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

FILED/ACCEPTED
AUG 10 2007
Federal Communications Commission
Office of the Secretary

In the Matter of

Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 05-112
FM Broadcast Stations.	)	RM-11185
(Fredericksburg, Converse, Flatonia,	)	RM-11374
Georgetown, Ingram, Lakeway, Lago Vista,	)	
Llano, McQueen, Nolanville, San Antonio,	)	
And Waco, Texas)	)	
Amendment of Section 73.202(b)	)	MB Docket No. 05-151
Table of Allotments,	)	RM-11222
FM Broadcast Stations.	)	RM-11258
(Llano, Junction and Goldthwaite, Texas)	)	

PETITION FOR RECONSIDERATION

Capstar TX Limited Partnership, CCB Texas Licenses, L.P., Clear Channel Broadcasting Licenses, Inc., and Rawhide Radio, LLC ("Joint Parties"), by their counsel, hereby submit this Petition for Reconsideration, pursuant to Section 1.429 of the Commission's Rules, directed to the *Report and Order* ("*R&O*") (DA 07-2544) in this proceeding, released on June 15, 2007.[1] The *R&O* rejected the Joint Parties' proposal to make various modifications to stations in southern Texas which had previously been filed, but not properly considered, in MM Docket No. 00-148 ("the Quanah proceeding").[2] Nevertheless, the Assistant Chief, Media Bureau ("Bureau") ruled that the Joint Parties' proposal in this proceeding was a new proposal and must

[1] The *R&O* was published in the Federal Register on July 11, 2007. Thus, this Petition for Reconsideration is timely filed pursuant to Section 1.429(d) of the Commission's Rules.

[2] *Quanah, TX, et al.*, 18 FCC Rcd 9495 (MB 2003), *aff'd Memorandum Opinion and Order*, 19 FCC Rcd 7159 (MB 2004), *app. for review pending.*

protect a prior filed application which, in turn, was granted subject to the Joint Parties' proposal pending on Application for Review in the Quanah proceeding.[3] The Bureau must reverse this decision and place the Joint Parties' proposal in pending status so that the Commission (on review) can proceed in an orderly fashion and rule on the Quanah proceeding before taking any further action on any conflicting or contingent filings. Alternatively, the Bureau can grant the Joint Parties' proposal based on an engineering solution provided herein. In support hereof, the Joint Parties state as follows:

BACKGROUND

1. The Bureau has avoided consideration of the Joint Parties' proposal on its merits ever since it was filed on Oct 10, 2000, in MM Docket No. 00-148, nearly seven years ago. It took the Bureau almost a year to enter the proposal into its data base and protect it against later filed conflicting rule making proposals and applications. As a result, eight (8) conflicting petitions and two (2) conflicting applications were either granted or accepted and held in queue.[4] Although the Commission later recognized its mistake and dismissed some of the late filed conflicting proposals presumably to allow it to consider the Joint Parties' proposal, actual consideration of the Joint Parties' proposal on the merits failed to materialize in the *Report and Order*, released May 8, 2003.[5] Instead, the Bureau decided that the proposal did not conflict with the proposal set forth in the original Petition for Quanah, Texas. But instead of treating it as

[3] The Bureau acted prematurely in this case. The Bureau issued a Public Notice on May 31, 2007, announcing acceptance of the Joint Parties' Counterproposal and providing a 15 day period for Reply Comments which were due on June 15, 2007. The Joint Parties as well as Munbilla Broadcasting Properties, Ltd. and Katherine Pyeatt and Charles Crawford filed Reply Comments on June 15, 2007. However these Reply Comments were not considered due to the issuance of the *R&O* on June 15, 2007 with an adoption date of June 13, 2007.

[4] See Exhibit 1.

[5] 18 FCC Rcd 9495 (MB 2003).

a separate petition and issuing a Notice of Proposed Rule Making ("NPRM"), in accordance with standard practice,[6] the proposal was dismissed. No reason was given for the disparate treatment.

