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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 20, 1996

BY HAND

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

NEW YORK OFFICE
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NEW YORK, NY 10022-2585

NEW JERSEY OFFICE
ONE GATEWAY CENTER
NEWARK, NJ 07102-5397

SPECIAL COUNSEL
JEROLD L. JACOBS

Re: **MM Docket No. 96-43**
FM Table of Allotments
Frederiksted, Virgin Islands

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Enclosed herewith for filing, on behalf of our client, D/B/A Calypso Communications, are an original and four (4) copies of its "REPLY COMMENTS OF CALYPSO COMMUNICATIONS and MOTION TO DISMISS COUNTERPROPOSAL FILED BY RAFAEL SERRA" in the above-referenced proceeding.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,


Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-43
Table of Allotments,) RM-8754
FM Broadcast Stations)
(Frederiksted and Charlotte Amalie,¹) RM-
Virgin Islands))

TO: Chief, Allocations Branch
Mass Media Bureau

RECEIVED
MAY 20 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY COMMENTS OF CALYPSO COMMUNICATIONS
and
MOTION TO DISMISS COUNTERPROPOSAL FILED BY RAFAEL SERRA

D/B/A CALYPSO COMMUNICATIONS ("Calypso"), permittee of Station WVNX(FM), Charlotte Amalie, Virgin Islands, by its attorneys, pursuant to §§1.415(c) and 1.420 of the Commission's Rules, hereby submits its Reply Comments in opposition to the Comments filed by José J. Arzuaga ("Arzuaga"), the original petitioner in this proceeding, and to the Counterproposal filed by Rafael Serra ("Serra").² In addition, because of the substantial legal and technical defects in Serra's Counterproposal, Calypso requests that Serra's Counterproposal be dismissed without consideration on the merits. In support whereof, the following is shown:

¹ The community of Charlotte Amalie, Virgin Islands has been added to the caption.

² In the cover letter which accompanies Serra's Counterproposal, he states that his "Petition for Rulemaking" is being submitted by Serra on behalf of "Saint John Broadcasters". The Counterproposal itself mentions only Serra's name. For convenience, this pleading refers to the counterproponent as Serra.

1. Calypso's May 3, 1996 Counterproposal and Comments outlines its objections to Arzuaga's proposed allotment of Channel 297B1 to Frederiksted, Virgin Islands, and fully sets forth the merits of Calypso's substitute plan. Calypso's Counterproposal would: (a) allot Channel 297B1 to Charlotte Amalie, instead of Frederiksted; (b) modify Calypso's construction permit to specify operations on Channel 297B1, instead of Channel 246B, pursuant to §1.420(g) of the Rules, without allowing other expressions of interest; and (c) delete Channel 246B from the FM Table of Allotments as unusable. As Calypso showed, its Counterproposal deserves a dispositive preference in this proceeding under the "other public interest matters" fourth priority of FM Channel Policies/Procedures, 90 FCC 2d 88 (1982).

2. Arzuaga's two-page Comments merely incorporate by reference the arguments made in his original Petition for Rulemaking. Calypso hereby reiterates its opposition to the allotment of Channel 297B1 to Frederiksted. As fully demonstrated in Calypso's Counterproposal and Comments, Calypso's proposed Charlotte Amalie allotment enjoys a decisive preference over Arzuaga's proposed Frederiksted allotment. This is especially so because grant of Calypso's channel substitution proposal is necessary to allow Calypso to activate its already-granted construction permit for Station WVNK. The Commission originally allotted Channel 246B to Charlotte Amalie in 1987, and Calypso's Counterproposal seeks to implement that nine-year-old allotment judgment at the present time with a viable frequency. Arzuaga's proposal does not have any such equity and deserves no allotment preference.

3. Turning to Serra's Counterproposal, he proposes (at ¶2) to allot Channel 296B1 to Frederiksted to satisfy Arzuaga's allotment request and then to allot Channel 298A to the allegedly licensable community of "Saint John, V.I" as a first local transmission service.

