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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 08-86
Table of Allotments)	
FM Broadcast Stations)	RM-11432
Custer, Michigan)	

To: Marlene H. Dortch, Secretary
Office of The Secretary,
Federal Communications Commission

REPLY COMMENTS

Respectfully submitted,

ROY E. HENDERSON

By Robert J. Buenzle,
His Counsel

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September 30, 2008

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I N D E X

	PAGE
Summary.....	i
I. The Northern Counterproposal is Legally Deficient and Should be Dismissed.....	2
II. To the Extent That the Northern Counterproposal is Considered At All On any Substantive Basis, It Remains Clearly Inferior to the Henderson Petition.....	4
1. The Henderson Petition versus the Northern Counterproposal.....	4
2. Northern's Attempt to Ignore the First Operating Service At Custer on Channel 227A as Proposed by Henderson Must be Rejected.....	6
III. The Old Allotment of Channel 263A At Custer Should be Deleted.....	9
IV. Summary and Conclusion: Henderson's Petition is Superior By Every Measure and Should be Adopted.....	10

S U M M A R Y

In this proceeding Roy E. Henderson filed a Petition for Rulemaking to delete existing vacant FM radio channel 263A from Custer, Michigan, and replace it with equivalent channel 227A at Custer for which Henderson filed an application and commitment to build. Adoption of the Henderson proposal would also clear the way for upgrade of radio station WCUZ in Bear lake, Michigan from a short-spaced class A facility to a fully spaced class C3 facility. Adoption of the Henderson proposal would result in a first operating service at Custer and in total combined new service to 79,272 persons. A counterproposal was then filed by Northern Radio of Michigan, Inc. opposing the Henderson petition, and instead proposing that existing channel 263A be retained at Custer and channel 227A assigned for Northern's use at Onekama, Michigan. Henderson suggests that the Northern filing is legally defective and should be dismissed for its failure to include a commitment and form 301 for Custer and, in the event that Northern were to receive substantive consideration of its filing, Henderson claims substantially superior service (79,272 for Henderson against 25,444 claimed by Northern) and other public interest benefits in efficient use of the frequencies. Henderson then suggests that under any analyses, his Petition is far superior in all public interest benefits and should be adopted, and the Northern Counterproposal dismissed or denied.

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To: Marlene H. Dortch, Secretary
Office of The Secretary,
Federal Communications Commission

REPLY COMMENTS

By Notice of Proposed Rulemaking (hereinafter "NPR") issued in this Docket and released on July 25, 2008 (DA 08-1710), the Federal Communications Commission ("FCC" or "Commission") proposed to adopt the Petition for Rulemaking ("Petition") as filed by Roy E. Henderson (hereinafter "Henderson"), on May 8, 2008, which proposed amendment of the FM Table of Allotments to delete existing vacant channel 263A as presently allotted to Custer, Michigan, and replacement of that channel with the new allotment of equivalent channel 227A to Custer.

In response to the NPR, Henderson filed Comments in Support of the Rulemaking and Northern Radio of Michigan, Inc. ("hereinafter Northern") filed a counterproposal suggesting that the Henderson Petition for Custer be denied, that the existing vacant channel 263A be retained in Custer, and that the Northern Counterproposal to allot channel 227A to Onkama, Michigan, be adopted. It is also noted here that while a copy of Northern's

counterproposal was received by mail, it bore the wrong docket number and has not yet appeared in ECFS in this docket or under the erroneous number. For the reasons set forth below, Henderson, by his counsel, submits that the Northern Counterproposal is legally deficient and should be dismissed or, if considered at all, that Henderson's original proposal is clearly superior, and with demonstrably more public interest benefits, than the Northern Counterproposal, and that the Henderson Petition should therefore be adopted and the Northern Counterproposal denied. In support whereof, the following is submitted:

I. The Northern Counterproposal is Legally Deficient and Should be Dismissed.

Initially it must be recognized here that the NPR as it was issued by the Commission included the Commission's stated intention to replace channel 263A with channel 227A at Custer, and when Northern chose to submit as part of its own Counterproposal its contrary suggestion that 227A NOT be placed in Custer but that the Custer allocation should remain as 263A, it was incumbent at that time for Northern to have then filed its own application and fee for use of the channel it was requesting to be maintained in Custer, along with its own commitment to build that station there as a first operating station in Custer upon adoption of the Northern Counterproposal. To the extent that it did not, and offered no such commitment, and filed no application to build a station on channel 263A in Custer, its Counterproposal was inherently deficient as filed and should be dismissed.

