

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

OCT 6 1994

In Reply Refer To:  
1800B3-BJB/KDY

Mr. Jerry A. Kimbro  
Vice-President for Finance  
Catawba College  
2300 W. Innes Street  
Salisbury, NC 28144

Mr. York David Anthony, President  
New Horizons Foundation, Inc.  
2613 Craig Avenue  
Concord, NC 28027

In re: WNDN(FM), Salisbury, North Carolina  
File No. BPED-910510MB  
Application for Construction Permit  
Petition for Reconsideration  
Special Temporary Authority Request  
Request for Waiver of 47 C.F.R. § 73.512(c)

Gentlemen:

We have on file (1) a pleading styled Petition for Reconsideration and Reacceptance for Filing Nunc Pro Tunc (the "Petition") filed by New Horizons Foundation, Inc. ("NHF") seeking reconsideration of a March 24, 1992 Mass Media Bureau decision dismissing the above-captioned construction permit application (the "Decision");<sup>1</sup> (2) NHF's October 14, 1992 request for special temporary authority ("STA") to operate with the facilities specified in the dismissed construction permit application; and (3) NHF's request for waiver of 47 C.F.R. § 73.512(c). As set forth below, we affirm the dismissal of the above-captioned application, deny NHF's request for waiver of 47 C.F.R. § 73.512(c) and dismiss NHF's request for STA as moot.

Background. On May 18, 1976, the Commission granted Catawba College ("Catawba") a construction permit to operate station WNDN(FM) on Channel 216D in

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<sup>1</sup> The Decision also granted renewal of the WNDN(FM) license (BRED-891204UH), an action from which NHF does not seek reconsideration.

Salisbury, North Carolina (BPED-2153) and subsequently granted Catawba a license for that facility on May 23, 1977 (BLED-1627). Thereafter, on March 1, 1982, the Commission granted Catawba a construction permit to move WNDN(FM) to Channel 273D (BPED-810717AF). Catawba allowed that construction permit to expire without filing a license application or extension request and by letter dated February 14, 1991, the Commission notified Catawba that it had forfeited the permit. Catawba did not seek reconsideration of that action. On April 5, 1991, Catawba and NHF jointly filed a pleading styled Motion for Extension of Time to Bring Renewal Application In Conformance With 47 C.F.R. § 73.512(a) requesting the Commission to withhold action upon WNDN(FM)'s then-pending renewal application until the "application can be brought into compliance" with the Commission's Rules.<sup>2</sup> Then, on April 12, 1991, Catawba filed an application to assign WNDN(FM) to NHF and the Commission granted that application on April 15, 1992 (BALED-910412HA), conditioned upon the sale being consummated within 60 days and WNDN(FM) resuming broadcasts within 60 days from the date of consummation.<sup>3</sup>

On May 10, 1991, NHF filed the above-referenced application for construction permit proposing that WNDN(FM) change frequency to Channel 200D, operate from a new transmitter site, and specify a new community of license, Concord, North Carolina (BPED-910510MB). NHF also stated that, as the proposed facilities would cause prohibited overlap to third-adjacent channel station WFDD(FM), Winston-Salem, NC, the application requested waiver of 47 C.F.R. § 73.509.<sup>4</sup> The Decision dismissed the application holding that Section 73.512(c) prohibits major changes by Class D stations.<sup>5</sup> The Commission indicated that the subject application constituted a major change in that the proposed transmitter site was 29.8

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<sup>2</sup> On December 4, 1989, Catawba had filed for a renewal of the WNDN(FM) license.

<sup>3</sup> According to Commission Records, Station WNDN(FM) is presently silent. It is unclear from the record before us when Catawba terminated the station's operations. In 1992, responding to a Commission request for information regarding the station's status, Catawba stated that WNDN(FM) had been silent for "several years." See October 2, 1992 Letter from Jerry A. Kimbro, Vice President, Catawba College, to Dennis Williams, Chief, FM Branch. That letter indicates that the station's silent status is primarily due to the lack of an "academic program and appropriate personnel to support the radio station." *Id.*

<sup>4</sup> That rule sets forth prohibited contour overlap applicable to noncommercial FM station applications.