Calypso urges that there are three fatal legal and technical defects with Serra's plan. First, the island of St. John, V.I., per se, does not qualify as a cognizable community for allotment/licensing purposes. Second, even if St. John did so qualify, it would be more appropriate to allot Channel 297B1 to Charlotte Amalie than to make other allotments to Frederiksted and St. John. Finally, Serra's proposed allotment of Channel 298A to St. John is shortspaced to the pending application site of Station WAHQ-FM, Carolina, Puerto Rico (File No. BPH-950509ID) in violation of §73.208 of the Rules.

4. In FM Channel Policies/Procedures, supra, 90 FCC 2d at 101, the Commission held that when identifying "communities" for allotment purposes, "It is sufficient that the community is incorporated or is listed in the census". See FM Table of Allotments (Vimville MS), 55 RR 2d 256, 258 (Mass Media Bur. 1983). However, where, as here, these indicia of "community" are lacking, the Commission requires a special showing of demographic information, such as the existence of a local newspaper, social, economic and cultural organizations, and municipal services, to demonstrate that the place is a "geographically identifiable population grouping....What must be shown is that residents of the locality are commonly regarded as a distinct group". See Availability of FM Broadcast Assignments, 5 FCC Rcd 934 ¶4 (1990); FM Table of Allotments (Pike Road and Ramer AL) ("Pike Road"), 10 FCC Rcd 10347 ¶2 (Mass Media Bur. 1995). In the instant case, Serra has presented absolutely no demographic information to support his extravagant view that the Commission can or should specify the entire island of St. John as the community of license for proposed Channel 298A (there is no town of the same name located on the island).

5. Calypso submits that the Commission can no more designate the entire island of St. John as an allotment "community" under FM Policies/Procedures, supra than it could so designate "Long Island" or "New York State". The legal and factual flaw in Serra's proposal is simply that the island does not represent the smallest "distinct group" on St. John. Rather, the town of Cruz Bay on St. John has already been identified by the Commission as a cognizable community through the recent allotment of Channel 267B as a first local transmission service there in FM Table of Allotments (Charlotte Amalie et al. VI), 10 FCC Rcd 8111 (Mass Media Bur. 1995). Moreover, a legal assistant in undersigned counsel's law firm recently contacted Ms. Sherece Smith, Information Officer at the Visitors Center in St. John, who verified that Cruz Bay is the only population center on the island. Specifically, as set forth in the attached Declaration of Gillian Brett Kirkpatrick (Exhibit A), Cruz Bay has the only newspaper and post office on St. John, the only medical facilities, the only municipal recreational facilities, the only fire and rescue, police, Coast Guard, and FBI installations, and all of St. John's public and private schools (with the exception of one elementary school). Moreover, attached as Exhibit B is 1990 U.S. Census data for St. John, which shows that the entire island had a 1990 population of 3504 persons, 2466 of whom were located in the only Census Designated Place ("CPD") on St. John -- Cruz Bay.

6. Calypso submits that the above demographic information yields two ineluctable conclusions: (1) the island of St. John does not qualify as a "community" for allotment purposes; and (2) there is no population grouping on St. John which can qualify for "community" status other than Cruz Bay. However, it is too late for Serra to amend his Counterproposal to change his proposed community to Cruz Bay (or anywhere else), because the Commission has

repeatedly held that technically and procedurally defective counterproposals will not be accepted, e.g., FM Table of Allotments (Fort Bragg CA), 6 FCC Rcd 5817 (Mass Media Bur. 1991), and has also stated that it is incumbent upon counterproponents "to initially present the Commission with sufficient evidence to demonstrate...a community for allotment purposes". See FM Table of Allotments (Pike Road and Ramer AL), *supra*, 10 FCC Rcd at 10349 ¶13 (emphasis added), citing FM Table of Allotments (Garden City IN) ("Garden City"), 6 FCC Rcd 3747 (Mass Media Bur. 1991). In both the Pike Road and Garden City cases, the Commission refused to allow amendments to counterproposals to cure deficiencies in demographic information. Calypso urges that the Commission should follow those case precedents and dismiss Serra's Counterproposal as fatally defective in its "community" showing

