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October 17, 2005

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Via Hand Delivery

Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: EX PARTE SUBMISSION**
WT Docket 03-66; Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 GHz Bands

Dear Ms. Dortch:

On October 13, 2005, former FCC Chairman Dennis Patrick, Bradley Holmes, Chief Operating Officer of NY3G Partnership ("NY3G"), and Tony Lin, counsel for NY3G, met with Fred Campbell, legal advisor to Chairman Martin, regarding the above-referenced proceeding. Mr. Patrick served as a Commissioner (1983-1987) and Chairman (1987-1989) of the FCC when the Commission adopted new rules and policies to increase the public benefit from the 48 MHz of spectrum that make up the E and F group channels.[1] Mr. Patrick is an acquaintance of some of the NY3G principals but has no financial investment in NY3G or any other BRS/EBS licensee. He agreed to NY3G's

[1] *See, e.g., In the Matter of Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service and the Private Operational Fixed Microwave Service, Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129 (1984).

request to discuss this issue with the Commission out of concern that, even after more than twenty years of Commission effort, this critical spectrum may remain underutilized for millions of consumers in the largest market in the country. This letter summarizes the views expressed by Mr. Patrick and NY3G's representatives, as well as other relevant information in the record.

In particular, Mr. Patrick discussed and endorsed Dr. Thomas Hazlett's analysis that uncertainty regarding spectrum rights creates enormous transaction costs and hold-up incentives, resulting in spectrum remaining dramatically underdeveloped and imposing an enormous cost on consumers by depriving them of additional competition.[2] Mr. Patrick noted that in a number of proceedings the Commission has recognized that negotiations are not always successful and that there must be specific rules to establish clear spectrum rights in the event voluntary negotiations fail.[3]

Mr. Holmes discussed how, in New York City, these problems have proven uniquely insurmountable. Unlike the situation in other markets, the co-channel F group licensees in New York City have been unable to resolve their differences voluntarily for nearly two decades. NY3G has previously demonstrated that the Commission's proposed "split-the-football" approach will not resolve the uncertainty regarding spectrum rights because in this case, uniquely, it will create a huge exclusion zone. Neither co-channel licensee would be able to provide service in the exclusion zone, effectively forcing the licensees to continue to negotiate with one another without any clarity regarding their relative rights.[4]

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[2] *See* Hazlett Study attached as Exhibit 2 to Comments of NY3G Partnership (January 10, 2005). As Dr. Hazlett explains, additional entry would "unleash market forces which will lower prices and expand services" and bring large numbers of new subscribers to the high-speed market. Hazlett Study, at 16.

[3] *See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 8 FCC Rcd 6589, at ¶¶ 13-18 (1993) (establishing involuntary relocation procedures in the event agreements between incumbent fixed service licensees and new emerging technology licensees are not reached).

[4] As explained in prior filings on the record, the calculation of the exclusion zone is based on conservative assumptions that base stations and CPE devices transmit at most an EIRP of 0.1 watts towards the GSA. *See* Engineering Study attached to Reply Comments of NY3G Partnership (February 8, 2005). In practice, however, such a power level could not practically achieve reliable in-building service to the densely urban New York City environment. *See* Engineering Study attached to Letter to Marlene Dortch from Bruce Jacobs (May 31, 2005).

Footnote continued on next page

The attached maps show the New York City exclusion zone, covering more than seven million people living (and many millions more working, shopping, and traveling) in the heart of the market, including all of Manhattan, the Bronx, and Staten Island and much of Brooklyn, Queens, Westchester County, and Jersey City.[5]

Mr. Patrick emphasized that market failure in such a large market as New York City, with millions of potential broadband users, makes it critical for the Commission to take action and assign clear spectrum rights.

Mr. Patrick expressed his support for the solution proposed by NY3G. *See, e.g.*, Letter to Marlene Dortch from Bruce Jacobs (June 27, 2005). The NY3G alternative would divide the frequencies in those unique cases where split-the-football would create exclusion zones affecting large numbers of people and a large percentage of the market. *See* Attachment B (providing NY3G's specific proposed change to the FCC's rules). This approach would create the clarity regarding spectrum rights that is missing under the existing rules or the split-the-football proposal.[6]

Mr. Patrick supported maximizing the amount of spectrum available for competitive broadband service. Mr. Holmes referenced an analysis by NY3G's consulting engineer demonstrating that NY3G's ability to use three channels instead of two would increase the capacity of its wireless broadband system by as much as 200%,

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Footnote continued from previous page

Under more realistic parameters (40 watts maximum EIRP base stations and minus 20 dB for the pattern null aimed towards the GSA border), the exclusion zone would be twice as large, 15.6 km on each side of the GSA border. *Id*. at 2.