DISCUSSION

2. It has been nearly seven (7) years since the Joint Parties' proposal was filed. Yet the Commission has yet to consider the proposal on its merits despite having described it as a "technically acceptable allotment proposal."[7] During the seven (7) year period, many of the conflicting proposals were denied by the Bureau in an initial decision, on reconsideration and then, on review, by the Commission. In addition, in two cases, *Benjamin and Mason, Texas* (MM Docket Nos. 01-131 and 01-133) denied by the U.S. Court of Appeals.[8] The only purpose in denying these proposals would be to allow consideration of the Joint Parties' proposal on the merits. Yet that has not happened. The Joint Parties continued to protect its own proposal by filing the Petition for Reconsideration in MM Docket No. 00-148.[9] However, in the *Memorandum Opinion and Order* ("*MO&O*"),[10] the Bureau refused to bifurcate and issue a separate NPRM and stated that the Joint Parties should wait for the various conflicting rule making petitions to be dismissed and then file again. The Joint Parties filed the Application for Review on June 21, 2004 while waiting for the Commission to dismiss the conflicting rule making petitions as it was directed to do on August 5, 2005, by the U. S. Court of Appeals decision in *Crawford v. FCC, supra*.

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[6] See e.g., *Noblesville, Indianapolis and Fishers, IN*, 18 FCC Rcd 11039 (MB 2003); *Saratoga, WY, et al,*. 15 FCC Rcd 10358 (MMB 2000); *Oakdale and Campti, LA,* 7 FCC Rcd 1033 (MMB 1992); *Milford, Utah*, 19 FCC Rcd 10335 (MB 2005).

[7] *MO&O,* 19 FCC Rcd 7159 at paragraph 13.

[8] *Crawford v. FCC*, 417 F.2d 1289 (DC Cir. 2005),

[9] Petition for Partial Reconsideration and Request for Expedited Action, filed on June 16, 2003.

[10] 19 FCC Rcd 7159 (MB 2004)

3. It has been three (3) years since the filing of the Application for Review and two (2) years since the Court of Appeals directed the Commission to dismiss the conflicting proposals. Yet the Bureau continues to issue contingent NPRMs such as the current one for Fredericksburg, Texas.[11] The only logical reason to dismiss the prior filed conflicting petitions and to condition the subsequent grants of other conflicting proposals rather than act in an orderly fashion and process the Joint Parties' proposal first would be to consider the Joint Parties' proposal in a separate NPRM within the context of MM Docket No. 00-148. Since that has not happened, the Joint Parties refiled its proposal in the instant proceeding, having relied on the Bureau's statement that there would be no impediments. But that has not been the case. To the Joint Parties' surprise, the proposal was treated as a new proposal and dismissed due to the prior filed application of Station KHLE, Burnet, Texas although the grant of that permit had been conditioned on the outcome of Commission action on the Joint Parties' proposal (in MM Docket No. 00-148).

4. The Bureau has sent conflicting messages to the Joint Parties. The Bureau continues to protect the Joint Parties' proposal by dismissing the later filed proposals that were inadvertently accepted or by conditioning the grants on the final outcome of MM Docket No. 00-148, under the Auburn, Alabama[12] policy (decided subsequently in 2003). But by doing so, the Bureau's statement in the *MO&O*[13] in MM Docket 00-148 that the Joint Parties should refile once the conflicting proposals are dismissed (and those dismissals are final) is unworkable as the

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[11] On April 27, 2007, the Bureau proposed yet another conflicting allotment of Ch. 245C3 to Christine, TX in MB Docket No. 07-78. Counterproposals in conflict with MM Docket 00-148 have also been filed. The Joint Parties have filed comments urging the Bureau again to withhold action until final resolution of the Quanah, TX docketed proceeding. In addition, on June 18, 2007, a Petition for Rule Making was filed to allot Ch. 256C3 to Harper, TX which acknowledges that it conflicts with MM Docket 00-148.

