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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.202(b)  
Table of Allotments,  
FM Broadcast Stations  
(Boulder Town, Levan, Mount Pleasant  
and Richfield UT)

MM Docket No. 04-258  
RM-11000  
RM-11149

RECEIVED

AUG - 7 2006

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

Federal Communications Commission  
Office of Secretary

**OPPOSITION TO PETITION FOR RECONSIDERATION**

SANPETE COUNTY BROADCASTING CO., successor to Mid-Utah Radio, Inc., by counsel, and pursuant to Section 1.429 of the Commission's rules, hereby submits its Opposition to the Petition for Reconsideration ("*Petition*") filed on June 5, 2006, by MICRO COMMUNICATIONS, INC. ("*Micro*").

**I. BACKGROUND AND TIMING FOR THIS OPPOSITION**

A. **Background.** On July 20, 2004, the Audio Division released a Notice of Proposed Rulemaking and Order to Show Cause (the "*NPRM*"), in response to a petition for rulemaking filed by Micro. Micro proposed to (i) substitute Channel 229C for Channel 244C at Levan, UT, and (ii) modify the license for Station KQMB (f/k/a KCFM; FCC Facility ID No. 89181) to operate on Channel 244. In order to accommodate the change at Levan, UT, Micro proposed the substitution of Channel 244C for

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Channel 229C at Richfield, UT, and the concomitant modification of the license for Station KLGL (f/k/a KCYQ; FCC Facility ID No. 41895). Mid-Utah, as the then-licensee of KLGL opposed Micro's proposal on the ground that it was defective due to short-spaced to vacant allotments at Beaver, UT (Channel 246A) and Mesquite, NV (Channel 244C).<sup>1/</sup>

Mid-Utah subsequently filed a Counterproposal urging the allotment of (i) Channel 231C to Boulder Town, UT, as that community's first local aural service, (ii) the deletion of Channel 229C at Richfield, UT, and (iii) Channel 229C's reassignment to Mount Pleasant, UT, as that community's first local service. Concurrently with allotment of Channel 229C to Mount Pleasant, UT, Mid-Utah has advocated the modification of KLGL's (f/k/a KCYQ) license to serve Mount Pleasant.

On May 5, 2006, the Media Bureau released a Report and Order in connection with the above-captioned proceeding (the "R&O"), whereby it dismissed Micro's rulemaking proposal in accordance with the policy articulated in *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (Media Bur. 1996) (hereafter sometimes "*Cut & Shoot*"), further described below, and denied Mid-Utah's Counterproposal. Both Micro and Mid-Utah have sought reconsideration of the May 5, 2006, R&O. This submission is in opposition to Micro's Petition.

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<sup>1/</sup> On March 1, 2006, Mid-Utah assigned the license for KLGL to Sanpete County Broadcasting Co. (See BALH-20051228ACL, granted February 24, 2006).

B. *Timing for this Opposition.* Section 1.429(f) of the Commission's rules<sup>2/</sup> provides that oppositions to a petition for reconsideration must be filed within fifteen (15) days after the date of the public notice of the petition's filing. Inasmuch as a Public Notice concerning Micro's Petition for Reconsideration has not yet been released, this submission is timely.

## II. MICRO'S ARGUMENT

*Micro Contends that the Cut & Shoot Policy has been Tempered.* Micro's primary argument is that the policy in *Cut and Shoot, Texas*,<sup>3/</sup> has been tempered by *WKVE, Semora, North Carolina*, 18 FCC Rcd 23411(2006) (hereafter "*WKVE*"). That, however, is not the case. *WKVE* did not change the *Cut & Shoot* policy but, instead, distinguished it in consideration of the changed and compelling public interest circumstances presented in that case.

When first expounding the *Cut & Shoot* policy, the then-Policy and Rules Division observed that

(p)rocessing petitions for rule making which would rely on other events by third parties to effect the compliance of the proposal with the separation requirements is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the administrative resources of both the Allocations Branch and the Audio Services. Division. 5 FCC Rcd at 16384.

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<sup>2/</sup> 47 C.F.R. § 1.429.