The fact that channel 263A was a leftover under the old rules that had sat unwanted and unused for more than six years does not diminish the applicability of the requirements of the current rules to Northern's request in its Counterproposal that the Commission NOT adopt its proposed channel change as set forth in the NPR, and instead maintain the original channel there in direct response to Northern's request that it do so. In making that request, and asking the Commission to act in response to Northern's request, Northern was required under the new rules to submit its own application for use of that channel in Custer, and to the extent that it did not do so, its Counterproposal as filed, was clearly deficient in an essential required element, that a counterproposal must be complete as filed and that the Northern counterproposal should therefore be dismissed.

Under the current rules, any action requested by a petitioner as to allocation of a channel in the Table of Allotments must be accompanied by a commitment and form 301 filed for use of the subject channel and, absent such filing, the request is deficient and will not be considered. See Report and Order, infra at footnote 1, at pa.20. The reason for the requirement could not be better illustrated than it is here, where acceptance of the Northern request would mean that, at Northern's request, the old channel 263A would be retained at Custer, but without the benefit of a firm commitment and filed application as currently required. And absent that commitment and application, it is clear that the channel which has already existed vacant and unused for over six years, will then remain

vacant and unused, and of no benefit or use to the community of Custer. That is not in the public interest of the community of Custer, nor is it consistent with the purpose of the Commission's current rules and requirements. Accordingly, it is submitted that the element missing from the Northern Counterproposal was substantive in nature, and the counterproposal was not complete with all essential elements when filed, and that the Northern Counterproposal should therefore be dismissed.

II. To the Extent That the Northern Counterproposal is Considered At All On any Substantive Basis, It Remains Clearly Inferior to the Henderson Petition.

1. The Henderson Petition versus the Northern Counterproposal

To begin with, we note that in the Henderson petition as filed, he proposed a new service on channel 227A with all the benefits that would predictably bring to Custer and its surrounding area, and also the simultaneous additional benefits that would be recognized at existing radio station WCUZ in Bear Lake, Michigan, since the channel change at Custer would also then accommodate an upgrade at that station from grandfathered short-spaced channel 261A to fully-spaced channel 264C3, with all the additional population and area coverage that would result from that change.

So, in short, by adoption of the Henderson Petition, a long-vacant channel allotment at Custer would be replaced by a new first service channel for which an application and fee have already been placed on file, essentially assuring at last the initiation of a new first service on that channel in Custer and,

as also noted in the NPR, the form 301 application and fee have also been placed on file at WCUZ for the upgrade requested there, and the Commission has already indicated it will seek Canadian concurrence on the change. We would submit that a new first-service radio station built and operated in Custer, in accordance with the application there as currently on file, plus the additional population and area benefits that would be recognized at WCUZ would be substantial, as would be the benefits of increased efficient use of the FM spectrum by replacing the presently short-spaced class A channel 261A at WCUZ with a fully-spaced class C3 channel 264C3.

Against that, Northern in its counterproposal suggests use of the channel as a first service in Onekama, a community of similar size located about 35 miles distant from Custer. We will not dispute that Onekama would qualify for consideration of a new allotment, and we would not dispute their intention to build a station on that channel, if allocated to Onekama, any more than we would expect them to dispute Henderson's commitment to build and operate a first service on that channel in Custer, if allocated there. Under the new rules applicable to new proposed modifications of the FM Table of Allotments as proposed in June of 2005 and adopted in November of 2006, anyone now offering such modifications is required to file a form 301 application and fee

along with its commitment to build a station on the channel as proposed or modified. 1/

This, of course, is significantly more definite than the rules that applied prior to these changes which, while requiring a good-faith statement of intent to construct, were a much lower bar, subject to changed conditions and circumstances which often resulted in the allotment remaining fallow, with no subsequent application or constructed station. As things now stand, consistent with the new FM rules, petitions such as those filed here must include the confirmation that the required application and fee has already been filed and there is a far greater certainty that any channel or channel modification requested in the Table of Allotments, will in fact be constructed. Clearly, the new proposed first service at Custer on channel 227A must be included as a basic part of the analyses between the Henderson Petition, and the Northern Counterproposal.

2. Northern's Attempt to Ignore the First Operating Service At Custer on Channel 227A as Proposed by Henderson Must be Rejected.