[5] *See* Attachment A. At the request of Mr. Campbell, NY3G is attaching the map previously filed in this proceeding, which depicts the exclusion zone in New York City. *See, e.g.,* Letter to Marlene Dortch from Bruce Jacobs, at Exhibit 2 (October 5, 2005). NY3G is also providing two additional, more detailed maps to highlight the area affected.

[6] NY3G has also proposed other alternatives that were not discussed at this meeting. These include requiring grandfathered ITFS licensees on the E or F group channels to operate on a secondary non-interference basis to co-channel MMDS licensees in certain situations (Comments of NY3G Partnership (January 10, 2005) or, through an adjudicatory proceeding, enforcing the FCC's rules limiting the ITFS licensee operating on the F group channels in New York City to four channels in a market (Petition to Modify Licenses (January 10, 2005)).

providing additional capacity critical in meeting expected demand in New York City. Additional capacity would facilitate NY3G's ability to be a viable competitor, benefiting consumers through lower prices and more services.[7]

Mr. Patrick emphasized that the Commission's decision is not about choosing between education and commercial interests. He noted that the NY3G proposal provides the EBS licensee with the ability to continue to transmit the same amount of educational programming, in light of the availability of digital compression for transmitting video, NY3G's proposal to pay for the transition to digital compression, and the many alternatives for distributing one-way video programming. *See* Comments of NY3G Partnership, at 8 (January 10, 2005).[8]

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[7] *See* Letter to Marlene Dortch from Bruce Jacobs (June 27, 2005). If the Commission were to assign NY3G only two channels, each base station will be limited to the use of omnidirectional or two-sector antenna installations, instead of six-sector site deployments that are available with a third channel. Without costly site modifications, each base station of a two-channel system will always be limited to a third or less capacity than is available to multi-sector sites within a three-channel system.

[8] Although not discussed at the meeting, NY3G has shown previously in its filings in this proceeding that in other spectrum management decisions, the Commission has taken into account the value of compression in preserving incumbents' ability to maintain service levels with less spectrum. *See* Comments of NY3G Partnership, at 15 (January 10, 2005) (citing *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825, at ¶ 29 (1996) ("Our goal is to foster efficient use of the spectrum, which would be thwarted if all incumbents are relocated to systems with capacity that exceeds their current needs. Also, limiting spectrum to current needs serves the public interest, because we believe that it will promote the development of spectrum-efficient technology capable of increasing capacity without increasing bandwidth.")).

For these reasons, Mr. Patrick urged the Commission to take the necessary actions to ensure that the rules that it establishes for this historically underdeveloped spectrum would allow licensees in all markets, including New York City, finally to put the spectrum to its highest and most-valued use.

