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

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 And 777-792 MHz Bands	)	WT Docket No. 05-211
	)	
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
	)	
Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones	)	WT Docket No. 01-309
	)	
Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services	)	WT Docket No. 03-264
	)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 06-169
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229
	)	
Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010	)	WT Docket No. 96-86
	)	
Declaratory Ruling on Reporting Requirement Under Commission's Part 1 Anti-Collusion Rule	)	WT Docket No. 07-166

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION

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Filed: September 24, 2007

SUMMARY

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its rural telephone clients (the "Blooston Rural Carriers") and pursuant to Section 1.429 of the Commission's Rules, hereby requests partial reconsideration and/or clarification of the *Second Report and Order* in the above-captioned proceeding. The Blooston Rural Carriers urge the Commission to modify its revised Cellular Market Area (CMA) build-out rule. The FCC's decision to impose a strict geographic build-out obligation on CMA licensees is simply unworkable. The geographic coverage requirement would force the licensee of a CMA (which may be a Rural Service Area, or RSA) to serve 70% of the land within the license boundaries, even if no one lives or travels there. In many RSAs, it may be possible to cover 70 to 90% of the population by putting a signal over well below 50% of the land area. The rule should be revised to provide a population coverage option, comparable to the benchmarks allowed for larger 700 MHz licenses.

The Commission should also rescind those portions of the *Second Report and Order* indicating that the Commission "may" issue monetary forfeiture, early license reclamation and outright license cancellation actions against those licensees that do not meet the build-out obligations. No indication is given as to the circumstances that will trigger such sanctions, or the degree of severity. These sanctions create uncertainty in assessing whether and how much to bid in the auction. Moreover, the rules already provide that licensees will lose any territory they do not serve. This reclamation mechanism allows a reasonable business decision by a licensee that there are simply some areas it cannot feasibly serve. The other sanctions ignore the realities of a rural

build-out. And it is not at all clear what will constitute coverage or service "at a level that is below the end-of-term benchmark." The method of calculating 700 MHz coverage is not defined in the rules, and the service requirements are even more nebulous. The same infirmity calls for the Commission to rescind its threat of bringing a "malicious interference" enforcement action against an auction licensee that establishes a transmitter close to the border of its license area, even though the licensee uses a directional antenna aimed back into its own territory, and complies with the rule governing field strength limits at the boundary of an auction license area.

The auction rules need to provide an interference "buffer zone" to protect the licensee's existing operations, when unbuilt areas are reclaimed at the end of the license term; and the rules need to clarify that Tribal lands will not be considered in calculating geographic coverage, if a Tribal government is not willing to allow such coverage.

The Commission should also eliminate the "interim" reporting requirement for small businesses and rural telephone companies, since the auction rules now establish multiple construction benchmarks and consequences if they are not satisfied.

TABLE OF CONTENTS

SUMMARY ii

TABLE OF CONTENTS iii

STATEMENT OF INTEREST 2

I. The Commission Should Modify the Geographic Coverage Requirement for CMA Licensees. 3

II. The Commission Should Eliminate Vaguely Worded "Sanctions" Relating to Construction Requirements That Create Uncertainty for Bidders. 11

III. The Commission Should Clarify that an Adequate Interference "Buffer Zone" Will Be Provided When Non-Constructed License Areas are Reclaimed 19

IV. The Commission Should Clarify That a Licensee Cannot Be Held Accountable For Coverage to Tribal Lands If the Tribe Does Not Agree to Allow Such Coverage 19

V. Small and Rural Telephone Carriers Should Be Exempt from the Interim Build Out Reports 20

CONCLUSION 21

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its rural telephone carrier clients shown in Attachment A hereto (the "Blooston Rural Carriers") and pursuant to Section 1.429 of the Commission's Rules, hereby requests partial reconsideration and/or clarification of the *Second Report and Order* in the above-captioned proceeding, regarding the rules governing the upcoming 700 MHz auction (Auction No. 73).[1] In general, the Blooston Rural Carriers applaud the Commission's decision to ensure that small businesses and rural telephone companies have an opportunity to participate in the upcoming auction, by creating an additional Cellular Market Area (CMA)-sized license block. License size is one of the primary factors in determining whether small and/or rural carriers will have a meaningful chance to bid successfully in an auction. The other primary factor is, inevitably, cost. Unfortunately, there are certain aspects of the new build-out rules that will create unnecessary obstacles to small business and rural telephone participation in Auction No. 73, contrary to the mandate of Section 309(j) of the Communications Act of 1934, as amended (the Act). Moreover, certain aspects of the revised rules are ambiguous and contradictory, making compliance difficult at best.

Statement of Interest

The Commission can take official notice that Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP represents a large number of rural telephone companies that are engaged in the provision of wireless services in less populated areas of the country. Each has a significant interest in the outcome of this proceeding, because each has an interest in seeing that the FCC adopts policies and rules that ensure meaningful rural

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[1] *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, WT Docket No. 06-150 and related proceedings, FCC 07-132 (*rel.* August 10, 2007) ("*Second Report and Order*").

telephone company and small business participation in spectrum auctions, and that encourage the rapid deployment of advanced telecommunications services in rural America.[2]

I. The Commission Should Modify the Geographic Coverage Requirement for CMA Licensees.

At paragraph 153 of the *Second Report and Order*, the Commission concluded that it should imposed stricter build-out requirements for the unauctioned 700 MHz licenses, rather than applying the existing "substantial service" standard. While the Blooston Rural Carriers are on record as favoring a continuation of the substantial service option, the decision to apply stricter standards is not untenable, provided the build-out obligations adopted bear a rational relationship to the economic realities of providing service in sparsely populated rural areas. However, the Commission's decision to impose a bare geographic build-out obligation on CMA licensees is simply unworkable. This requirement will act to discourage bidding in the upcoming auction, and ultimately discourage rather than promote rural coverage. The geographic coverage requirement seeks to force the licensee of a CMA (which may be a Rural Service Area, or RSA) to serve 70 percent of the land within the license boundaries, even if no one lives or travels there. As shown in the Engineering Study of Eugene Maliszewskyj (Exhibit A hereto), in many RSAs, it is possible to cover 80 to 90 percent of the population by putting a signal over less than 50 percent of the land area.

The geographic coverage approach would force a rural licensee to invest in the equipment, site acquisition, site rental, and maintenance costs to serve areas that may

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[2] The Blooston Rural Carriers filed multiple comments in the instant proceeding, and their comments addressed the build out requirements now at issue. Thus, the Blooston Rural Carriers are parties in interest under Rule Section 1.429.

have little or no traffic. In certain RSAs, the existence of swampland, mountains, desert and other uninhabitable terrain will make compliance with the 70 percent coverage requirement virtually impossible. In other RSAs, provision of coverage to 70 percent of the geographic area will literally necessitate the construction of transmitters and related infrastructure in areas that are not inhabited. This requirement can make a rural wireless system financially untenable. While most rural telephone companies and cooperatives are not-for-profit entities driven to provide coverage to their rural residents even if larger companies would not find such coverage sufficiently profitable, cost is an inevitable factor in determining whether a rural wireless project can sustain itself. Rural carriers do not have millions of customers over which to spread the cost of their build-out. Instead, these costs often are sustained by a few thousand, or even a few hundred rural residents. Therefore, these rural entities must make their wireless construction resources count, and a requirement to provide coverage where no one lives or travels can force a rural carrier to simply forego participating in the auction. In stark contrast, the larger licenses to be sold in Auction No. 73 (likely to be won by mega-corporations such as Verizon or Google) are governed by a more reasonable population-based construction benchmark.

It is respectfully submitted that imposing a geographic coverage-only construction requirement on CMA licensees, without providing a population coverage option to account for situations in which a geographic build-out is not practical, constitutes an arbitrary and capricious action, and does not serve the public interest.[3] Action taken by an administrative agency may reflect a correct understanding of the law and a rational

[3] The Blooston Rural Carriers believe that the public interest would best be served by creating a population-based coverage option for all 700 MHz licensees, including those acquiring Economic Area (or "EA")-sized market areas. The instant petition focuses on the rules governing CMA-sized licenses, because these licenses are the more immediate concern for small businesses and rural telephone companies.

review of the facts, yet might still be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[4] The emphasis in this analysis is on the quality of an agency's reasoning.[5] While traditionally deferential to the agencies, courts review an agency's decisions for arbitrariness to ensure it has considered the relevant factors and articulated a rational connection between the facts found and the choice made.[6] It is arbitrary and capricious "for an agency not to take into account all relevant factors in making its determination."[7]

In determining that CMA and EA licenses would have to meet a geography-based build-out requirement, the Commission appears to have simply adopted Cellular South's argument that "the uniqueness of the 700 MHz spectrum justifies the use of geographic benchmarks and that the band's excellent propagation characteristics make it ideal for delivering advanced wireless services to rural areas."[8] The *Second Report and Order* itself promotes no clarification or expansion other than a blanket "agreement" with Cellular South's reasoning.[9] Therefore, in adopting Cellular South's rationale as its own, the FCC justifies the geographic build-out requirement on the ground that a company acquiring a service area that is larger than it intends to cover merely "keeps what it uses", leaving the rest to be either re-assigned, "or not."[10] "[F]ailing to meet the geographic

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4 5 U.S.C.A. § 706(2)(A).

5 *See, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C.Cir.1970) (Judicial intervention where, "the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." Leventhal, J.)

6 *EarthLink, Inc. v. FCC*, 373 U.S. App. D.C. 202, (D.C. Cir. 2006).

7 *Hanly v. Mitchell*, 460 F.2d 640, 648 (2nd Cir. 1972), *quoted in National Black Media Coalition v. F.C.C.*, 791 F.2d 1016, 1024 (2nd Cir. 1986).

8 *Second Report and Order*, ¶158.

