

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

In the Matter of)
)
Expanding the Economic and Innovation)
Opportunities of Spectrum Through Incentive) GN Docket No. 12-268
Auctions)
)

COMMENTS OF CHANNEL 32 MONTGOMERY LLC

Channel 32 Montgomery LLC (“Channel 32”), licensee of digital full-power commercial station WNCF(DT) (“WNCF”), Montgomery, Alabama (Facility ID No. 72307), by its attorneys, hereby submits these comments in response to the *Notice of Proposed Rulemaking* (“*NPRM*”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-referenced proceeding.¹ Although the *NPRM* seeks comment on a number of issues regarding the FCC’s forthcoming broadcast television spectrum incentive auction, Channel 32 limits the instant comments to issues presented by the *NPRM* concerning the protection of facilities licensed after February 22, 2012.² Specifically, Channel 32 urges the FCC to protect facilities beyond those licensed as of February 22, 2012, the date on which the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”) was passed.³

The FCC proposes to require preservation only with regard to facilities that were licensed, or for which an application for license to cover authorized facilities already was on file with the Commission, as of February 22, 2012. Channel 32 submits that this interpretation not only is far more restrictive than what is required by the Spectrum Act, but that such interpretation

¹ See *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Notice of Proposed Rulemaking (rel. Oct. 2, 2012) (“*Incentive Auction NPRM*”).

² Nonetheless, Channel 32 may elect to file reply comments on any matters raised by commenters to the *NPRM*.

³ See Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (“Spectrum Act”).

would be arbitrary and capricious, fundamentally unfair, and contrary to the public interest, specifically with respect to those stations that have implemented the terms of a construction permit required to effectuate a channel substitution following a rulemaking proceeding.

I. WNCF PROCEDURAL HISTORY

In an effort to better replicate WNCF's over-the-air analog service area, and consistent with the goals of the digital television ("DTV") transition, on May 31, 2011, Channel 32 submitted a petition for rulemaking ("Petition") on behalf of WNCF to substitute UHF channel 31 for UHF channel 32.⁴ In evaluating the Petition, the Commission specifically acknowledged that the proposed facility would "significantly increase the geographic area within the station's protected contour."⁵ Accordingly, the Commission issued an order granting the Petition on November 9, 2011 ("Order").

As directed by the Order, Channel 32 submitted a minor change application for a construction permit specifying channel 31 in lieu of channel 32 on January 30, 2012, before passage of the Spectrum Act. This application was granted on March 22, 2012. Significantly, although granted after February 22, 2012, the construction permit authorization contained no condition that protection of the constructed facilities would be subject to the outcome of the instant rulemaking proceeding. Substantial resources (financial, technical, legal, and otherwise) were then expended to construct the facilities in accordance with the terms of the construction permit. Thereafter, on September 28, 2012, Channel 32 signed a license application to cover the

⁴ See *Petition for Rulemaking to Amend the Table of DTV Allotments*, MB Docket No. 11-137, RM-11637; see also *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14596 (1997) (establishing parameters in the initial DTV Table of Allotments to "allow existing broadcasters to provide DTV service to a geographic area that replicates, to the extent feasible, the service area of their existing NTSC [or analog] station"). This Petition was filed just prior to the FCC's institution of a freeze on the filing of all such channel substitution petitions. See *Freeze on the Filing of Petitions for Digital Channel Substitutions, Effective Immediately*, Public Notice, 26 FCC Rcd 7721 (MB 2011).

⁵ See *In the Matter of Amendment of Section 73.622(i), Post-transition Table of DTV Allotments, Television Broadcast Stations (Montgomery, Alabama)*, Report and Order, 26 FCC Rcd 15652, 15652 (MB 2011).

construction permit, and filed such application on October 4, 2012. Such license application was granted promptly, and again unconditionally, on November 16, 2012.

II. THE SPECTRUM ACT DOES NOT REQUIRE THAT THE FCC PROTECT ONLY FULL-POWER TELEVISION FACILITIES LICENSED AS OF FEBRUARY 22, 2012.