Against this background, we review the Northern counterproposal and find it to be seriously deficient. According to Northern's logic, all that should be compared here is Northern's proposed first service at Onkama versus the additional benefits that would be achieved from adoption of the

1/ See Notice of Proposed Rulemaking, Revision of Procedures Governing Amendment to FM Table of Allotments, 20 FCC Rcd 11169 (2005) at paragraph 34; and Report and Order, 21 FCC Rcd 14212 (2006), at paragraphs 18-20.

Henderson Petition at WCUZ, BUT with no consideration whatsoever of the BASIC benefits of a first operating service at Custer.

Although not stated specifically, it seems that Northern simply assumes the channel 263A allotment at Custer as a "given", which, in their analyses would be on a par with their request for channel 227A in Onekama, and they could not be more wrong on that. It is apples and oranges and the situations are totally dissimilar. In the case of Custer, that channel was requested and allotted in 2002, 2/ and although under the old rules in effect at that time, an intention to build a station on that channel would be required, these intentions were of a low order, subject to any number of subsequent changed conditions and circumstances, and not anything like the firm commitments and applications added and required under the new rules as adopted in docket 05-210 in 2006 (see footnote 1, supra). That being the case, the history of channel 263A at Custer is that after it was allotted in 2002, it was then included in auction Number 70 but received no interest and no bids then, and it has remained fallow and unapplied-for by anyone at any time since then. That is a period of over six years that channel 263A has remained vacant and unapplied for at Custer, and there is no evidence of any future interest in that channel at Custer.

In the instant proceeding, Henderson has requested the channel change from 263A to 227A and, consistent with the current rules which now apply, has filed his application, paid his fee,

2/ See Report and Order in MM Docket 01-186, May 17, 2002

and submitted his full assurance and commitment that upon grant of his request, he will proceed to bid at auction and if successful to build that first operating station service at Custer. That is what is reliable, and that is what he will do if his petition is adopted. On the other hand, if his petition is denied, then channel 263A will predictably remain unwanted and unused by anyone, and Custer will not get a first service then or, in all likelihood, ever.

Such being the case, it is utterly unfair and illogical for Northern to seek to equate the old channel allocation at Custer as a "first operating service" already existing there, with their requested use of 227A in Onekama as a first operating service there. Channel 263A at Custer is a child of the old rules which suffers the problems from the old rules, as so clearly described in the Commission's adoption of its new FM rules. No application was ever filed for Custer, no fee ever paid and no interest shown by anyone in proceeding to do so. That doesn't count for too much and it is clearly not the same as a commitment and application as presently filed for use of channel 227A at Custer.

There is no doubt that upon adoption of his Petition, that a new operating first service will in fact be built on channel 227A in Custer. There is also no doubt that additional public interest benefits will be realized by the upgrade at WCUZ in Bear lake which will be possible with the change at Custer. There is also virtually no doubt that if the Petition is denied, Custer is doomed, and there will never be a first operating radio service

there, nor will there be any upgrade possible at WCUZ in Bear Lake. All these things being so, it is respectfully submitted that the comparison here should be between the public interest benefits to be gained by a new first operating service on channel 227A in Custer, plus the additional benefits at WCUZ, versus a new first operating service at Onekama as proposed by Northern.

On this comparison, as documented in the attached Engineering Statement, the total new population that would be served from the first service at Custer would be 43,548 persons, and the total new population receiving service from the upgrade at WCUZ would be 35,724 persons. This then comes to a total of new population receiving service of 79,272 persons. To say the least, that compares very favorably against the predicted population coverage of Northern's new proposed service at Onekama, as indicated by Northern as 25,444 persons. In fact, the new population that would receive service under the Henderson proposal would be more than 3 times the number that would receive service under the Northern counterproposal. On every part of the analyses the Henderson Petition is clearly superior in every public interest consideration to that of the Northern Counterproposal, and the Henderson Petition should be adopted in the public interest.

III. The Old Allotment of Channel 263A At Custer Should be Deleted

Finally, we note that in the event that for whatever reason, the Commission does not dismiss the Northern Counterproposal for its patent deficiency, and then also determines that it should

actually adopt Northern's counterproposal, then Henderson submits that, in view of the record of no interest by anyone in utilizing channel 263A at Custer, that the Commission, sua sponte, also delete that channel in Custer, thereby at least opening the way for the update of station WCUZ.