9 *Id.*

10 Comments of Cellular South Licenses, Inc., at p. 9.

build-out benchmarks simply means that the licensee would lose a portion of its license area."[11] However, under the proposed rules, this is not what happens. Rather than merely "keeping what it uses", a carrier obtaining a CMA license can lose two years on the length of the license,[12] and "may also be subject to potential enforcement action, including possible forfeiture or cancellation of license."[13] Moreover, requiring a geographic build out, even in the absence of these added enforcement threats (which are discussed further below) will force many licensees to give back geographic areas that they will be best positioned to eventually serve, when the demand and economic justification warrants. In essence, the geographic construction will unnecessarily turn CMA licenses into "Swiss cheese", rather than allowing a licensee a reasonable chance to evolve its coverage based on a sound business plan addressing the particular dynamics of its market.

In addition, the introduction of a geographic build-out requirement marks a clear departure from a well-established build-out standard, yet the Commission does not supply an adequate explanation of its rationale in so doing. Departures from agency precedents require adequate explanation.[14] "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed..."[15] "While an agency is not locked into the first interpretation of a statute it embraces, it

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11 Comments of Cellular South Licenses, Inc., page 5.

12 *Second Report and Order*, ¶153.

13 *Id.*

14 *See, e.g., Atchison, T. & S.F. Ry. v. Wichita Bd. Of Trade*, 412 U.S. 800 (1973).

15 *Greater Boston Television Corp. v. FCC, supra*, 444 F.2d at 852 (D.C. Cir. 1970).

cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'"[16] In the past, the Commission has applied a "substantial service" build-out requirement.[17] In the *Rural Spectrum Access Rulemaking*, the Commission made several detailed public interest findings regarding the benefits of such a build-out requirement, and went so far as to praise the substantial service requirement as a way to "increase their flexibility to develop rural-focused business plans and deploy spectrum-based services in more sparsely populated areas without being bound to concrete population *or geographic coverage requirements*."[18] The Commission clarified its policy regarding build-out requirements in stating that, "we do not propose to require licensees to deploy services where their market studies or other analyses indicate that service would be economically unsustainable."[19] The Commission even specifically rejected suggestions to use a "keep what you use" scheme.[20] The *Second Report and Order*, therefore, marks a complete 180 degree turn in policy, yet provides little or no rationale for its change in position.

Generally speaking, "evaluation of the agency's reasons for its change in policy is confined to the reasons articulated by the agency itself."[21] In the *Rural Spectrum Access Rulemaking*, the Commission made several findings of public interest and policy in

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16 *Fox TV Stations, Inc. v. FCC,* 489 F.3d 444, 457 (2d Cir. 2007), *quoting Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d Cir. 1993).

17 *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation*, WT Docket No. 03-202, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078 (September 27, 2004) (the "*Rural Spectrum Access Rulemaking*").

18 *Id.* at ¶ 76 (emphasis added).

19 *Id.* at ¶ 77.

20 *Id.* at ¶ 78.

21 *Fox TV, supra, citing State Farm,* 463 U.S. *at 50* ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (internal citation omitted)).

support of the substantial service build-out requirement.[22] Yet, in the *Second Report and Order*, the Commission makes no articulation beyond a blanket statement that "these performance requirements will provide all licensees with incentives to serve more rural communities."[23] The Commission must base its decision on the record in a rule making. In this instance, there was overwhelming opposition against a geographic-only build-out requirement from the Blooston Rural Carriers and several other commenters.[24] These opponents provided detailed arguments against the application of a geographic construction requirement to smaller licenses. However, the Commissioned failed to explain why these arguments were not controlling, and instead based its decision on a thinly-supported minority view lacking a rational basis. There were certainly no detailed findings that the substantial service standard has failed based on evidence in the record.

The decision to apply a geographic construction requirement to smaller licenses is also arbitrary and does not constitute reasoned decision making because the Commission is allowing larger licensees to satisfy a population-based build-out obligation. It is axiomatic in administrative law that, "if an agency treats similarly situated parties differently, its action is arbitrary and capricious in violation of the APA." [25] Such disparate treatment, where it occurs, can only be validated with a well articulated rationale.[26] In *Fresno Mobile*, petitioners challenged the FCC's refusal to permit them, as incumbent wide-area SMR licensees, to take advantage of newer build-out requirements

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22 *Rural Spectrum Access Rulemaking*, ¶ 74-77.

23 *Second Report and Order*, ¶153.

24 *Id.*

25 *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 27-28 (D. D.C. 1997) (citation omitted). *See, also, Nat'l Ass'n of Broadcasters v. FCC*, 239 U.S. App. D.C. 87, 740 F.2d 1190, 1201 (D. C. Cir. 1984).

applicable to cellular, PCS, and EA licensees.[27] The Commission defended this action on the ground that SMR licenses tended to cover singular locations, and therefore took less time to build out than EA licensees, which tended to cover multiple locations.[28] In criticizing the Commission's action, the court noted that, "[t]he Commission elevates form over function", ignoring the fact that a company could acquire multiple SMR licenses, thereby requiring them to cover multiple areas, as an EA licensee would.[29] This, in the eyes of the court, created a disparity between similarly situated parties that was not adequately explained and, therefore, arbitrary and capricious.[30]

The situation here is analogous to *Fresno Mobile*. In its *Second Report and Order*, the Commission supports its decision to allow REAG and EA licensees to meet population-based build-out requirements by noting, "[t]he use of benchmarks based on population ... may best allow a potential new entrant to achieve the economies of scale needed for a viable business model, while also ensuring that a majority of the population in a given region may have access to these services."[31] Thus, REAG and EA licensees are permitted much more flexibility in their build-out requirements on the ground that it can be expensive to get started. However, the Commission does not acknowledge the fact that smaller CMA licensees face the same difficulties in starting up, albeit on a smaller scale, particularly where they are small, rural telephone companies or their wireless

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26 *Fresno Mobile Radio, Inc. et al., Petitioners v. Federal Communications Commission and United States of America, Respondents; Nextel Communications, Inc., Intervener*, 334 U.S. App. D.C. 178 (D.C. Cir. 1999).

27 *Id.*

28 *Id.* at 969.

29 *Id.*

30 *Id.* at 969-970.

31 *Second Report and Order*, ¶164.

subsidiaries, or other small businesses. Indeed, it is documented in several proceedings (including the *Rural Spectrum Access Rulemaking*) that a rural build-out (which is necessitated by any CMA that is an RSA) is more expensive due to difficult terrain and sparse population.[32] The Commission again raises form over function, failing to recognize that the small-scale and rural licensees have proportionally smaller access to capital and equipment; and that a rural build-out is as challenging and costly to a small rural telephone company as a larger, region-wide build-out is to a large, national company. As this firm has argued, "sustainable coverage in sparsely populated rural areas often takes time to develop."[33] Comparable to the vast start-up costs the Commission envisions for REAG licensees, "a critical mass must first be attained ... before service is economically feasible in smaller towns and along secondary roadways."[34] It is important to note that the court in *Fresno* recognized that there is an economic difference between EAs and SMR license areas, and thus EAs could be auctioned under 309(j). Yet, despite this difference, the court looked to the facts and recognized that the two types of licensees, despite owning different sizes of licenses, were similarly situated.

The major difference the Commission relies upon in differentiating the two types of licensees is one of *scale*, or form, and not function. The Commission ignores the fact that REAG licensees are likely to be huge corporations, with large cash reserves and hundreds of thousands if not millions of customers over which to spread the costs of a

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32 *Rural Spectrum Access Rulemaking, supra at* ¶ 74-77 (referencing the need for flexibility due to the potentially expensive nature of rural build-outs).

33 Blooston Rural Carriers' Ex Parte Comments regarding Frontline proposal, filed May 23, 2007.

34 *Id.*

geographic build-out. By failing to take into account the similarities of the *situations* that CMA and larger licensees face, the Commission's application of a more rigid, costly build-out requirement on rural companies (those most likely to bid on CMA licenses) is arbitrary and capricious.

II. The Commission Should Eliminate Vaguely Worded "Sanctions" Relating to Construction Requirements That Create Uncertainty for Bidders.

It is respectfully submitted that several overly zealous enforcement pronouncements made in the *Second Report and Order* will only inhibit bidding (and ultimately, service to unserved areas). Revised Rule Section 27.14(g) already provides that licensees failing to meet the interim build-out obligation will have two years shaved off of their license term; and that licensees failing to meet the final build-out benchmark will have the unserved areas of their license reclaimed and sold again at auction. However, a review of the text of the *Second Report and Order* and the wording of revised Rule Section 27.14 reveals that the Commission has created the following additional sanctions for not meeting the stricter construction obligations:

1. The Commission states at paragraph 153 and in Sections 27.14(g)(1), (h)(1) and (i)(1) that it may fine those licensees that do not meet the build-out obligations. No indication is given as to the circumstances that will trigger a fine, or how much. This sanction creates uncertainty in assessing whether and how much to bid in the auction. Moreover, the rules already provide that licensees will lose any territory they do not serve. This mechanism allows a reasonable business decision by a licensee that there are simply some areas it cannot feasibly serve. Fining a licensee would constitute an attempt

by the Commission to substitute its judgment for the licensee's as to whether such areas should be served. This ignores the realities of a rural build out.

2. The new build-out rule also states in the fine print that if a licensee that fails to meet the 4-year interim construction benchmark, the licensee will not only lose two years off of its license term, but "may lose authority to operate in part of the remaining unserved areas of the license." Again, this form of "extra punishment", with no guidelines as to when and how it will be applied, only injects more uncertainty into the auction process for small and rural carriers. Does an auction winner have 10 years to complete its build-out? Or will the Commission swoop in after only four years?

3. The build-out rule for the smaller CMA and EA licenses states that, in addition to reclaiming unserved areas and imposing fines, the FCC can simply *terminate* the entire license if the licensee "provides signal coverage and offers service at a level that is below the end-of-term benchmark." Again, there is no standard defined for when this "death penalty" sanction may be imposed. And it is not at all clear what will constitute coverage or service "at a level that is below the end-of-term benchmark." The method of calculating 700 MHz coverage is not clearly defined in the rules, and the service requirements are even more nebulous. It could boil down to a case where the Commission simply disagrees with a licensee's consulting engineer or marketing director as to whether the service offered meets the benchmark. Again, the larger licensees are treated differently: Pursuant to Rule Section 27.14, if a REAG licensee fails to meet the final benchmark, it will not lose its entire REAG license, but instead only those EAs within the REAG that it failed to adequately served.