<sup>5</sup> The Decision stated that, for noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area (sum of the area gained and the area lost as a percentage of the original area) within the station's predicted 1mV/m field strength contour. See 47 C.F.R. § 73.3573(a)(1).

kilometers from WNDN(FM)'s licensed site. The Decision, did, however, grant the renewal of license for WNDN(FM) on Channel 216D (BRED-891204UH).<sup>6</sup>

On April 6, 1992, NHF filed a Petition for Reconsideration and Reacceptance for Filing Nunc Pro Tunc seeking reconsideration of the Decision (the "Petition"). NHF alleges that the Commission erroneously dismissed the above-captioned application. Specifically, NHF contends that WNDN(FM) complied with the Commission's initial "clearing out" process for Class D stations when the Commission granted the construction permit to operate on Channel 273D, although the permit was later forfeited for reasons "unclear to NHF." NHF states that WNDN(FM) cannot resume operations on its licensed channel (Channel 216D) because it would cause prohibited overlap to second adjacent channel WFAE(FM), Channel 214C1, Charlotte, North Carolina.<sup>7</sup> Therefore, NHF argues that 47 C.F.R. § 73.512(d) contemplates the filing of an application to change frequency and transmitter site as proposed in the subject application. NHF argues that the Commission's reliance on 47 C.F.R. § 73.512(c)'s prohibition against major change applications is in error as that subsection does not apply to a class D station that has already been "phased out." NHF further contends that denial of the subject application will result in the "certain deletion" of WNDN(FM). Finally, NHF submits that, if the Commission concludes that 47 C.F.R. § 73.512(c) does prohibit the major change proposed by the above-captioned application, the Commission should grant a waiver of that provision to permit the nunc pro tunc reinstatement of the application.

Discussion. On March 17, 1976, the Commission issued a Notice of Proposed Rulemaking in MM Docket No. 20735 to address a number of issues including, among other things, the inefficient pattern of assignments in the 20 FM channels set aside for noncommercial educational FM stations. 41 FR 16973 (March 17, 1976). Of particular concern was the effect that 10-watt stations had in precluding the establishment or extension of the noncommercial educational service. To address this concern, the Commission first amended its rules to impose a "freeze" on the acceptance of any additional 10-watt applications. See In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations ("First Report and Order"), 68 FCC 2d 988 (1978). Recognizing, however, the service's value to its listeners, the Commission devised a system to provide for the continued existence of 10-watt stations, but required those stations, where possible, to change channel and, regardless of a station's ability to change channel, ended their protection against interference. See In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations Second Report and Order ("Second Report and Order"), 69 FCC 2d 240

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<sup>6</sup> Initially, the License Renewal Authorization for station WNDN(FM)'s March 24, 1992 renewal grant (BRED-891204UH) inadvertently specified Channel 273D. The Commission, however, corrected and reissued that authorization to specify Channel 216D.

<sup>7</sup> NHF alleges that WNDN(FM)'s 80 dBu interfering contour would be completely encompassed by WFAE's 60 dBu protected contour.

(1978).<sup>8</sup> The Second Report and Order gave eligible Class D stations until January 1, 1980, to increase facilities to the minimum Class A level of 100 watts effective radiated power ("ERP"). Id. at 246.

The Second Report and Order also set forth special channel change procedures commencing with the group of renewal applications due beginning on February 1, 1980, for licenses expiring on June 1, 1980. Id. With their renewal applications, Class D stations, where possible, were to have proposed a commercial channel in conformance with established technical standards. See 47 C.F.R. § 73.512(a)(1). If a commercial channel was not available, the Commission required Class D stations to then propose operations on Channel 200. See 47 C.F.R. § 73.512(a)(2). If the first two alternatives were not available, the Class D station must study all 20 noncommercial educational channels and propose operation on the channel least preclusive to the establishment of new stations or the increase in power by existing stations. See 47 C.F.R. § 73.512(a)(3). Although later challenged on reconsideration, the Commission upheld the channel change procedures. See In re Rules Changes Relating to Noncommercial Educational FM Broadcast Stations Memorandum Opinion and Order ("MO&O"), 70 FCC 2d 972, 973-974 (1979).<sup>9</sup> Finally, the Commission codified the "freeze" on new Class D stations established in the First Report and Order and prohibited Class D stations from filing major change applications, except when changing frequency. See 47 C.F.R. § 73.512(c).

At the outset, we find that the subject application is violative of the Commission's channel change procedures applicable to Class D stations.<sup>10</sup> Although NHF alleges that WNDN(FM)'s licensed facilities create prohibited overlap to WFAE(FM) and that the "prohibited overlap would be of the 80 dBuV contour of WNDN to the 60 dBuV contour of

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<sup>8</sup> Beyond the scope of the issues presented by the subject application, are exceptions provided for 10-watt stations in Alaska and those 10-watt stations within the Canadian and Mexican border areas.

