</sup> Supplemental Order at ¶ 78.

AIRPEAK network switch via T1 lines, microwave circuits, or comparable means and carried communications between subscribers in their respective markets and users elsewhere in the network. The Company considers them just as “integral” to its network as all other cell sites it operates.

However, as is not uncommon in the initial stages of any CMRS rural market build-out, the Attachment B stations do not yet have overlapping coverage with other sites in the immediate area and, therefore, do not “hand-off” calls to other stations in the network. Station WNPS555 in EA 169 is the first cell site to be deployed in that market and does not have coverage overlap with facilities in adjacent markets. Multiple stations have been deployed in EA 166, but they all are at one of two locations without overlap between the two sites. In both markets the public interest is served by having facilities integrated into an advanced digital network installed in these very small communities. The Commission’s newly-adopted definition would substitute the agency’s judgment for that of the operator in determining where and when facilities should be deployed as additional markets are added to a CMRS network, with no apparent countervailing public benefit.

The Supplemental Order offers no explanation for this after-the-fact condition. It is not clear why the Commission has determined to consider hand-off on a site-by-site basis, rather than as a capability of the network itself. The FCC presumably considers single-site cellular and PCS operations as cellular architecture systems and recognizes that hand-off among sites will occur as the system is expanded. Surely it considers stand-alone sites operated by Nextel or its affiliate to be part of the iDEN network, since the network itself and every site integrated into it is capable of hand-off, even if that function is not yet an operational requirement for a particular location. There is nothing in the record to support using a different standard in this instance.

The most troubling part of the FCC's new requirement is its timing. This defining criterion was not adopted until after the November 22, 2004 deadline by which site-based stations needed to qualify for ESMR relocation. AIRPEAK could have, and assuredly would have, constructed additional sites with overlapping contours pursuant to its EA authorizations if this condition had been announced as part of the 800 MHz Order. It would have done so even if its immediate coverage and subscriber requirements did not demand a second, proximate site had it been aware that these just-acquired stations would otherwise not be eligible for relocation to the ESMR Band and, thus, would be unusable in AIRPEAK's network. It was denied that opportunity, because the definition was not made part of the ESMR relocation standard until after the deadline had passed.

The FCC already has determined that AIRPEAK operates an ESMR system and may elect to relocate to the ESMR Band.<sup>28</sup> The stations identified on Attachment B were acquired for the express purpose of providing additional capacity for AIRPEAK's cellular architecture network in their respective markets and were fully deployed in that network prior to November 22, 2004. AIRPEAK respectfully requests the Commission to waive the later-adopted criterion that only stations with overlapping contours qualify for relocation to the ESMR Band and confirm that the Attachment B stations are eligible to be relocated.

C. Certain Stations That Were Not Deployed in AIRPEAK's Network as of November 22, 2004 Should be Eligible for Relocation to the ESMR Band.

AIRPEAK recognizes the urgency of completing the 800 MHz rebanding process so interference to public safety will be alleviated. It also appreciates that the TA and the Commission must have a settled spectrum landscape so that system reconfigurations may begin.

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<sup>28</sup> See n. 24 *supra*.

The process cannot accommodate the natural growth of a CMRS network, but instead requires a flash-cut point at which an ESMR system's 800 MHz spectrum is defined forever.<sup>29</sup>

For this reason, AIRPEAK requests the relief described herein from the abbreviated period afforded to complete the negotiation, acquisition and deployment of the last 800 MHz spectrum the Company will be able to add to its network. It would have been financially imprudent, indeed irresponsible, for AIRPEAK to acquire additional spectrum during the three years that the FCC deliberated this highly complex, controversial proceeding, particularly in light of Nextel's position on the Company's status. As soon as the 800 MHz Order was released and the FCC's position on AIRPEAK itself and its site-based stations was known, AIRPEAK acted promptly to complete carefully targeted acquisitions.

The stations listed on Attachment C were acquired as part of larger transactions. The majority of the stations acquired in those transactions was deployed as part of AIRPEAK's network before the November 22, 2004 deadline<sup>30</sup> and even satisfy the contour overlap requirement, but the Company was unable to complete construction of all stations in these areas prior to the deadline. In some cases, AIRPEAK has had to identify an alternative facility to which existing customers on an operational, analog station could be migrated with minimal disruption. In other instances, the Company simply was unable to complete the deployment process within the limited time allotted by the FCC. AIRPEAK had taken delivery of the

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<sup>29</sup> At this point, all remaining 800 MHz spectrum available for ESMR expansion in the band above 862 MHz is held by Nextel.

<sup>30</sup> AIRPEAK was unable to include stations WNFG976 and WPDC990 in the lease and assignment applications for the rest of the stations in that transaction because it was discovered that these two call signs somehow had become associated with an incorrect FRN. It took the seller multiple calls to the FCC over a period of time before the error was corrected. The assignment application for those two stations was filed on December 2, 2004, and consent was granted on December 30, 2004. Additionally, lease applications could not be filed for stations KNNG473 and WPCQ306 because of erroneous information in ULS indicating that the stations were not assigned on an exclusive basis. Assignment applications for both stations were filed on December 20, 2004, and consent was granted on February 28, 2005. Those stations are not included on Attachment A, but the Company has included them on Attachment C and asks the FCC to consider allowing them to be relocated to the ESMR band.

necessary equipment by October 30, 2004, but did not have sufficient time or human resources to complete the necessary zoning, building permitting and deployment process for the Attachment C stations by the deadline.

As detailed on Attachment C, all of the remaining stations will be deployed in the ESMR network no later than November 22, 2005 and most substantially before that date. Allowing AIRPEAK additional time to integrate these stations into its system will not delay the rebanding process or even the planning process, since the location and number of channels for each station is known and can be accounted for in the TA's analysis. Indeed, the Company already included all these stations in its TA Election filing with appropriate disclosures. As these channels represent the last 800 MHz spectrum the Company will ever be able to add to its network, AIRPEAK respectfully requests an extension consistent with the schedule on Attachment C to complete the deployment of these stations in its ESMR system.

D. Site-Specific Stations With Extensive Population Coverage Within the EA Should be Exchanged for EA-Wide, Incumbent-Free Channels.

The Supplemental Order effected another substantive change in the original 800 MHz Order. The latter stated that qualified site-based stations would be converted to “an EA-wide, incumbent-free license in the ESMR portion of the band.”<sup>31</sup> The rationale was that doing so would create a more uniform licensing scheme.<sup>32</sup> In the Supplemental Order, the FCC instead determined that a qualified site-based station would be “limited to the 40 dBu/V coverage contour it provided as of the date the 800 MHz R&O was published in the Federal Register.”<sup>33</sup>

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<sup>31</sup> 800 MHz Order at ¶ 163.

<sup>32</sup> *Id.*

<sup>33</sup> Supplemental Order at ¶ 78. AIRPEAK assumes the FCC does not intend to deny rights that are granted under the existing rules. Currently, FCC Rule Section 90.693 allows licensees of site-specific 800 MHz SMR stations to modify or add sites anywhere within their 22 dBu/V contour provided they do not expand that contour and also satisfy the co-channel separation requirements in FCC Rule Section 90.621(b) *vis-à-vis* other site-based stations. If site-specific stations are moved into the ESMR band based only on their contours, at a minimum they should retain all rights currently available under Section 90.693.

It is not possible to challenge the FCC's reasoning in support of this change since none is provided. Yet, even if the Commission believes that its modified approach will better serve the public interest, AIRPEAK urges it to consider granting site-specific for EA-wide station exchange waivers under certain conditions. Specifically, if the 22 dBu/V contour of AIRPEAK's site-based station already provides coverage to at least fifty percent (50%) of the population within the EA it would be both equitable and administratively easier to permit a site-based for EA-wide exchange.<sup>34</sup>

The Company has provided as Attachment D a spreadsheet identifying its site-based stations in EA153 that meet the above-proposed definition. It also has included the supporting contour maps. If the FCC grants this request, AIRPEAK will provide comparable documentation for all such site-based stations that meet this test to the TA, to the FCC, or to both as part of the Company's reconfiguration process.

This approach will not unjustly reward with an EA-wide license a party holding site-specific licenses of minimal coverage potential that were shoe-horned into the outer boundary of an EA. To the extent the Company is unable to make the showing outlined above because a particular site has only limited coverage within the EA, it does not request waiver relief. Conversely, however, grant of this request would recognize AIRPEAK stations that already cover more than a majority of the population within the EA. The situation typically will arise in relatively rural EAs with one or perhaps two population centers and the remaining population dispersed broadly throughout the remainder of the market.<sup>35</sup>

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<sup>34</sup> The Company recognizes that its site-based stations are entitled to protection only within their 40 dBu/V contours. Nonetheless, since the rules permit channels authorized pursuant to site-based stations to be added or relocated anywhere within the 22 dBu/V contour, that is the appropriate parameter to use for purposes of determining station coverage.

<sup>35</sup> The FCC generally has identified counties with populations of fewer than one hundred (100) persons per square mile as rural. *See, e.g.,* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,

It is, of course, theoretically possible that Nextel or its affiliates would choose to build facilities on these same channels in multiple outlying communities to capture the remaining, widely-dispersed population. In reality, the areas of potential coverage are ones in which Nextel is likely to have an abundance of 800 MHz (as well as 900 MHz) spectrum relative to the population. It would not need these channels in those sparsely populated outlying areas should it ever elect to provide service to those communities. By contrast, AIRPEAK holds considerably less spectrum in those markets and could make good use of these channels by building out from its core market and extending coverage without needing to protect third-party facilities. The Company is the likely entity to make productive use of these channels throughout the remainder of the EA.

The FCC routinely considers one-third population coverage as a first benchmark for demonstrating satisfactory spectrum utilization in a geographic area and two-thirds coverage as conclusive evidence that the spectrum is being used productively.<sup>36</sup> To the extent AIRPEAK already is covering at least fifty percent (50%) of the EA population from its site-based facility and the remaining EA population is dispersed broadly, the Company respectfully requests a waiver so that the stations identified on Attachment D are exchanged for EA-wide, incumbent-free ESMR channels in the 800 MHz rebanding process.