4. Paragraph 175 of the *Second Report and Order* suggests that the Commission can bring a "malicious interference" enforcement action against an auction licensee that establishes a transmitter too close to the border of its license area, even if the licensee uses a directional antenna aimed back into its own territory, and complies with the rule governing field strength limits at the boundary of an auction license area. The Commission indicates that it can take this action if it concludes that the real reason for the placement of the transmitter is to block or interfere with a neighboring 700 MHz licensee. *Id.* Again, this sort of threat only increases uncertainty over whether the Commission will use what is clearly a subjective judgment to harm a licensee.

These threatened additional penalties, beyond the "keep what you use" rule, are arbitrary and capricious because they lack a rational basis on the record, both in terms of their appropriateness and as another marked departure from Commission practice. As stated above, an administrative agency must include its rationale for imposition of a rule. However, in its *Second Report and Order*, the Commission fails to provide any such rationale. In the context of CMAs and EAs, the additional imposition of fines and potential termination of the license are not supported on the record. Unlike the "keep what you use" rule, the rationale for which was advocated by Cellular South, no substantial consideration of the cumulative effects of these penalties is supplied.[35] They are merely tacked on, and in the case of potential fines, appear for the first time in the *Second Report and Order.*

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[35] *See Second Report and Order,* ¶153; *cp Cellular South Comments.*

Furthermore, such fines represent a marked departure from Commission practice, whose auction build-out rules have never imposed such penalties on licensees. In conducting an "arbitrary and capricious" review on such facts, a court "must scrutinize the agency's actions to ensure that the Commission has rationally considered significant alternatives."[36] Looking the record in this proceeding, the Commission stated that it was considering three potential penalties regarding the failure to meet build-out requirements: license shortening, "keep what you use", and license cancellation.[37] Fines were never suggested, and as such no alternatives were suggested or discussed in this proceeding.

Moreover, the threatened sanctions place licensees in a position of not knowing the consequences of their actions. In order to actually promote the desired effect, a rule must be clear enough for a person of ordinary intelligence to understand what behavior is prohibited, and what behavior is not. "A vague rule denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions."[38] At the same time, ""economic regulation is subject to a less strict vagueness test … because businesses … can be expected to consult relevant legislation in

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36 *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985), *citing Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 46 (1983).

37 *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309; Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86*, 22 FCC Rcd 8064 (2007) ("*First Report and Order*"), at ¶ 207 et seq.

38 *William Timpinaro, et. al., Petitioners v. Securities Exchange Commission, Respondent*, 2 F.3d 453 (D.C. Cir. 1993), *quoting Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 105 (D.C. Cir. 1987).

advance of action."[39] The additional penalties threatened by the Commission do not contain sufficient clarity to put a regulated company on notice as to what behavior might lead to a fine.

Aside from the apparent future harms from these added sanctions, there is harm readily ascertainable – small rural companies are left with absolutely no way to determine an appropriate amount to bid on a license, because they have no way to determine whether a fine or total loss of license will accompany a short-coming in the already stringent build-out requirement. For all they know, they can invest hundreds of thousands or millions of dollars in planning, site acquisition, equipment and construction, only to lose their entire license and be subjected to expensive fines because they were only able to cover 65 percent of the geographic area instead of 70 percent. This possible outcome makes it difficult if not impossible to prepare a rational business case.

Indeed, the fines and penalties advanced in the *Second Report and Order* hinder the purpose of competitive bidding process espoused in Section 309(j) of the Communications Act of 1934, as amended [47 USC § 309(j)] (hereinafter "the Act"), particularly subsections (3)(B) and (3)(E)(ii). Subsection 309(j)(3)(B) of the Act states that, in designing auction procedures, the Commission shall seek to promote "economic opportunity and competition … by disseminating licenses among a wide variety of applicants, *including small businesses, rural telephone companies and businesses owned by members of minority groups and women.*" (Emphasis added). The addition of penalties beyond the reduction of license area and duration, especially in the form of

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[39] *Id., quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498

unspecified fines, severely cripples the ability of small businesses and rural telephone companies to participate in the auction. Moreover, the vague additional penalties threatened in the Second Report and Order are likely to inhibit bidding, thereby running afoul of Congress' mandate in Section 309(j)(3)(C) of the Act that the Commission seek to recover for the public the value of the public spectrum resource. While recovery of spectrum value is subject to the other important public interest goals set forth in Section 309 (j), it is respectfully submitted that reduced bidding due to uncertainty over vague and excess enforcement mechanisms is not a public interest goal of the Act.

The Administrative Procedure Act requires that the public be given notice of the nature of a proposed rule change *before* the rulemaking, not after.[40] There are no substitutes or alternatives.[41] Generally, "[a]gencies must include in their notice of proposed rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'"[42] Of course, it is well established that the final rule need not be the absolute and identical embodiment of the original proposal;[43] it need only be the "logical outgrowth" of the proposed rule.[44] A rule is a logical outgrowth of a notice if "[the party] should have anticipated that such a requirement might be imposed."[45]

(1982).

40 *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972)

41 *Id.*

42 *Kooritzky v. Reich,* 17 F.3d 1509 (D.C. Cir. 1994), citing 5 U.S.C. § 553(b)(3)

43 *See, e.g., Fertilizer Inst. v. EPA,* 935 F.2d 1303, 1311 (D.C. Cir. 1991); *Small Refinery Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 546-47 (D.C. Cir. 1983); *International Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 632 & n.51 (D.C. Cir. 1973)

44 *See 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Memorandum and Opinion,* 14 FCC Rcd 17525 at 17534 ¶ 24, *citing Public Service Commission of the District of Columbia v FCC*, 906 F.2d 713, 717 (DC Cir. 1990).

45 *Small Refinery Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 546-47 (D.C. Cir. 1983).

In *Kooritzky*, the Department of Labor was challenged for lack of notice regarding a rule that abolished the ability to substitute one immigrant worker on a labor certification for another during the application process.[46] The court, in comparing the rule with the notice, stated, "[t]he notice of proposed rulemaking contains nothing, not the merest hint, to suggest that the Department might tighten its existing practice of allowing substitution. Substitution is neither discussed nor mentioned. The subject is not touched upon in any of the rules proposed."[47] Thus, the court had little trouble in finding failure to give proper public notice – after all, "[s]omething is not a logical outgrowth of nothing."[48]

The notice of proposed rule making preceding the *Second Report and Order* suffers the same shortcomings. In the *First Report and Order* in this proceeding, the Commission proposed and sought comment on (among other things) performance requirements for the upcoming 700 MHz auction.[49] Specifically, paragraph 214 addressed propositions regarding the failure to meet the proposed geographic build-out requirement for CMA-size licenses. Therein, and throughout the document, the Commission discussed the proposed "keep what you use" rule that would result in a reduction of the unused portion of the license, such that the used percentage equals the minimum percentage.[50] At no point did the Commission ever suggest the possibility of a monetary forfeiture. Indeed, the only suggestions the Commission offers on the topic of failing to meet build-out requirements deal with reducing either the size or term of the license, so as to re-allocate and maximize coverage (by turning the license over to

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46 *Kooritzky,* 17 F.3d. at 1511.

47 *Id.* at 1513.

48 *Id.*

49 *Id.* at ¶ 207 *et. seq.*

someone who will use it.)[51] Therefore, this becomes a case of "something from nothing." The notion of a fine is not the logical outgrowth of the content of the *First Report and Order*. A fine serves a purely penal end – it does not involve the freeing up or reallocation of unused license territory. A reasonable person, reading the *First Report and Order*, would expect some reassignment scheme to come into effect in the final rulemaking, not a fine. Such penalty is beyond the scope of action contemplated in the *First Report and Order*, and this document therefore failed to provide adequate notice to the public.

In addition, a monetary fine (or forfeiture) is permitted under Section 503(b) of the Communications Act of 1934, as amended, for a violation of the terms of the Act or the Commission's Rules. A "use or lose" build-out rule, such as the one adopted in this proceeding, accords the licensee an option either to serve a given geographic area or to automatically return the area to the Commission for re-licensing to an unaffiliated entity. A licensee that elects to "lose" a given area, and thereby surrender that area for re-licensing by the Commission, is exercising an option that the regulation expressly accords to the licensee. As such, no violation of the regulation is present, and the imposition of a monetary forfeiture is not permitted under Title V of the Act.

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50 *Id.* at ¶ 214.

51 *See generally, First Report and Order.*

III. The Commission Should Clarify that an Adequate Interference "Buffer Zone" Will Be Provided When Non-Constructed License Areas are Reclaimed.

Revised Rule Section 27.14(g) provides that the Commission can reclaim unserved areas from a licensee for failure to provide the necessary coverage, but appears to provide no clear "buffer zone" to protect the licensee's existing operations. Instead, the rules can be read to suggest that every square inch left uncovered by a licensee can be reclaimed and sold again. In the real world, co-channel operations must be separated by a sufficient buffer zone to prevent interference. It is also wise to allow some flexibility to existing licensees to make minor modifications to their coverage, as necessary to address changes in customer demands, or the need to relocate transmitters due to a loss of antenna site or other technical issue. It is respectfully submitted that the Commission should more explicitly provide for a buffer zone protecting marketing area licensee's completed coverage. Licensees need a more precise definition of how the take-back process will work, and what propagation model will be used. In this regard, the Commission must define what constitutes "portions of its license in which the licensee is not providing service" for purposes of Rule Section 27.14(g)(2) enforcement.

IV. The Commission Should Clarify That a Licensee Cannot Be Held Accountable For Coverage to Tribal Lands If the Tribe Does Not Agree to Allow Such Coverage.

