

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

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Lake Isabella, California))

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: June 21, 2006

Released: June 23, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Living Proof, Inc. (“Living Proof”) directed to the staff letter dated March 18, 2004, returning its Petition for Rule Making requesting the reservation of vacant FM Channel 239A at Lake Isabella, California for noncommercial educational (“NCE”) use. For reasons discussed below, we are denying the Petition for Reconsideration.

2. **Background.** In 2002, the Commission revised the criteria by which a rulemaking proponent may reserve an FM allotment for NCE use. Initially, this reservation process was limited to future allotment proceedings.¹ The Commission later extended the expanded criteria to existing vacant FM allotments for which a *Notice of Proposed Rule Making* had been released prior to August 7, 2000, the effective date of the *NCE Report and Order*.² Under this expanded criteria, a proponent must demonstrate that it is technically precluded from using a reserved channel (Channels 201 through 220) and the proposal would provide a first and/or second NCE radio service to at least 10 percent of the population within the 1 mV/m (60 dBu) contour of the proposed station, provided that such population would exceed 2,000 persons.

3. Living Proof filed a petition requesting the reservation of vacant FM Channel 239A at Lake Isabella, California for NCE use. The petition was returned as unacceptable for consideration by staff letter action because it failed to meet the reservation criteria. The staff analysis determined that the proposed NCE reservation request for the vacant Lake Isabella allotment would not provide a first or second NCE radio service to at least 10 percent of the population within the proposed primary service area.

4. **Petition for Reconsideration.** Living Proof submitted an engineering study that provided calculations relating to the population within the proposed service area utilizing three different

¹ In the *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Report and Order*”). Previously, the Commission would only reserve a channel in the nonreserved FM band (Channels 221 through 300) if the petitioner demonstrated that no reserved channel could be used in the noncommercial reserve band (Channels 201 through 220) without causing prohibited interference to a Channel 6 TV station or to a foreign broadcast station.

² *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691 (2003) (“*NCE Second Report and Order*”). In a *Public Notice* released September 30, 2003, we invited petitions for rule making to reserve vacant FM allotments for NCE use pursuant to the *NCE Second Report and Order*. In response to the *Public Notice*, we received 129 petitions for the reservation of 91 allotments.

engineering programs. Living Proof noted that the results differ depending on the level of radials plotted and the population database used. Nonetheless, Living Proof states that each showing proves that at least 10 percent of the population within the 60 dBu contour would receive a second NCE service because NCE Station KTQX(FM), Bakersfield, California already provides the first NCE service to this area.

5. **Discussion.** Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if the Petitioner cites error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. Living Proof has not met this burden.

6. A review of the engineering study reveals that Living Proof's ten percent population calculations are based on the non-uniform terrain propagation methodologies for determining the 60 dBu signal strength contour. In allotment proceedings, the staff relies on the standard propagation signal methodology, F (50,50) curves, to predict the distance from the proposed antenna site and the 60 dBu and 70 dBu signal strength contours. These curves are based on the propagation characteristics of radio signals transmitted in the FM band and assume "uniform terrain." Under this methodology, the 60 dBu contour of maximum Class A facilities (6 kilowatts ERP at 100 meters HAAT), extends 28.3 kilometers.³ In instances where 60 dBu coverage issues are raised, there is a limited exception to the use of uniform terrain.⁴ Living Proof has not met the requirements under *Woodstock and Broadway, Virginia*. Therefore, we reject its calculations based on the non-uniform terrain propagation method to meet the ten percent population criterion.

7. Our engineering review of the instant proposal reveals that a second NCE service could be provided to persons who reside in a small area within the northern sector of the 60 dBu contour using uniform terrain propagation. According to the 2000 U.S. Census, the total population living in this underserved area is five percent of the total population receiving a second NCE service, 704 persons. Accordingly, Living Proof's showing fails to satisfy either the ten percent requirement or the 2,000 person minimum threshold. The Petition for Reconsideration is denied.

8. The Commission will not send a copy of this *Memorandum Opinion and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A), because the aforementioned petition for reconsideration was denied.

³ *See Caldwell, College Station and Gause, Texas*, Memorandum Opinion and Order, 15 FCC Rcd 20641 (MMB 2000).

⁴ *Woodstock and Broadway, Virginia*, Memorandum Opinion and Order, 3 FCC Rcd 6398 (1988) (determining that use of an alternate propagation methodology is warranted if all of the following applies: (1) the new channel would not be available for competing applications; (2) the petitioner had provided substantial evidence showing that the proposed facilities would comply with our principal city coverage requirement using our standard prediction method but relaxing the normal assumption of uniform terrain; (3) the petitioner had secured the proposed site owner's assurance that the land would be available; (4) the petitioner had obtained FAA approval for a tower at the proposed site; and (5) the petitioner had submitted sufficient information to allow the Commission to confirm the height above average terrain (HAAT) of an antenna located at the proposed site. *See also See also, Elkins, West Virginia, Mountain Lake Park and Westernport, Maryland*, Memorandum Opinion and Order, 7 FCC Rcd 5527 (MMB 1992); *Saltville, Virginia and Jefferson, North Carolina*, Memorandum Opinion and Order, 11 FCC Rcd 5234 (MMB 1996); and *Harrisburg and Albemarle, North Carolina*, Memorandum Opinion and Order, 11 FCC Rcd 2511 (MMB 1996), *review denied*, Memorandum Opinion and Order, 15 FCC Rcd 24296 (2000).

9. IT IS ORDERED, That the Petition for Reconsideration filed by Living Proof, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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