

WAIVER REQUEST

KTNC License, LLC, respectfully requests a waiver of Section 73.622(f)(5) of the Commission's rules, 47 C.F.R. § 73.622(f)(5) (2003), to permit the modification of Station KTNC-DT, Concord, California ("Station KTNC" or the "Station"), as specified in the instant application (the "Application"). Although KTNC is licensed to the San Francisco DMA, its transmitter site is, and always has been, on Mount Diablo in the easternmost part of the San Francisco DMA, just ten miles from the border of the adjacent Sacramento-Stockton-Modesto DMA (the "Sacramento DMA"). Most other stations licensed to the San Francisco DMA are located on Mount Sutro in the westernmost part of the San Francisco DMA. Moreover, the Station is licensed to Concord, which is also in the easternmost county of the San Francisco DMA. Because of Station KTNC's unique placement on Mount Diablo, which straddles the border of the San Francisco and Sacramento DMAs, the Commission has consistently recognized the Station's extensive service within the Sacramento DMA as evidenced by the Commission's grant of cable carriage rights throughout much of the Sacramento DMA on two separate occasions.¹

As is demonstrated herein, grant of the requested waiver is justified and would serve the public interest. As is more fully discussed herein, grant of the waiver would in no way undermine Section 73.622(f)(5) of the Rules, whose purpose is to allow stations to increase their power to be competitive with other similarly situated in-market stations. The rule was not intended to arbitrarily restrict the permissible power levels of KTNC on Mount Diablo by reference to the power levels of stations on Mount Sutro, well to the west/southwest. As reflected in the engineering statement submitted with the application, the proposed KTNC complies with the FCC's *de minimis* interference standards for DTV. Moreover, grant of the waiver would provide over-the-air viewers in the Sacramento DMA with the same Spanish language alternatives currently afforded to many cable viewers in the DMA.

A. The Station

KTNC License, LLC, is owned by Hispanic America of San Francisco, LLC, an indirect subsidiary of Pappas Telecasting Companies ("Pappas"). Through affiliated entities, Pappas currently is the licensee or permittee of 16 full-power television stations, operates three additional full-power stations pursuant to local marketing agreements, and is the provider of free over-the-air local television programming in 16 markets in 10 states across the country.

¹ See *First Century Broadcasting, Inc.*, 10 FCC Rcd 13,113 (1995); See also *KTNC Licensee, LLC*, 18 FCC Rcd 16269 (2003). As noted in *KTNC Licensee, LLC*, the Station is one of a few San Francisco stations that have been afforded such cable carriage rights. *Id.* at ¶ 7. See also *Engineering Statement*, attached hereto as Attachment 1.

Station KTNC is a charter affiliate of the emerging Azteca America television network, an emerging network providing Spanish-language programming to over 70% of Hispanic households in the United States. The Station is licensed to Concord, California, which is assigned to the San Francisco DMA and is located in the easternmost part of the DMA. By virtue of the placement of its transmitter site on Mt. Diablo, which virtually borders the Sacramento DMA, the Station provides at least a Grade B signal to large portions of the Sacramento DMA as well as the San Francisco DMA to which it is licensed. In contrast, most of the other network affiliates licensed to the San Francisco DMA are located on Mt. Sutro, which is in the western part of the San Francisco DMA. Station KTNC's site on Mt. Diablo is approximately 10 miles from the border of the Sacramento DMA and it therefore has the unique ability to naturally serve both DMAs.

The Commission has recognized Station KTNC's extensive service within the Sacramento DMA on two separate occasions by granting must-carry rights for the Station for more than 40 communities within the Sacramento DMA, including the communities of Sacramento, Stockton, and Modesto.² The grant of cable carriage rights for Station KTNC permitted the Station to provide a valuable competitive counterweight to the television stations carrying Univision and Telefutera programming in the Sacramento DMA. Based on these decisions, it is clear that the Commission has concluded that the Sacramento DMA is part of the competitive market for Station KTNC.

B. The Rule

Section 73.622(f)(5) permits DTV licensees to propose an increase in operating power and service area of their DTV facilities, so long as the facilities specified would not exceed the facilities of the largest station in the market. This rule is restricted to those situations where the applicant is proposing an increase beyond the maximum power and antenna height specified in the Commission's rules.