Rule Section 27.14(g) indicates that it is not generally necessary to count Federal, state or local government-owned lands in determining the geographic area that CMA and EA licensees must cover to meet their build out obligations. However, this rule provides that Tribal lands must be counted, even if they are Federally managed. As licensees seeking Tribal bidding credits have discovered, it is necessary to secure the cooperation of the Tribal government in order to provide service to its territory. If a Tribal

government is not cooperative (especially if it has an exclusive arrangement with a competing carrier), the licensee may not be able to provide coverage to the Tribal lands in its license area. Therefore, the Commission should clarify that Tribal lands need not be included for purposes of determining if a licensee has satisfied the build-out requirements, if the licensee has made a good faith but unsuccessful effort to secure Tribal permission for coverage. Otherwise, licensees will be put into a compliance situation over which they have little or no control, and yet may be subject to the severe sanctions discussed above. In certain CMAs, such as South Dakota 2-Corson (CMA 635) and South Dakota 5-Custer (CMA 638), tribal lands cover a substantial portion of the market area, making compliance with Section 27.14 doubtful in the absence of Tribal consent.[52]

V. Small and Rural Telephone Carriers Should Be Exempt from the Interim Build Out Reports

Pursuant to paragraph 165 of the Second Report and Order, 700 MHz licensees will be required to submit two "interim" construction progress reports, at the end of the second and seventh years following the DTV transition (i.e., on February 17, 2011 and February 17, 2016). These reports will be in addition to the construction reports that must be filed within 15 days after the build-out benchmark deadlines, and the Form 611T reports that must be filed only by the small and rural bidders that receive bid credits. These extra reports will only increase the regulatory burden on smaller licensees; and it is not clear from the *Second Report and Order* what purpose these reports will serve, other than to invite conjecture about whether the Commission should invoke some of the

[52] Most of the land area of CMA 635 is made up of lands of the Standing Rock and Cheyenne River Sioux reservations; and a substantial portion of CMA 638 is covered by Pine Ridge reservation lands.

inappropriate sanctions discussed above, even *before* the construction obligation deadlines have arrived. The bottom line must be that either the fourth and tenth anniversaries are the construction deadlines or they are not. A licensee should not have to fear sanctions before a build out deadline has even arrived. And smaller carriers do not need additional regulatory burdens imposed on them. Therefore, the Commission should either eliminate these interim reports, or should exempt small and rural licensees.

CONCLUSION

The instant petition brings to the Commission's attention certain aspects of the resulting rules and policies that warrant reconsideration and/or clarification, to ensure that the 700 MHz auction will bring the greatest benefit to the public, consistent with the mandate of Section 309 of the Act.

Respectfully Submitted,

The Blooston Rural Carriers

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Harold Mordkofsky
D. Cary Mitchell

Their Attorneys

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(202) 659-0830

Filed: September 24, 2007

Attachment A

BLOOSTON RURAL CARRIERS

Ace Telephone Association
CC Communications
Chibardun Telephone Cooperative, Inc.
Command Connect, LLC
FMTC Wireless, Inc.
Golden West Telecommunications Cooperative, Inc.
Hancock Rural Telephone Corp.
Hanson Communications, Inc.
Heart of Iowa Communications
Home Telephone Company
Horizon Telcom
Kasson & Mantorville Telephone Co. d/b/a KM Telecom
Kennebec Telephone Company, Inc.
Red River Telephone Association, Inc.
Penasco Valley Telephone Cooperative, Inc.
Van Buren Telephone Co., Inc.
Mabel Cooperative Telephone Company
Manti Telephone Company
Midstate Communications
Smithville Telephone Company
Spring Grove Communications
Venture Communications Cooperative
Webster-Calhoun Cooperative Telephone Association

ATTACHMENT B

ENGINEERING STATEMENT OF EUGENE MALISZEWSKYJ

Engineering Statement

I, Eugene Maliszewskyj, hereby certify as follows:

1. I am employed as Director of Engineering for the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP in Washington, DC. I have over 35 years of experience in telecommunications and radio frequency engineering.

2. I hold a Bachelor of Science degree in Electrical Engineering from Villanova University and have worked as an Electronics Engineer at the Federal Communications Commission ("FCC"), in the predecessor office of the current Wireless Telecommunications Bureau.

3. I have prepared or supervised the preparation of the technical portions of numerous applications and engineering showings filed with the FCC. I am familiar with the relevant portions of the FCC's Rules.

4. I have prepared or supervised the preparation of the attached analysis of the impact of a 70 percent geographic coverage requirement on certain Cellular Market Areas as contemplated by FCC Rule Section 27.14 (g), as revised by the Commission's Second Report and Order, FCC 07-132, released August 10, 2007.

Eugene Maliszewskyj

Eugene Maliszewskyj

Dated: September 24, 2007

The Engineering Department of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP has studied various rural Cellular Market Areas ("CMAs") to examine the feasibility of satisfying the requirement in revised FCC Rule Section 27.14(g) that a market area licensee must provide coverage to at least 70 percent of the geographic area of the CMA. In particular, we looked at the population characteristics of a sampling of CMAs, and found that there are several markets in which it will be possible to provide a reliable signal to the vast majority of the population using cell sites that provide coverage to only a small portion of the CMA's geographic area. For example:

It is possible to cover 72 percent of the population of the Nevada 1-Humboldt RSA (CMA 543) with transmitters providing a reliable signal over only 2.3 percent of the total land area of the market area.

It is possible to cover 74.3 percent of the population of the Nevada 2-Lander RSA (CMA 544) with transmitters providing a reliable signal over only 7 percent of the total land area of the market area.

It is possible to cover 72.7 percent of the population of the Nevada 4-Mineral RSA (CMA 546) with transmitters providing a reliable signal over only 6 percent of the total land area of the market area.

It is possible to cover 75 percent of the population of the Nevada 5-White Pine RSA (CMA 547) with transmitters providing a reliable signal over only 5.8 percent of the total land area of the market area.

It is possible to cover 70.6 percent of the population of the North Dakota 1-Divide RSA (CMA 580) with transmitters providing a reliable signal over only 8.2 percent of the total land area of the market area.

It is possible to cover 78.6 percent of the population of the Wyoming 1-Park RSA (CMA 718) with transmitters providing a reliable signal over only 7.5 percent of the total land area of the market area.

It is possible to cover 75.3 percent of the population of the Wyoming 2-Sheridan RSA (CMA 719) with transmitters providing a reliable signal over only 6.3 percent of the total land area of the market area.

It is possible to cover 75 percent of the population of the Wyoming 4-Niobrara RSA (CMA 721) with transmitters providing a reliable signal over only 6.7 percent of the total land area of the market area.

It is possible to cover 87 percent of the population of the Wyoming 5-Converse RSA (CMA 722) with transmitters providing a reliable signal over only 16.3 percent of the total land area of the market area.

These calculations were made utilizing a 40 dBu signal contour to depict a reliable signal, consistent with Rule Section 27.55(a)(2), which is a stronger signal (and thus more of a "worst case scenario") than the 32 dBu contour embodied in Rule Section 22.911(a)(1) for determining a reliable cellular signal. Population calculations were made using RadioSoft ComStudy v.2.2 population counting software.

The above findings, which are explained in greater detail below and in the attached contour plots, represent a sampling of CMAs, and not an exhaustive review of all CMAs. In general, we observed that the above results could often be explained by the presence of difficult terrain/climate features that appears to have constrained human habitation of and travel to large portions of the CMAs. Based on the above findings, it is reasonable to conclude that in many cases, it will be extremely expensive, for a disproportionately low gain of useful coverage, if a licensee must complete coverage to 70 percent of the geographic area of a rural CMA.

Nevada 1 – Humboldt RSA

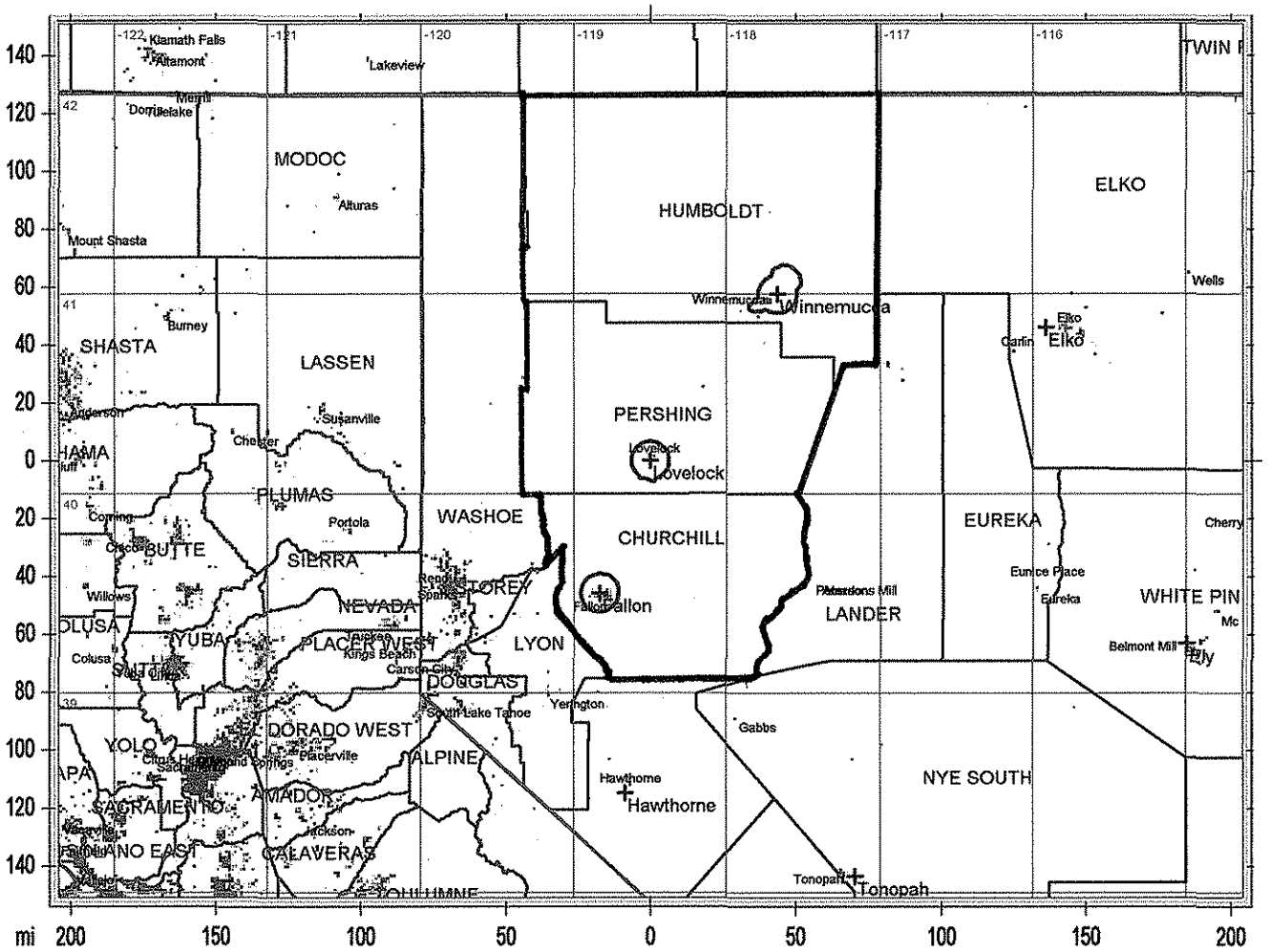
The Nevada 1 – Humboldt RSA consists of the counties of Humboldt, Pershing and Churchill, NV.