Very truly yours,

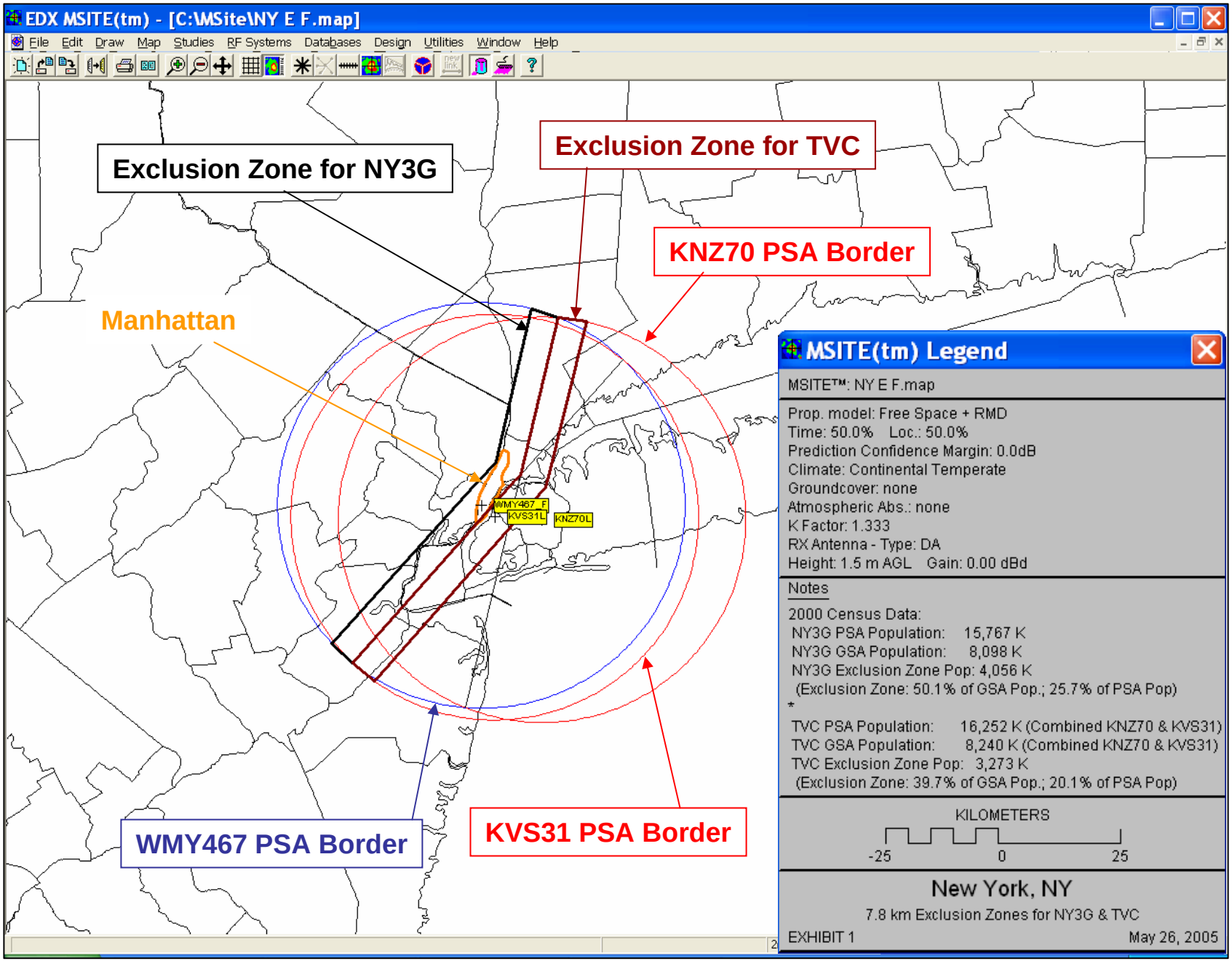
/s/

Bruce D. Jacobs
Tony Lin
*Counsel for NY3G Partnership*

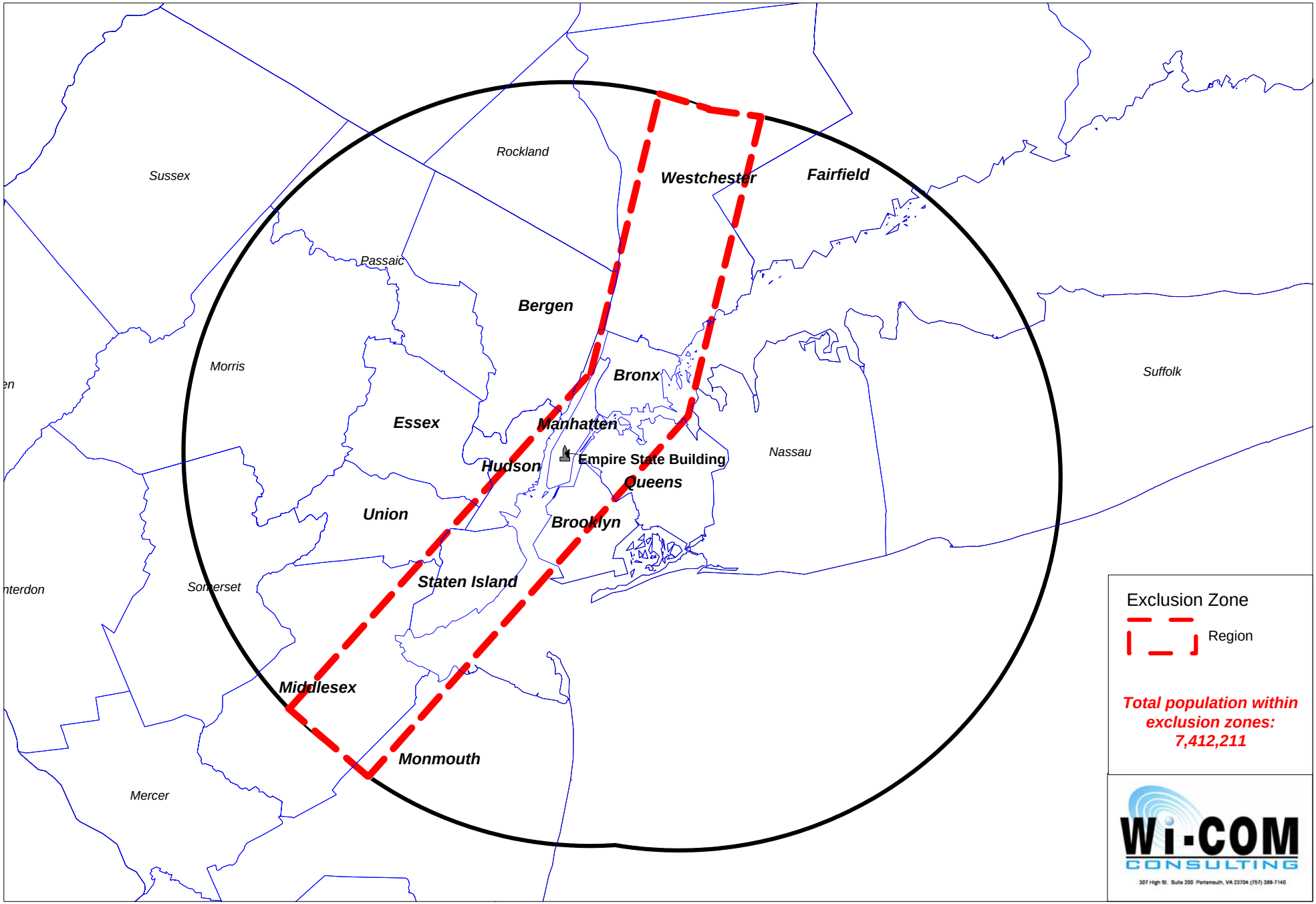
Attachments

cc: Fred Campbell

# Attachment A


EDX MSITE(tm) - [C:\MSite\NY E F.map]
File Edit Draw Map Studies RF Systems Databases Design Utilities Window Help
Exclusion Zone for NY3G
Exclusion Zone for TVC
KNZ70 PSA Border
Manhattan
WMY467_F
KVS31L
KNZ70L
WMY467 PSA Border
KVS31 PSA Border
MSITE(tm) Legend
MSITE™: NY E F.map
Prop. model: Free Space + RMD
Time: 50.0% Loc.: 50.0%
Prediction Confidence Margin: 0.0dB
Climate: Continental Temperate
Groundcover: none
Atmospheric Abs.: none
K Factor: 1.333
RX Antenna - Type: DA
Height: 1.5 m AGL Gain: 0.00 dBd
Notes
2000 Census Data:
NY3G PSA Population: 15,767 K
NY3G GSA Population: 8,098 K
NY3G Exclusion Zone Pop: 4,056 K
(Exclusion Zone: 50.1% of GSA Pop.; 25.7% of PSA Pop)
*
TVC PSA Population: 16,252 K (Combined KNZ70 & KVS31)
TVC GSA Population: 8,240 K (Combined KNZ70 & KVS31)
TVC Exclusion Zone Pop: 3,273 K
(Exclusion Zone: 39.7% of GSA Pop.; 20.1% of PSA Pop)
KILOMETERS
-25
0
25
New York, NY
7.8 km Exclusion Zones for NY3G & TVC
EXHIBIT 1
May 26, 2005

# F Group GSA Map - New York City



# F Group GSA Map - New York City

# Attachment B

**§27.1206** Geographic Service Area.

(a) The Geographic Service Area (GSA) is either:

(1) The area for incumbent site-based licensees that is bounded by a circle having a 35 mile radius and centered at the station's reference coordinates, which was the previous PSA entitled to incumbent licensees prior to January 10, 2005, and is bounded by the chord(s) drawn between intersection points of the licensee's previous 35 mile PSA