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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. 00-123**
Table of Allotments,	)	**RM-9903**
FM Broadcast Stations	)	
Rincon, Puerto Rico	)	

To: The Commission

APPLICATION FOR REVIEW

Jose J. Arzuaga, Jr., d/b/a Ocean Communications ("petitioner"), by his counsel, herewith submits his application for review in the above-captioned proceeding as follows:

1. Petitioner requests review under Sec. 1.115 (b)(2)(iv) and (v) in that the Staff has made "(iv) [a]n erroneous finding as to an important or material question of fact.... and [subjected petitioner to] (v) [p]rejudicial procedural error."

2. On July 7, 2000, the Commission issued a Notice of Proposed Rule Making in the instant proceeding. 15 FCC Rcd 12611 (2000). In the Notice of Proposed Rule Making (at para. 5), the Commission established the date for filing Comments in the proceeding as August 28, 2000. Reply comments were required to be filed on or before September 12, 2000. All comments were to be served on petitioner. Petitioner filed comments by the required date. No other comments or reply comments were filed in a timely manner.

3. On December 28, 2000, more than three months past the time for filing reply comments, International Broadcasting Corporation ("IBC") filed an unauthorized pleading opposing the proposed rulemaking. In its Report and Order, denying the proposed rulemaking (DA 01-255, released February 2, 2001), the Commission acknowledged that IBC's comments

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were untimely and, more significantly, not accompanied by a request for their acceptance. (R & O at FN 2).

4. Despite the infirmity in IBC's filing, the Commission denied the rulemaking proposal based on the comments filed by IBC. IBC misled the Commission into believing that the tower for the proposed allotment would have to be located in the Desecheo National Wildlife Refuge (which is not the case). The Commission stated that the "evidence" presented by IBC had "not been refuted." (R & O at para. 3). However, petitioner was never provided a proper opportunity to refute the "evidence."

5. The evidence in question is a letter from the Department of the Interior relating to the "Desecheo National Wildlife Refuge." The official stated: "To date, we have had no request for a permit to construct facilities on Desecheo, nor is it likely that we would approve any such request if received." No evidence was submitted to demonstrate that there was no other location where a tower could be located outside the Wildlife Refuge. This was merely assumed.

6. Petitioner requested reconsideration on both procedural and substantive grounds. The evidence in question was presented in an unauthorized pleading, as acknowledged by the Commission. Petitioner was precluded from filing an "authorized" response to the pleading since the deadline for filing reply comments had expired. The only avenue available to petitioner for filing a response would have been through the filing of a second "unauthorized pleading." However, the filing of such an unauthorized pleading would have been inconsistent with a long line of Commission rulings.

7. The Chief, Allocations Branch denied the petition for reconsideration by Memorandum Opinion and Order, released April 24, 2001. (DA 01-1065). In doing so, the Staff stated: "Consideration of the late-filed Comments by International Broadcasting enabled us to resolve

this proceeding on the basis of a complete and accurate record." Of course, this conclusion by the Staff is patently in error since the Commission was misled by IBC into believing that the only land area available to locate a transmitter for the proposed station would be in the Desecheo National Wildlife Refuge. In order to obtain a complete record, the appropriate procedure would have been to notify the petitioner that the unauthorized pleading was going to be considered and to invite comment thereon. More importantly, the record obtained is anything but accurate as will be demonstrated herein.

8. The Commission is reminded that IBC failed to file a request for acceptance of its unauthorized pleading. Had IBC filed an accompanying request that the late-filed comments be considered, petitioner would have had a reasonable basis to file a response. As indicated no such request was filed. In short, petitioner has been injured by its diligence to adhere to the rules, while IBC has benefited by filing an unauthorized untimely pleading that was not the subject of an authorized response and which resulted in the Commission being misled by IBC's mischaracterization of the facts. The ruling denied petitioner "due process" in that the Commission stated that IBC's unauthorized proffer of "evidence" was not "refuted" when there was no proper procedure for petitioner to refute the "evidence." Thus, on procedural grounds alone, the Staff should have reconsidered the original ruling in this proceeding.

9. With respect to the "evidence" itself, there was no engineering showing submitted that the transmitter in question would have to be located in the Desecheo National Wildlife Refuge, which is the basis for denying the proposed allocation in this case. Petitioner pointed out in his petition for reconsideration that he could locate outside the Wildlife Refuge (noting that he could place the transmitter on a ship). This was not the only option available to him as will be demonstrated below. Since he did not intend to locate on Desecheo island proper, the "evidence"

submitted by IBC had no bearing on whether the rulemaking as proposed by the Commission could be approved. Under the circumstances, petitioner had no reason to refute an unauthorized pleading that was irrelevant to the proposal since he did not intend to locate in the Desecheo National Wildlife Refuge as was alleged.