<sup>3/</sup> *Id.*

The Division continued by noting that there was no public interest benefit in such a delay and that the policy of not accepting petitions for rulemaking that are contingent on the licensing of facilities as set forth in an outstanding construction permit will “conserve Commission resources and enable ... (the agency) to process expeditiously the vast majority of rule making proposals.” *Id.*

The circumstances in *WKVE* that warranted deviation from the *Cut & Shoot* policy turned on timing and the interrelationship of minor change applications.<sup>4/</sup> Indeed, *WKVE* was not an allocation proceeding, in the strict sense, because it involved “one-step” minor change applications. As the Commission noted there, the sequencing of dates was “important” to the resolution of the issues in *WKVE*. For clarity, the pertinent dates and events were as follows:

DATE	EVENT
February 14, 1995	WEND filed a one-step application to downgrade facilities.
January 16, 1996	WEND was granted a CP to downgrade
March 7, 1996	WKVE filed a one-step application to up-grade from a Class A to a Class C2
March 13, 1996	The Amherst Virginia rule making petition was filed
May 1, 1996	A Notice of Proposed Rule Making was issued regarding Amherst, VA, proposing a site restriction to protect WKVE’s Class A facilities at Semora

<sup>4/</sup> The *WKVE* case involved minor-change modifications for WEND, Salisbury, North Carolina, and WKVE, Semora, North Carolina, and a conflicting rule making petition to allot, *inter alia*, channel 294A to Amherst, Virginia.

DATE	EVENT
September 24, 1997	WEND filed a license application to cover the permit for the downgrade
December 21, 1997	WEND's license application was granted
December 23, 1997	WKVE's upgrade permit was granted

Under the Commission's rules, the following allotment protections were required: (1) an application generally must protect licensed facilities, construction permits, and prior-filed applications (18 FCC Rcd at 23423, citing § 73.207); (2) existing facilities' modification applications must protect the formerly licensed facilities until a the grant of license application covering the modification; and (3) rule making petitions must protect licensed facilities, notwithstanding the grant of a modification application or the pendency of a covering license application.

In reaching its decision in the *WKVE* case, the Commission noted that, at the time the WKVE-upgrade application was filed, it was unacceptable because it was contingent upon the grant of the WEND downgrade. However, before the staff could examine the WKVE application, it granted the WEND license application. That eliminated any need for WKVE to protect WEND and cured the acceptability defect. Thus, the Commission stated:

Our broadcast *licensing procedures* do not require the return of *applications* that were unacceptable at the time of filing but which came into compliance with our technical rules prior to the deadline for corrective amendments. We will not take adverse action on ... (WKVE's) Upgrade Application based solely on its acceptability as filed, when subsequent events prior to staff review resulted in a fully acceptable *application*. *Id.* at ¶ 26. (Emphasis added.)

Unlike the *WKVE* case, the instant allocation proceeding does not involve either an upgrade or downgrade modification *application*. Rather, it strictly is an allocation proceeding, and is readily distinguishable from *WKVE*.

More fundamentally, unlike *WKVE*, at the time of the issuance of the NPRM (the equivalent of the staff examining *WKVE*'s application), not all obstacles to Micro's proposal had been resolved or removed. A channel change involving Beaver, Utah, had not yet become a final order,<sup>5/</sup> and the short-spacing involving the allotment at Mesquite, Nevada, was extant. Accordingly, unlike the circumstances in *WKVE*, not all the conflicts have been removed. Therefore, the *Cut & Shoot* policy is fully applicable to Micro's proposal. The situation is best summarized in *Amboy, Baker & Desert Center California; Kingman, Mohave Valley, Parker, and Seligman, Arizona; and Boulder City, Caliente, Henderson and Pahrump, Nevada*, 19 FCC Rcd 12405 (Audio Division, 2004), to wit:

In allocation proceedings, both counterproposals *and initial rule-making proposals* are deemed defective if they are in conflict with, or contingent upon, a cut-off proposal, or a non-final decision in another pending proceeding. This policy not only affords protection to parties entitled to cut-off protection, it also is essential to the efficient processing of proposed changes to the Table of Allotments. Processing proposals that are *not capable of being effectuated on the date of filing* would cause an unnecessary expenditure of

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<sup>5/</sup>See *Dinosaur and Rangely, Colorado; Franklin and Preston, Idaho; Beaver, Coalville, Elsinore, Manila, Monroe, Nephi, Richfield, Smithfield and Tremonton, Utah; and Fort Bridger, Green River, Lyman, Rock Springs, Saratoga and Wamsutter, Wyoming*, 19 FCC Rcd 10327 (Audio Division, 2004).

Commission resources and would impose an unfair burden on other parties. (Emphasis added.)