Section 6403(b)(2) of the Spectrum Act requires the FCC to “make all reasonable efforts to preserve, as of [February 22, 2012], the coverage area and population served of each broadcast television licensee. . .”⁶ This statutory mandate was enacted in direct response to concerns of broadcasters that the incentive auction process might harm the viability of local television service for viewers who rely on over-the-air television for news, information, and other new and innovative services.⁷ Thus, the Spectrum Act requires that the FCC adopt, at a minimum, rules that preserve the coverage area and population served by those facilities that were licensed (or for which a license to cover was on file) as of February 22, 2012.⁸ However, the FCC also should promulgate rules aimed at protecting full-power television facilities licensed after February 22, 2012, specifically those covering construction permits required to effectuate channel substitutions, particularly because such channel substitutions were sought before the FCC’s “freeze” of such petitions and were allocated in a rulemaking completed prior to February 22, 2012. It would be arbitrary and capricious, and contrary to the public interest, to establish February 22, 2012 as the “cut-off” for protection for coverage areas and populations served by

⁶ Spectrum Act, § 6403(b)(2).

⁷ See, e.g., 158 Cong. Rec. H907, 914 (daily ed. Feb. 13, 2012) (statement of Rep. Walden) (emphasizing that broadcasters would be protected by the legislation and that viewers “will still be able to see and watch their over-the-air public and private broadcasters”); John Eggerton, *Incentive Auctions Are Part of Payroll Package*, Multichannel News, Feb. 16, 2012, <http://www.multichannel.com/content/incentive-spectrum-auctions-are-part-payroll-package> (discussing “compromise legislation” that included language requiring the FCC to protect the coverage areas and interference protections for repacked stations).

⁸ See *Incentive Auction NPRM* ¶ 98.

full-power television licensees that had no notice that the facilities would not receive protection in any repacking.⁹

A. The Spectrum Act provides for protection for licenses and construction permits authorized after enactment of the Spectrum Act and should be interpreted consistent with legislative intent.

In the *NPRM*, the Commission states that it is statutorily obligated to protect only television facilities licensed as of February 22, 2012, and that facilities licensed after this date, as well as those specified in construction permits (whether granted or pending before the Commission), are not covered by section 6403(b)(2) of the Spectrum Act.¹⁰ However, section 6403(b)(2) does not state that the Commission must preserve the coverage areas of television stations *licensed* at the time of enactment of the Spectrum Act. Rather, section 6403(b)(2) states that the Commission must protect the coverage areas and populations of “each broadcast television *licensee*”, *i.e.*, any entity that held a full-power (or Class A) television license as of February 22, 2012.¹¹ Had Congress intended to statutorily mandate protection of licensed operations only (as compared to facilities specified in a construction permit (or application there for)), it would have used language to this effect in the Spectrum Act.¹²

Indeed, in enacting section 6403(b)(2), Congress specifically sought to protect broadcasters and their current viewers, particularly those viewers “who rely on over-the-air

⁹ Indeed, the Commission’s rules specify that such applications would be protected from interference by, *inter alia*, subsequent applications and rulemakings to amend the DTV table of allotments. *See* 47 C.F.R. § 73.623(h)(ii).

¹⁰ *See, e.g., Incentive Auction NPRM* ¶ 98 & n.151. Although the Commission proposes to protect additional facilities in the *NPRM*, the FCC appears to believe that protection of such facilities is discretionary under the Spectrum Act. *See Incentive Auction NPRM* ¶ 113 (“[W]e do not interpret [section 6403(b)(2)] to prohibit the Commission from granting protection to additional facilities where appropriate.”).

¹¹ *See* Spectrum Act, § 6001 (defining the term “broadcast television licensee”).

¹² *See Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1986) (stating that statutory construction “must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose”).

broadcast for entertainment and public emergency information.”¹³ Contrary to the Commission’s interpretation of section 6403(b)(2), Congress was not focused upon protection of facilities that were licensed as of a certain date, but rather on ensuring that “broadcasters that relocate due to repacking do not lose over-the-air viewers as a result of that move.”¹⁴ Thus, to fulfill the legislative goals of section 6403(b)(2), the FCC must protect any licenses and construction permits (and applications for such authorizations) that a broadcaster requires to serve its longstanding over-the-air viewing area, even if these authorizations were not obtained prior to February 22, 2012.¹⁵

B. It is arbitrary and capricious, as well as contrary to the public interest, to specify February 22, 2012 as the cut-off for protection because stations lacked notice that facilities authorized after this date would not receive protection.