7. Little need be said about the greater preference for an allotment which Calypso's Counterproposal deserves over Serra's, in the unlikely event that Serra is found to have specified an appropriate "community" on St. John for allotment of Channel 298A. As explained in Paragraph 5 above, such an allotment would be a second local transmission service for Cruz Bay or the island of St. John. As such, it is well established that where a choice must be made between two proposed channel allotments and no first or second aural reception service or first local transmission service is involved, the Commission reaches its public interest determination by comparing and weighing all relevant engineering and socio-economic factors, including number of local services, relative size of communities, and relative overall service areas. See FM Channel Policies/Procedures, *supra*; FM Table of Allotments (Greenup KY and Athens OH), 2 FCC Rcd 4319, 4321 (Mass Media Bur. 1987). Applying these criteria, as Calypso did with Arzuaga's Frederiksted allotment proposal, it is clear that Calypso's proposed Charlotte

Amalie allotment deserves a decisive preference over Serra's proposed St. John allotment, given the minuscule population of Cruz Bay (2466 persons) and the rest of St. John (1038 persons) compared to Charlotte Amalie (12,331 persons). As with Arzuaga's proposal, Serra has shown absolutely no need for the allotment of a second local FM transmission service to St. John when common experience suggests that the single local transmission service which has already been allotted to Cruz Bay should suffice.

8. Moreover, apart from general comparative allotment standards, Calypso repeats the very important equitable point which it made in its Counterproposal and Comments vis-a-vis Arzuaga's proposal, namely that it is now Station WVN~~X~~'s turn for relief from the Commission to cure the interference impasse with a British Virgin Islands station that has existed since 1987. In order to make Calypso's construction permit for Station WVN~~X~~ viable, it is necessary for Calypso to move to Channel 297B1, which it cannot do if the Commission allots Channel 298A to St. John. Calypso submits that, like Arzuaga, Serra's proposal does not have any such equity and deserves no allotment preference over Calypso.

9. Finally, attached hereto as Exhibit C is an Engineering Statement ("Engineering Statement") by Mr. Neil Smith of Smith and Fisher, which succinctly demonstrates that, as stated in Paragraph 3 above, Serra's Counterproposal is fatally shortspaced to the pending application site of Station WAHQ-FM, Carolina, Puerto Rico, although it is fully spaced to its presently licensed site. Calypso submits that Serra does not qualify under the Note to §73.208(a) of the Rules for authority to amend its Counterproposal to cure the shortspacing, because Serra cannot demonstrate, in the words of the Note, that "at the time it filed the counterproposal, it...could not have known by exercising due diligence of the pendency of the

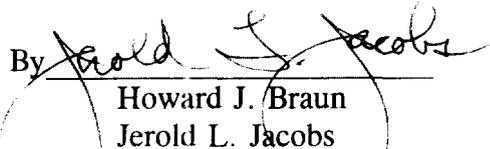
conflicting [WAHQ] FM application" (emphasis added). The simple reason is that in FM Table of Allotments (Frederiksted VI et al.), DA 95-2416, released December 11, 1995 (Mass Media Bur.), the Commission rejected a Counterproposal filed by Arzuaga, which was similarly shortspaced to Station WAHQ's application, on the ground that due diligence would have made him aware of WAHQ's application, which was accepted for filing on May 26, 1995 (Broadcast Applications, Report No. 23516) -- almost one entire year before Serra filed his Counterproposal. If Arzuaga's shortspaced proposal was rejected five months ago under §73.208(a)'s Note, so should Serra's. Therefore, since Serra cannot cure his Counterproposal's shortspacing, it is fatally flawed technically and should be dismissed.

WHEREFORE, in light of the foregoing, D/B/A Calypso Communications respectfully requests that the Commission should grant its Counterproposal, deny Arzuaga's Frederiksted proposal, dismiss Serra's Counterproposal, and allot Channel 297B1 to Charlotte Amalie.

Respectfully submitted,

D/B/A CALYPSO COMMUNICATIONS

By



Howard J. Braun
Jerold L. Jacobs

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Its Attorneys

Dated: May 20, 1996

DECLARATION

GILLIAN BRETT KIRKPATRICK hereby declares, under penalty of perjury, that the following is true and correct:

1. I am a legal assistant in the Washington, D.C. office of Rosenman & Colin LLP, where I have served in that capacity since January 1996.

