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

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In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 02-376
Table of Allotments,) RM-10617
FM Broadcast Stations) RM-10690
(Sells, Willcox, and Davis-Monthan)
Air Force Base, Arizona)

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To: Office of Secretary
Attn: Chief, Audio Division
Media Bureau

Federal Communications Commission
Office of Secretary

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Lakeshore Media, LLC ("Lakeshore"), licensee of Station KWCX-FM, Willcox, Arizona, by its counsel, and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to the oppositions filed in this proceeding.¹ Oppositions were filed by Journal Broadcast Corporation ("Journal") and REC Networks ("REC").

1. Journal supports the staff's reliance on *Pacific Broadcasting of Missouri, LLC*, 18 FCC Rcd 2291 (2003), *recon. denied*, 19 FCC Rcd 10950 (2004) ("*Refugio*") in denying Lakeshore's counterproposal. Lakeshore had proposed two new allotments, Channels 282C2 and 245C2 at Willcox, which would provide service to an area that would otherwise have been left without reception service as a result of the relocation of Station KWCX-FM from Willcox to Davis-Monthan Air Force Base. *Refugio* stands for the proposition that the loss of a community's only transmission service cannot be cured through the provision of a vacant allotment. However, as Journal notes, *Refugio* does not *literally* apply to this case, because this

¹ Public Notice of the filing of the petition for reconsideration was published in the Federal Register on March 8, 2005. The date for filing oppositions was March 23, and the reply date is April 4. See 47 C.F.R. § 1.429(f)-(g).

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case involves the loss of *reception* service, not the loss of transmission service. As a result, Journal inadvertently confirms what Lakeshore has been saying all along: the staff was without authority to deny Lakeshore's proposal in this proceeding. The case on which the staff relied *does not*, on its face, bar Lakeshore's proposal.

2. As Lakeshore has previously pointed out, what precedent there is tends to *support* Lakeshore's position in this case. In *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580, 6584 n. 30 (1991), the Commission favored the grant of two new allotments to replace reception service lost in the relocation of Station WHMA from Anniston to Sandy Springs. In *Caliente, Nevada, et al.*, DA 04-2146 (rel. Sept. 3, 2004), the Commission proposed an allotment at Grand Canyon Village, Arizona to avoid the creation of "gray" area in another reallocation situation. Journal dismisses these cases in a footnote, but they are not so easily avoided. While neither *Eatonton* nor *Caliente* resulted in the addition of the vacant allotments in question, they both clearly set forth the Commission's policy to avoid the loss of an area's only existing reception service through the addition of a vacant allotment serving the area. That policy was unquestioned. The allotments were denied for unrelated reasons (in *Eatonton*, the proposal was decided under priority 4, and in *Caliente*, the area needed no allotment because it was unpopulated).

3. Journal argues that *Refugio* should nevertheless be extended to bar Lakeshore's proposal in this case. However, neither Journal nor the staff recognize that extending *Refugio* in this manner would work havoc on the Commission's established methodology for computing white and gray areas. For at least fourteen years it has been the policy of the Commission that vacant allotments are to be counted for the purposes of white and gray area considerations. That is, an area is not considered to be without reception service as long as there is a vacant allotment

covering the area. *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991).² Similarly, an area is not considered to be without reception service if it is within the theoretical coverage of an occupied allotment operating at the maximum facilities for its class, even when the licensed facilities are submaximum and the station has no plans to upgrade the facilities. *Banks, Sunriver, Redmond, and Corvallis, Oregon*, FCC 04-118 at ¶ 21 n. 28 (rel. May 27, 2004). In other words, potential service negates white area. Journal argues that *Greenup* should apply only in cases where new service is being proposed, not where it is being removed. However, that distinction does no good here, because Lakeshore *has* proposed new service: the two new allotments at Willcox would be new service. Considered under the *Greenup* standard, they would be treated as covering white and gray area.

4. The Commission's long-established policy with respect to reception service stands in stark contrast to its policy with respect to transmission service. In the case of transmission service, potential service does *not* negate the loss of a community's sole transmission service. *Actual* service is required. See *Barnwell, South Carolina et al.*, 17 FCC Rcd 18956 (2002) (requiring activation of replacement service before relocation of existing station); *Alva, Mooreland, Tishomingo, Tuttle, and Woodward, Oklahoma*, 17 FCC Rcd 14722 (2002) (granting change in community of license only when replacement service had commenced operation at Tishomingo), *app. for review granted in part*, FCC 05-64 (March 14, 2005);³ *Refugio and Taft, Texas*, 15 FCC Rcd 8497 (1997); *Llano and Marble Falls, Texas*, 12

² It is silly to try to distinguish *Greenup's* factual situation from this one, as both Journal and the staff attempt to do. The factual situation of *Greenup* is irrelevant. That foundational case set forth the Commission's policy, which has been uniformly applied in *all* white and gray area situations since that time. Any attempt to apply different calculation methodologies in different white and gray area situations would lead to absurd and contradictory results, which Lakeshore pointed out in its Petition for Reconsideration and no party has denied.

³ The station was returned to Tishomingo because there was no longer an expression of interest in the new community. However, the underlying allotment principle was not questioned.