The "largest station" provision was adopted as part of the Commission's adoption of the DTV rules in the *Sixth Report and Order*.³ The purpose behind the adoption of the rule was to permit stations to modify their facilities so that they could provide geographic coverage equal to the largest station in their market.⁴ The rule was proposed by participants in the proceeding concerned about the competitive impact of the Commission's adoption of maximum power and height

² *Id.*

³ *Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14,588 (1997).

⁴ *Id.* at ¶ 31. The Commission subsequently defined "market" as those stations in the applicant's DMA. See *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5946, ¶ 74 (2001).

restrictions. Such concerns were expressed by many parties, due mostly to the impact of the maximum facility rules on stations previously authorized with lower operating power.⁵ The Commission agreed with these parties, and adopted rules that would permit stations "to maximize their facilities provided that no new interference is caused to other stations."⁶

Thus, rather than to serve as a limiting factor among stations in the same competitive market, Section 73.622(f)(5) was seen as an avenue to enable stations, mostly UHF stations, to level the playing field among competitors so that the legacy of inequality among VHF and UHF stations would not be carried over into the digital world. The focus of the Commission in adopting the rule was to ensure that no station would be competitively disadvantaged vis-à-vis stations in its competitive market, so long as the proposed increase in service would not create new interference to any other station.

C. The Waiver Request

The Commission will grant waiver requests upon a showing of good cause.⁷ To support a waiver request, the Applicant must demonstrate that special circumstances warrant a deviation from the rule, and that the waiver would serve the rule's underlying purpose and the public interest.⁸

1. KTNC-DT Would Not Serve A Greater Area than KXTV-DT

As shown in the attached Engineering Statement, the proposed KTNC-DT facilities would provide a 41 dBu signal to a large portion of the populated area within the Sacramento DMA. This area includes the metropolitan areas of Modesto, Stockton and Sacramento, which, as noted above, the Commission has determined to be part of KTNC's competitive market. In fact, with the proposed facilities, the Station would provide the requisite signal to each of the three principal communities in the DMA in compliance with Section 73.625 of the Commission's rules, and would provide as strong a signal to these major communities as the nine television stations licensed to the Sacramento DMA. Therefore, KTNC strongly believes that the stations licensed to the Sacramento DMA should be included in the consideration of the application under Section 73.622(f)(5).

The inclusion of these stations would permit the processing and grant of the Application. As shown in the attached Engineering Statement, Station KXTV-DT,

⁵ *Sixth Report and Order*, ¶¶ 14-28, nt. 35.

⁶ *Id.* at ¶ 31, nt. 70.

⁷ 47 C.F.R. § 1.3 (2003).

⁸ *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert denied* 409 U.S. 1027 (1972).

Sacramento, California, provides a 41 dBu signal to an area of 44,581 square kilometers, whereas the proposed KTNC facility would provide a 41 dBu signal to an area of 37,701 square kilometers. Moreover, Station KXTV-DT serves 56,483 more persons than the proposed KTNC-DT facility. *Id.* From a coverage area perspective, Station KXTV-DT provides substantially duplicative coverage to the San Francisco DMA as provided by KTNC-DT to the Sacramento DMA. As such, the Application would comply with Section 73.622(f)(5) with the inclusion of at least Station KXTV-DT within KTNC's competitive market.

2. Grant of the Waiver Would Not Undermine the Purpose of the Rule

While the Commission previously determined that the appropriate "market" for purposes of Section 73.622(f)(5) is the DMA to which the DTV station is assigned, KTNC respectfully requests that the Commission consider the stations licensed to the Sacramento DMA as part of the Station's "market" when processing the Application.

As discussed above, the Commission has previously determined that the Sacramento DMA is part of Station KTNC's competitive market. The prior decisions relied upon, in great part, the fact that KTNC provided at least an NTSC Grade A signal to each of the three major cities in the Sacramento DMA, and the Commission granted must-carry rights in communities located throughout the proposed service area of KTNC-DT. The proposed KTNC-DT facility would provide a 41 dBu signal to most of the highly-populated areas within the Sacramento DMA, while serving less area and population than Station KXTV, its counterpart in the Sacramento DMA.