<sup>9</sup> The MO&O also amended Section 73.512(d) to make it "clear that the Commission has taken every possible step to protect the ability" of Class D stations to continue their operations. 70 FCC 2d 972, 980 (1979). In a subsequent action, the Commission further amended Section 73.512(d) to require the cessation of a Class D station upon the commencement of program tests by an authorized TV or FM station. See In re Oversight of the Radio and TV Broadcast Rules, 51 RR 2d 1169, 1170 (1982).

<sup>10</sup> NHF incorrectly asserts that, having accepted the subject application for filing and having no objections to it on file, we are obligated to grant it. However, the "[a]cceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC's rules." 47 C.F.R. § 73.3564(b).

WFAE," we disagree. Our studies indicate that WNDN(FM)'s licensed operation on Channel 216D causes no interference to WFAE(FM)'s operations. Station WNDN(FM)'s licensed transmitter site is located outside the WFAE(FM) 60 dBu protected contour and the licensed WNDN(FM) 80 dBu interfering contour does not cause any interference to WFAE(FM)'s 60 dBu protected contour. See Attachments 1 and 2 (Contour Plots). Accordingly, WNDN(FM) can resume operations on its licensed facilities on Channel 216D and the Commission's Rules do not require the filing of an application to change channels as WNDN(FM) presents no interference on its presently licensed channel.

Although NHF contends that its forfeited permit for Channel 273D enables it to request the proposed facilities pursuant to 47 C.F.R. § 73.512(d), we conclude that NHF is mistaken. The Commission established a three-year process for Class D stations to make initial channel changes ( and convert to secondary status) that corresponded with the stations' renewals expiring June 1, 1980 or thereafter.<sup>11</sup> See MO&O at 974. Section 73.512(a) sets forth the three channel change alternatives available to Class D stations. See 47 C.F.R. § 73.512(a).<sup>12</sup> In conformance with Section 73.512(a)(1), the Commission granted Catawba a construction permit for Channel 273D (BPED-810717AF). Catawba, however, never licensed that facility and the permit was forfeited without appeal. When subsequently considering WNDN(FM)'s renewal application (BRED-891204UH), the Commission granted that renewal for Channel 216D, the only facility ever licensed by Catawba. That renewal grant on Channel 216D complied with the third channel change alternative set forth in 47 C.F.R. § 73.512(a)(3). See MO&O at 974 (Class D stations already on the least preclusive reserved educational channel can remain there).<sup>13</sup> Although NHF argues that 47 C.F.R. § 73.512(d) permits the relocation of WNDN(FM), that subsection applies only to licensed Class D stations that now present objectionable interference to a corresponding FM or television licensee and must accordingly change channel. See 47 C.F.R. § 73.512(d); see also Second Report and Order at 245 (future changes in FM table could result in station having to move a

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<sup>11</sup> The Commission staff will determine a Class D station's compliance with 47 C.F. R. § 73.512(a) with every renewal cycle. The three-year period referred to in that subsection (starting June 1, 1980), references the first renewal cycle affected by the then-new Class D rules.

<sup>12</sup> The requirements of 47 C.F.R. § 73.512(b) expired as of June 1, 1980. Therefore, that subsection, for all practical purposes, is extinct.

<sup>13</sup> Commission studies indicate that Channel 200 was not available to WNDN(FM) from its present site, absent a waiver request. With no available channel in the commercial band, the Commission's renewal of WNDN(FM)'s operations on Channel 216D therefore conformed with the channel change procedure set forth in 47 C.F.R. § 73.512(a).

second or third time).<sup>14</sup> As we noted above, Catawba never licensed the Channel 273D facility and in any event, does not provide objectionable interference from its present licensed site on Channel 216D.<sup>15</sup>

Because the subject application does not come within 47 C.F.R. § 73.512(d), as WNDN(FM) presents no objectionable interference from its presently licensed facility, the Decision correctly held that the subject application violates 47 C.F.R. § 73.512(c). NHF's arguments concerning Section 73.512(c)'s inapplicability to the subject application are without merit. That subsection codified the First Report and Order's "freeze" on new Class D applications. Thus, the Commission specifically intended 47 C.F.R. § 73.512(c) to prohibit applications for new Class D stations. NHF proposes to serve Concord, North Carolina, on Channel 200D from a site located 29.8 kilometers from WNDN(FM)'s presently licensed location. This represents a 100% new service area for WNDN(FM). Therefore, we find that NHF's proposal constitutes a de facto new Class D station that is violative of the Commission's prohibition against the acceptance of applications for new 10-watt stations. See 47 C.F.R. § 73.512(c); see also Second Report and Order at 250 ("no additional 10-watt applications will be accepted for filing").<sup>16</sup>