The Commission’s proposal to deny protection to construction permits for modifications to full-power television facilities granted, as well as to facilities for which licenses were sought,

¹³ See, e.g., 157 Cong. Rec. S4933 (daily ed. July 27, 2011) (statement of Sen. Kirk); see also 158 Cong. Rec. E238 (daily ed. Feb. 24, 2012) (statement of Rep. Upton) (“To protect broadcasters, however, subsection (b) prohibits the FCC from involuntarily relocating broadcasters from UHF channels to VHF channels. It also requires the FCC to make all reasonable efforts to preserve relocating broadcasters’ coverage area and population served.”).

¹⁴ See 156 Cong. Rec. E1471 (daily ed. July 29, 2010) (statement of Rep. Boucher); see also 158 Cong. Rec. S889 (daily ed. Feb. 17, 2012) (statement of Sen. Leahy) (“Broadcast television is critically important to communities across this country . . .”).

¹⁵ Such an interpretation also is consistent with Congress’s longstanding intent with respect to the DTV transition. Specifically, Congress was adamant that no viewer be left without television service following the transition. This legislative goal served as the basis for Congress’s decision to delay the DTV transition deadline for four months, as well as for a multitude of Commission actions. See, e.g., *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order, 23 FCC Rcd 4220, 4243 (2008); see also *In re Amendment of Parts 73 & 74 of the Commission’s Rules*, Report and Order, 24 FCC Rcd 5931, 5933 (2009) (explaining that it is the FCC’s goal that “following the digital transition, all Americans continue to receive the television broadcast service that they are accustomed to receiving to the greatest extent feasible”); *In the Matter of Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking, 22 FCC Rcd 15581, 15609 (2007) (“[O]ur overall goal in the DTV transition [is] encouraging replication of analog service.”). Indeed, in enacting the Spectrum Act, Congress specifically recognized its inter-relationship with the DTV transition. See 158 Cong. Rec. H907, 914 (daily ed. Feb. 13, 2012) (statement of Rep. Walden) (“The bill also provides the best protection of any competing legislation to make sure American viewers can continue to watch programming and news from the Nation’s free, over-the-air broadcasters, who just went through an expensive and difficult federally mandated conversion to digital.”).

after February 22, 2012 is arbitrary and capricious and contrary to the public interest.¹⁶ At the time the Spectrum Act was passed, television stations like WNCF had no notice that Commission rules may not preserve the coverage areas of, and populations served by, licenses applied for and granted after February 22, 2012. Rather, enactment of the Spectrum Act merely provided broadcast television licensees with assurances that entities holding a license for a full-power television station as of February 22, 2012 were eligible for protection.¹⁷ As the FCC itself acknowledges, the Spectrum Act authorizes it to protect television facilities as necessary to serve the public interest.¹⁸ Not until release of the *NPRM* on October 2, 2012 did the FCC propose to deny protection to coverage areas and populations authorized by licenses applied for, and granted, after February 22, 2012.

Moreover, the Commission's own actions since the enactment of the Spectrum Act further support protecting the coverage areas of, and populations served by, licenses applied for and issued after February 22, 2012. The FCC generally has not implemented a freeze on applications to modify full-power television facilities pending the agency's adoption of rules governing the incentive auction and repacking process.¹⁹ Indeed, the FCC has continued to accept, process, and grant such applications, even after release of the *NPRM*.²⁰ Moreover, the construction permits and license authorizations issued to stations like WNCF by the FCC have

¹⁶ See, e.g., *Incentive Auction NPRM* ¶ 98 & n.151.

¹⁷ See Spectrum Act, § 6403(b)(2); see *supra* Section II.A (explaining that the Spectrum Act does not mandate the interpretation advanced by the Commission).

¹⁸ See *Incentive Auction NPRM* ¶ 113.