[12] *Auburn, AL , et al., MO&O*, 18 FCC Rcd 10333 (MB 2003)

[13] *Id* at paragraph. 13.

R&O in the instant proceeding demonstrates.

5. When the Joint Parties refiled its proposal and asked that it receive treatment as if it were the same proposal filed in MM Docket 00-148, such filing was clearly consistent with the Bureau's directive in the *MO&O* "...there would be no impediment that would preclude the Joint Petitioners from filing a petition for rule making setting forth the technically acceptable allotment proposals originally contained in the Counterproposal as well as any related allotment proposals."[14] However the Bureau's treatment of the Joint Parties' proposal in the *R&0* in this proceeding indicates that it has "overlooked" its earlier stated assurance that conflicting proposals such as the permit issued to Station KHLE, Burnet, Texas would not be an impediment. In that regard, when KHLE filed for the permit it expressly recognized the need to protect the proposed substitution of Ch. 297A at Llano, Texas in MM Docket No. 00-148. The permit for KHLE, Burnet, TX, was specifically conditioned on the final disposition of the Llano channel substitution. Thus the Joint Parties cannot rely on the expectation that after nearly seven (7) years of waiting to have the Commission consider the "technically acceptable allotment proposal", there will be a forum for this proposal.

6. The Commission has always insisted on maintaining an orderly process in its proceedings. In *Pinewood, South Carolina,*[15] the Commission allowed the late filing of an alternate channel to resolve a conflict in a pending rule making proceeding even though that filing precluded consideration of another pending proposal. The Commission stated "[w}e continue to believe that the continuous filing of proposals without regard to a cut-off date is not conducive to the efficient transaction of Commission business and would delay service to the

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[14] *Id.*

[15] *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990).

public."[16] This language was relied upon by the aforementioned Court of Appeals decision in *Crawford v. FCC.*

7. However, the Bureau seems to have "lost its way". As the Joint Parties argued in its Application for Review, "[t]he Joint Parties were the first to file an acceptable rule making proposal. Obviously it is the latecomers who should wait for the Joint Parties' proposal to be processed, not the other way around. Moreover the roadblocks that stand in the way of a re-filing by the Joint Parties are of the Commission's own making, and no fault of the Joint Parties." In this case, Station KHLE's permit was conditioned on the outcome of the proposal for the Ch. 297A substitution for Station KAJZ, Llano, Texas. That exact same proposal is offered here. To rule that the Joint Parties must now protect the KHLE permit rather than the other way around amounts to a perverse procedural interpretation of the rules. The Joint Parties have a right to expect that the Commission will act in an orderly fashion and consider the Joint Parties' proposal on its merits without regard to proposals filed years later. The Bureau prefers to rely on the Auburn policy to justify their actions in processing later filed conflicting proposals. However this case should not be subjected to the Auburn policy for several reasons. First the Auburn policy was developed in 2003 after the filing of the Joint Parties' proposal in 2000. Second, the Auburn policy relied on the "effective but non-final grant" of a proposal. Here the proposal was denied and relying on denials creates a whole different set of problems as this case points out. Third, the Joint Parties' proposal has no technical defects as the Bureau has recognized and is capable of being granted. But the Joint Parties should not be responsible for having to defend its proposal against all of the later filed and subsequently granted requests

[16] Id at 7610. See also *Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336 (1988) (concerning the acceptance of late filed pleadings); *Santa Margarita and Guadelupe, California*, 4 FCC Rcd 7887 (MMB 1989) (concerning finality of proceedings); *Paradise, California*, 3 FCC Rcd 1894 (MMB 1988); *South Lake Tahoe, California*, 7 FCC Rcd 1332 (MMB 1992); *Rosendale, New York*, 13 FCC Rcd 20590 (1998).

under the Auburn policy. That responsibility places an unreasonable burden as well as time and expense on the Joint Parties who do not deserve such treatment when the mistake in accepting conflicting proposals derived from the Bureau's error in not protecting the proposal for nearly a year after it was first filed.