Using the 2000 Census, the population of Nevada 1 is 46,781 persons.

Using sites at Fallon, Lovelock and Winnemucca (100 watts ERP), the population covered is 33,649 persons (72%).

The total land area covered within the Nevada 1 – Humboldt RSA is 20,613.5 square miles. The total land area covered by the 40 dBu contours at Fallon, Lovelock and Winnemucca is 482.6 square miles (2.3% of the total land area of the RSA).

Nevada 1 - Humboldt



Map Footer

County Borders State Borders Lat/Lon Grid

Nevada 2 – Lander RSA

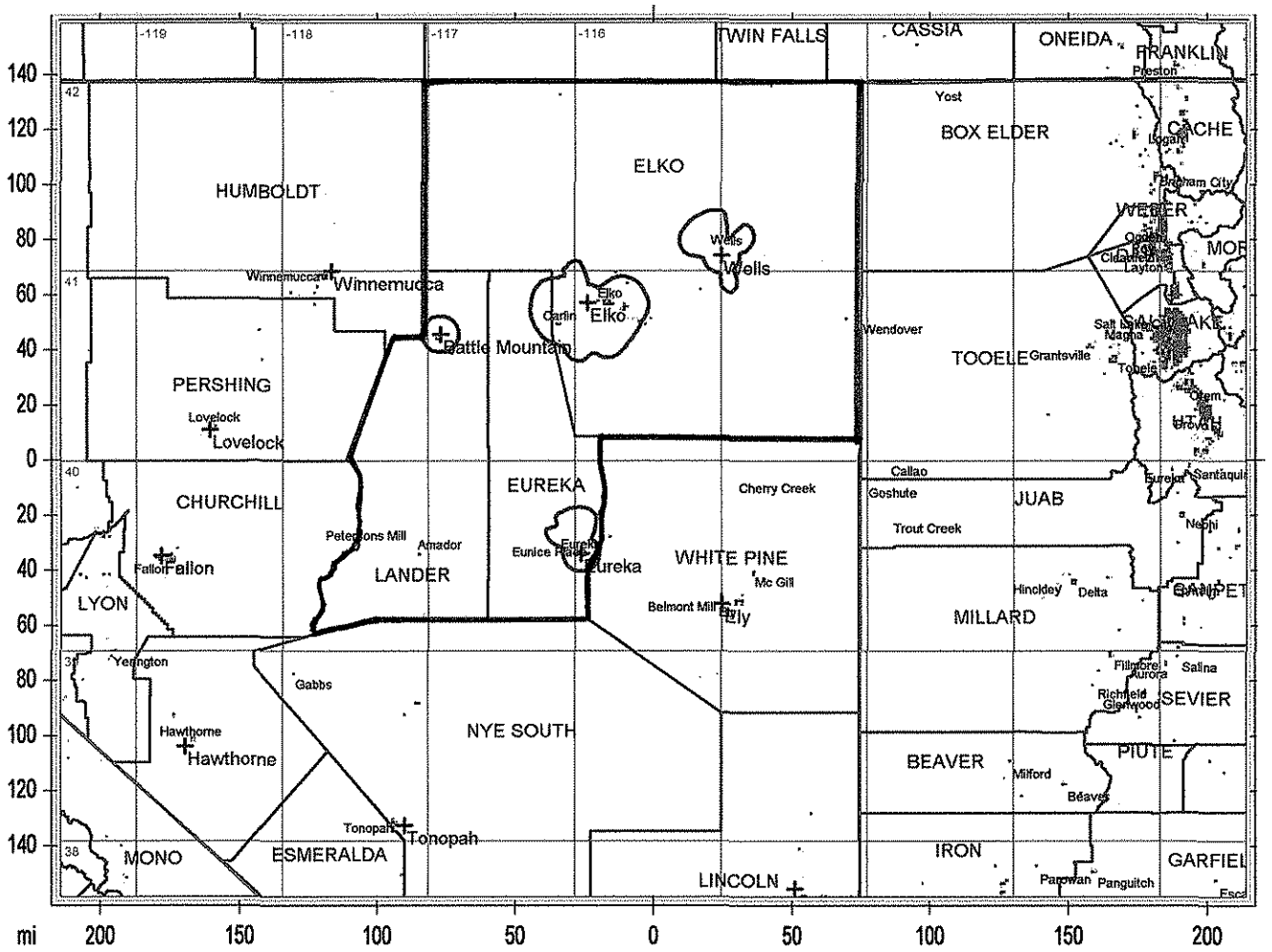
The Nevada 2 – Lander RSA consists of the counties of Lander, Eureka and Elko, NV.

Using the 2000 Census, the population of Nevada 2 is 52,736 persons.

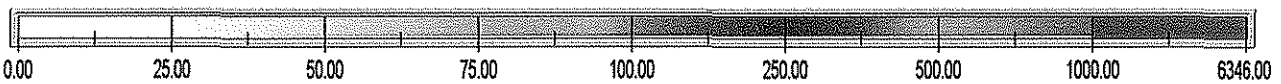
Using sites at Elko, Battle Mountain, Eureka and Wells (100 watts ERP), the population covered is 39,189 persons (74.3%).

The total land area covered within the Nevada 2 – Lander RSA is 26,848.3 square miles. The total land area covered by the 40 dBu service area contours is 1,897.5 square miles (7% of the total land area of the RSA).

Nevada 2 - Lander



Population and Land Area



County Borders State Borders Lat/Lon Grid

Nevada 4 – Mineral RSA

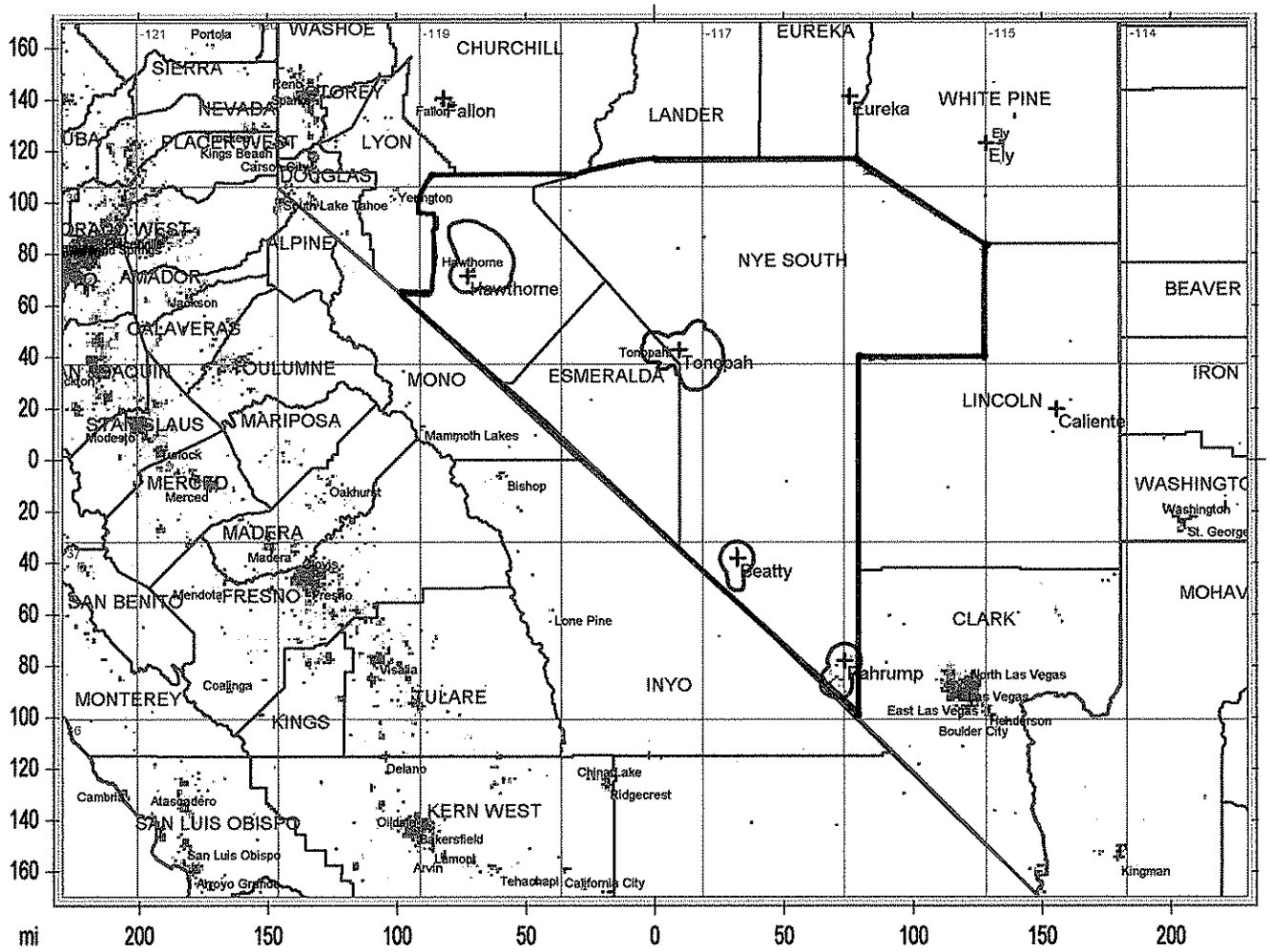
The Nevada 4 – Mineral RSA consists of the counties of Mineral, Esmeralda & Nye South, NV.