¹⁹ Historically, the Commission has concluded that it is in the public interest to impose a freeze upon the acceptance, processing, or action upon applications seeking to operate using spectrum that is the subject of a rulemaking to change license service rules or spectrum allocations. For instance, the Commission implemented a freeze on the filing of applications for broadcast facilities on channel 51 in anticipation of a rulemaking aimed at making UHF spectrum available for wireless services. See *General Freeze on the Filing and Processing of Applications for Channel 51 Effective Immediately and Sixty (60) Day Amendment Window for Pending Channel 51 Low Power Television, TV Translator, and Class A Applications*, Public Notice, 26 FCC Rcd 11409 (MB 2011).

²⁰ Thus, even release of the *NPRM* cannot be said to have served as notice that construction permits and licenses authorized or applied for after October 2, 2012 would not receive protection given that the Commission has continued to accept, process and authorize modifications after its release.

not been subject to any conditions that the authorizations are subject to the outcome of the instant rulemaking proceeding.²¹ As a result, broadcast stations have expended technical, financial, and other resources to implement modifications authorized by the Commission without any notice whatsoever (prior to the *NPRM*) that such modifications would not be protected. Therefore, the FCC’s proposal essentially would constitute a *de facto* freeze—a freeze that would be applied retroactively to penalize stations like WNCN that have improved their digital facilities in reliance on existing rules and policies and to deny viewers the benefits of such improvements.²² In these circumstances, it would be arbitrary and capricious, fundamentally unfair, and contrary to the public interest to adopt rules that would not protect the coverage areas of, and populations served by, station licenses and construction permits authorized or applied for after enactment of the Spectrum Act.

C. The FCC absolutely should protect construction permits required to effectuate a channel substitution following a rulemaking proceeding.

In the *NPRM*, the Commission seeks comment on whether to “protect outstanding construction permits issued to effectuate a channel substitution following a rulemaking proceeding.”²³ As explained below, Channel 32 believes that such construction permits absolutely should receive protection during the incentive auction process.

²¹ See, e.g., FCC File No. BLCDDT-20121004AAI. This approach is contrary to that taken in the full-power DTV transition, where the FCC expressly included DTV transition-related conditions on the face of the construction permit. See, e.g., FCC File No. BPCDDT-20080616AEA (“This is to notify you that the grant of this construction permit is subject to the condition that this facility cannot commence operation prior to midnight of February 17, 2009, or by such other date as the Commission may establish in the future, without prior approval from the Commission.”).

²² See, e.g., *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12630 (1999) (stating that cut-off date for grandfathering of attributable interests was reasonable where affected parties were on notice that the date of adoption of an order proposing a rule would serve as the cut-off date).

²³ *Incentive Auction NPRM* ¶ 116.

Stations that have obtained construction permits following a rulemaking proceeding have done so in reliance on, and in compliance with, existing FCC rules and policies. As the Commission itself recognizes, these stations already have completed a rulemaking process and the Commission already has modified its DTV Table of Allotments to reflect the change.²⁴ Thus, it would be “fundamentally unfair” to fail to protect the facilities specified in such construction permits (or applications there for), even if the facilities were not licensed until after the enactment of the Spectrum Act.²⁵ Indeed, this was the case with WNCF. As explained above, after over a year of operation on DTV channel 32, Channel 32 determined that operation on channel 31 would offer more meaningful replication of its traditional analog service area.²⁶ The Media Bureau agreed and, in November 2011, modified the DTV Table of Allotments to reflect the channel change.

As directed by the Order, Channel 32 then filed an application for a construction permit to effectuate this change.²⁷ The Media Bureau granted this application unconditionally on March 22, 2012 (after the passage of the Spectrum Act, but before the release of the *NPRM*). In reliance on this agency action, WNCF implemented facilities to enable a transition to channel 31.²⁸ WNCF filed an application for a license to cover this facility on October 4, 2012, which was well in advance of the March 22, 2015 expiration date specified on the face of the construction permit. By the time Channel 32 received notice that the as-constructed facilities would not be protected, when the *NPRM* was released on October 2, 2012, the almost-eighteen-month process for implementing WNCF’s channel change was 99% complete. In this instance, where

²⁴ *See id.*

²⁵ *See infra* Section II.D (discussing application of the Commission’s rationales for protecting Class A digital facilities to full-power television stations). Moreover, such a failure to protect these facilities would upend the protections established under Section 73.623(g) of the Commission’s rules. *See* 47 C.F.R. § 73.623(h).