8. The Commission has several alternatives available to resolve this matter. The Commission can consider the Joint Parties' proposal on review in the context of MM Docket 00-148 by issuing a NPRM in that proceeding. This option would be fair to all interested parties and allow any other conflicting proposal to receive comparative consideration. As suggested in the Application for Review, the Bureau could issue the NPRM now subject to any further action in MB Docket No. 00-148 taken on review by the Commission with respect to the late filed conflicting proposals previously dismissed by the Commission.

9. Alternatively, the Bureau can treat the Joint Parties' proposal filed in this proceeding as a response to its invitation to refile as stated in the *MO&O* in MM Docket No. 00-148 with the assurance that there would be no impediments to the acceptability of such a filing. Under this scenario any other proposals timely submitted in the instant proceeding would receive comparative consideration.

10. Finally, the Joint Parties offer an engineering solution to the conflict noted in the *R&O* between the substitution of Ch. 297A at Llano, Texas for Station KAJZ(FM) and the authorization issued to Station KHLE(FM), Burnet, Texas on Ch. 295A. As shown in the attached channel study, the reference coordinates for substitute Channel 297A at Llano can be modified and eliminate the previous short spacing of 2.82 kilometers to the KHLE authorization. See attached Channel Study and coverage map.[17] Rawhide Radio, LLC, one of the Joint Parties,

[17] The Joint Parties suggested this same resolution in its Supplement filed on June 13, 2005. However the *R&O* makes no mention of this proposed solution.

is the licensee of the Llano station and hereby consents to the change in site coordinates. A transmitter site may be modified at any time during the pendency of a rule making proceeding to resolve a conflict. Indeed the Commission's preference is to resolve conflicts between rule makings and applications. See e.g. *Pauls Valley, Oklahoma, et al*, 13 FCC Rcd 13458 at paragraph 8 (1998); *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 and n.12 (1993). By adopting this solution, Station KHLE can have the condition listed on its permit deleted and the Joint Parties can withdraw from the longstanding MM Docket No. 00-148. More importantly, the public interest will benefit from the provision of first local services to two communities: Lakeway, Texas (pop. 8,002) and Lago Vista, Texas (pop. 4,507) and an overall gain in service to over a million people.[18]

CONCLUSION

11. The Joint Parties are entitled to have its proposal considered on its merits. The Bureau mistakenly acted in MM Docket No. 00-148 by accepting and, in some cases, granting later filed conflicting proposals which clearly influenced the decision made by the Bureau to refuse to issue a NPRM on the Joint Parties' proposal which is its standard practice. The Bureau then applied the Auburn policy to all subsequently filed conflicting proposals and making it much more difficult to ever consider the proposal as it has assured the Joint Parties that it would do. But it has been nearly seven (7) years. Although the Joint Parties did no more than respond to the Bureau's invitation to refile, the Bureau rushed to judgment, did not consider an

[18] The Joint Parties recognize that by adopting this proposal, the allotment of Ch. 297A to Goldthwaite would be deleted. However that proposal was filed at the same time and does not have prior procedural cut off rights to the Joint Parties' proposal for Ch. 297A at Llano. In addition, the suggested modified coordinates do not have any greater effect on the Goldthwaite proposal than the previously proposed coordinates. The only requirement is for the Bureau to compare the proposals. In doing so, it is clear that a first local service for two communities with a combined population of 12,509 should be favored over the first local service at Goldthwaite with population of 1,802. See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982); and *Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828 (1995).

engineering solution which would have granted the proposal and then reaffirmed the grant of the Burnet permit. The Bureau has the opportunity to correct its past actions and serve the public interest by providing two new first local services to a combined population of 12,509, reestablish its practice of an orderly administrative procedure and bring finality to several proceedings.