2. On May 16, 1996, I contacted Ms. Sherece Smith, Information Officer at the St. John Visitor's Bureau, St. John, United States Virgin Islands, to gather information for a community profile of the island of St. John. She provided me with the following information:

A. There is one local newspaper on St. John, with offices in Cruz Bay.

B. The only Post Office on St. John is located in Cruz Bay.

C. The medical facilities for St. John (a 24-hr. emergency room and the Community Health Center) are located in Cruz Bay.

D. All of the municipal recreational facilities for St. John, including tennis courts, parks, baseball fields, basketball courts, soccer fields and state parks, are located in Cruz Bay.

E. St. John's Fire & Rescue, Police Department, Coast Guard and FBI are all located in Cruz Bay.

F. The St. John Chamber of Commerce, Visitor's Bureau, Tourist Information Center, and National Park Service offices are located in Cruz Bay.

G. All of St. John's public and private schools are located in Cruz Bay, with the exception of one elementary school, which is located in Coral Bay.

H. The office of the Senator-At-Large for St. John is located in Cruz Bay.

FURTHER DECLARANT SAYETH NOT.

Dated: May 16, 1996

Gillian B. Kirkpatrick
Gillian B. Kirkpatrick

1990 CPH-1-55

**1990 Census of
Population and Housing
Summary Population and
Housing Characteristics
Virgin Islands of
the United States**

Issued October 1991



**U.S. Department of Commerce
Robert A. Mombacher, Secretary
Rockwell A. Schnabel, Deputy Secretary**

**Economics and Statistics Administration
Michael R. Darby, Under Secretary
for Economic Affairs and Administrator**

**BUREAU OF THE CENSUS
Barbara Everitt Bryant, Director**

Table 1. Age: 1990

[For definitions of terms and meanings of symbols, see text]