FCC Rcd 6809 (1997); *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

5. In fact, the need to provide a community with an activated transmission service is precisely the reason that the Commission decided *Refugio* the way it did. The Commission was concerned over the lengthy delay that often intervened before service can commence on a vacant allotment. *Refugio*, 18 FCC Rcd at 2296. Delays of this nature had, in several instances, interfered with the implementation of the Commission's allotment decisions. *Id.* Significantly, however, there is no corresponding concern with respect to the replacement of reception service in a populated area, because an area is considered as having reception service as soon as there is an allotment potentially capable of providing service to the area. Therefore, in the case of reception service there is no similar delay. Potential service negates white area. In this case, the staff failed to account for the potential service and in doing so created confusion as to how loss area studies are to be performed. Will the Commission now find white area everywhere that there is no actual service?⁴

6. Lakeshore recognizes that this case involves the loss of *existing* reception service, and this is what makes it a difficult case. The Commission has a legitimate concern that the public is not unduly inconvenienced by the loss of radio service upon which it has come to rely, and Lakeshore shares that concern. Indeed, the Commission has many times articulated its concern that the replacement of an operating station with a vacant allotment does not adequately cure the disruption in service caused by the loss of an operating station. *See Report and Order* at ¶ 9. However, due to the manner in which every case involving service to loss area has been

⁴ In this regard, if KWCX were an unbuilt construction permit, it could change city of license without a replacement transmission service because *Refugio's* prohibition would not apply. If it were relocated as an unbuilt construction permit, would actual service be required, or would potential service suffice to avoid the creation of white area?

calculated by considering potential service (*i.e.*, vacant allotments), this concern falls under priority (4), "other public interest matters." See *Nogales, Vail, and Patagonia, Arizona*, 16 FCC Rcd 20515, 20519 [¶ 9] (2001); *Detroit Lakes and Barnesville, Minnesota and Enderlin, North Dakota*, 16 FCC Rcd 22581, 22584 [¶ 10] (2001), *aff'd in pertinent part*, 17 FCC Rcd 25055 (2002). The relocation proposed by Lakeshore advances priority (3), first local service. Because there is no white or gray area created, this case does not involve any higher priority.⁵ Though it may be a hard case, the Commission cannot simply ignore its priority system in order to reach the result it wants. A reasoned decision is still necessary.

7. Journal also states that the Commission should disregard the service that will be provided to the area once service commences on the upgraded facilities of KCDQ(FM), Tombstone, Arizona and the new FM station proposed at Lordsburg, New Mexico. However, that assertion lacks credibility. Journal argues that the Tombstone and Lordsburg applications are not likely to be granted, reciting supposed defects and delays. But even as Journal made that argument on March 23, 2005, the Tombstone application had already been granted one day earlier, on March 22, 2005. See File No. BPH-20010525AAX.⁶ Therefore, the Commission should *not* disregard the reception service that will be provided by these stations, either of which will replace the service lost in Lakeshore's relocation. It should instead disregard Journal's comments, which have already been proved wrong in one significant respect. The grant of the Tombstone application assumes decisional significance in the light of *Greenup*, because that was

⁵ When vacant allotments are properly considered, the KWCX-FM relocation does not leave any area with fewer than two reception services. This is consistent with other relocations the Commission has granted. See, *e.g.*, *Scappoose and Tillamook, Oregon*, 15 FCC Rcd 10899 (2000); *Detroit Lakes and Barnesville, Minnesota, supra*; *Earle, Arkansas, et al.*, 10 FCC Rcd 8270 (1995).

⁶ The service area of the upgraded Tombstone facility encloses most of the KWCX-FM loss area. The small remaining "white" area contains only 40 people and is *de minimis*. See *Seabrook, Texas, et al.*, 10 FCC Rcd 9360 (1995).

exactly what happened in that case. *Greenup* holds that intervening changes in the spectrum should cause the Commission to reconsider the benefits of a rule making proposal affected by those changes. See *Greenup*, 6 FCC Rcd at 1494 [¶ 9]. Thus, pursuant to Section 1.429(b)(1) of the Commission's Rules, the facts relied upon by the staff in the *Report & Order* have changed in a decisional manner.

8. Finally, both REC and Journal argue that Davis-Monthan Air Force Base is not a community for allotment purposes, but neither raises any new arguments in that regard. Rather, they state that if Commission reaches this question, it should consider their arguments raised in comments earlier in the proceeding. Lakeshore submitted extensive evidence on the community status of Davis-Monthan, and believe that the evidence compels a determination that it is both a community and independent of Tucson.

WHEREFORE, for the foregoing reasons, the Commission should reconsider the *Report and Order*. It should hold that *Refugio* does not apply here, and that it should not be extended to this situation. It should consider the loss area sufficiently well served by new allotments as well as by service at Tombstone, Arizona, which has now been granted. It should grant Lakeshore's counterproposal on its merits.

Respectfully submitted,

LAKESHORE MEDIA, L.L.C.

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April 4, 2005

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CERTIFICATE OF SERVICE

I, Andrea Brown, hereby certify that on this 4th day of April, 2005, copies of the foregoing "Reply to Oppositions to Petition for Reconsideration" were sent via first-class mail, postage prepaid, to the following:

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