Using the 2000 Census, the population of Nevada 4 is 38,527 persons.

Using a sites at Tonopah, Pahrump, Beatty and Hawthorne (100 watts ERP), the population covered is 28,001 persons (72.7%).

The total land area covered within the Nevada 4 – Mineral RSA is 24,491.5 square miles. The total land area covered within the 40 dBu service area contours is 1,479.6 square miles (6% of the total land area of the RSA).

Nevada 4 - Mineral



Population and Land Area

County Borders State Borders Lat/Lon Grid

Nevada 5– White Pine RSA

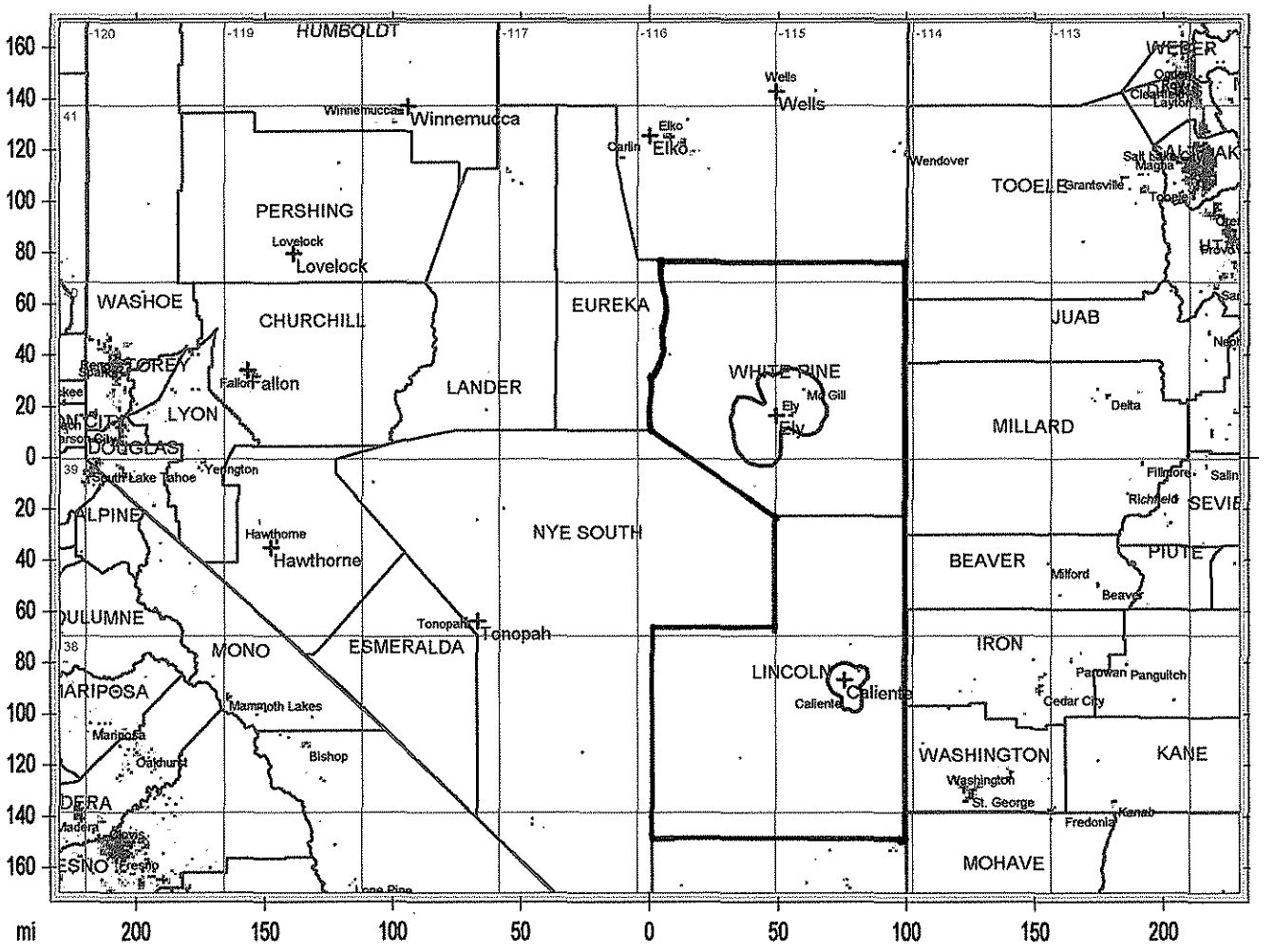
The Nevada 5 – White Pine RSA consists of the counties of White Pine & Lincoln, NV.

Using the 2000 Census, the population of Nevada 5 is 13,346 persons.

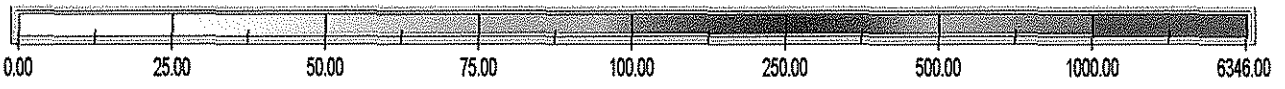
Using a sites at Ely and Caliente (100 watts ERP), the population covered is 10,104 persons (75%).

The total land area covered within the Nevada 5 – White Pine RSA is 19,539.6 square miles. The total land area covered within the 40 dBu contours at Ely and Caliente is 1,139.1 square miles (5.8% of the total land area of the RSA).

Nevada 5 - White Pine



Map Footer



County Borders State Borders Lat/Lon Grid

North Dakota 1 – Divide RSA

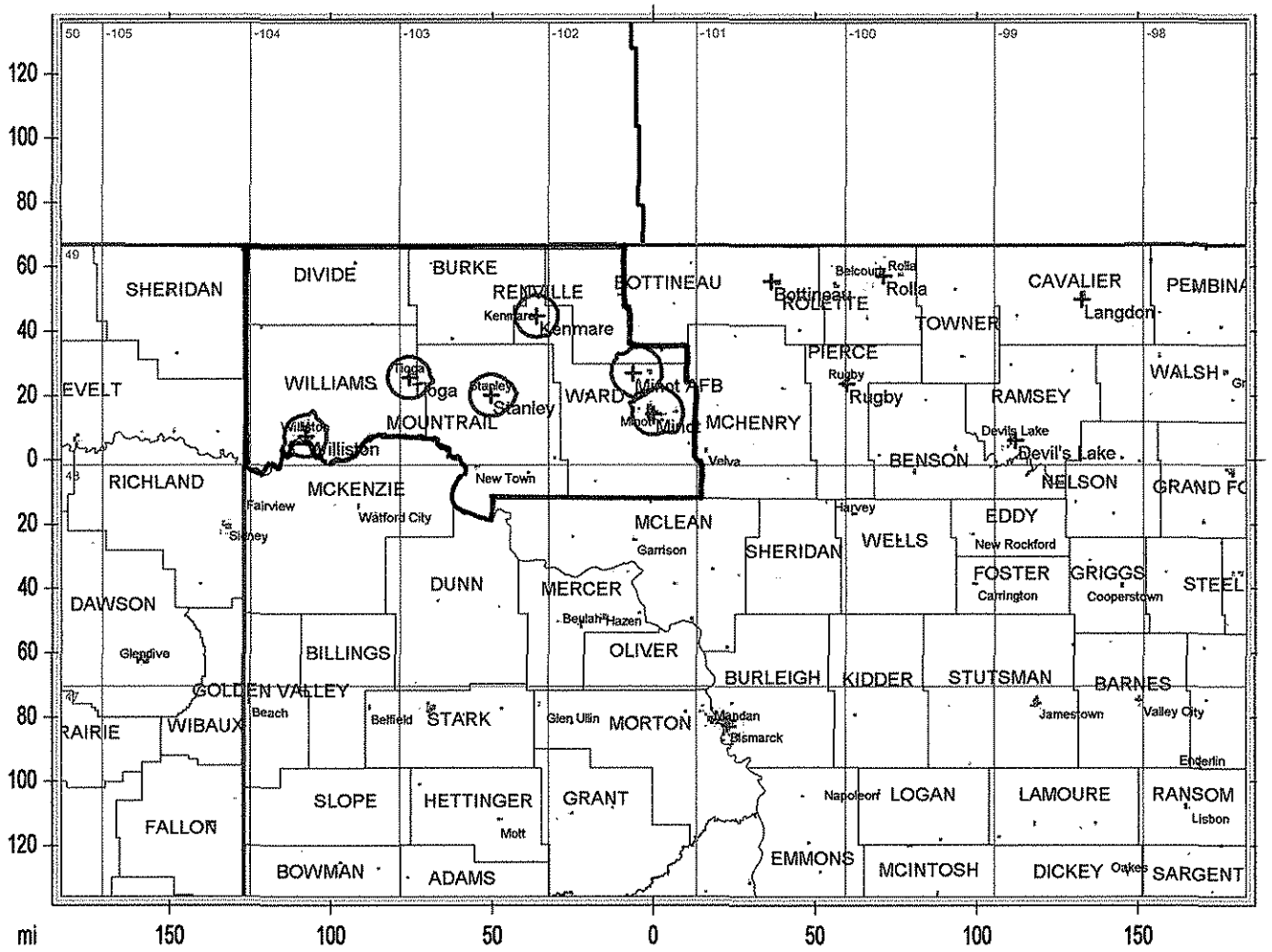
The North Dakota 1 – Divide RSA consists of the counties of Divide, Williams, Mountrail, Burke, Renville, McLean and Ward, ND.