Since Section 73.622(f)(5) was adopted to ensure that stations are not competitively disadvantaged, the grant of the instant waiver request would not undermine the purpose of the rule. As shown above, Stations KXTV and KNTC serve comparably large areas of each other's respective competitive markets. Thus, it would be appropriate to consider Station KXTV in processing the instant application.

As established in the Allocation and Interference Study submitted as Exhibit E-1 to the application, the proposed facility would "not contribute more than two percent DTV interference to the service population of any affected NTSC or DTV station" with the exception of the allotment facility of KFTL-DT. In addition, according to a Longley-Rice interference study submitted with the application, the proposed KTNC-DT facility "does not cause any interference to the service population of the pending KFTL-DT proposal. Nonetheless, Pappas secured and submitted with the application an interference agreement with the licensee of KFTL (see Exhibit E-3).

Finally, it is unlikely that the grant of this waiver request would undermine the intent of Section 73.622(f)(5) by opening the floodgate to similar applications, since KTNC sits in a unique position: First, KTNC is the only station in the San Francisco DMA that is licensed to operate from Mt. Diablo. Second, none of the other stations licensed to San Francisco provide the equivalent signal to each of the major communities within the Sacramento DMA. Finally, any subsequently-filed application would be required to demonstrate that the proposed facility would not cause interference to any other station. Given the tightly-packed DTV channels in California, it is unlikely that such a showing could be made.

3. Grant of the Waiver Would Be in the Public Interest

The grant of the instant waiver request would also serve the public interest, as it would permit Station KTNC to provide the programming of a new, emerging Spanish-language network to a larger over-the-air audience.. Moreover, a waiver will advance the Commission's long-standing public interest objective of fostering the growth of new national over-the-air television networks,⁹ particularly those geared toward underserved minority communities, and it will enhance broadcast diversity and competition in the local marketplace.

The Commission has long considered the provision of a new network service in an area to be a factor supporting grant of a waiver of the Commission's technical rules.¹⁰ Moreover, the Commission has stated that it is the Commission's "duty to provide, when possible and feasible, the opportunity for effective competition among the networks."¹¹ In such cases, the Commission has been willing to waive its technical rules in order to allow such competition to take place. For example, in *Television Broadcasters, Inc.*, the Commission sought to encourage the growth of the ABC network. Given the chance to compete effectively, ABC did emerge as one of the "Big Three" networks. Moreover, in *Nebraska Educational Television*

⁹ See *Report On Chain Broadcasting*, Commission Order No. 37, Docket 5060 (May 1941) at 88 ("*Report on Chain Broadcasting*"); *Amendment of Part 73 of the Commission 's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 FCC 2d 318, 333 (1970); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. 73.658*, 5 FCC Rcd 3211, 3211 and n.9 (1990), (citing Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. 1 Oct. 1980)), waiver extended, 6 FCC Rcd 2622 (1991).

¹⁰ *Caloosa Television Corporation*, 3 FCC Rcd 3656 (1988); *Roy H. Park Broadcasting, Inc.*, 45 Rad. Reg. 2d (P&F) 1083 (1979); *Television Broadcasters, Inc.*, 5 Rad. Reg. 2d. (P&F) 155 (1965).

¹¹ *Television Broadcasters, Inc.*, 5 Rad. Reg. 2d (P&F) at 160 (emphasis in original). See also *Peninsula Broadcasting Corporation*, 3 Rad. Reg. 2d (P&F) 243 (1964); *New Orleans Television Corp.*, 23 RR 1113 (1962) (waiver granted for the purpose of assuring the existence of a third truly competitive station in the market, thereby making available competitive facilities to the networks).

Commission,¹² the Commission waived its spacing requirements to allow for the prompt implementation of a state-wide plan for educational television. In that case, the Commission found that the implementation of the state-wide plan was an overriding public interest consideration which required waiver of its technical rules.