It is also noteworthy that Micro has made no countervailing or compelling public interest demonstration to warrant any deviation whatsoever from the *Cut & Shoot* policy. *See* 11 FCC Rcd at 16384, ¶ 5. Rather, Micro blithely and mistakenly relies upon *WKVE* as an erroneous basis for the inapplicability of *Cut & Shoot*. Micro simply is wrong and, accordingly, its Petition for Reconsideration must be denied.

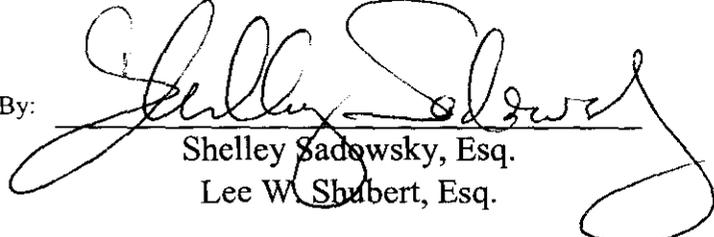
### **III. ADDITIONAL DEFICIENCIES IN MICRO'S PROPOSAL**

*Micro's Proposal Creates White Space.* In the event the Audio Division were to undertake any further analysis of Micro's proposal in connection with its Petition for Reconsideration, it should be noted that Micro's proposal creates a substantial amount of new white and gray areas. *See* the attached Engineering Statement prepared by consulting engineer, Kevin Terry, which is incorporated by reference herein. These facts exacerbate the defects inherent in Micro's proposal and further support the rejection of Micro's proposal. In sum, Micro's proposal was flawed when filed, and no good cause exists for reconsideration of the dismissal of its petition for rule making.

**WHEREFORE**, the premises considered, respectfully requests that Micro's Petition for Reconsideration be denied

Respectfully submitted,

**SANPETE COUNTY BROADCASTING CO.**

By:   
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August 7, 2006

**ATTACHMENT A**

**ENGINEERING STATEMENT OF KEVIN TERRY**

**ENGINEERING STATEMENT**  
**In Support of**  
**Opposition to Petition for Reconsideration**  
MB Docket 04-258  
Sanpete County Broadcasting Co.  
Levan, UT

**Introduction**

This engineering statement is offered in support of Sanpete County Broadcasting Co.'s (successor to Mid-Utah Radio, Inc. and hereafter referred to "Sanpete/Mid-Utah") Opposition to Petition for Reconsideration filed by Micro Communications, Inc. ("Micro") on June 5, 2006, in the above-referenced proceeding.

As a matter of background, on October 14, 2003, Micro filed a Petition for Rulemaking (the "Petition") requesting that Channel 244C be changed to 229C at Levan, Utah, for use by KCFM. At the time the Petition was filed, Channel 229C at Levan was shortspaced to the licensed facilities of KCYQ 229C Richfield, Utah (FCC Facility ID #41895; see BLH-19961107KA), operating at a site called Monroe Peak. The Levan proposal was also shortspaced to the permitted site for KCYQ to operate at Barton Peak. In order to eliminate these conflicts, Micro proposed the substitution of Channel 244C for 229C at Richfield, UT, for KCYQ's use.

In the Report and Order released in this proceeding on May 5, 2006 (the "R & O"), the Audio Division of the Media Bureau (the "Division") dismissed Micro's Petition as defective under the policy set in *Cut and Shoot, Texas*<sup>1</sup>. This was based on the fact that when the Petition was filed, although Channel 244C could be allotted to Richfield at the site specified in an outstanding Station KCYQ Construction Permit<sup>2</sup>, Channel 244C would be short-spaced to two vacant channels, Channel 246A at Beaver, Utah, and Channel 244C at Mesquite, Nevada, based on KCYQ's licensed site<sup>3</sup>.

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<sup>1</sup> See *Cut and Shoot, Texas*, Memorandum Opinion and Order, 11 FCC Rcd 16383 (MMB 1996)

<sup>2</sup> See File BPH-20030304AAQ

<sup>3</sup> See File BLH-19961107KA

Since the R&O correctly concluded that Micro's Petition was defective when filed, it appears that the Staff, understandably, did not go through the unnecessary steps to determine whether or not the Petition would have furthered the Commission's allotment priorities if it had *not* been defective when filed. While Sanpete/Mid-Utah disagrees with Micro's assertion that its Petition warrants reconsideration in the first place, the purpose of the instant Engineering Statement is to demonstrate that Micro's Petition, ignoring the fact that it was defective when filed, will not further the Commission's allotment priorities and is not in the public interest.