²⁶ *See* Petition, *supra* note 4.

²⁷ Such application was pending at the time the Spectrum Act was passed.

²⁸ *See supra* Section I.

significant resources were expended to modify WNCF's facilities consistent with a Commission order, and no prior notice was given that the facilities would be unprotected, the FCC's proposal to deny protection to WNCF's construction permit, which was pending at the time the Spectrum Act was passed, and subsequent license application would be both fundamentally unfair and arbitrary and capricious.

D. It is arbitrary and capricious to afford more protection to construction permits for Class A digital facilities than to full-power stations seeking to replicate over-the-air analog viewers.

In the *NPRM*, the Commission proposes to deny protection to construction permits (and construction permit applications that were pending at the time the Spectrum Act was passed) for full-power stations while, at the same time, proposing to protect construction permits for digital Class A facilities, whether such permits have been authorized or are the subject of applications pending before the Commission.²⁹ To support its proposal, the FCC reasons that failing to protect digital Class A construction permits would be “fundamentally unfair” because Class A licensees relied on previously adopted Commission rules to develop their digital construction plans.³⁰ The FCC also concludes that the failure to preserve the coverage areas of un-built construction permits for digital Class A facilities would “deprive the public of important benefits of the Class A digital transition.”³¹ However, these rationales apply equally to applications submitted by full-power television stations, especially those such as WNCF, that sought to, and did, restore or improve service to viewers adversely impacted by the DTV transition.

First, as is the case with Class A stations that relied on FCC rules to plan their digital facilities, it would be fundamentally unfair to fail to protect full-power facilities constructed in reliance on long-standing Commission rules and policies aimed at fulfilling the fundamental

²⁹ See *Incentive Auction NPRM* ¶ 115 & n.170 & n.175.

³⁰ See *id.* ¶ 115.

³¹ See *id.*

objective of the DTV transition, namely, digital replication of the station's over-the-air analog viewing area. The station worked earnestly and diligently to obtain construction permits and other authorizations necessary to construct facilities that would enable it to meet more closely the FCC's replication goal. Although the station's license application was not filed before the proposed February 22, 2012 "cut-off" for protection, the station made its plans and extensive new facilities were constructed based on rules and policies in existence well before this date. Under these circumstances, it would be inequitable to deny protection to stations like WNCF.³²

Not only is the failure to protect full-power facilities intended to resolve over-the-air digital reception challenges associated with the DTV transition fundamentally unfair to broadcast licensees, the failure to protect such facilities also "would deprive the public of important benefits" of the full-power DTV transition. For example, by commencing broadcasts with its channel 31 facility, WNCF has dramatically increased the number of viewers able to receive a digital from WNCF.³³ Failing to protect the coverage areas and populations served by WNCF— notwithstanding that the facility only recently was licensed—would dramatically disserve the public interest.

III. CONCLUSION

In sum, to effectuate the intent behind section 6403(b)(2) of the Spectrum Act, the Commission should adopt rules aimed at preserving the coverage areas of, and populations served by, full-power broadcast facilities specified in construction permits and in licenses applied for and authorized after February 22, 2012. This is especially the case given that stations like WNCF had absolutely no notice that the Commission would propose in the *NPRM* to deny protection to their as-constructed and licensed facilities.

³² This is the case even though WNCF's construction permit application (which was filed prior to enactment of the Spectrum Act) was not granted until after February 22, 2012. *See supra* Section I.

³³ *See* Exhibit A, WNCF "Before" and "After" Coverage Maps.