and those of respective adjacent market, co-channel licensees, except if the overlap of the PSAs of incumbent site-based co-channel BRS and grandfathered EBS licensees operating on the E or F group channels would result in an exclusion zone containing [3] million or more people and more than [33]% of the total population of the combined GSAs of the co-channel licensees. (An exclusion zone is the area within 7.8 kilometers of the chord(s) drawn as described above in connection with any two co-channel licensees and within the PSAs of those two co-channel licensees.) In that case, any one of the two affected co-channel licensees may elect during the transition process (*see* §27.1232 (b),(c)) to divide the channel assignments so that the grandfathered EBS licensee is assigned the one high-powered channel and the BRS licensee is assigned the three low-powered channels. If such an election is made, the GSA for the affected licensees' assigned channel(s) will be the area bounded by that licensee's previous 35 mile PSA centered at the station's reference coordinates and by the chord(s) drawn between intersection points of the licensee's previous 35 mile PSA and those of any other adjacent market co-channel licensees that are operating on the same channels; or:

(2) The BTA that is licensed to the respective BRS BTA authorization holder subject to the exclusion of overlapping, co-channel incumbent GSAs as described in paragraph (a)(1) of this section.

(b) If the license for an incumbent BRS station cancels or is forfeited, the GSA area of the incumbent station shall dissolve and the right to operate in that area automatically reverts to the GSA licensee that held the corresponding BTA.