**IV. Summary and Conclusion: Henderson's Petition is
Superior By Every Measure and Should be Adopted**

The overriding mantra and requirement as set forth in Section 307(b) of the Communications Act of 1934 (47 USC 307(b)) is that the Commission should at all times seek to "...provide a fair, efficient, and equitable distribution of radio service..." Similarly, the Commission itself set general priorities in evaluating conflicting allotment proposals ("FM Priorities", 90 FCC 2d 88 (1982)), and further indicated that in applying those priorities, it would always consider "the totality of factors" LaGrange and Rollingwood, Texas, 10 FCC Rcd, 3337 (1995).

Under every single rule and policy, the Henderson Petition is not only superior, but overwhelmingly preferable to the Northern Counterproposal. Adoption of the Henderson Petition has the positive benefits of:

(1) deleting a 6 year old unused channel at Custer from the Table;

(2) providing an assured first local service station at Custer on the requested replacement channel 227A which would provide new service to 43,548 persons; and

(3) upgrade of service at WCUZ in Bear Lake by allowing the substitution of fully spaced channel 264C3 for the presently short-spaced channel 261A, resulting in new service there to an additional 35,724 persons.

All of which would be in clear furtherance of the 307(b) directions seeking efficiency of the radio spectrum, as well as maximized and equitable distribution of radio service.

Against this, adoption of the Northern counterproposal would:

(1) require a continuation of the unused channel 263A allotment in Custer, effectively precluding any new station there and forcing the retention of that unused channel in the Table of Allotments;

(2) would bar any upgrade at WCUZ in Bear Lake, effectively requiring that the present grandfathered short-spaced channel 261A would remain that way; and

(3) in return for all this would provide only a new station in Onekama serving a total of 25,444 persons, less than 1/3 the population that would receive new service from the Henderson proposal.

So, Northern's counterproposal would not only serve far fewer persons, but would also be directly contrary to the goal of efficiency in the spectrum, both at Custer and at Bear Lake.

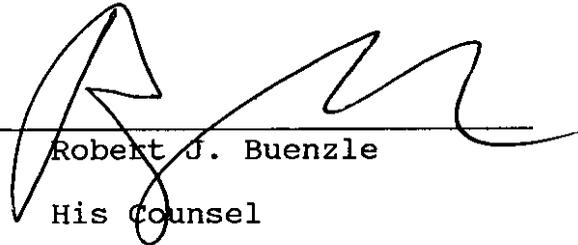
We respectfully submit that this is not a close analyses and that adoption of the Henderson Petition is not only far more favorable to the public interest, but that the Northern proposal is not even close, not by any measure.

Wherefore, for the reasons as stated herein, it is respectfully requested that the Counterproposal as submitted by Northern Radio of Michigan, Inc., be dismissed as fatally flawed and legally deficient as filed or, if considered in any way, that it be denied as inferior to the Petition as filed by Henderson, and that Henderson's Petition as reflected in the Commission's Notice of Proposed Rulemaking be adopted.

Respectfully submitted,

ROY E. HENDERSON

by

A large, stylized handwritten signature in black ink, appearing to be 'R. Buenzle', written over a horizontal line.

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His Counsel

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September 30, 2008

**Engineering Statement
Custer, Michigan**

**MB Docket 08-86
Reply Comments
September 29, 2008**

This firm has been retained by Roy E. Henderson, ("Henderson") to prepare this Engineering Statement in support of his Reply Comments in the above captioned proceeding. Henderson filed a Petition For Rulemaking seeking to amend the FM Table of Allotments to substitute FM Channel 227A¹ at Custer, Michigan which, if adopted, would allow Henderson to upgrade Radio Station WCUZ(FM) from its presently assigned FM Channel 261A² to FM Channel 264C3³. The Commission released the proposed rulemaking on July 25, 2008. The specified date for Comments was September 15, 2008 and Reply Comments are to be filed by September 30, 2008.

In Response to the Notice of Proposed Rulemaking, Henderson filed his comments supporting the channel change proposed for Custer, Michigan and for Bear Lake, Michigan. Northern Radio of Michigan, Inc., ("Northern"), filed a Counterproposal⁴ seeking to assign FM Channel 227A to the community of Onekama, Michigan and to retain FM Channel 263A⁵ at Custer, Michigan. The Northern Counterproposal has not been placed in the file for MB Docket 08-86 as

¹ Henderson filed the required FCC Form 301 for the requested FM Channel 227A at Custer, Michigan and paid the requisite filing fee. See FCC File No. BNPH-20070919ACP.