Station KTNC now seeks the same opportunity for Azteca America to compete and become an established national network, and KTNC-DT is a vital step in executing that plan. The grant of this Application will ensure that more than 500,000 Hispanic persons in the major communities within the Sacramento DMA will receive Azteca America programming over-the-air.¹³ More than one-half of this population speaks Spanish as the principal language at home, and 150,000 persons have indicated that they speak English less than "very well."¹⁴ The grant of the instant application would permit Station KTNC to expand the delivery of its digital Spanish-language programming to an additional 700,000 persons in the two DMAs, and will provide such digital, over-the-air programming to many that do not have access to cable or satellite services.

Azteca America can only emerge as a viable new national network serving America's large Spanish-language population if it is present in all of the major markets. Only then can the benefits of greater competition among networks and enhanced diversity of viewpoint be fully realized. The grant of the Application would serve this important public policy goal as well, and would be therefore serve the public interest.

D. CONCLUSION

KTNC License, LLC, respectfully requests that the Commission waive the strict application of Section 73.622(f)(5) with respect to the instant Application, and consider Station KXTV as part of the relevant market for Station KTNC. The grant of this waiver request would be result in a win-win situation, as it would more accurately reflect the competitive television market for the respective stations. Grant of the requested waiver would in no way harm any other station in the DMA, and at the same time it would foster the development of a new national Spanish-language network.

¹² 4 Rad. Reg. 2d (P&F) 771 (1965).

¹³ See *American Factfinder*, U.S. Census Bureau: Race and Hispanic or Latino – 2000.

¹⁴ See *American Factfinder*, U.S. Census Bureau: Profile of Selected Social Characteristics – 2000.

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of KTNC LICENSE, LLC, licensee of station KTNC-TV in Concord, California, in support of this supplement to its pending modification application BPCDT-20020814AAX, an upgrade proposal for KTNC-DT. The purpose of this supplement is to address the Commission's concern about the coverage of the proposed KTNC-DT facility with respect to that of other stations in the market.

In the referenced application, the proposed height and power combination is in excess of the maximum allowed in Section 73.622(f)(8) of the FCC's Rules. However, Section 73.622(f)(5) allows stations to exceed the maximum power and height limitations as long as the land area within the proposed service contour does not exceed that of the largest station in the market.

Figure 1 is a map upon which we have plotted the 41 dBu service contour of proposed KTNC-DT. The contour is based on the use of the station's height above average terrain and effective radiated power along each of 360 radials. The FCC's F(50,90) curves for UHF DTV propagation were employed. On the map we have also plotted the 41 dBu contour of KXTV-DT, as authorized in BLCDT-19991116BEM. KXTV-DT operates on Channel 61 in Sacramento, California, and serves much of the same market as proposed KTNC-DT.

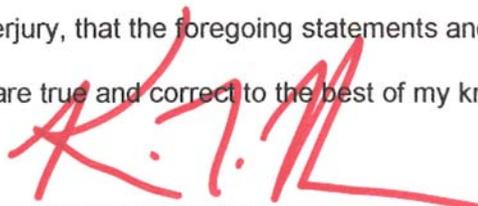
We then determined the land area located within each station's service contour, using a compensating polar planimeter. The land area within the KXTV-DT 41 dBu contour is 44,581 square kilometers, as compared to only 37,701 square kilometers for proposed KTNC-DT. In

addition, as shown in Figure 1, there are 57,493 more people residing within the KXTV-DT 41 dBu contour than are located within that of proposed KTNC-DT.

Therefore, it is believed that the KTNC-DT facility proposed in BPCDT-20020814AAX meets the Commission's maximum height and power requirements in Section 73.622(f)(5) of the Rules.

From a public interest standpoint, the proposed KTNC-DT facility serves a significantly greater area and population than does analog KTNC-TV. Figure 2 is a map upon which the proposed KTNC-DT 41 dBu contour is plotted in relation to the Grade B contour of licensed KTNC-TV. As shown, the contour from the digital facility will encompass nearly 760,000 more people than that of analog KTNC-TV.

declare, under penalty of perjury, that the foregoing statements and the attached exhibit, which was prepared by me, are true and correct to the best of my knowledge and belief.