Using the 2000 Census, the population of North Dakota 1 is 101,633 persons.

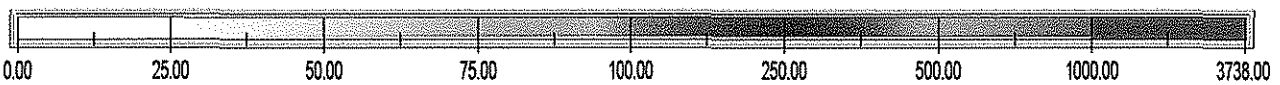
Using a sites at Williston, Minot, Kenmare, Tioga, Stanley and Minot AFB (100 watts ERP), the population covered is 71,792 persons (70.6%).

The total land area covered within the North Dakota 1 – Divide RSA is 11,255 square miles. The total land area covered within the 40 dBu service area contours is 928.1 square miles (8.2% of the total land area of the RSA).

ND 1 - Divide



Population and Land Area Covered



National Borders County Borders State Borders Lat/Lon Grid

Wyoming 1 – Park RSA

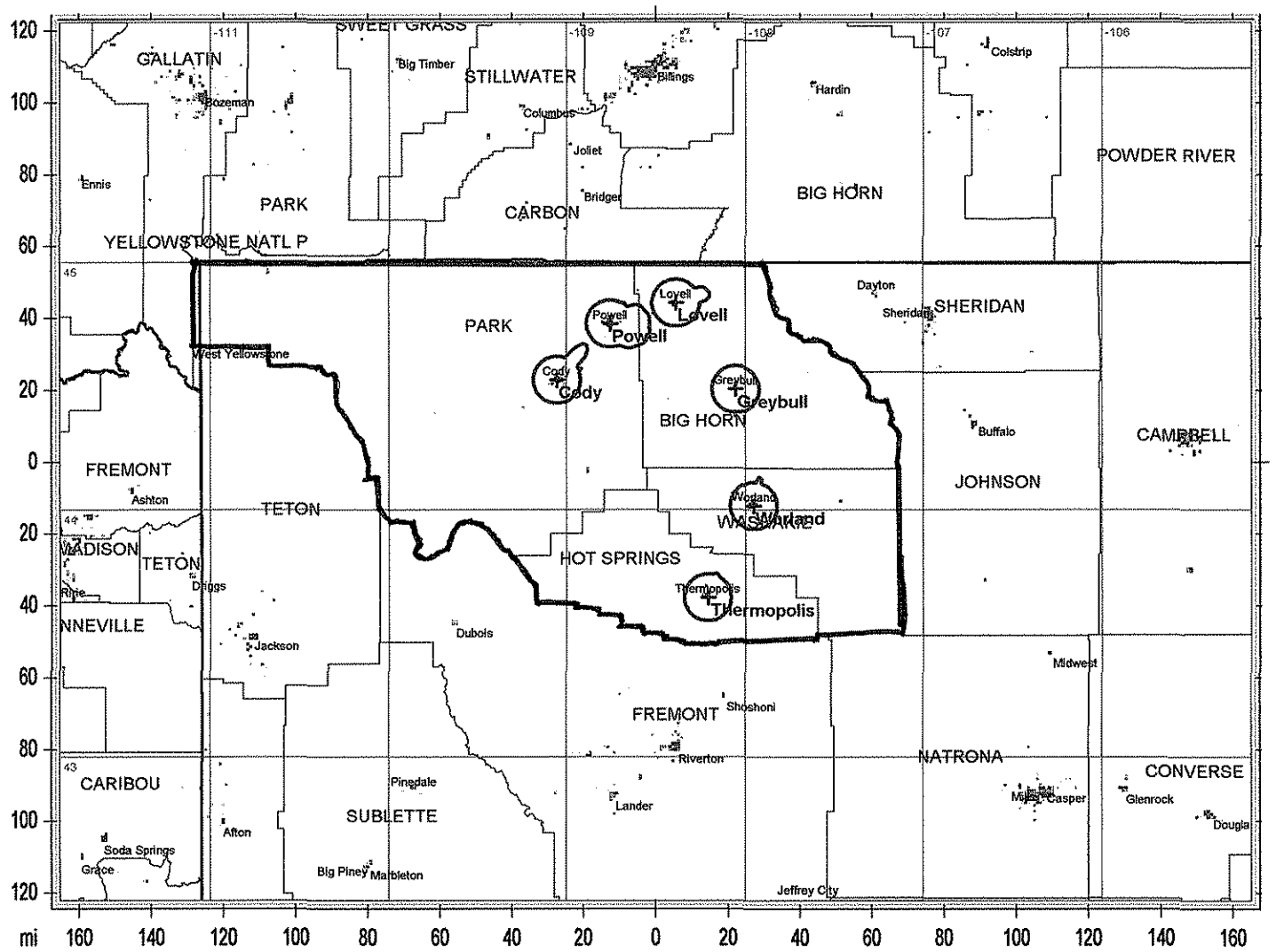
The Wyoming 1 – Park RSA consists of the counties of Park, Big Horn, Hot Springs and Washakie, WY.

Using the 2000 Census, the population of Wyoming 1 is 50,418 persons.

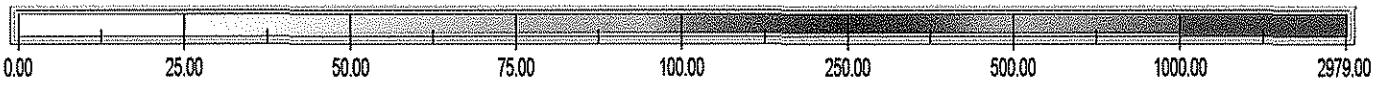
Using a sites at Powell, Cody, Worland, Lovell, Greybull and Thermopolis (100 watts ERP), the population covered is 39,636 persons (78.6%).

The total land area covered within the Wyoming 1 – Park RSA is 12,083.273 square miles. The total land area covered within the 40 dBu service area contours is 895.2 square miles (7.5% of the total land area of the RSA).

Wyoming 1 - Park



Population and Land Area Covered



County Borders State Borders Lat/Lon Grid

Wyoming 2 – Sheridan RSA

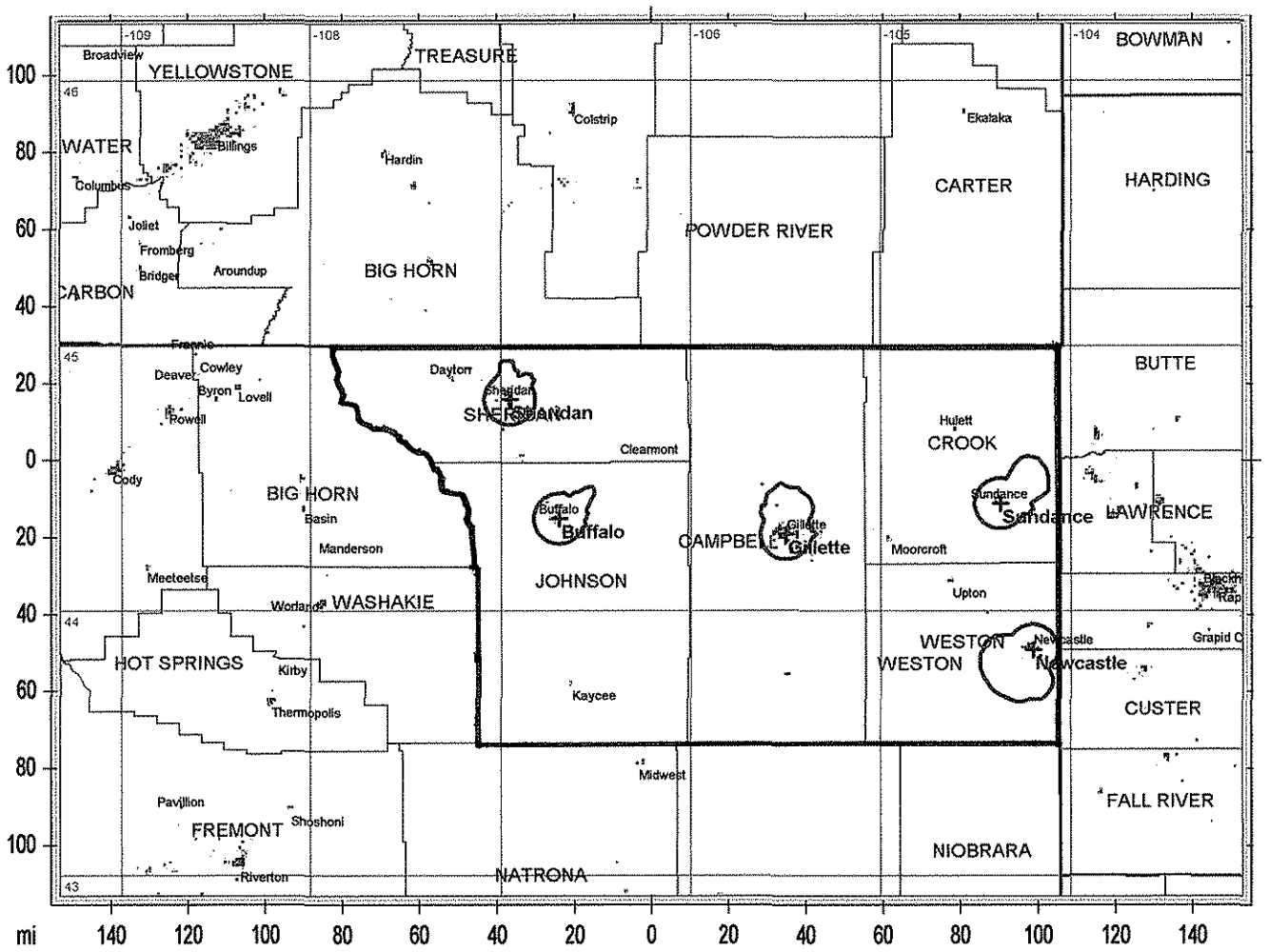
The Wyoming 2 – Sheridan RSA consists of the counties of Sheridan, Johnson, Campbell, Crook and Weston, WY.