² Radio Station WCUZ(FM) is a grand fathered short spaced facility operating on FM Channel 261A. Its operation on FM Channel 264C3 would remove the grandfathered short spaced status that presently exists on FM Channel 261A. Operation on FM Channel 264C3 would fully comply with the Commission's mileage separation requirements as specified in Section 73.207 of the Rules.

³ FM Channel 264C3 at Bear Lake, Michigan would provide that community with a first local aural service that is fully spaced under the Commission's mileage separation requirements and would eliminate a grandfathered short spaced facility at Bear Lake.

⁴ Northern Radio of Michigan, Inc., simultaneously filed FCC Form 301 for FM Channel 227A at Onekama, Michigan. It did not file the required FCC Form 301 for FM Channel 263A at Custer, Michigan.

⁵ See Engineering Statement of Northern Radio of Michigan Counterproposal, page 1. "This counterproposal requests that Channel 263A remain in Custer, MI, as presently allotted. Further, it is requested that Channel 227A be added at Onekama, Michigan, in lieu of Custer, Michigan, to allow for a new first local service to Onekama, Michigan."

of the date of this Statement⁶ and it has not been published as an acceptable Counterproposal by the Commission.

Initially it should be noted that the Northern Counterproposal appears to be procedurally defective. In its Counterproposal, Northern has requested that FM Channel 227A be assigned to the community of Onekama, Michigan and that FM Channel 263A be retained at the community of Custer, Michigan. It filed the required FCC Form 301 for the Onekama, Michigan FM Channel 227A⁷, however, it did not file the required FCC Form 301 for FM Channel 263A⁸ at Custer, Michigan as is required to do in order to comply with the new procedural rules for changes in the FM Table of Allotments. This defect results in the Counterproposal, as filed, being procedurally defective at the time of filing and the Northern Counterproposal should be dismissed.

The Northern Counterproposal Analysis

The Northern Counterproposal⁹, as filed, requests that FM Channel 227A be assigned to Onekama¹⁰, Michigan with transmitter site coordinates N44-19-30, W86-11-37, (NAD27), and the application proposes a transmitter power of 4.7 kw at antenna height 111 meters above average terrain. The community of license has a population¹¹ of 647 persons, and it is located in Manistee County which has a population of 24,444 persons.

The facility proposed will provide a first local service to Onekama, Michigan and will provide service to a population of 25,444 persons within its 1

⁶ Research reveals that not only did Northern fail to file the required FCC Form 301 for Channel 263A at Custer, Michigan but Northern **also filed its Counterproposal IN THE WRONG DOCKET.** As a consequence of this failure, therefore, it appears that the Counterproposal was not on file **THIS DOCKET** before the Comment date specified in the Commission's Notice of Proposed Rulemaking for MB Docket 08-86.

⁷ See FCC File No. BNPH-20080915ACP.

⁸ FM Channel 263A was allotted to Custer, Michigan in MM Docket 01-186, by a Report and Order dated May 17, 2002 and the channel has lain fallow since that time. It was placed in Auction 70 for public bidding and it received no bids.

⁹ Notwithstanding the procedural defects which render the Northern Counterproposal unacceptable for filing.

¹⁰ Onekama, Michigan is listed in the US Census as a Village and it appears to have all of the necessary engineering attributes necessary to qualify as a community for allotment purposes.

¹¹ All population data presented is from the US Census Bureau, 2000 Census.

mv/m contour. The entire service area is well served with 5 or more aural services¹².

No analysis of the Custer proposal can be done because Northern did not file the required FCC Form 301 for the facility nor did Northern express any interest in applying for Channel 263A at Custer when it filed its Counterproposal to the Commission's proposal to delete FM Channel 263A at Custer, Michigan.

The Henderson Proposal Analysis

The Henderson proposal, as filed, requests a.) that the present operating authority for Radio Station WCUZ(FM)¹³ be amended to specify operation on FM Channel 264C3 and b.) that the Commission assign FM Channel 227A¹⁴ to the Community of Custer, Michigan to replace the presently assigned FM Channel 263A¹⁵.