#### **IV. CONCLUSION**

AIRPEAK has been diligent in its acquisition, licensing and deployment of the site-based stations for which waiver relief is requested herein. Allowing the Company to include the

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*Eighth Report*, 18 FCC Rcd 14783 at ¶ 114 (2003). A significant number of AIRPEAK's facilities operate in rural areas under this definition.

<sup>36</sup> See e.g., 47 C.F.R. 90.685(b).

stations identified in Attachments A – C in its ESMR conversion not only will recognize the Company's efforts in the abbreviated period permitted, but will create additional vacant spectrum below 862 MHz for use by public safety entities. For the reasons described above, AIRPEAK respectfully requests approval of the instant waiver request.

## ATTACHMENT A

### Stations Deployed in ESMR Pursuant to Lease Authority

<u>EA</u>	<u>YX/GX License</u>
EA151	KNRU946
EA153	WPEJ290 WNCS310 WPOX417 WPQI251 WPOX419 KNNH532
EA169	KNBP741

## ATTACHMENT B

**Stations That Were Being Used “As Part Of A Cellular-Architecture System” and Were Capable of Carrying Traffic Between Units Throughout the Network, But That Did Not Have Another Site Close Enough to Create Overlapping 40 Dbu/V Coverage Contours and, Thus, Were Not “Capable of Hand-Off”.**

### **EA166:**

Quarry Hill: KNIY817 and WCFG851

Baldy Mtn: WNMD376, WPIJ307, WPIH910, WPIH908, WPIH909, WPHQ461

### **EA169:**

Jump Off Butte: WNPS555

## ATTACHMENT C

### AIRPEAK ESMR Deployment Schedule

EA	Call Sign	Location	Buildout
EA153	KNNG473	3465 S Las Vegas Blvd, NV	1st Qtr. 2005
EA153	WPCQ306	Potosi Mtn, NV	1st Qtr. 2005
EA153	WN3C310	Black Mtn, NV	1st Qtr. 2005
EA153	WPOX417	Potosi Mtn, NV	1st Qtr. 2005
EA153	WPQI251	Potosi Mtn, NV	1st Qtr. 2005
EA153	WPOX419	Potosi Mtn, NV	1st Qtr. 2005
EA153	WPDV921	Jean NV, NV	1st Qtr. 2005
EA153	WPDV923	Laughlin, NV	2nd Qtr. 2005
EA153	WPDV925	Angel Peak, NV	2nd Qtr. 2005
EA153	WPDV920	Glendale, NV	2nd Qtr. 2005
EA153	WNXW276	Oatman, AZ	2nd Qtr. 2005
EA153	WNUX368	Lake Havasu, AZ	2nd Qtr. 2005
EA163	WNQA940	Cobb Mtn, CA	3rd Qtr. 2005
EA166	WNFG976	Buck Mtn, OR	3rd Qtr. 2005
EA166	WNQY305	Florence, OR	3rd Qtr. 2005
EA166	WPDC930	Coos Bay, OR	3rd Qtr. 2005
EA166	WPBC758	Grants Pass, OR	3rd Qtr. 2005
EA166	WNQY247	Cottage Grove, OR	3rd Qtr. 2005
EA167	WPDC990	Mount Hebo, OR	3rd Qtr. 2005
EA168	WNUD578	Pendelton, OR	3rd Qtr. 2005
EA169	KNBP741	Rattlesnake Mtn, WA	2nd Qtr. 2005
EA169	WNPS559	Rattlesnake Mtn, WA	2nd Qtr. 2005
EA169	WNDR605	Ahtanum Ridge, WA	2nd Qtr. 2005

## ATTACHMENT D

### Stations (by Frequency) Whose 22 dBu/V Contour Provides Coverage to at Least 50% of the Population in EA153

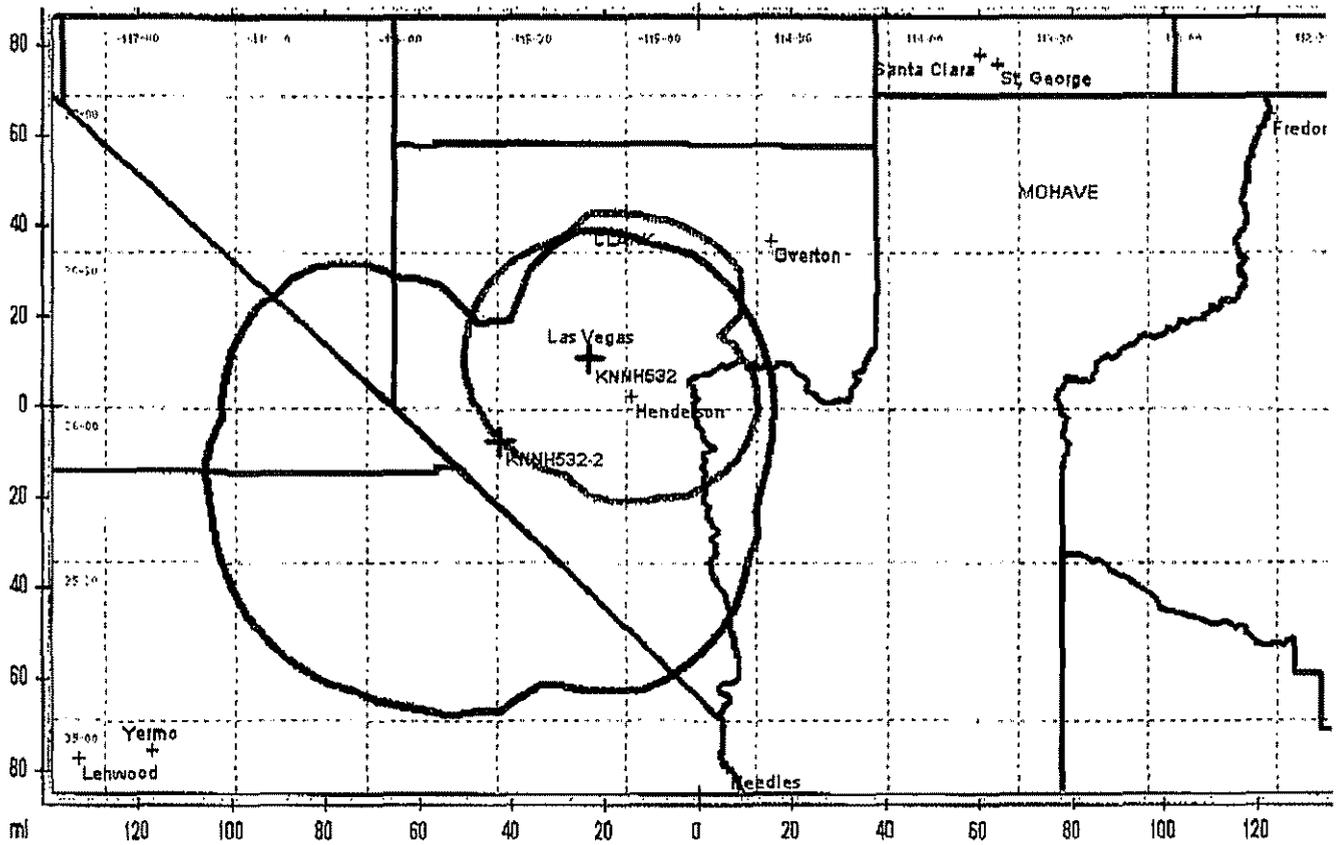
EA	Freq	Call Sign	Pops in 22 dBu Contour	Pops in EA	Percentage of Population Covered
153	851.4875	WNVJ762	1,385,347	1,709,797	81%
153	851.4875	WPFU355	1,385,347	1,709,797	81%
153	851.5875	WNVY310	1,385,347	1,709,797	81%
153	852.2375	KNNG473	1,343,596	1,709,797	79%
153	852.5375	WPEJ290	1,341,852	1,709,797	78%
153	852.6875	WNMJ676	1,381,352	1,709,797	81%
153	852.6875	WNVA748	1,381,352	1,709,797	81%
153	852.9875	WNMJ676	1,381,352	1,709,797	81%
153	852.9875	WNVA740	1,381,352	1,709,797	81%
153	853.3125	WNMJ676	1,554,462	1,709,797	91%
153	853.3125	WPDV918	1,554,462	1,709,797	91%
153	853.3125	WPDV919	1,554,462	1,709,797	91%
153	853.3125	WPDV920	1,554,462	1,709,797	91%
153	853.3125	WPDV921	1,554,462	1,709,797	91%
153	853.3125	WPDV923	1,554,462	1,709,797	91%
153	853.3125	WPDV925	1,554,462	1,709,797	91%
153	853.8375	WNMJ676	1,381,352	1,709,797	81%
153	854.0625	WPEJ290	1,341,852	1,709,797	78%
153	854.5375	WPCQ306	1,373,414	1,709,797	80%
153	855.7875	WNCS310	1,356,759	1,709,797	79%
153	856.0625	WNMJ676	1,381,352	1,709,797	81%
153	856.1375	WNMJ676	1,381,352	1,709,797	81%
153	856.3625	WPOX417	1,386,089	1,709,797	81%
153	856.6375	WPQI251	1,387,310	1,709,797	81%
153	856.8625	WPRR969	1,381,352	1,709,797	81%
153	857.0625	WNMJ676	1,381,352	1,709,797	81%
153	857.1375	WNMJ676	1,554,462	1,709,797	91%
153	857.1375	WPDV918	1,554,462	1,709,797	91%
153	857.1375	WPDV919	1,554,462	1,709,797	91%
153	857.1375	WPDV920	1,554,462	1,709,797	91%
153	857.1375	WPDV921	1,554,462	1,709,797	91%
153	857.1375	WPDV923	1,554,462	1,709,797	91%
153	857.1375	WPDV925	1,554,462	1,709,797	91%
153	857.3125	WPDV918	1,549,514	1,709,797	91%
153	857.3125	WPDV920	1,549,514	1,709,797	91%
153	857.3125	WPDV923	1,549,514	1,709,797	91%