WHEREFORE, for the foregoing reasons, the Commission should consider the Joint Parties' Counterproposal on its merits.

Respectfully submitted,

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August 10, 2007

Engineering Statement
In Support of a
Counterproposal
MM Docket 00-148
The Joint Petitioners

Allocation Study - Ch 297A Llano, TX (KBAE)
(Depicting spectrum changes required to allot Ch 297A at Llano)
(Using proposed Ch 297A allotment coordinates as reference)
(Checked 08-09-2007)

REFERENCE
30 47 03 N
98 38 01 W

CLASS = A
Current Spacings

DISPLAY DATES
DATA 08-08-07
SEARCH 08-10-07

Channel 297 - 107.3 MHz

Call	Channel		Location		Dist	Azi	FCC	Margin
RADD	ADD	297A	Llano	TX	6.59	161.7	115.0	-108.41
RADD	ADD	297A	Llano	TX	6.59	161.7	115.0	-108.41
RADD	ADD	297A	Llano	TX	6.59	161.7	115.0	-108.41
RADD	ADD	297A	Llano	TX	10.13	258.9	115.0	-104.87

Of no concern:
Coordinates used by channel 297A at Llano, TX in Docket 00-148.

RADD	ADD	297A	Goldthwaite	TX	79.67	355.0	115.0	-35.33

Of note:
Allocation proposed in instant proceeding that is MX
with channel 297A at Llano.

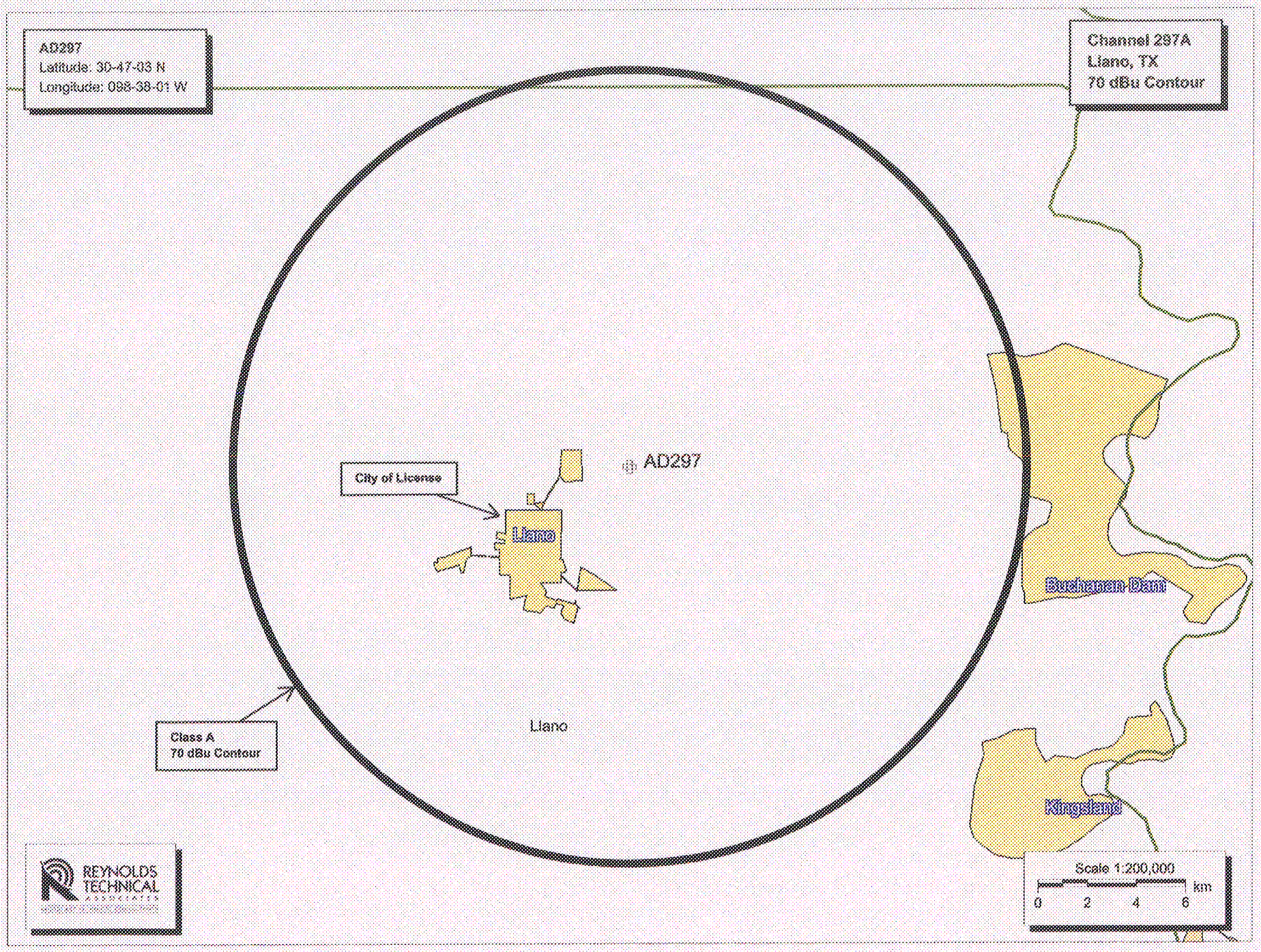
KLFX	LIC-N	297A	Nolanville	TX	104.55	70.7	115.0	-10.45
KLFX.C	CP -N	297A	Nolanville	TX	106.31	70.8	115.0	-8.69
RDEL	DEL	297A	Nolanville	TX	106.31	70.8	115.0	-8.69
RDEL	DEL	297A	Nolanville	TX	106.31	70.8	115.0	-8.69