Although NHF contends that in three instances we have previously granted major changes for Class D stations, it is incorrect, with one exception. The change granted to station WOUI(FM), Chicago, Illinois (BPED-880628IE) and the change requested by station KBDY(FM), St. Louis, MO (BPED-900110IG) (later dismissed for interference and other technical violations) were both minor changes. Although the Commission did inadvertently grant a major change to station WUAG(FM), Greensboro, North Carolina (BPED-871023MP), that application incorrectly indicated that the change in area was minor (i.e., less than 50%). See 47 C.F.R. § 73.3573(a)(1). We subsequently determined that the change in area constituted a major change. In any event, unlike NHF's proposal, that application did not involve a site change nor did it propose to eliminate any service currently provided. Moreover, that prior inadvertent grant of a major change does not require us to grant the

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<sup>14</sup> The Commission subsequently pointed out that future changes in FM stations or assignments could lead to the termination of operations for the adversely affected Class D station. See MO&O at 977 n. 11.

<sup>15</sup> The Commission's Records do not contain any correspondence from Catawba indicating that it had ever operated on Channel 273D. In any event, had Catawba initiated operations on Channel 273D, the Commission would have required station WNDN(FM) to cease operations on that channel because of prohibited interference to the modified facilities of station WEZC(FM).

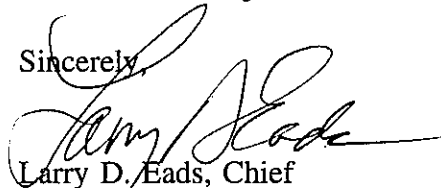
<sup>16</sup> NHF has apparently made a business decision to abandon WNDN(FM)'s current service area as it has no obligation to consummate the assignment should the Commission deny the subject application. See Asset Purchase Agreement, Exhibit 1, to File No. BALED-910412HA.

subject application. See American Trucking Ass'ns v. Frisco Trans. Co., 358 U.S. 133, 144-46 (1958) (agency not bound by an instrument of authorization that reflects inadvertent ministerial error).