## ATTACHMENT D

### Stations (by Frequency) Whose 22 dBu/V Contour Provides Coverage to at Least 50% of the Population in EA153

EA	Freq	Call Sign	Pops in 22 dBu Contour	Pops in EA	Percentage of Population Covered
153	857.3625	WPOX417	1,386,089	1,709,797	81%
153	857.6375	WPQI251	1,387,310	1,709,797	81%
153	858.0625	WNMJ676	1,381,352	1,709,797	81%
153	858.1375	WNMJ676	1,554,462	1,709,797	91%
153	858.1375	WPDV918	1,554,462	1,709,797	91%
153	858.1375	WPDV919	1,554,462	1,709,797	91%
153	858.1375	WPDV920	1,554,462	1,709,797	91%
153	858.1375	WPDV921	1,554,462	1,709,797	91%
153	858.1375	WPDV923	1,554,462	1,709,797	91%
153	858.1375	WPDV925	1,554,462	1,709,797	91%
153	858.3625	WPOX419	1,386,089	1,709,797	81%
153	858.6375	WPQI251	1,387,310	1,709,797	81%
153	859.0625	WNMJ676	1,381,352	1,709,797	81%
153	859.1375	WNMJ676	1,554,462	1,709,797	91%
153	859.1375	WPDV918	1,554,462	1,709,797	91%
153	859.1375	WPDV919	1,554,462	1,709,797	91%
153	859.1375	WPDV920	1,554,462	1,709,797	91%
153	859.1375	WPDV921	1,554,462	1,709,797	91%
153	859.1375	WPDV923	1,554,462	1,709,797	91%
153	859.1375	WPDV925	1,554,462	1,709,797	91%
153	859.3625	WPOX419	1,386,089	1,709,797	81%
153	859.6375	WPQI251	1,387,310	1,709,797	81%
153	859.7875	KNNH532	1,373,579	1,709,797	80%
153	860.0625	WNMJ676	1,381,352	1,709,797	81%
153	860.1375	WNMJ676	1,554,462	1,709,797	91%
153	860.1375	WPDV918	1,554,462	1,709,797	91%
153	860.1375	WPDV919	1,554,462	1,709,797	91%
153	860.1375	WPDV920	1,554,462	1,709,797	91%
153	860.1375	WPDV921	1,554,462	1,709,797	91%
153	860.1375	WPDV923	1,554,462	1,709,797	91%
153	860.1375	WPDV925	1,554,462	1,709,797	91%
153	860.3625	WPOX419	1,386,089	1,709,797	81%
153	860.6375	WPQI251	1,387,310	1,709,797	81%

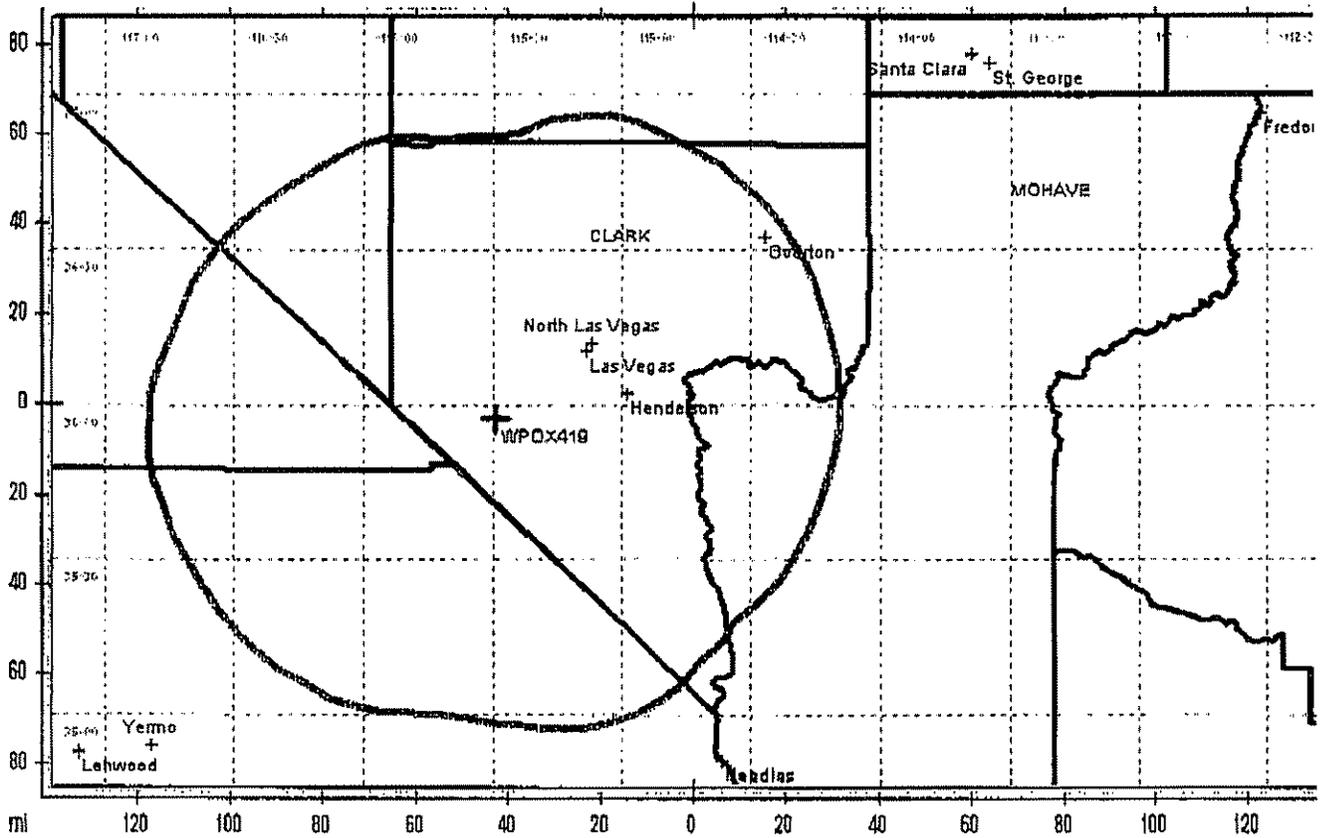
# 859.7875; AIRPEAK EA 153 Site Specific KNNH532



1,373,579 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Long Grid

# 858.3625, 859.3625, 860.3625; AIRPEAK EA 153 Site Specific WPOX419



1,386,089 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

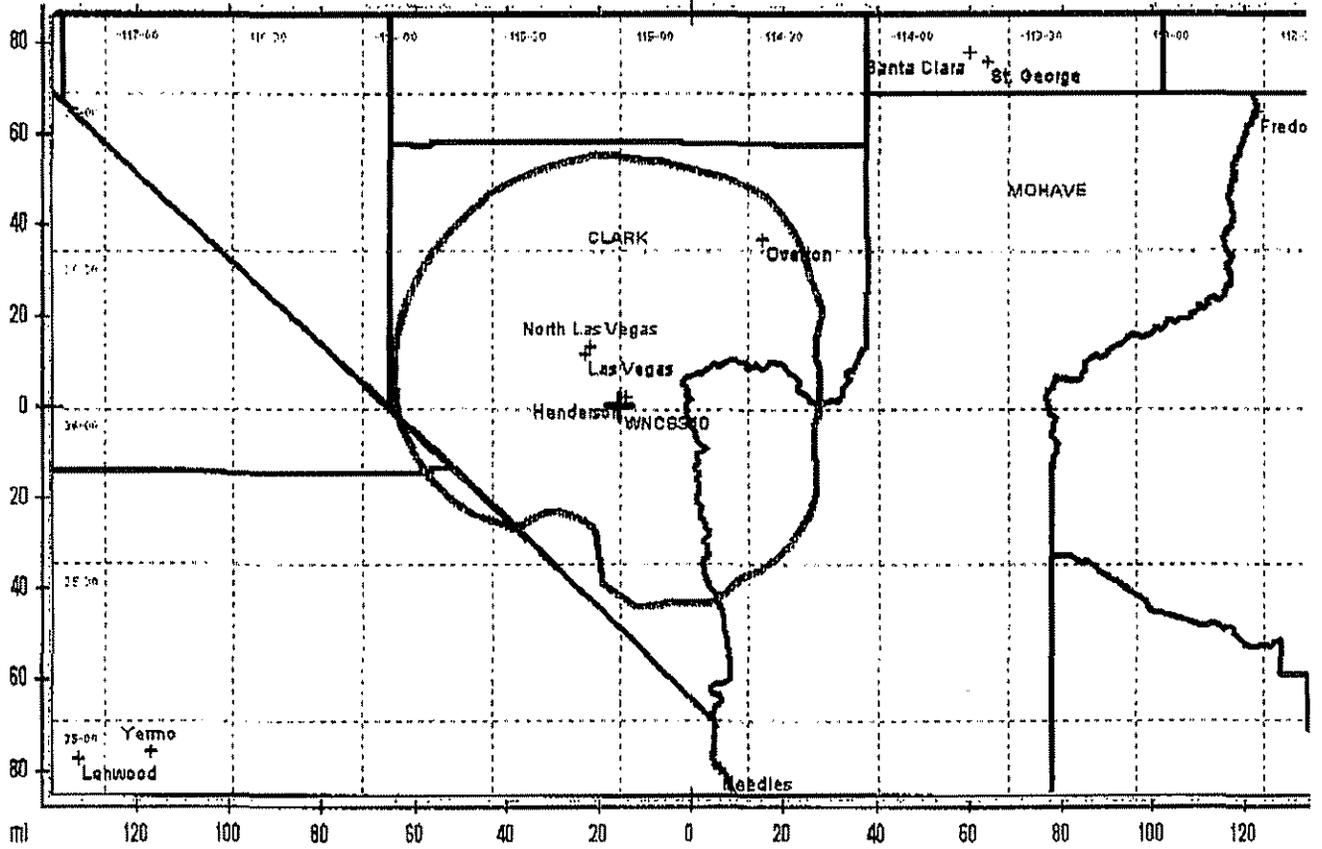
County Borders
  State Borders
  Lat/Long Grid