Respectfully submitted,

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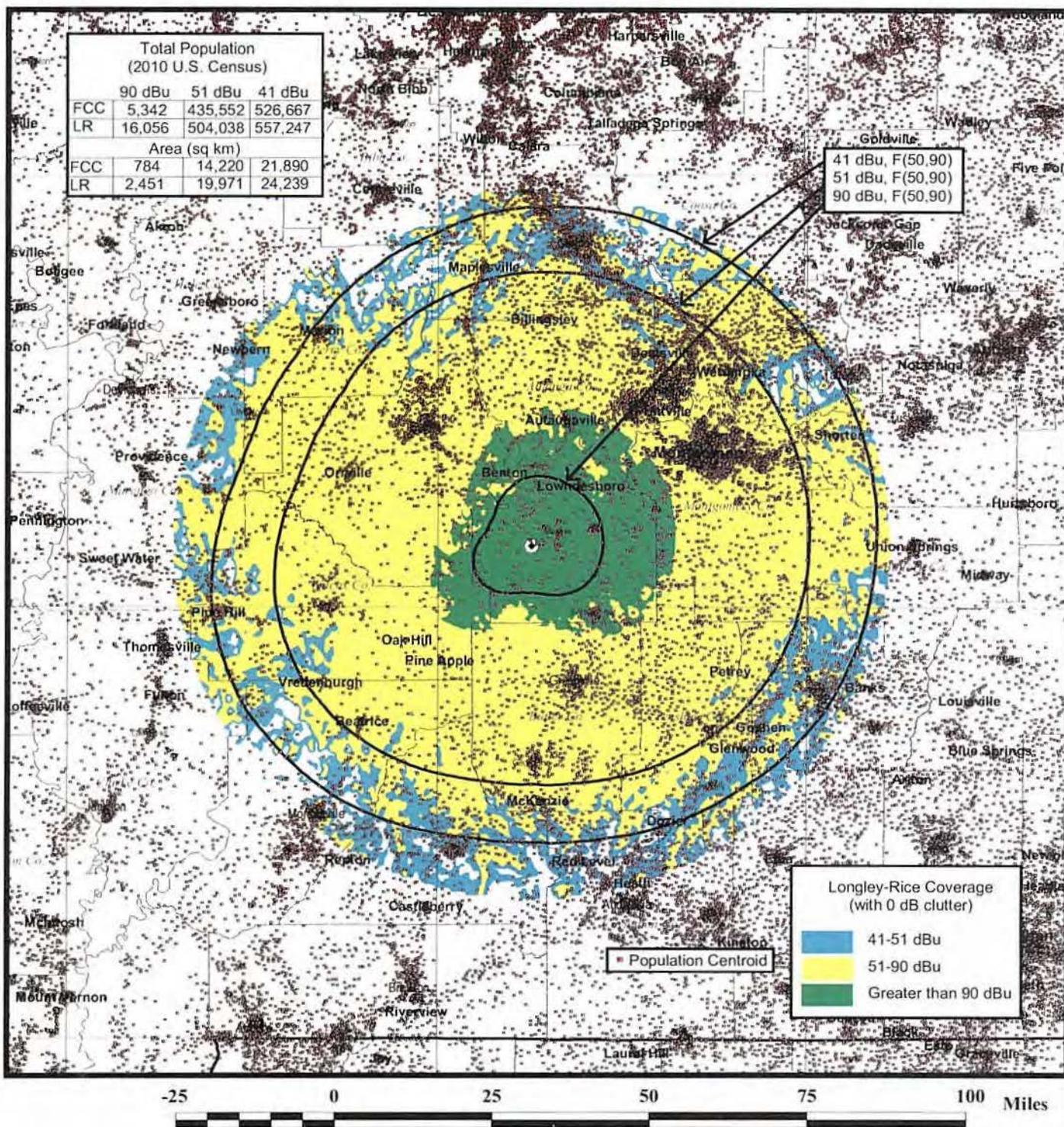
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EXHIBIT A