10. In any event, the evidence upon which the Commission based its ruling is inaccurate and misleading. The letter from the National Wildlife Refuge related only to the National Wildlife Refuge. The fact is that there is land available that is not a part of the National Wildlife Refuge. Attached hereto is a copy of a map obtained from Mr. Foote of the National Wildlife Refuge, marking the boundaries of the Refuge. As indicated, there are land areas outside the limits of the Refuge where a tower could be located without requiring approval from the Refuge because this land is outside the jurisdiction of the Refuge. Accordingly, the Staff was clearly in error when it stated:

> The only island upon which the transmitter could be located is Desecheo, Island, The Desecheo National Wildlife Refuge covers all of Descheo Island. On the basis of our own engineering review, there is no site on land that could accommodate a transmitter site for this allotment.

There are clearly small islands off the coast of Desecheo where a transmitter could be located outside the jurisdiction of the Refuge. Furthermore, if a ship or offshore facility were to be used (and that would not be necessary since there are land areas available), it could be located in the area of these small islands where the water is very shallow and where stability could easily be obtained. The Staff's statement that this location is 16 miles out in the Atlantic Ocean ignores the true nature of the location in question. Clearly locations are available outside the Desecheo Refuge but either on land or in very shallow water should an offshore facility be employed.

11. In its ruling, the Commission stated: "In view of the Decisional Significance of the Comments, Ocean Communications could have filed a response to the letter from Val K. Urtan either at that time or in the context of its Petition for Reconsideration." As indicated above, there was no indication that the letter from Mr. Urtan would be of decisional significance. All he said was that petitioner had not requested authority to locate on Desecheo Island. Without evidence (and none was submitted) that the only site where a tower could be located was the Wildlife Refuge, Mr. Urtan's letter was without decisional significance. Furthermore, as indicated previously, Ocean Communications would have had to file an unauthorized pleading in order to respond. For the Commission to state, after the fact, that it would have permitted an unauthorized pleading in response to a submission that, after the fact, was determined to be of decisional significance, is too little, too late.

12. Likewise, the concept that the time for making such submissions is in a petition for reconsideration is without merit and requires the Commission to stand the law on its head. In essence, the rulemaking was denied based on "evidence" submitted outside the context of the rules coupled with the staff's alleged examination of the facts outside the record of the rulemaking. To reach a conclusion in a rulemaking proceeding totally outside the record renders administrative process a shambles. What is the point of having rules regarding submission of evidence on the record if the public record is going to be ignored and decisions are going to be made on the basis of unauthorized pleadings and non-public examination of the evidence? Does this type of rulemaking comport with the intent of the Administrative Procedure Act? The answer in this case is obvious. Mr. Urtan is no longer at the Desecheo Wildlife Refuge but a successor, Mr. Foote, has confirmed that there is land outside the Preserve over which the Refuge has no jurisdiction. The Commission's "evidence" is incorrect and cannot be found in the public record

of this rulemaking. There is land where a tower could be located outside the National Wildlife Refuge, and the Staff's finding to the contrary is in error.

13. In summary, petitioner requests review under Sec. 1.115 (b)(2)(iv) and (v) in that the Staff has made "(iv) [a]n erroneous finding as to an important or material question of fact.... and [has subjected petitioner to] (v) [p]rejudicial procedural error." The Staff's (outside-the-record) finding that there is no land available outside the Desecheo National Wildlife Refuge is wrong. The error stems from the misleading evidence submitted by IBC in its unauthorized pleading. The acceptance of the unauthorized pleading constituted prejudicial procedural error, which, in turn, led to an inaccurate record and inaccurate conclusions upon which the Staff relied. The action is also inconsistent with a multitude of Commission rulings over the years that have rejected unauthorized pleadings of this sort. This case proves the wisdom of Commission precedent. Reliance on unauthorized pleadings, without offering petitioner an opportunity to respond, will inevitably lead to errors of this sort.

14. The Commission must step in at this juncture and make it clear, once again, that it will not accept unauthorized pleadings, particularly when such pleadings are submitted without a request for leave to file. To do otherwise would establish a very dangerous precedent. In the future, petitioners will be free to file unauthorized pleadings whenever they want by simply citing this case and arguing that their pleading is required to respond to a matter they speculate may be of "decisional significance" upon which the Commission may now rely regardless of the status of the public record. This would lead to chaos.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Commission grant the instant application for review and amend the FM Table of Allotments as

proposed in Docket No. 00-123. In the alternative, this matter should be remanded to the Allocations Branch to permit further documentation relative to site availability.