Study

EA153\_WNCS310\_angle\_freqs.rst

Wednesday, January 19, 2

# 855.7875; AIRPEAK EA 153 Site Specific WNCS310



1,356,759 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

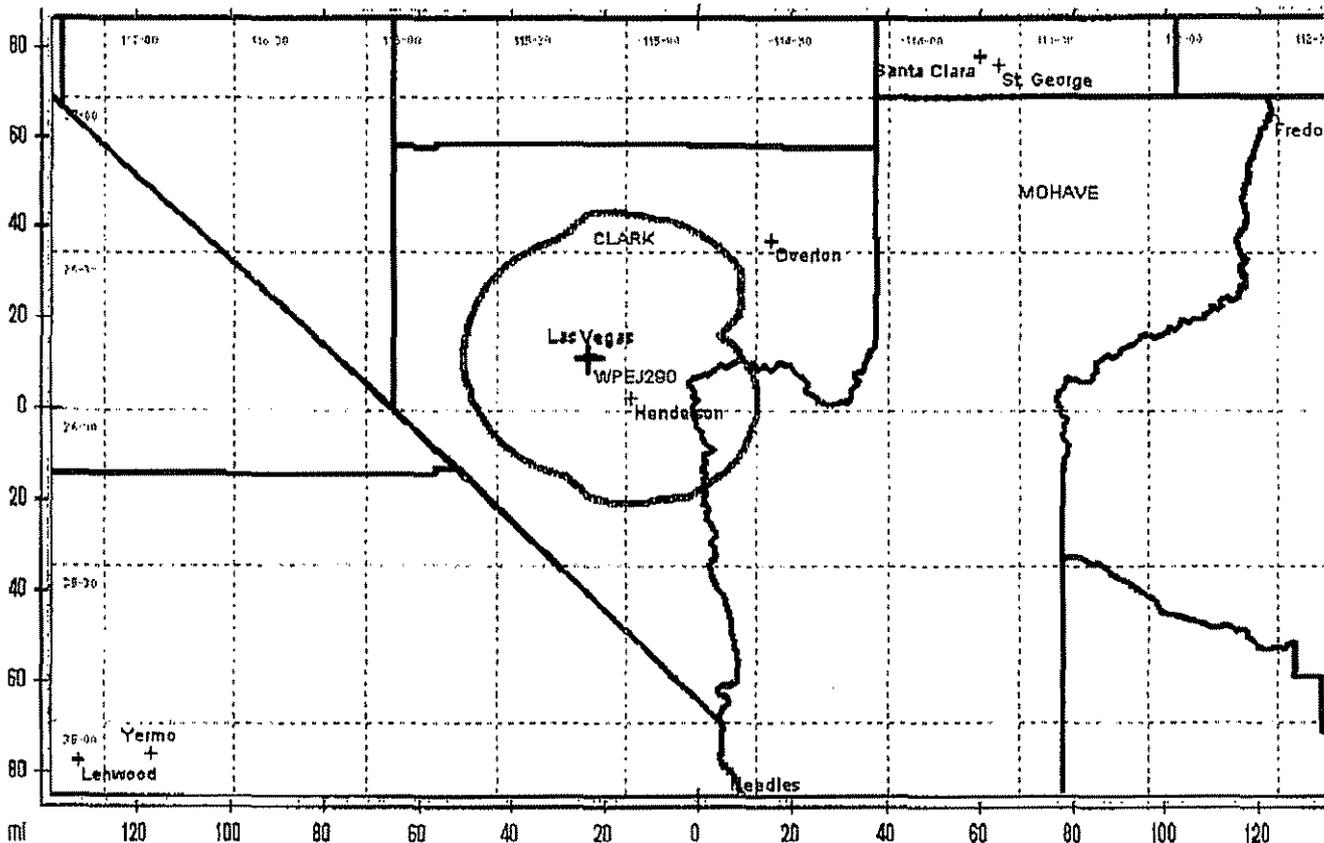
County Borders
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Copy Study

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Wednesday, January 19, 2005

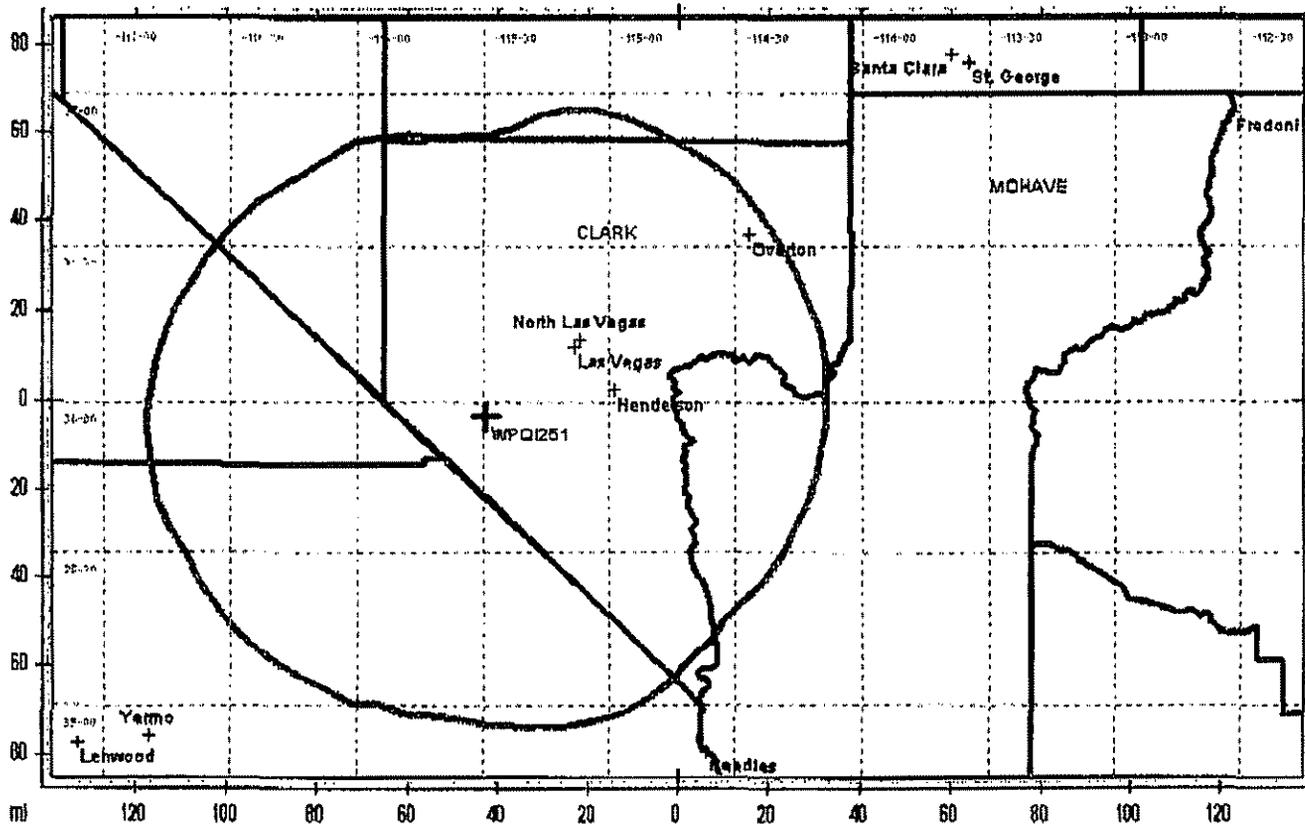
### 852.5375, 854.0625; AIRPEAK EA 153 Site Specific WPEJ290



1,341,852 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Lon Grid

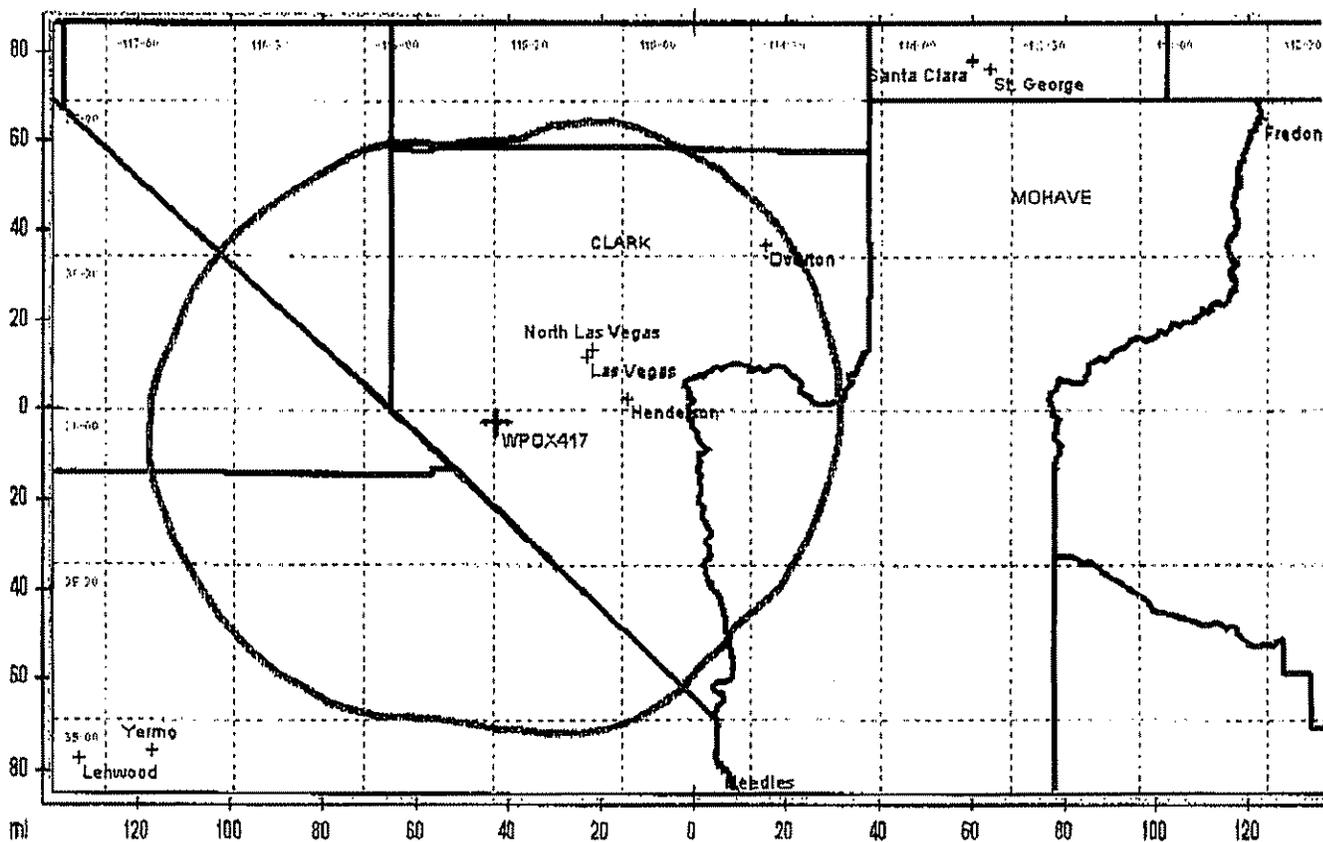
# 856.6375, 857.6375, 858.6375, 859.6375, 860.6375; EA 153 Site Specific WPQ1251