Figure 1A
BEFORE

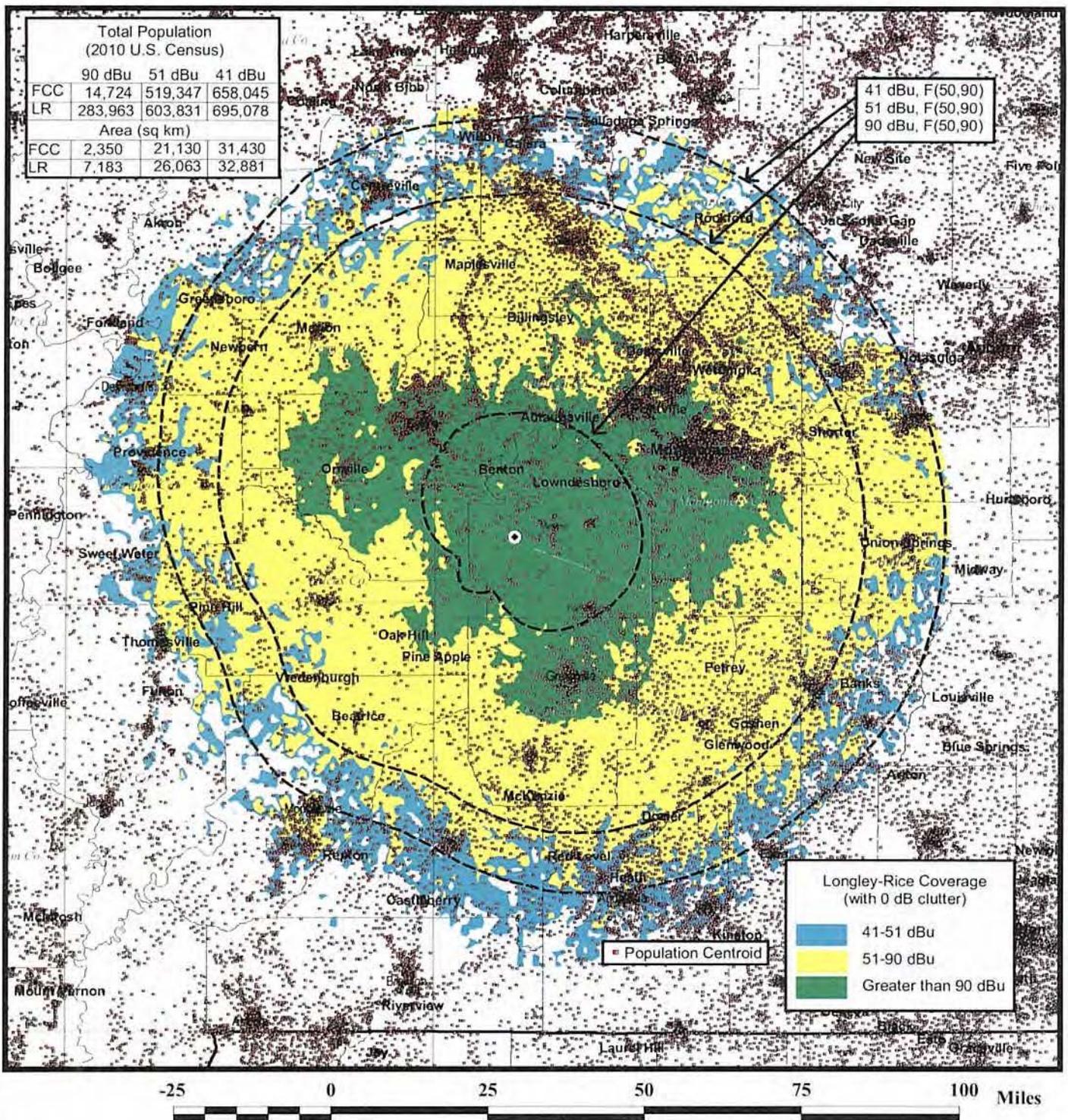


FCC AND LONGLEY-RICE COVERAGE

STATION WNCF- LICENSE
MONTGOMERY, ALABAMA
CH 32 35 KW (DA) 545 M

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Figure 2A
AFTER



FCC AND LONGLEY-RICE COVERAGE
STATION WNCF - CONSTRUCTION PERMIT
MONTGOMERY, ALABAMA
CH 31 720 KW (DA) 473 M

du Treil, Lundin & Rackley, Inc. Sarasota, Florida