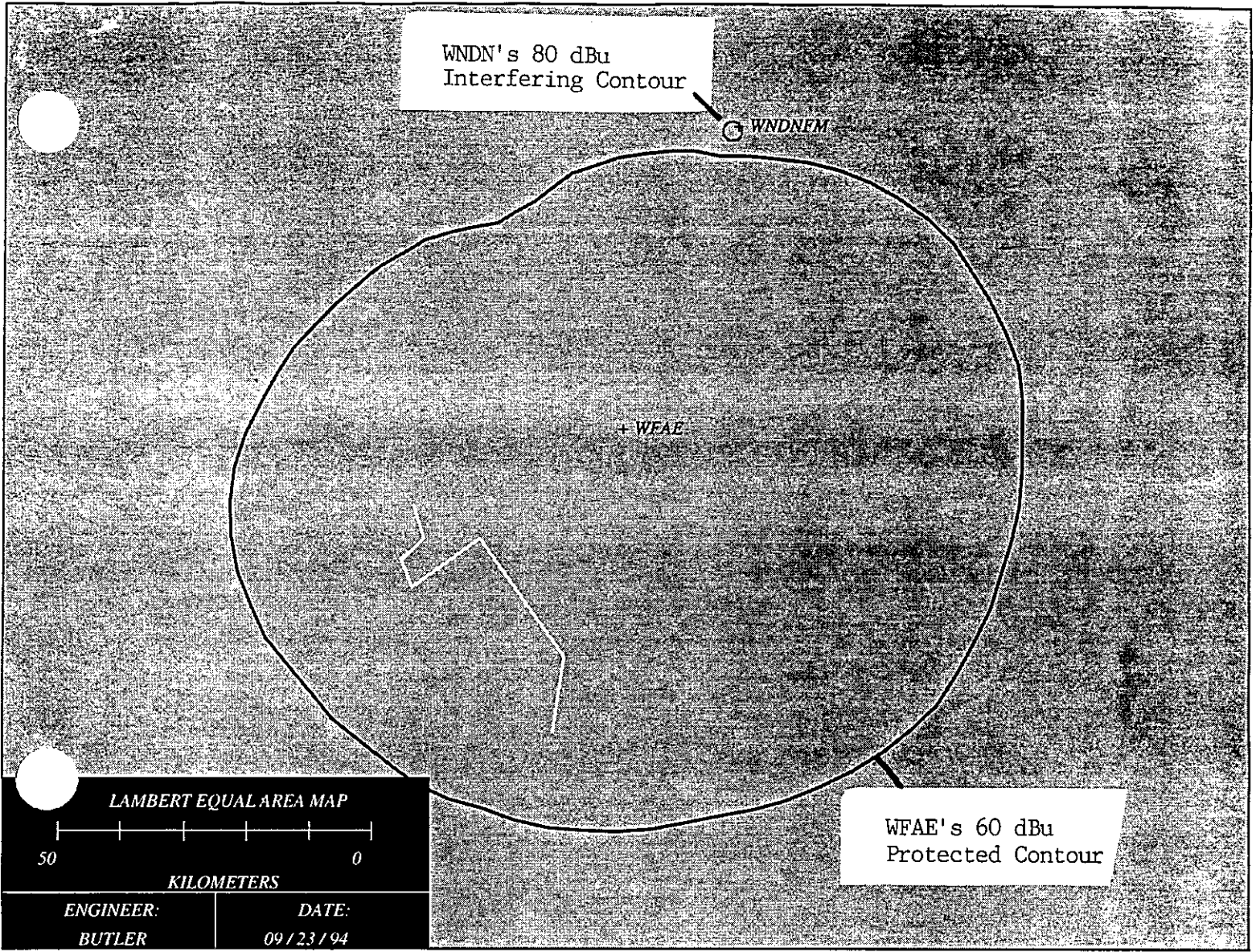
Finally, we find that NHF does not provide a sufficient basis to waive the major change prohibition set forth in 47 C.F.R. § 73.512(c). We will consider a waiver in cases where a Class D station causing objectionable interference demonstrates that a major change is necessary to continue serving its present service area. NHF's application, however, does not present such a case. NHF is not causing objectionable interference on Channel 216D. Moreover, NHF proposes to abandon station WNDN(FM)'s current service area. Therefore, the application does not warrant a waiver.

Conclusion. NHF's Petition for Reconsideration and Reacceptance for Filing Nunc Pro Tunc IS DENIED. Furthermore, NHF's request for waiver of 47 C.F.R. § 73.512(c) IS DENIED and NHF's October 14, 1992 request for special temporary authority to operate with the facilities requested in File No. BPED-910510MB IS DISMISSED AS MOOT. If station WNDN(FM) does not resume operations within thirty (30) days from the date hereof, a request to remain silent must be filed pursuant to 47 C.F.R. § 73.1740.