1,387,310 pops in 22 Dbu Service contour, 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Long Grid

# 856.3625, 857.3625; AIRPEAK EA 153 Site Specific WPOX417



1,386,089 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

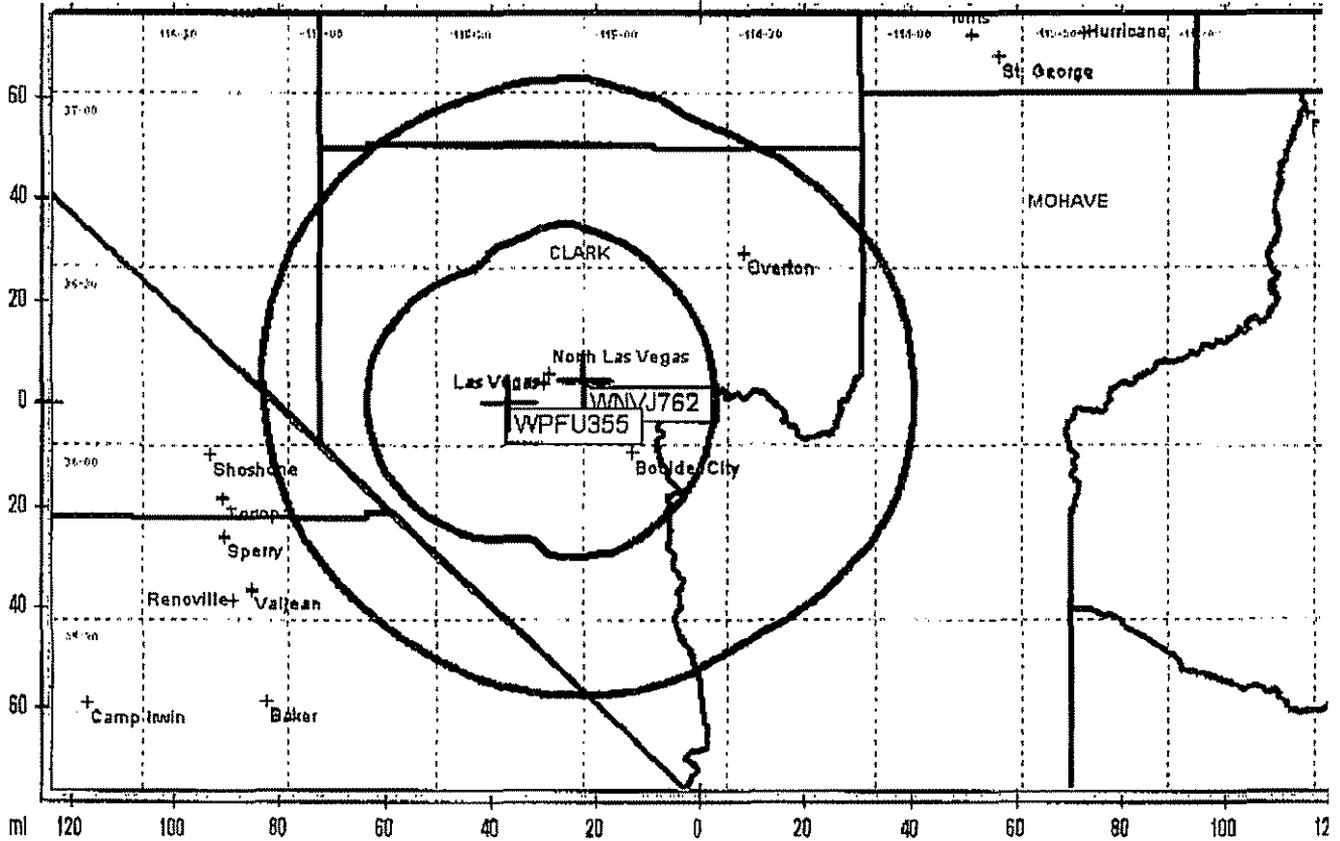
County Borders
  State Borders
  Lat/Lon Grid

Dem Study

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Tuesday, January 18, 2005

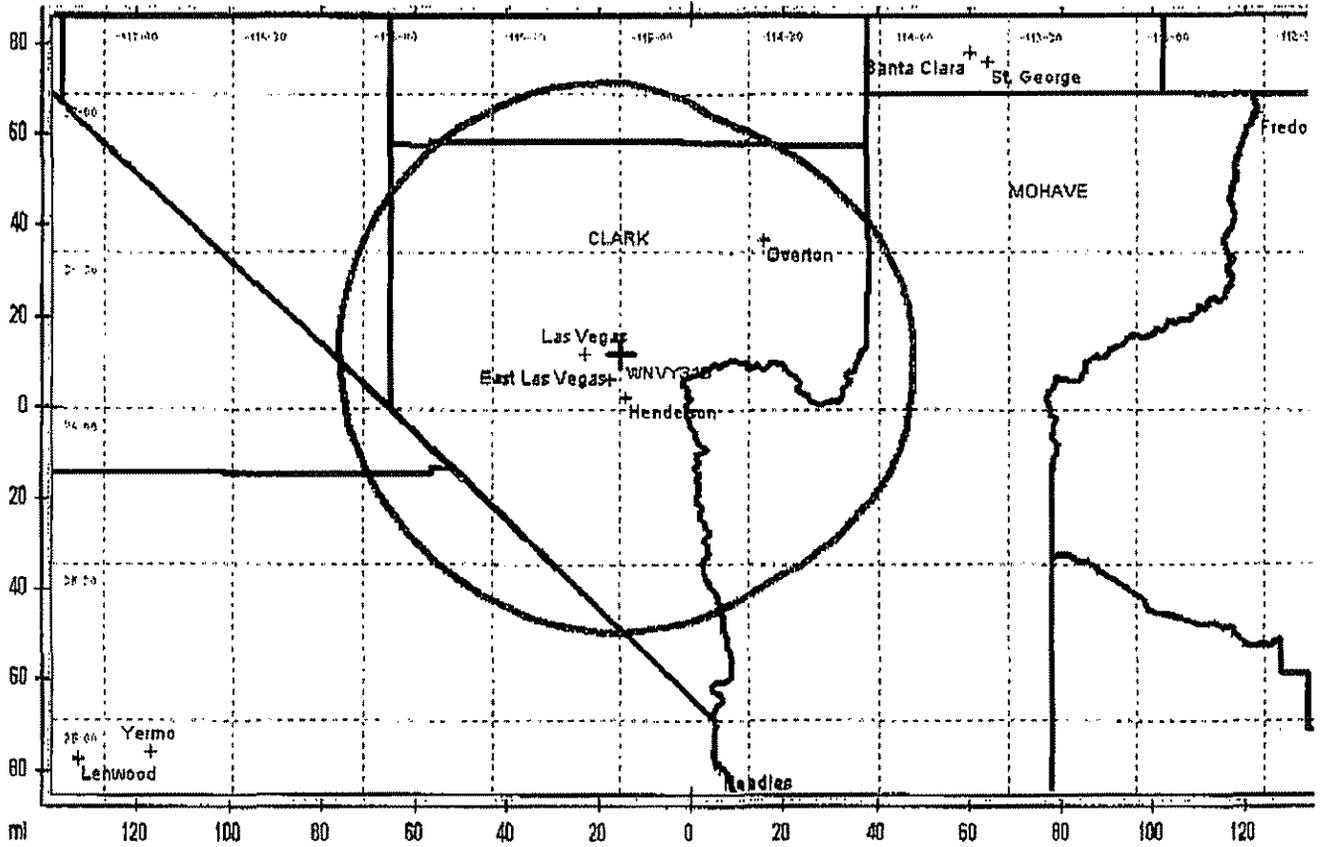
# 851.4875; AIRPEAK EA153 Site Specifics WNVJ762, WPFU355



1,385,347 pops in 22 Dbu Service Contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Lon Grid