### **Updated Examination of Remaining Services**

Since Micro proposes to change its site location for KCFM, Sanpete/Mid-Utah has generated the attached Levan, Utah, Remaining Services Study. In accordance with Commission policies set forth in *Change of Community* as well as *Sells, Arizona*, and *Mertzon, Texas*, only currently operating stations have been counted in the study<sup>4</sup>. In its original Petition for Rulemaking and its Comments dated September 13, 2004 ("Micro's Comments"), Micro and engineer assert that no white or gray area is being created as a result of its proposal and that in the loss area, all persons will remain well served, receiving at least five other full time aural services. These assertions, as Sanpete/Mid-Utah has previously pointed out, are erroneous.

The attached Map A shows that a substantial White Area encompassing approximately 1,450 square kilometers will be created as a result of Micro's proposed change. That is a land mass nearly half the size of Rhode Island. The attached Map B shows that three separate Gray Areas encompassing approximately 1,200 square kilometers will also be created.

While no population resides in the White and Gray Areas being created, these areas are not completely unpopulated as there is an important transient population that travels Interstate 70, which

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<sup>4</sup> The White and Gray Areas created as a result of Micro's proposal are substantially covered by unbuilt Construction Permits at Huntington, UT (BNPH-20041227ACP), Castle Dale, UT (BNPH-20041227ACN), and Torrey, UT (BNPH-20060310ADP). However, since Micro does not own or control any of these unbuilt Construction Permits, it cannot give any assurance that any of these new stations will ever become operational and provide continuing service to the White and Gray Areas created as a result of Micro's proposed change. However, since new station KMXD Monroe, UT (BMPH-20051116ADA) is currently under construction by Sanpete, the Commission and public can rely on this station as a remaining service.

traverses the White Area for 24 kilometers. According to the Utah Department of Transportation, this specific section of Interstate 70 carries, on average, over 5000 vehicles per day<sup>5</sup>. An additional 14 kilometers of Interstate 70 to the west of this new White Area will be relegated to having only one reception service<sup>6</sup>. Finally, approximately 4000 vehicles per day along a 9 kilometer stretch of US Highway 6 will lose one of two current reception services as more Gray Area is created. Many of the vehicles traveling these two highways are tourists on their way to and from Arches National Park, Capitol Reef National Park, the greater Moab area, and Glen Canyon National Recreation Area. Others are commercial vehicles transporting goods between Denver, Salt Lake City, and Las Vegas. Interstate 70 and US Highway 6 are certainly not “back roads.” They both serve critical roles in Utah’s transportation system. Members of the public using them have the legitimate expectation that existing radio service will continue here. Cell phone service is often non-existent. There are few towns or even rest stops. In these areas, radio is the only means for people to access the outside world for news, weather, and emergency information.

According to the *Engineering Reply to Opposition Filed by Mid-Utah Radio, Inc.*, attached to Micro’s Comments, Micro’s engineer states that the substitution of Channel 229C for Channel 244C at the Levan community reference coordinates results in 207,938 persons gaining new service and 31,074 persons losing service. This is the only public interest benefit Micro has offered in support of its proposal which triggers Priority 4 of the Commission’s allotment priorities. When compared to the detriment of creating of White and Gray Area as a result of Micro’s proposal, this benefit pales in comparison.

## **Conclusion**

Micro’s Petition was flawed in many ways when it was filed. First, the Petition was defective when filed as it did not propose an allotment site for Channel 229C at Levan that had line-of-sight to the Community of License. The Notice of Proposed Rulemaking, in effect, cured this defect for Micro by moving the proposed allotment site to Levan’s community reference coordinates. Second, the

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<sup>5</sup> Source: Traffic on Utah Highways 2004; Utah Department of Transportation Systems Planning and Programming Division; <http://www.dot.utah.gov/download.php/tid=1338/2004TrafficOnUtahHighways.pdf>

<sup>6</sup> To the east of the White Area being created as a result of Micro’s proposal, existing White Area extends for an additional 55 kilometers over Interstate 70. If KCFM is permitted to move, the White Area plaguing Interstate 70 would increase from 55 kilometers to 69 kilometers, a 20% increase.