Of no concern:
Deletion of channel 297A and substitution of channel 249A
proposed in instant proceeding and in Docket 00-148.

KHLE	LIC-Z	295A	Burnet	TX	30.58	98.9	31.0	-0.42
AL0752	VAC	297A	Junction	TX	114.69	251.8	115.0	-0.31
RDEL	DEL	297A	Junction	TX	114.69	251.8	115.0	-0.31
RDEL	DEL	295A	Burnet	TX	33.00	99.1	31.0	2.00
RADD	ADD	297A	Junction	TX	125.16	250.6	115.0	10.16
KXTN-F	LIC	298C0	San Antonio	TX	171.07	168.0	152.0	19.07
KGSR	LIC-N	296C2	Bastrop	TX	125.10	125.8	106.0	19.10
KFAN-F	LIC	300C3	Johnson City	TX	65.10	180.4	42.0	23.10
AL2622	VAC	299A	Richland Springs	TX	56.71	317.8	31.0	25.71
RADD	ADD	295A	Kempner	TX	69.59	64.0	31.0	38.59
AL2207	VAC	296C3	Paint Rock	TX	135.12	307.6	89.0	46.12

REYNOLDS TECHNICAL ASSOCIATES
BROADCAST TECHNICAL CONSULTANTS

Exhibit E Figure 51


AD297
Latitude: 30-47-03 N
Longitude: 098-38-01 W
Channel 297A
Llano, TX
70 dBu Contour
City of License
Llano
AD297
Buchanan Dam
Kingsland
Llano
Class A
70 dBu Contour
REYNOLDS TECHNICAL ASSOCIATES
Scale 1:200,000
0 2 4 6 km

CERTIFICATE OF SERVICE

I, Elbert Ortiz, a legal secretary in the law firm of Wiley Rein LLP do hereby certify that I have on this 10th day of August, 2007, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Reply Comments**" to the following:

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