# 851.5875; AIRPEAK EA 153 Site Specific WNVY310



1,385,347 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

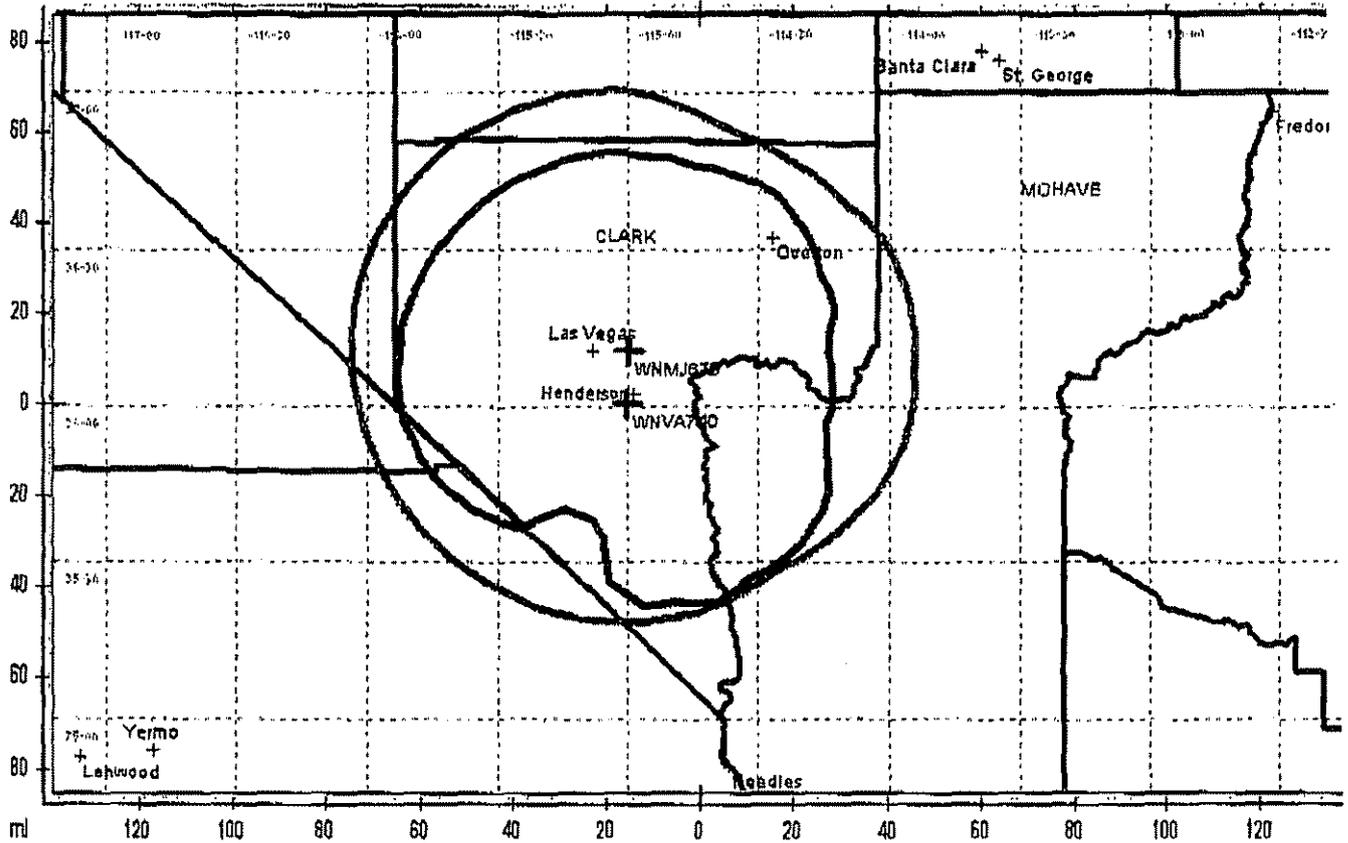
County Borders
  State Borders
  Lat/Long Grid

ComStudy

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Tuesday, January 18, 2

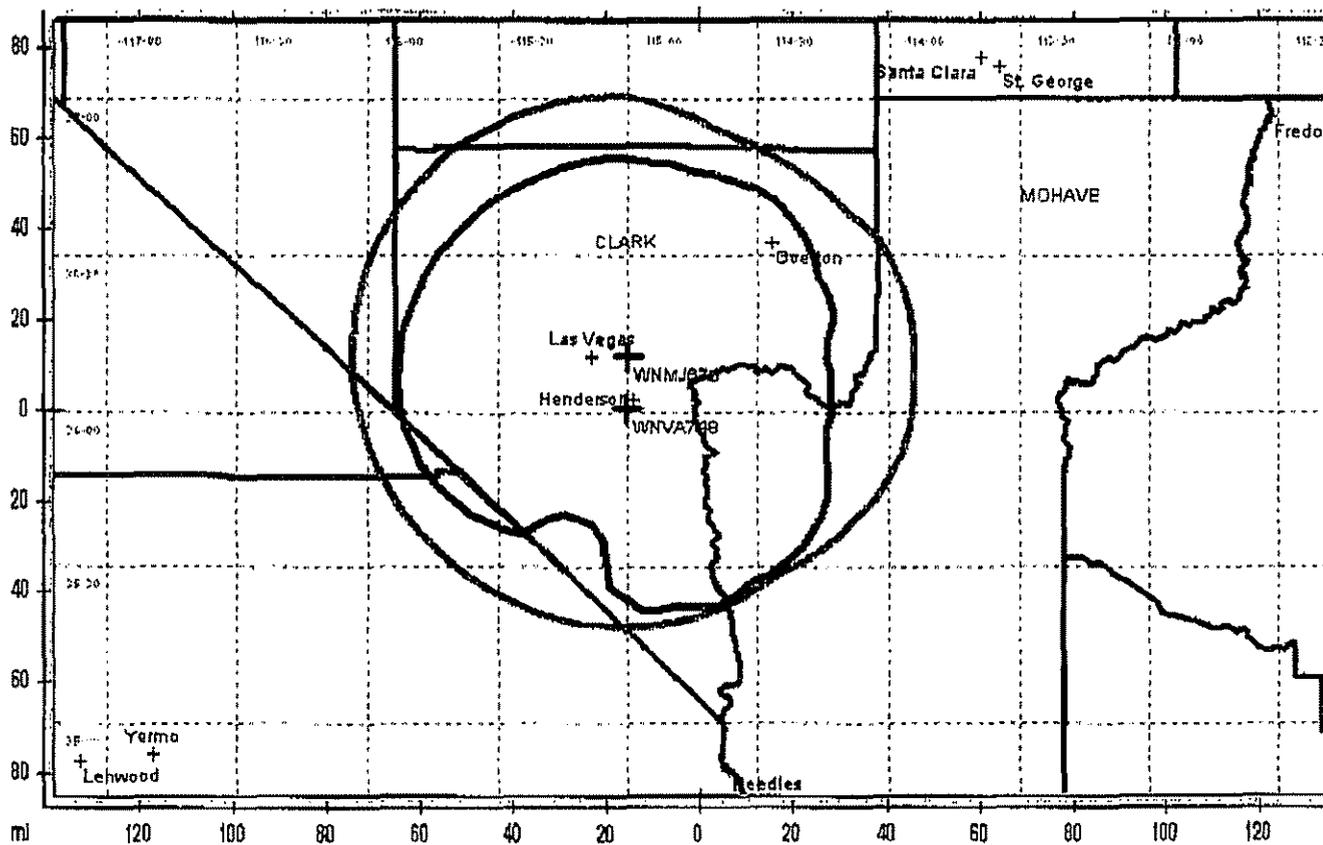
### 852.9875; AIRPEAK EA 153 Site Specific WNMJ676 & WNVA740



1,381,352 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Lon Grid

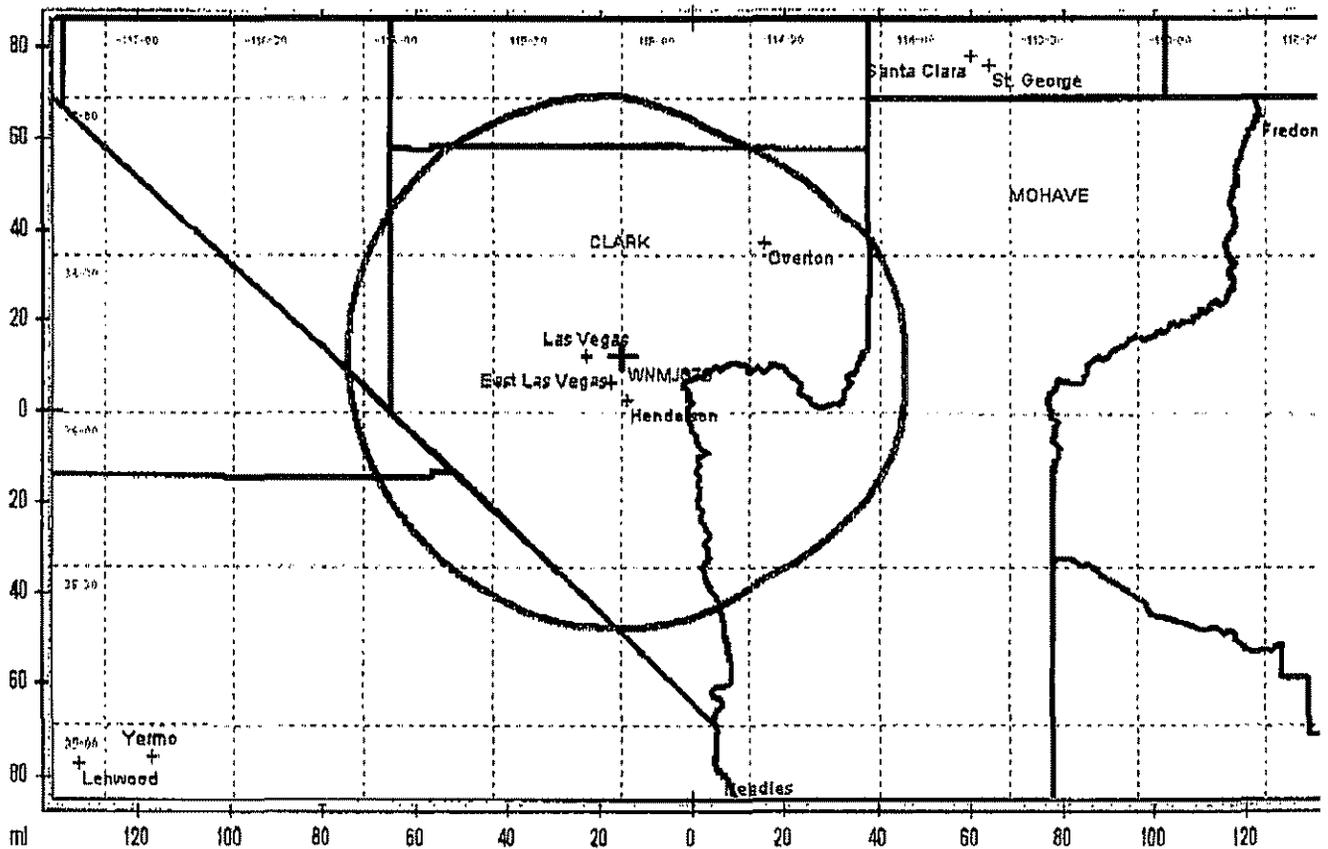
### 852.6875; AIRPEAK EA 153 Site Specific WNMJ676 & WNVA748