Virgin Islands Island Census Subdistrict Place	All persons	Age											Median age	
		Under 5 years	16 years and over	18 years and over	18 to 20 years	21 to 24 years	25 to 44 years	45 to 54 years	55 to 59 years	60 to 64 years	65 years and over	75 years and over		85 years and over
Virgin Islands	101 809	9 230	70 323	66 382	5 196	5 547	29 716	12 304	3 988	3 188	6 479	2 196	418	28.2
St. Croix Island	50 139	4 736	33 556	31 433	2 520	2 628	13 752	6 060	1 915	1 537	3 021	978	174	26.8
Ann's Hope Village subdistrict	3 663	265	2 631	2 477	155	174	1 102	527	171	100	248	66	12	31.4
Christened town (pt.)	9	1	8	8	-	-	3	1	1	-	3	1	-	52.5
Christened subdistrict	3 199	309	2 221	2 121	132	163	963	315	129	144	275	109	19	29.9
Christened town (pt.)	2 546	260	1 743	1 645	103	137	780	238	101	113	213	89	14	29.2
East End subdistrict	1 740	89	1 421	1 378	52	61	636	279	94	84	170	45	4	38.9
Federated subdistrict	4 066	434	2 554	2 369	217	246	1 042	369	131	97	267	97	11	22.9
Federated town	1 064	79	758	727	46	67	345	130	45	21	73	30	4	30.4
Federated Southeast CDP	3 002	355	1 796	1 642	171	179	697	239	86	74	194	67	7	20.4
Northwest subdistrict	5 495	523	3 642	3 398	299	280	1 444	702	227	149	297	89	12	26.0
Northwest subdistrict	4 828	508	3 135	2 939	258	243	1 327	575	177	161	258	88	14	25.4
Grove Place CDP	2 655	299	1 589	1 461	174	135	636	248	77	69	122	40	9	20.4
Sion Farm subdistrict	11 883	1 110	8 201	7 710	587	633	3 298	1 577	474	418	723	226	47	28.4
Christened town (pt.)	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Southeast subdistrict	7 425	801	4 621	4 308	391	416	1 975	797	230	169	325	123	31	22.9
Southwest subdistrict	7 840	697	5 130	4 738	429	412	1 965	979	262	213	458	155	24	24.8
St. John Island	3 504	285	2 627	2 537	133	172	1 378	419	129	93	213	68	5	32.3
Central subdistrict	621	57	438	426	14	23	281	63	14	7	24	2	-	32.0
Cruz Bay CDP (pt.)	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Central Bay subdistrict	363	42	273	269	19	10	136	44	13	8	39	16	4	33.1
Cruz Bay subdistrict	2 469	182	1 874	1 802	98	137	942	308	98	76	143	48	1	32.0
Cruz Bay CDP (pt.)	2 466	181	1 873	1 801	98	137	941	308	98	76	143	48	1	32.0
East End subdistrict	51	4	42	40	2	2	19	4	4	2	7	2	-	40.7
St. Thomas Island	48 166	4 209	34 140	32 412	2 543	2 747	14 586	5 805	1 936	1 550	3 245	1 150	239	29.1
Charlotte Amalie subdistrict	20 589	1 899	14 423	13 700	1 066	1 294	6 012	2 093	771	715	1 749	684	150	28.1
Charlotte Amalie town	12 331	1 076	8 732	8 292	600	691	3 542	1 289	482	457	1 231	517	116	29.4
Charlotte Amalie East CDP	2 836	310	1 811	1 702	154	157	801	233	88	85	184	64	11	24.3
Charlotte Amalie West CDP (pt.)	5 422	513	3 880	3 706	312	446	1 649	571	201	173	334	163	23	27.4
East End subdistrict	5 927	456	4 342	4 137	301	307	1 977	800	242	175	335	111	22	30.6
Northside subdistrict	6 404	402	5 124	4 933	235	256	2 578	1 011	295	228	410	151	31	35.6
Southside subdistrict	4 648	450	3 221	3 040	267	273	1 357	579	228	142	194	43	9	27.2
Tule subdistrict	9 084	908	5 970	5 515	607	539	2 226	1 081	348	245	469	134	21	23.6
Ann's Retreat CDP	9 084	908	5 970	5 515	607	539	2 226	1 081	348	245	469	134	21	23.6
Water Island subdistrict	172	3	158	155	6	4	77	18	9	12	29	8	4	41.9
Charlotte Amalie West CDP (pt.)	-	-	-	-	-	-	-	-	-	-	-	-	-	-
West End subdistrict	1 322	91	962	912	61	74	419	223	43	33	59	19	2	32.4

SMITH AND FISHER

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of CALYPSO COMMUNICATIONS ("Calypso"), permittee of WVN(FM), Charlotte Amalie, Virgin Islands, in support of its Reply Comments in MM Docket No. 96-43.

It was originally proposed in this proceeding that Channel 297B1 be allotted to Frederiksted, Virgin Islands. Calypso offered a counterproposal in which Channel 297B1 would be allotted to Charlotte Amalie for use by WVN. Saint John Broadcasters ("St. John") proposed in its Comments that Channel 296B1 be allotted to Frederiksted and Channel 298A be allotted to Saint John, Virgin Islands.

However, this Channel 298A proposal does not comply with the spacing Rules. St. John specifies coordinates of 18° 20' 30", 64° 43' 59" for its Saint John allotment. This site is 140 kilometers from the licensed site of WAHQ, Carolina, Puerto Rico, on Channel 299B, which does comply with the 113 kilometer separation requirement. However, WAHQ has a pending application (BPH-950509ID) which specifies a new site at 18° 18' 36", 65° 47' 41", and this site is but 112 kilometers from the proposed Saint John site, creating a one-kilometer shortspacing.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



NEIL M. SMITH

May 15, 1996

CERTIFICATE OF SERVICE

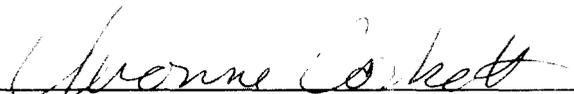
I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 20th day of May, 1996, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**REPLY COMMENTS OF CALYPSO COMMUNICATIONS and MOTION TO DISMISS COUNTERPROPOSAL FILED BY RAFAEL SERRA**" to the following:

John A. Karousos, Chief*
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Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
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Ms. Sharon P. McDonald*
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Yvonne Corbett

***BY HAND**