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JUN 13 1996

OFFICE OF SECRETARY

June 13, 1996

BY HAND

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

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 TO JOINT OPPOSITION TO MOTION TO DISMISS**" in the above-referenced proceeding.

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

Very truly yours,

Jerold L. Jacobs

Jerold L. Jacobs

Enc.

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

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JUN 1 3 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

REPLY TO JOINT OPPOSITION TO MOTION TO DISMISS

D/B/A CALYPSO COMMUNICATIONS ("Calypso"), permittee of Station WVNX(FM), Charlotte Amalie, Virgin Islands, by its attorneys, pursuant to §1.45(b) of the Commission's Rules, hereby replies to the "Joint Opposition to Motion to Dismiss" ("Joint Opposition" or "J.O.") filed by José J. Arzuaga ("Arzuaga"), the original petitioner in this proceeding, and Rafael Serra ("Serra"), a counterproponent (together, the "Petitioners"). In support whereof, the following is shown:

1. Calypso's "Motion to Dismiss" ("Motion")[2] fully demonstrated that Serra's Counterproposal has three fatal defects:

- The proposed allotment of Channel 298A to St. John is shortspaced to the pending application site of Station WAHQ-FM, Carolina, Puerto Rico in violation of §73.208 of the Rules;
- The island of St. John, V.I. does not qualify as a cognizable community for allotment purposes; and
- On public interest grounds, Channel 297B1 should be allotted to Charlotte Amalie.

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

[2] The Motion was filed as part of Calypso's May 20, 1996 Reply Comments in this proceeding.

As Calypso will now show, the Joint Opposition unsuccessfully attempts to rebut these points. Hence, Serra's Counterproposal should be dismissed.

I. Serra's Counterproposal is Fatally Shortspaced

2. The Petitioners concede that Serra's Counterproposal is shortspaced to Station WAHQ-FM's pending application, calling the shortspacing "hyper-technical" (J.O. at ¶4) or "technical" (id. at ¶7). However, importantly, they admit that the required spacing between the reference points in Serra's Counterproposal under §73.207 of the Rules is 113 kilometers (id. at ¶6), while the actual separation is 112.28 kilometers (id. at ¶7). Section 73.208(c)(8) of the Rules unequivocally states that, when computing the distance between two reference points, the correct procedure is to "[r]ound the distance to the nearest kilometer". Hence, the Petitioners' discussion about Serra's shortspacing in terms of miles is simply irrelevant under §73.208(c)(8) and should be ignored. Following the Rule, it is clear that 112.28 kilometers rounds to 112 kilometers, which is one kilometer shortspaced. It is also well established that the Commission will not grant shortspacing waivers in the FM channel allotment process, absent a showing of compelling need or extraordinary circumstances. See, e.g., FM Table of Allotments (Chester and Wedgefield SC), 5 FCC Rcd 5572 ¶¶'s 3,4 (1990). No such showing has been proffered by Petitioners, and no compelling need or extraordinary circumstances exist. Therefore, Serra's Counterproposal should be dismissed as violative of §73.207.

3. As a fall-back argument, the Petitioners urge (J.O. at ¶8) that Serra should be permitted to amend his Counterproposal to remove the shortspacing because Serra allegedly "did not know" that his proposal was shortspaced to Station WAHQ's application. Calypso disagrees. Serra does not qualify under the Note to §73.208(a) of the Rules for authority to amend his

Counterproposal to cure the shortspacing, because he has not demonstrated, and cannot demonstrate, that (using the words of the Note) "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). 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 six months ago under §73.208(a)'s Note, so should Serra's, especially since Arzuaga and Serra have joined forces as the Petitioners herein. Therefore, since Serra cannot cure his Counterproposal's shortspacing, it is fatally flawed technically and should be dismissed.

II. St. John Does Not Qualify as a Community for Allotment Purposes

4. In its Motion (at ¶¶'s 4-6), Calypso urged that Serra had presented absolutely no demographic information to support his view that the Commission can or should specify the entire island of St. John as the community of license for proposed Channel 298A. In response, the Joint Opposition (at ¶¶'s 11-15) misconstrues and misapplies decisionally significant Commission case precedents in several respects. First, when the Commission held in FM Channel Policies/Procedures, 90 FCC 2d 88, 101 (1982), that "It is sufficient [for allotment purposes] that the community...is listed in the Census," the Commission did not mean that the mere presence of the words "St. John Island" on a U.S. Census report was sufficient for St.

John to be treated as a "community" for allotment purposes. Generally speaking, the Census must classify a locale as an incorporated city or town or as a "Census Designated Place" ("CDP") to qualify as an allotment "community". E.g., FM Table of Allotments (Smith NV), DA 96-620 ¶3, released May 6, 1996 (Mass Media Bur.). In the instant case, as Calypso demonstrated in Exhibit B of its Motion, the Census describes St. John Island as consisting of four "subdistricts" and one CDP -- Cruz Bay. Moreover, St. John Island per se is not given any Census designation whatsoever. Thus, under established Commission precedent, only Cruz Bay is "listed" in the Census for allotment purposes. Id.