Sincerely,



Larry D. Eads, Chief  
Audio Services Division  
Mass Media Bureau



THE FOLLOWING IS A LIST OF THE DATA WHICH APPEARS ON THE ABOVE MAP

BOTTOM LATITUDE: 34.51 TOP LATITUDE: 35.87 LEFT LONGITUDE: -81.57 RIGHT LONGITUDE: -79.77

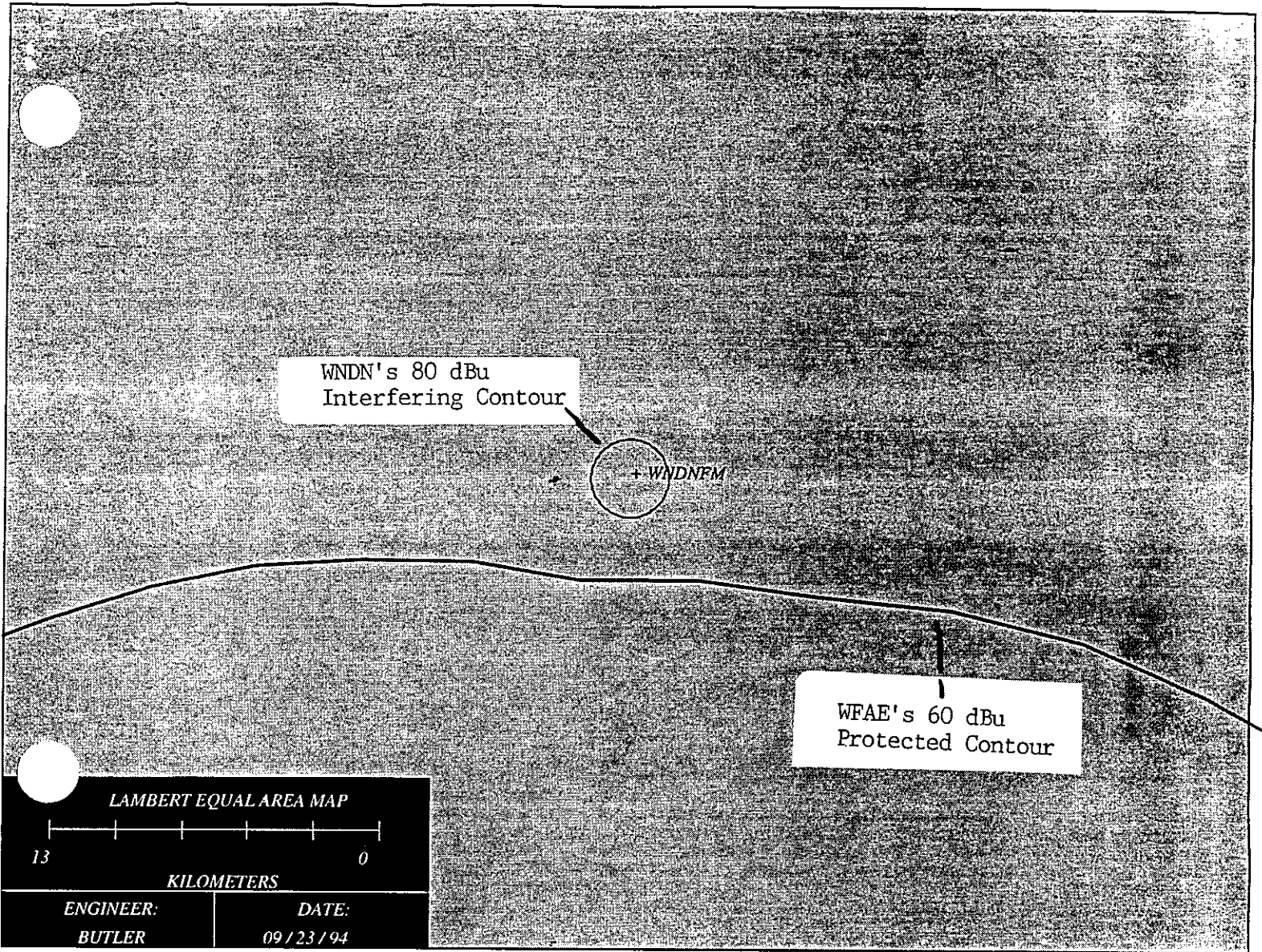
MAP: ENLARGED CONUS MAP PROJECTION: Lambert Equal-area CENTER LAT: 35.19 LONG: -80.67 GRID SPACING: 0.00

KILOMETERS / INCH = 24.90

PLOT MADE ON : 23 September, 1994 10:55 HOURS

call	serv	city,state	application no.	contour	chan	erp	haat	rcamsl	coverage area	A1	A7
WNDNFM	FM	Salisbury,NC	BLED1627	80.0 dBu (50,10)	216D	0.010	8.0	230.0	15.5 sq km	73	0
WFAE	FM	Charlotte,NC	BLED900627KA	60.0 dBu (50,50)	214C1	100.000	228.0	428.0	10819.5 sq km	0	0





THE FOLLOWING IS A LIST OF THE DATA WHICH APPEARS ON THE ABOVE MAP

BOTTOM LATITUDE: 35.53 TOP LATITUDE: 35.85 LEFT LONGITUDE: -80.70 RIGHT LONGITUDE: -80.27

MAP: ENLARGED CONUS MAP PROJECTION: Lambert Equal-area CENTER LAT: 35.69 LONG: -80.49 GRID SPACING: 0.00

KILOMETERS / INCH = 5.95

PLOT MADE ON : 23 September, 1994 11:03 HOURS

call	serv	city,state	application no.	contour	chan	erp	haat	rcamsl	coverage area	A1	A7
WNDNFM	FM	Salisbury,NC	BLED1627	80.0 dBu (50,10)	216D	0.010	8.0	230.0	15.5 sq km	73	0
WFAE	FM	Charlotte,NC	BLED900627KA	60.0 dBu (50,50)	214C1	100.000	228.0	428.0	10819.5 sq km	0	0