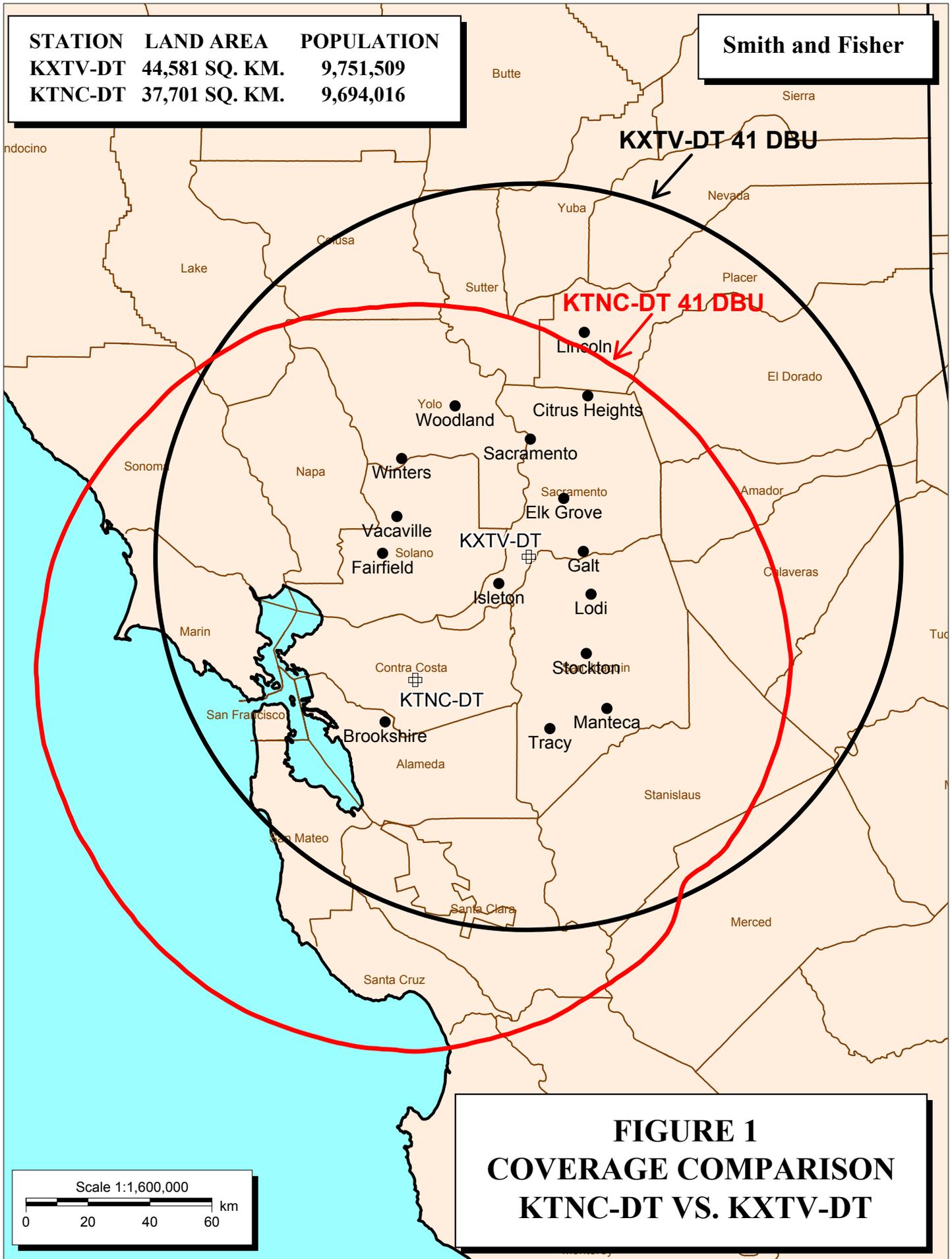


KEVIN T. FISHER

June 18, 2004

STATION	LAND AREA	POPULATION
KXTV-DT	44,581 SQ. KM.	9,751,509
KTNC-DT	37,701 SQ. KM.	9,694,016

Smith and Fisher



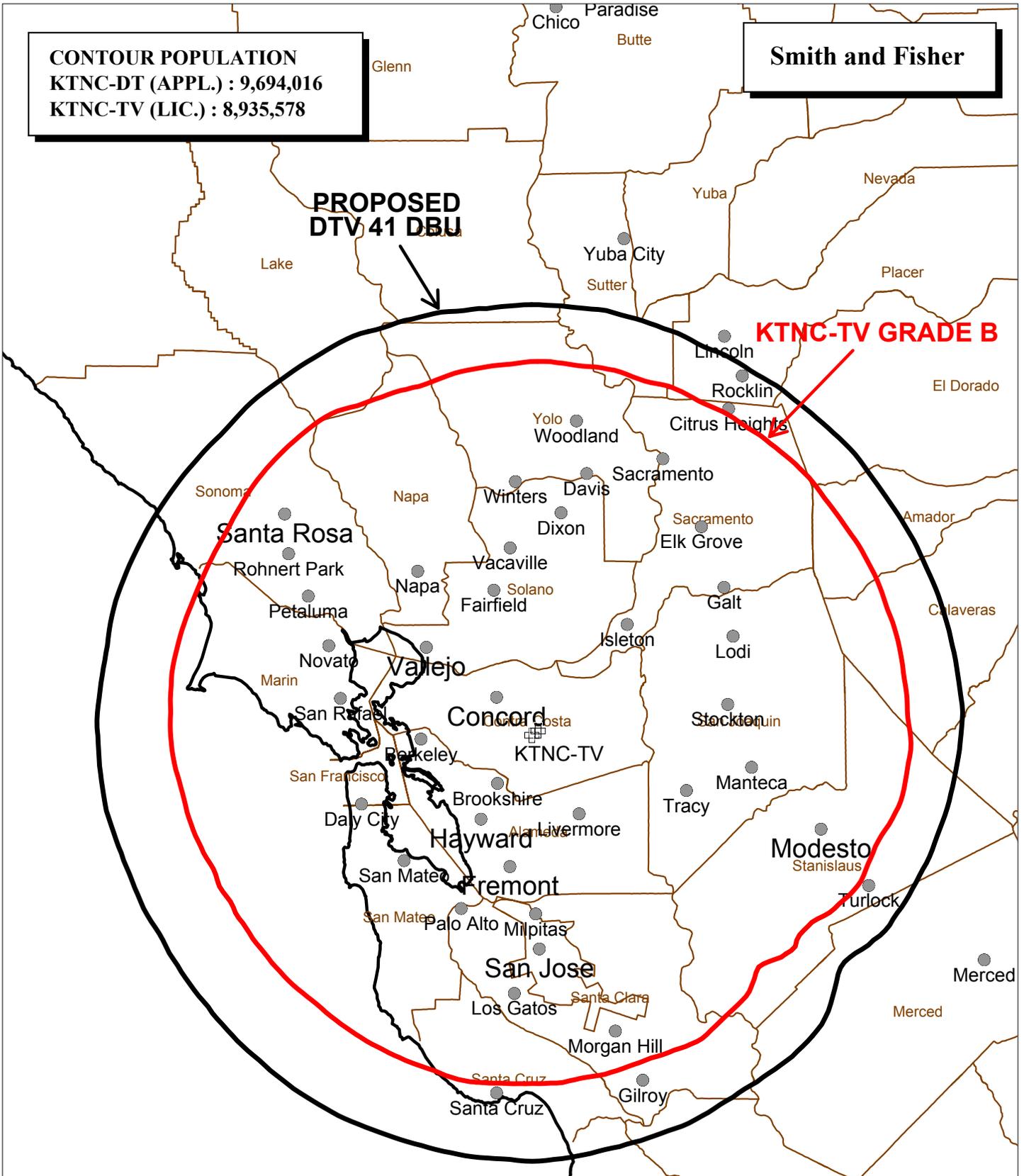
**FIGURE 1
COVERAGE COMPARISON
KTNC-DT VS. KXTV-DT**

CONTOUR POPULATION
KTNC-DT (APPL.) : 9,694,016
KTNC-TV (LIC.) : 8,935,578

Smith and Fisher

**PROPOSED
DTV 41 DBU**

KTNC-TV GRADE B



Scale 1:1,500,000



FIGURE 2
COVERAGE COMPARISON
KTNC-DT VS. KTNC-TV