5. Next, the Commission very recently emphasized that "While the Census listing [if there is a "listing"] raises a presumption of community status, it is not absolute for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as shopping centers, a newspaper, and social or civic organizations". See FM Table of Allotments (Riverdale CA), DA 96-795 ¶3, released June 5, 1996 (Mass Media Bur.). Stated differently, where, as here, standard socio-economic indicia of "community" are lacking for any population grouping on St. John other than Cruz Bay, 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...." 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). The Petitioners have made no such showing for "St. John" in Serra's Counterproposal or in the Joint Opposition.

6. Indeed, the Joint Opposition inadvertently bolsters Calypso's claim that Cruz Bay is the only appropriate allotment "community" on St. John by asserting (at ¶13) that the only community services on St. John outside of Cruz Bay are facilities of the Community Health Center at Susanberg and a fire department and a public school at Coral Bay. Under the above-cited precedents, the Coral Bay facilities are clearly insufficient to establish Coral Bay as an allotment "community," contrary to the Petitioners' belated claim (J.O. at ¶15). In any event, as Calypso urged in its Motion (at ¶6), it is too late for Serra to amend his Counterproposal now to change his proposed community to Coral Bay, or Cruz Bay (see J.O. at note i), because the Commission has repeatedly held 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 these precedents and refuse to allow Serra to convert his "St. John" Counterproposal into a Coral Bay or Cruz Bay proposal.

7. Finally, the Petitioners attempt to use the Commission's allotments to the islands of Culebra and Vieques, Puerto Rico as precedent for making an allotment to the island of St. John. The analogy fails for the simple reason that, unlike St. John, there are no other allotments already on Culebra or Vieques. In other words, the Commission is entitled to decide, absent pre-existing allotments to communities on an island, that the entire island is a "community" for allotment purposes, as it determined in FM Table of Allotments (Culebra PR), 6 FCC Rcd 5161

(Mass Media Bur. 1991), and FM Table of Allotments (Vieques PR et al.), 10 FCC Rd 6673 (Mass Media Bur. 1995). By contrast, St. John Island does not represent the smallest "distinct group" on St. John. Rather, the CPD of Cruz Bay has already been identified by the Commission as a cognizable community on the island through the recent allotment of Channel 267B as a first local transmission service there in FM Table of Allotments (Charlotte Amalie et al. VI) ("Charlotte Amalie"), 10 FCC Rcd 8111 (Mass Media Bur. 1995). Under these circumstances, Calypso maintains that an allotment cannot be made to the entire island of St. John as if St. John were a single community entity (unlike Culebra or Vieques). In sum, where, as here, the Petitioners have failed to show that St. John Island is a legitimate community for allotment purposes, Calypso urges that Serra should not be allowed to cure his error, and his Counterproposal should be dismissed. See FM Table of Allotments (Clark CO), DA 96-796, released June 4, 1996 (Mass Media Bur.)(presence of general store only is insufficient evidence of "community" for allotment purposes).

III. Several Public Interest Factors Favor Calypso's Counterproposal

8. As explained in Paragraph 7 above, it is misleading and erroneous for the Petitioners to speak about Serra's Counterproposal as a first transmission service to St. John Island (J.O. at ¶15). If the Counterproposal is not dismissed, at best it proposes a second local transmission service for Cruz Bay or the island of St. John. As such, it is well established that where, as here, 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, 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). 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.

9. 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 WVNX'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 WVNX viable, it is necessary for Calypso to move to Channel 297B1, which it cannot do if the Commission allots Channel 298A to St. John.[3] The Petitioners' claim (J.O. at ¶ 16) that Calypso did nothing from August 9, 1991 until June 2, 1995 to resolve its foreign interference problem is incorrect. Serious efforts

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[3] The Petitioners' expression of interest in applying for Channel 297B1 at Charlotte Amalie (J.O. at ¶16) is unavailing. As explained in Paragraph 8 and footnote 4 of Calypso's May 3, 1996 Counterproposal, Calypso's proposal to downgrade Station WVNX from Channel 246B to Channel 297B1 does not requiring entertaining other expressions of interest in the frequency under §1.420(g) of the Rules, because no upgrade is involved. See FM Table of Allotments (Thief River Falls and Walker MN), 8 FCC Rcd 2944 (Mass Media Bur. 1993) (frequency down-grading approved without allowing other expressions of interest); FM Table of Allotments (Shingle Springs and Quincy CA), 7 FCC Rcd 3113 (Mass Media Bur. 1992) (same); cf. FM Table of Allotments (Salem and Cherokee Village AR), 11 FCC Rcd 1082 (Mass Media Bur. 1996) (§1.420(g) does not apply where no upgrade in facilities is requested).

were made during 1991-92 to make WVNX viable through diplomatic negotiations with the British Virgin Islands. When those efforts failed, on June 22, 1992 Calypso initiated the Charlotte Amalie MM Docket No. 92-244 FM channel rulemaking proceeding, supra, by filing a petition for rulemaking (RM-8027) to substitute Channel 267B for WVNX's Channel 246B. That proceeding did not end until August 1995. Given all of the above circumstances, Calypso submits that Serra's proposal does not have any "public interest" allotment equities like Calypso's proposal (using the fourth allotment priority of FM Channel Policies/Procedures, supra) and, therefore, deserves no allotment preference over Calypso.

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

Respectfully submitted,

D/B/A CALYPSO COMMUNICATIONS

By _____
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Dated: June 13, 1996

CERTIFICATE OF SERVICE

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 13th day of June, 1996, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**REPLY TO JOINT OPPOSITION TO MOTION TO DISMISS**" to the following:

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***BY HAND**