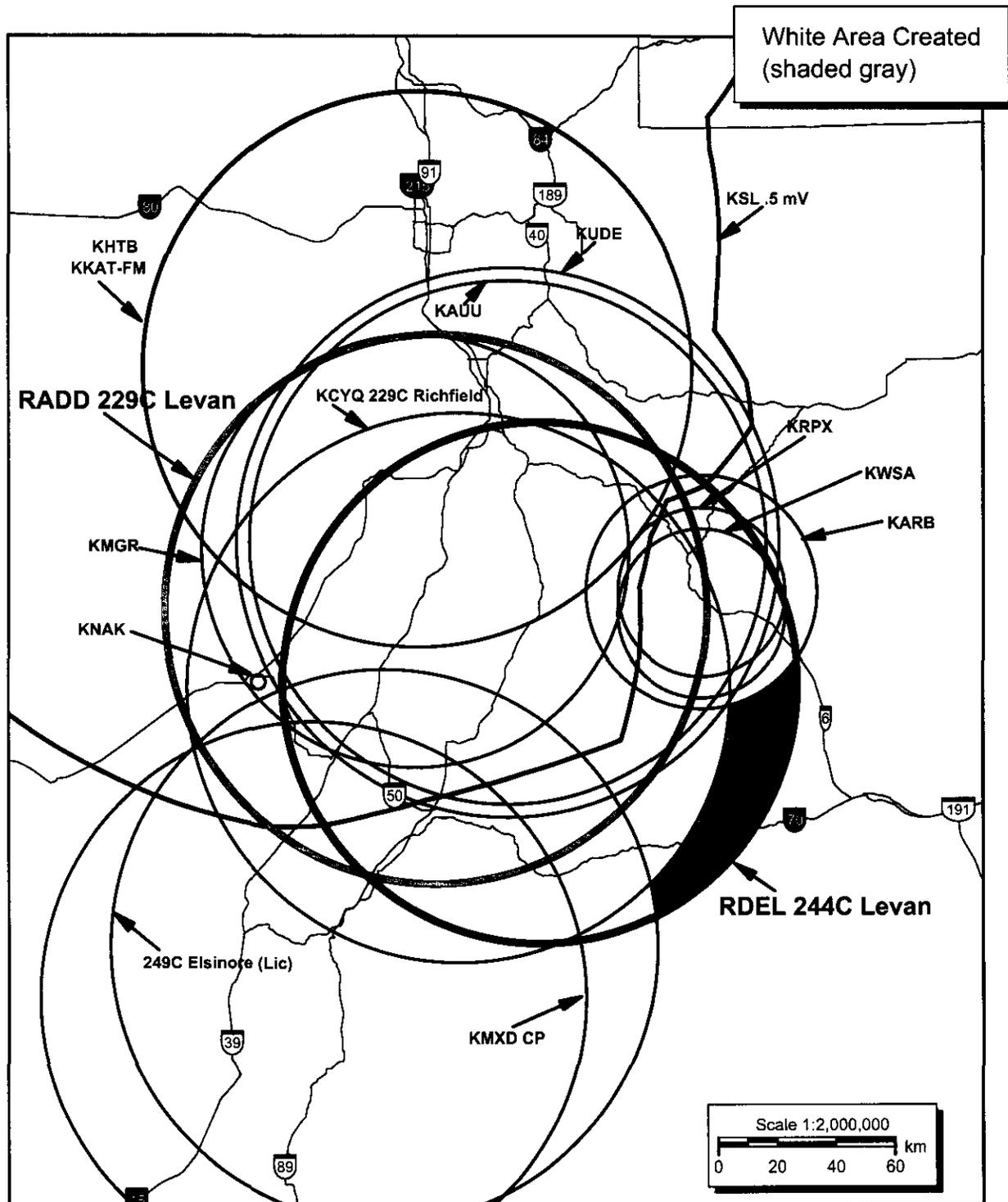
Petition, as noted in the R&O, was also defective when filed in that the substitute channel proposed for KCYQ at Richfield was not fully spaced pursuant to Section 73.207 at the then-current licensed site for KCYQ. Finally, Micro's Petition does not further the Commission's allotment priorities. Huge amounts of White Area and Gray Area are created with no benefits of greater significance being advanced as a result of the Petition. It is clearly apparent that the prime reason for Micro's filing of its Petition was to obtain Commission approval for KCFM to migrate from the underserved rural region of central Utah to the highly populated, well-served urban area near Provo, Utah. For these reasons, Mid-Utah believes that Micro's Petition does not further the Commission's allotment priorities and respectfully requests that the Commission uphold its decision to dismiss the Petition.