1,381,352 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Lon Grid

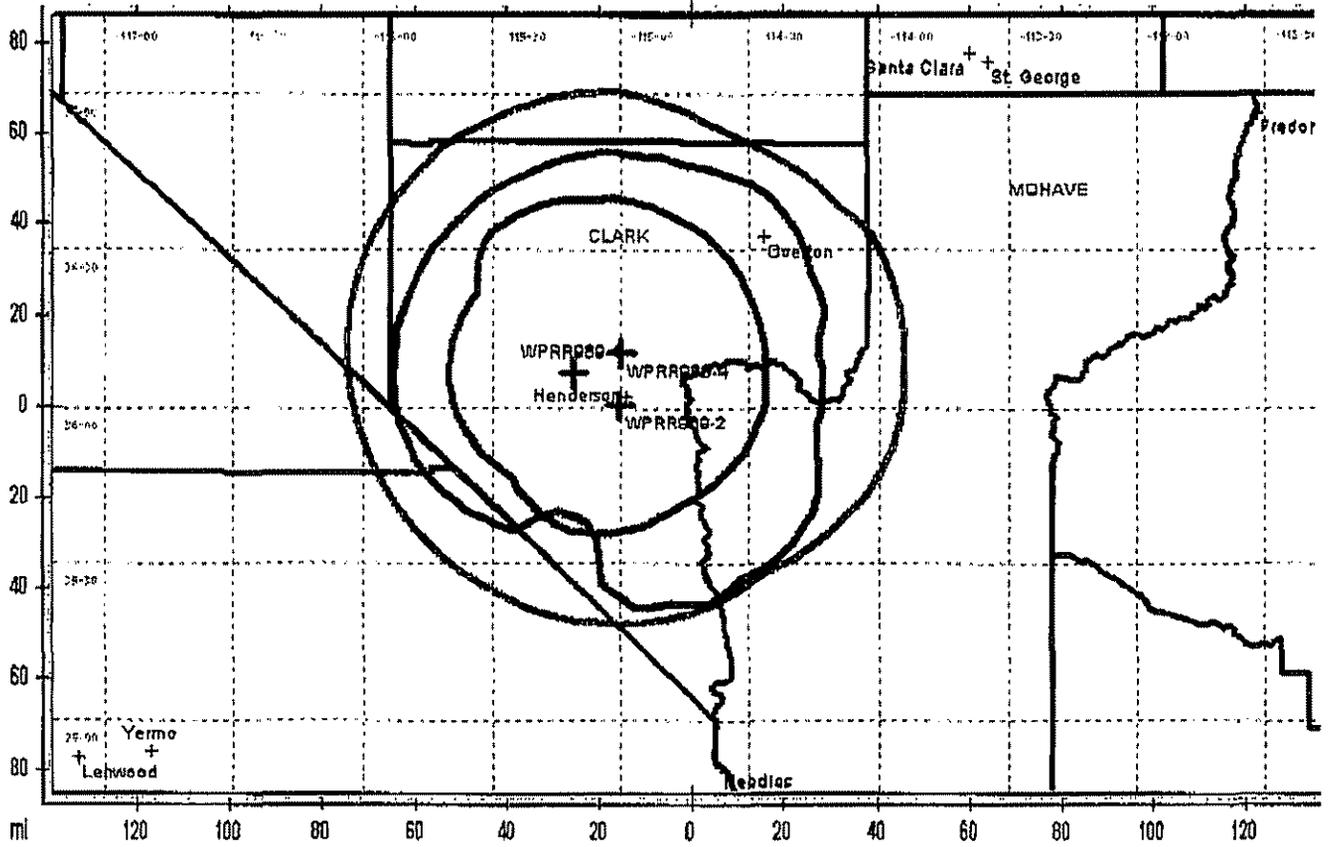
853.8375, 856.0625, 856.1375, 857.0625, 858.0625, 859.0625, 860.0625 EA 153 Site Specific WNMJ676



1,381,352 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Lon Grid

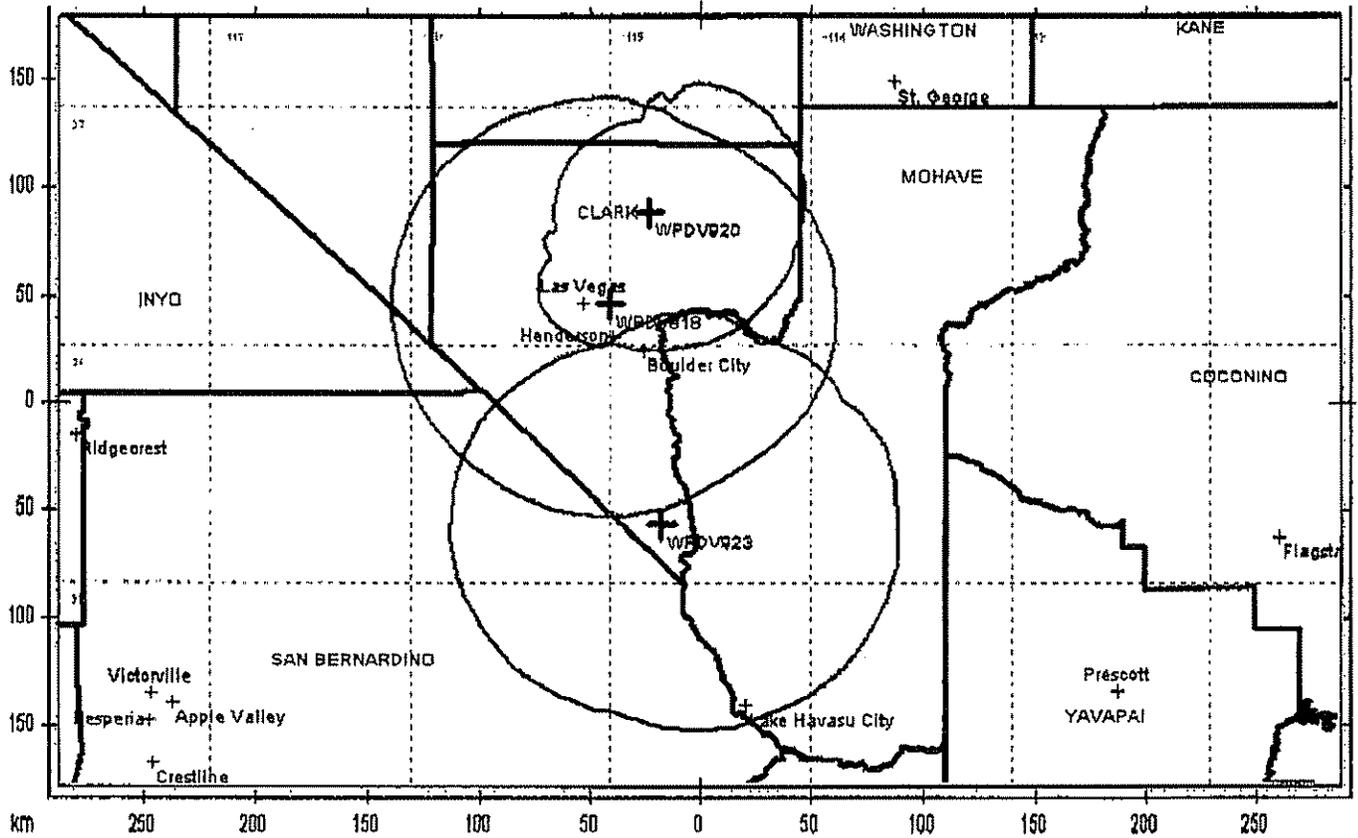
### 856.8625; AIRPEAK EA 153 Site Specific WPRR969



1,381,352 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Lon Grid

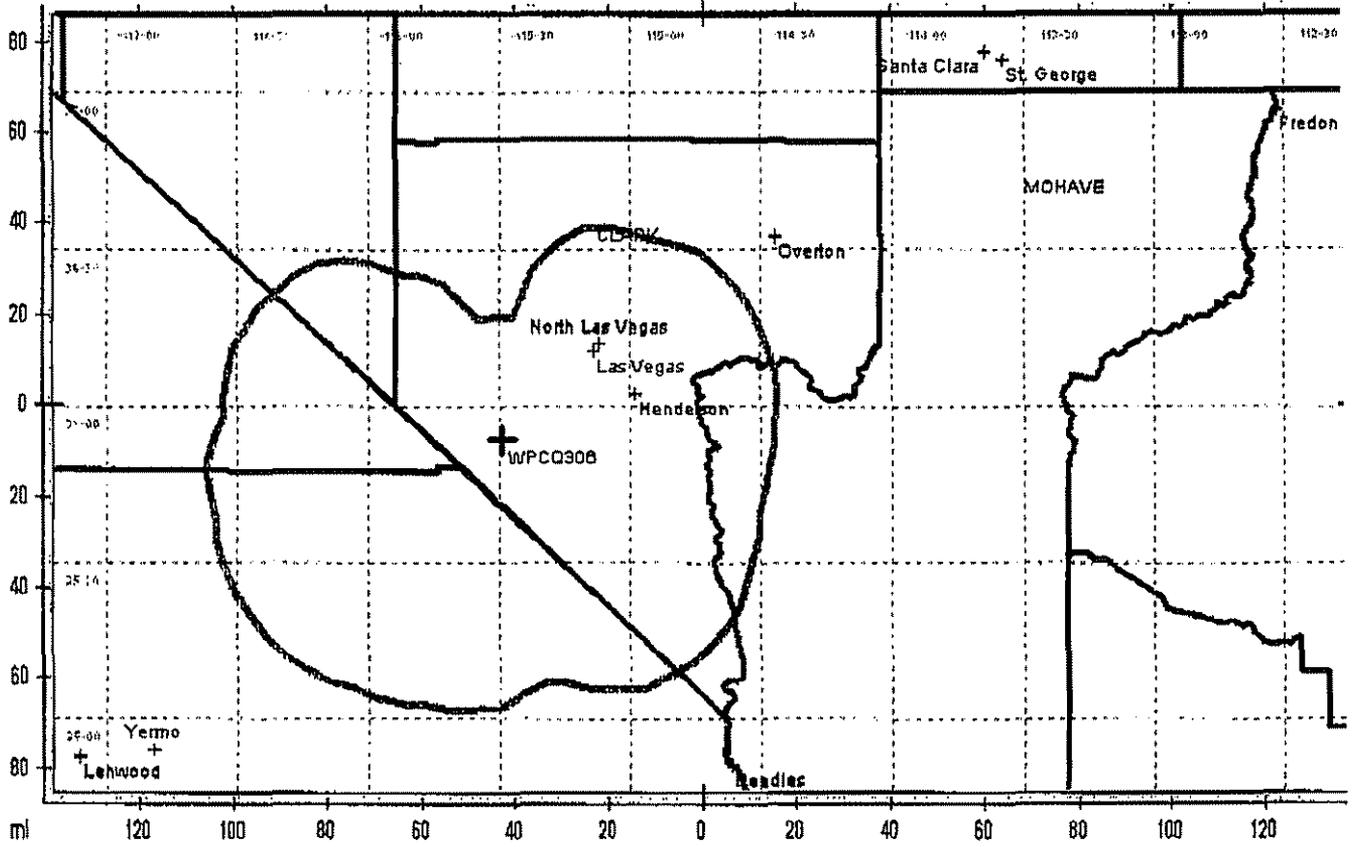
# 857.3125; EA 153 Site Specific WPDV918, WPDV920, WPDV923