The present facility at Bear Lake, Michigan operates on FM Channel 261A¹⁶, a grandfathered short spaced Class A channel, and its licensed facility provides service Bear Lake, Michigan. The community has a population of 318 persons and it is located in Manistee County which has a population of 24,527 persons. The facility provides service to a population of 15,741 persons within its 1 mv/m contour.

The facility proposed for Bear Lake, Michigan¹⁷ would provide service to a population of 51,465 persons within its 1 mv/m contour and it would provide the community of Bear Lake, Michigan with a first local fully spaced FM Channel.

It is proposed that FM Channel 227A be assigned to Custer, Michigan. This community has a population of 318 persons; it is located in Mason County,

¹² As is also true of the Henderson proposal. All gain and loss areas of these proposals are well served by more than 5 aural services.

¹³ Henderson filed the required FCC Form 301 for FM Channel 264C3 at Bear Lake, Michigan, FCC File No. BNPH-20070919ACM. This application is mutually exclusive with the presently assigned FM Channel 261A at Bear Lake, Michigan. Channel 261A is a grandfathered short spaced Class A facility and the proposed operation on FM Channel 264C3 is a fully spaced channel.

¹⁴ Henderson filed the required FCC Form 301 for FM Channel 227A at Custer, Michigan. See FCC File No. BNPH-20070919ACP.

¹⁵ This channel has laid fallow since it was assigned in 2002. It was published in Auction 70 and received no bids from the public.

¹⁶ Presently licensed facility, FCC File No. BLH-19871116KA.

¹⁷ FCC File No. BMPH-20070919ACM.

Michigan which has a population of 28,274 persons. The proposed facility¹⁸ would provide service to 43,548 persons within its 1 mv/m contour.

Net gain in population of the Henderson proposal is 79,272 persons within the 1 mv contour of the proposed FM Channel 264C3 at Bear Lake and the proposed FM Channel 227A at Custer, Michigan as is shown below.

Community	Present 1 mv/m contour	Proposed 1 mv/m contour
Bear Lake, Michigan	15,741	51,465
Custer, Michigan	-----	43,548
Net Population service increase		79,272

Conclusions

The use of FM Channel 227A at Onekama, Michigan filed by Northern is procedurally defective insofar as it opposes the deletion of FM Channel 263A at Custer, Michigan and yet Northern did not file the required FCC Form 301 for its proposed Custer allotment on FM Channel 263A¹⁹ nor did it express any interest whatsoever in Channel 263A at Custer.

The Henderson proposal to upgrade FM Channel 261A at Bear Lake, Michigan to FM Channel 264C3 would provide a first local fully spaced FM Channel at Bear Lake; it would provide service to an additional 35,724 persons; it would eliminate an existing short spaced channel on FM Channel 261A at Bear Lake and it would provide a first local service to the community of Custer, Michigan on FM Channel 227A and the Henderson proposal would provide an additional aural service to a population of 79,272 persons.

¹⁸ No comparison of the service provided by FM Channel 263A at Custer, Michigan is provided as no FCC Form 301 is on file for that facility.

¹⁹ Northern simply urges the Commission to retain a fallow channel that has laid vacant for nearly 7 years after being assigned and offered to the public at subsequent auction where there were no bids submitted for the channel. It is difficult to determine how the public interest is served by such a proposal.

CERTIFICATION

This engineering statement has been prepared by the undersigned and is true and correct to the best of his knowledge and belief, and is submitted in good faith. My qualifications are a matter of record before the Commission.

The undersigned is aware that this document is being filed with the Federal Communications Commission in MB Docket 08-86 filed by Roy E. Henderson and hereby consents to its use for that purpose.

Dated this 29th day of September, 2008.

Respectfully,

A handwritten signature in black ink that reads "F. W. Hannel". The signature is written in a cursive style and is positioned above a horizontal line.

F. W. Hannel, PE

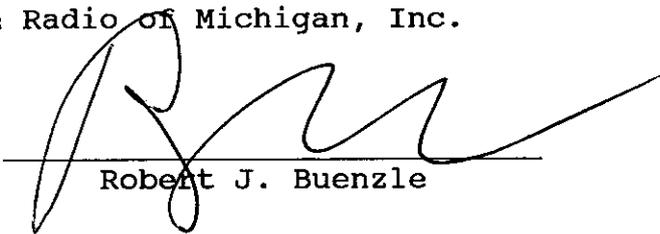
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CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Reply Comments have been served by United States mail, postage prepaid this 30th day of September, 2008, upon the following:

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