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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re Applications of)
AURIO A. MATOS) MM DOCKET NO. 93-89
LLOYD SANTIAGO-SANTOS AND)
LOURDES RODRIGUES-BONET) File No. BPH-911114MS
For a Construction Permit for a)
New FM Station on Channel 293A at)
Culebra, Puerto Rico) File No. BPH-911115MP

To: The Review Board

MASS MEDIA BUREAU'S REPLY

1. On February 7, 1994, Aurio A. Matos (" Matos") filed an Opposition to [the Mass Media Bureau's] Motion to Reopen the Record and Enlarge Issues. The Bureau hereby submits its reply.

2. The Bureau continues to believe that Section 1.65 and transmitter site issues should be added against Matos. Matos takes the position that he did not have to notify the Commission of the December 13, 1993, letter from the U.S. Fish and Wildlife Service because the correspondence did not precipitate a material change in his proposal. Nothing could be further from the truth, however. Matos acknowledges that a Special Use Permit is required from the U.S. Fish and Wildlife Service before he can lawfully mount his antenna on the existing tower located in a National Wildlife Refuge. In its letter of December 13, 1993, the U.S. Fish and Wildlife Service made "a definitive decision not to grant [Matos] a Special Use Permit for use of [the] tower, not even on a temporary basis." Having failed to obtain permission to use his proposed site, it belies logic how Matos can continue to

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maintain that he still has the required reasonable assurance that the site is available.

3. It is bedrock Commission policy that an applicant is not basically qualified unless he has reasonable assurance of the availability of his proposed transmitter site. Any assurance that Matos might arguably have had about the availability of his site was thrown into doubt by the U.S. Fish and Wildlife Service decision. Because that decision effected a material change in Matos' application, it should have been reported to the Commission pursuant to Section 1.65 of the Commission's Rules.¹

4. In Warren Price Communications, Inc., 71 RR 2d 291, 292 (1992), the Commission restated its policy of assuming that an applicant will receive zoning approval for its proposed transmitter site absent a reasonable showing to the contrary. Here, the governmental body which has the authority to grant Matos a Special Use Permit to mount his antenna on a tower located in a National Wildlife Refuge has definitively rejected Matos' formal application for such. When Matos learned that the U.S. Fish and Wildlife Service had denied his request for a Special Use Permit, he was obligated to report the decision to the Commission pursuant to Section 1.65.

5. Furthermore, Matos had a clear motive for not reporting to the Commission his loss of reasonable assurance of the availability of his transmitter site. As the Bureau has previously noted, Matos prevailed below, in major part, on the basis of the areas and populations served from his original site. When Matos lost reasonable assurance of the availability of that site, his grant was thrown into jeopardy. Had the U.S. Fish and Wildlife Service not sent a copy of its decision directly to Bureau counsel, it is likely that Matos

¹ Indeed, the fact that Matos has filed a petition for leave to amend his application in an attempt to propose a new transmitter site constitutes an acknowledgement by Matos that he no longer has reasonable assurance of the availability of his original site.

would have concealed the decision until after his grant in this proceeding became final² and Matos could modify his construction permit without objection.

6. Matos maintains that the addition of a Section 1.65 issue is not warranted because there is no evidence presented that he engaged in a pattern of reporting violations. However, Matos ignores the fact that a Section 1.65 issue may also be added when there is evidence that the applicant intended to conceal material information from the Commission. Valley Broadcasting Co., 4 FCC Rcd 2611, 2618 (Rev. Bd. 1989). Matos clearly had a motive for concealing his loss of reasonable assurance from the Commission; Matos, in fact, did not timely report the decision of the U.S. Fish and Wildlife Service to the Commission; and Matos has failed to provide a reasonable explanation for his actions relative to the status of his original transmitter site.

7. Matos has also failed to explain why a site issue is not also warranted. Matos does not have reasonable assurance of his original site, and his petition for leave to amend his application to specify a new site is only pending. In comments filed on February 15, 1994, the Bureau opposed acceptance of Matos' amendment because it does not comply with Section 73.3522(b) of the Commission's Rules. Simply stated, Matos does not now have a transmitter site for which there exists reasonable assurance of availability. Consequently,

² It would appear that Matos began settlement negotiations with his sole competitor in this proceeding only after he received his copy of the U.S. Fish and Wildlife Service decision.

an issue is warranted to determine whether Matos is basically qualified on that basis.

Respectfully submitted,
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February 16, 1994

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 16th day of February 1994, sent by regular First Class United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Reply" to:

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