1,549,514 pops in 22 Dbu Service contour union; 1,709,797 pops in EA 153

County Borders
  State Borders
  Lat/Long Grid

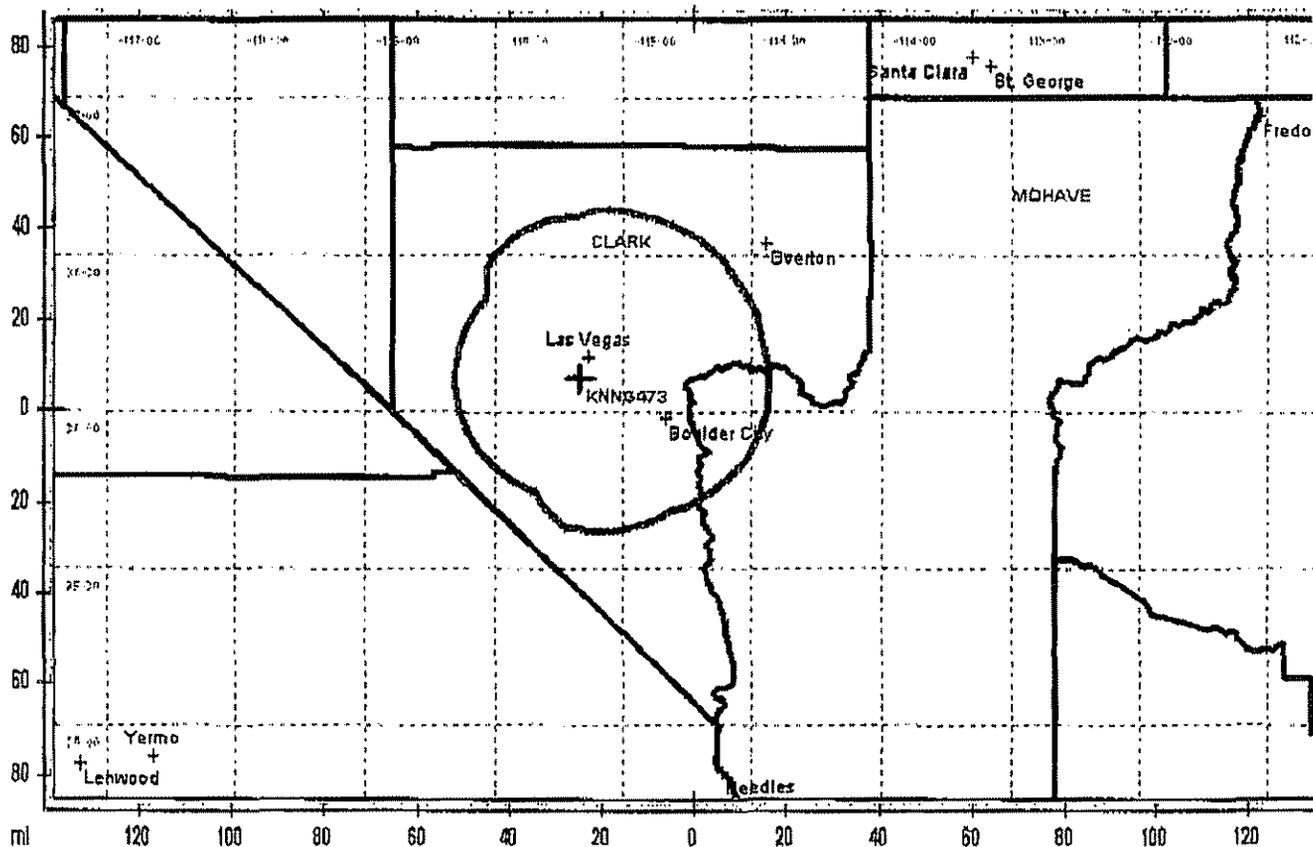
# 854.5375; AIRPEAK EA 153 Site Specific WPCQ306



1,373,414 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders   
  State Borders   
  Lat/Lon Grid

### 852.2375; AIRPEAK EA 153 Site Specific KNNG473



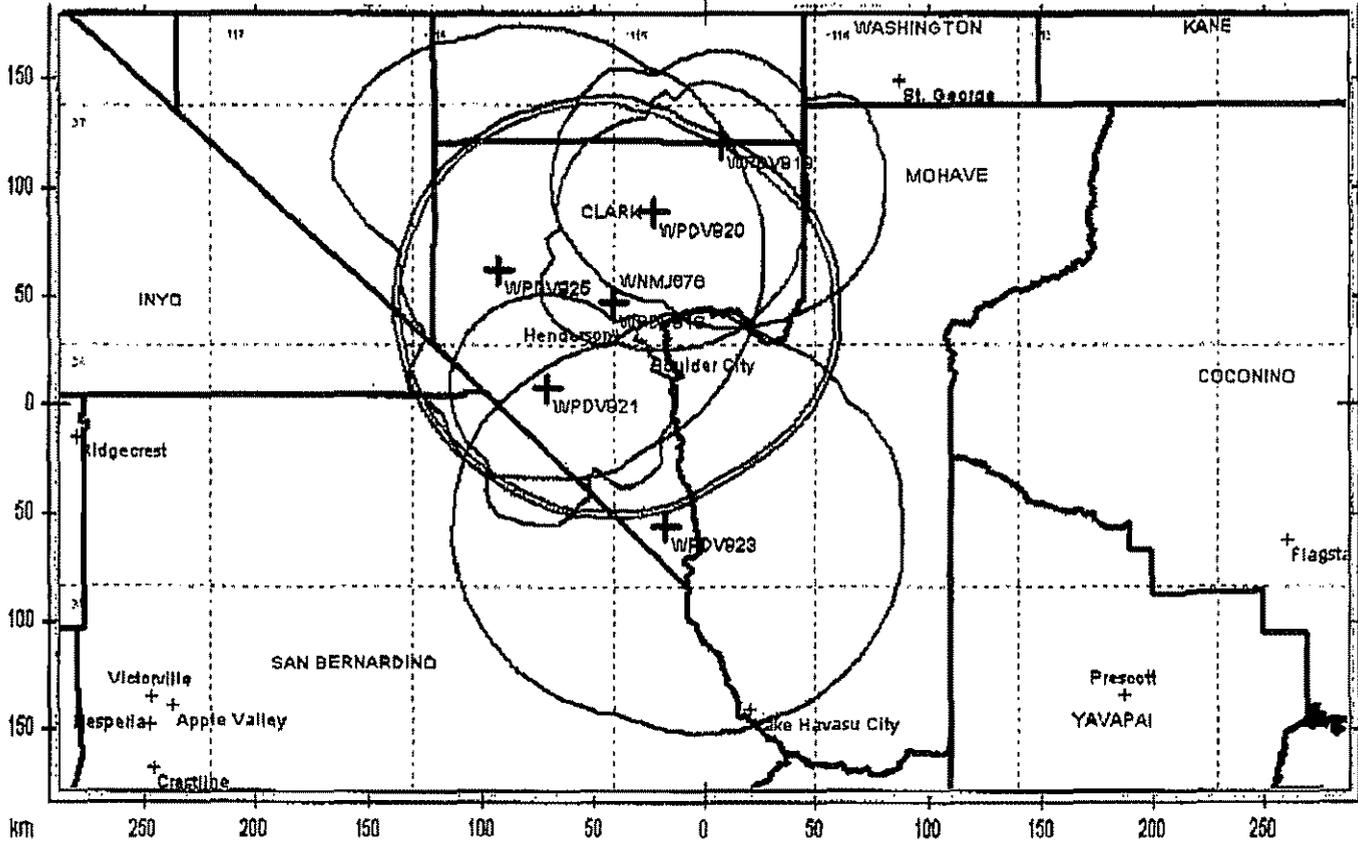
1,343,596 pops in 22 Dbu Service contour; 1,709,797 pops in EA 153

County Borders   
  State Borders   
  Lat/Lon Grid

EA153\_853.3125.rst

Tuesday, January 18, 2005

853.3125; EA 153 Site Specific WNMJ676, WPDV918, WPDV919, WPDV920, WPDV921, WPDV923, WPDV925



1,554,462 pops in 22 Dbu Service contour union; 1,709,797 pops in EA 153

*This Study applies to 853.3125, 857.1375, 858.1375, 859.1375, 860.1375*

County Borders    State Borders    Lat/Long Grid