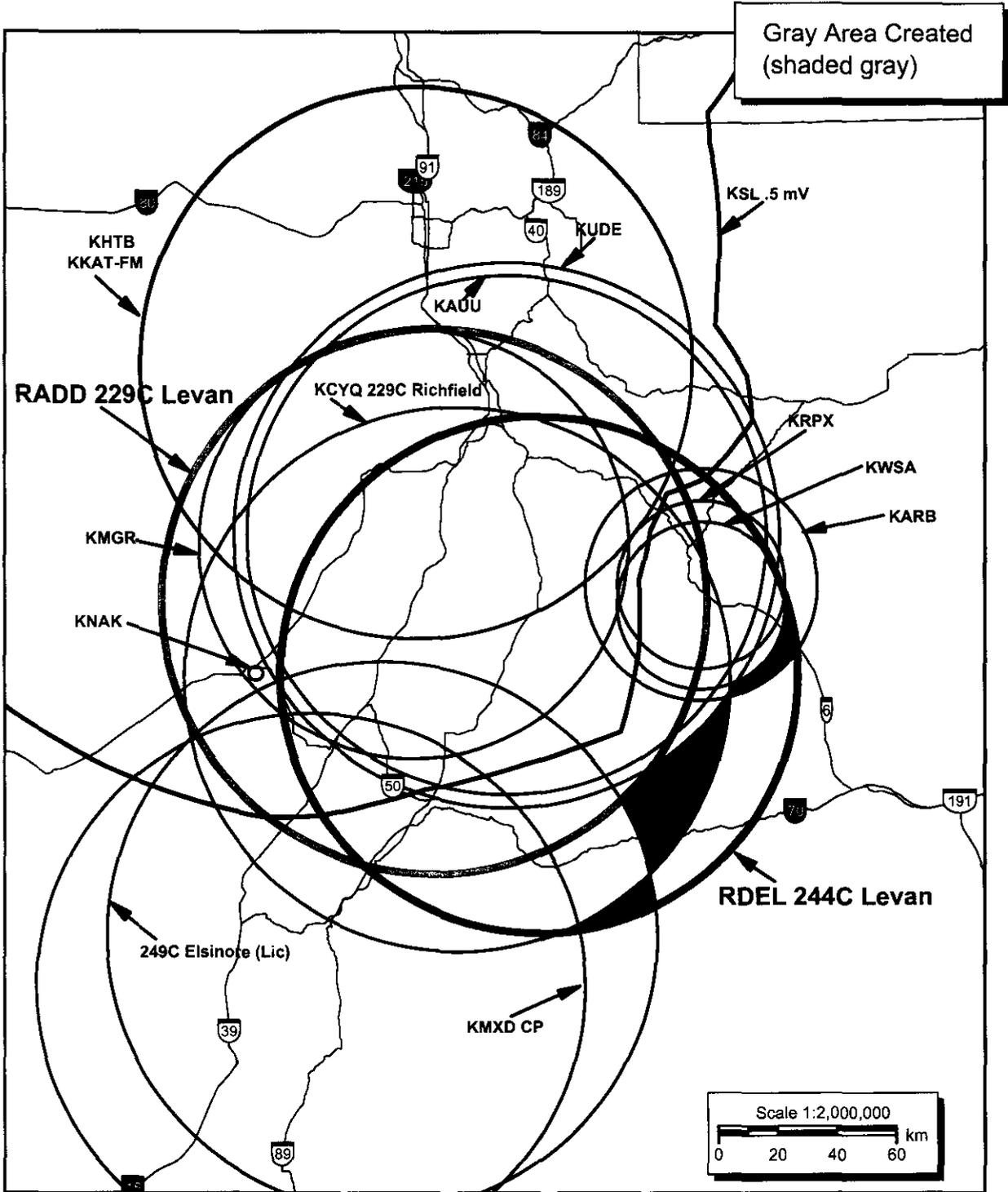
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin Terry", written over a horizontal line.

Kevin Terry, Consulting Engineer

August 7, 2006  
2835 E 3300 S  
Salt Lake City, UT 84109



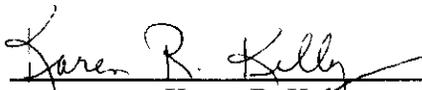


## CERTIFICATE OF SERVICE

The undersigned, an employee of **KATTEN MUCHIN ROSENMAN LLP**, hereby certifies that the foregoing **OPPOSITION TO PETITION FOR RECONSIDERATION** regarding MB Docket No. 04-258 (RM-11000 and RM-11149), was mailed this date by First Class U.S. Mail, postage prepaid, and/or served electronically via e-mail to the following:

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By:   
Karen R. Kelly

August 7, 2006

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\* Service via U.S. Postal Service.

† Service electronically, via e-mail only.