Using the 2000 Census, the population of Wyoming 2 is 79,864 persons.

Using a sites at Sheridan, Gillette, Sundance, Newcastle and Buffalo (100 watts ERP), the population covered is 60,127 persons (75.3%).

The total land area covered within the Wyoming 2 - Sheridan RSA is 16,742.808 square miles. The total land area covered within the 40 dBu service area contours is 1,059.5 square miles (6.3% of the total land area of the RSA).

Wyoming 2 - Sheridan



Population and Lard Area Covered

County Borders State Borders Lat/Lon Grid

Wyoming 4 – Niobrara RSA

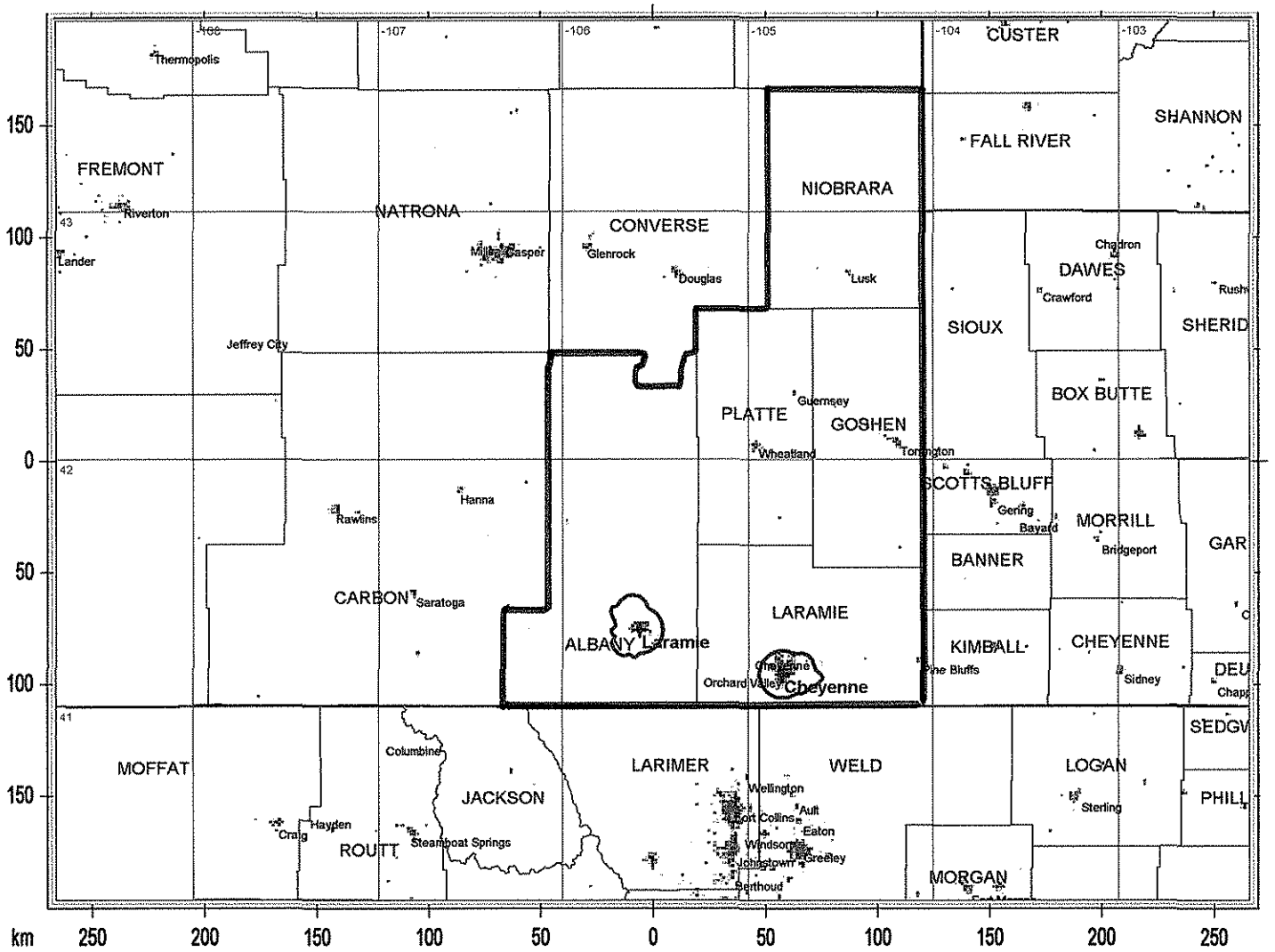
The Wyoming 4 – Niobrara RSA consists of the counties of Albany, Platte, Laramie, Niobrara and Goshen, WY.

Using the 2000 Census, the population of Wyoming 4 is 137,373 persons.

Using a sites at Laramie and Cheyenne (100 watts ERP), the population covered is 103,502 persons (75%).

The total land area covered within the Wyoming 4 – Niobrara RSA is 13,894.868 square miles. The total land area covered within the 40 dBu service area contours is 927.6 square miles (6.7% of the total land area of the RSA).

Wyoming 4 - Noibrara



Population and Land Area Covered

County Borders State Borders Lat/Lon Grid

Wyoming 5 – Converse RSA

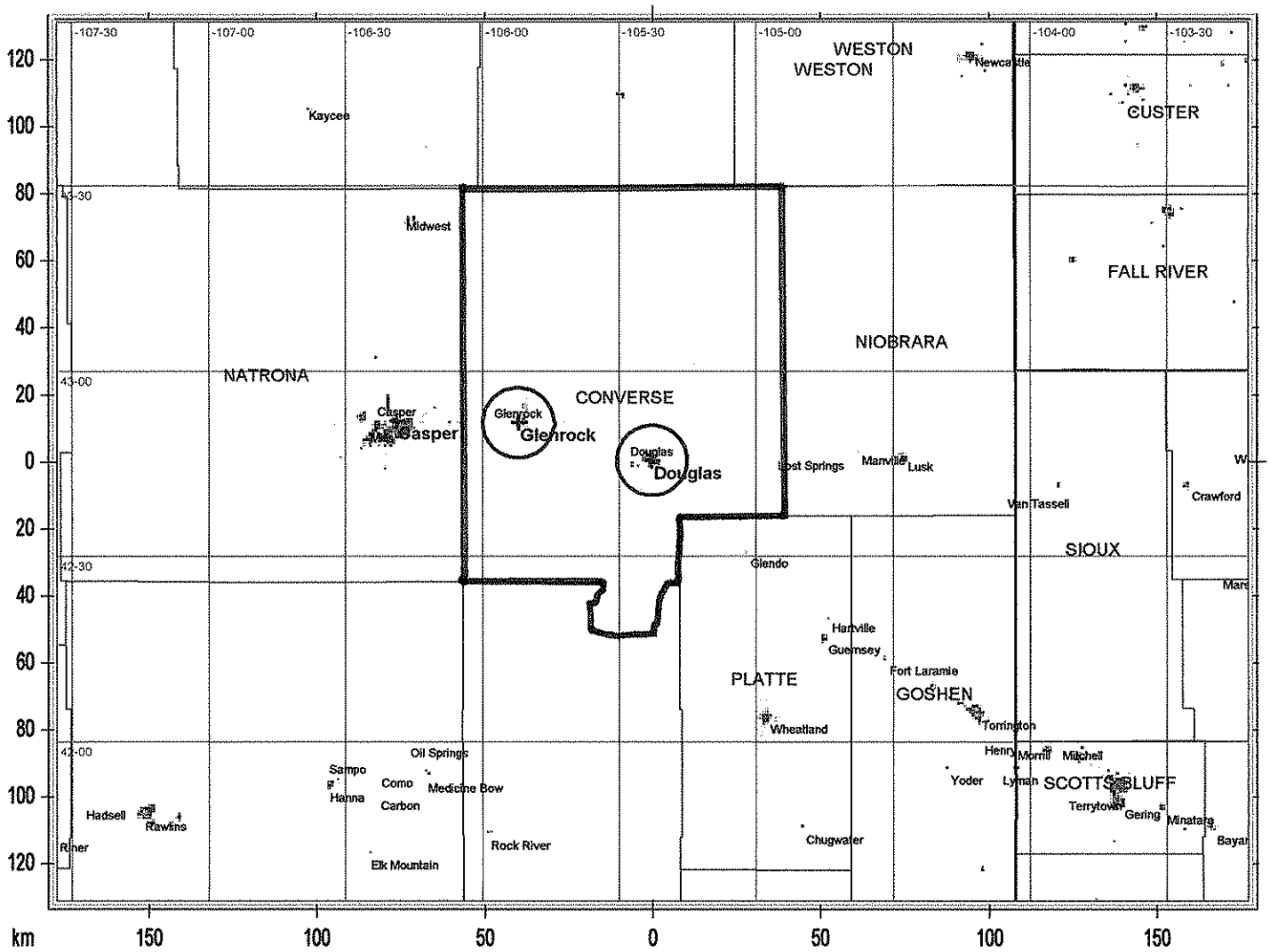
The Wyoming 5– Converse SA consists of the county of Converse, WY.

Using the 2000 Census, the population of Wyoming 5 is 12,052 persons.

Using a sites at Douglas and Glenrock (100 watts ERP), the population covered is 10,503 persons (87%).

The total land area covered within the Wyoming 5 - Converse RSA is 4,254.721 square miles. The total land area covered within the 40 dBu service area contours is 695 square miles (16.3% of the total land area of the RSA).

Wyoming 5 - Converse



Population and Land Area Covered

County Borders State Borders Lat/Lon Grid