Respectfully submitted,

OCEAN COMMUNICATIONS

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May 21, 2001

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing Application for Review by first class U.S. mail, postage prepaid, or by hand delivery, on or before the 21st day of May, 2001, to the following:

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James L. Oyster

DESECHEO NATIONAL WILDLIFE REFUGE

PUERTO RICO

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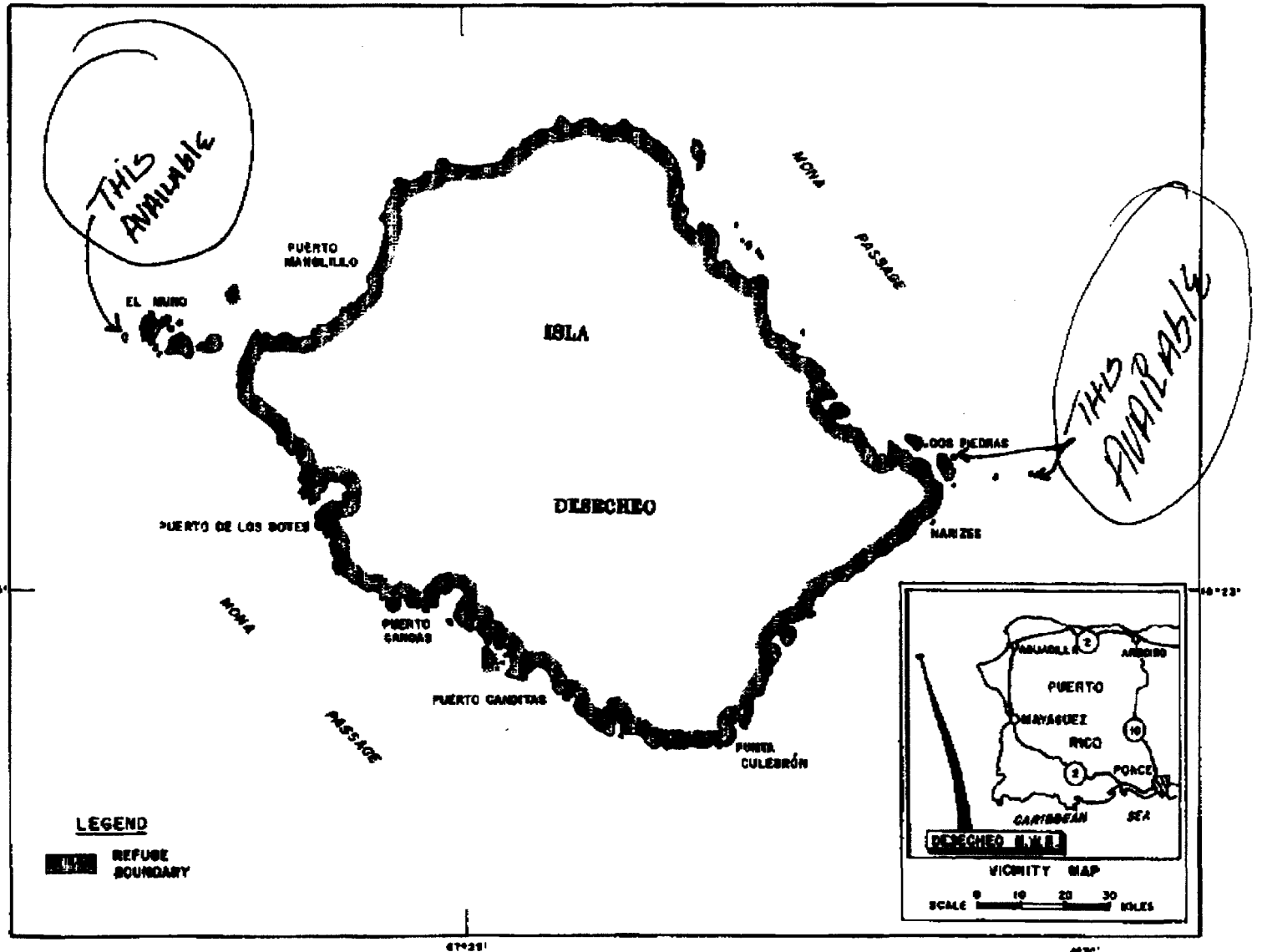
DEPARTMENT OF THE INTERIOR

UNITED STATES
FISH AND WILDLIFE SERVICE



COMPILED IN THE DIVISION OF REALTY
FROM A BASE MAP BY H. MANRELLO
AND R.P. BRIGGS, U.S.G.S. 1966

ATLANTA, GEORGIA JULY, 1977

MAGNETIC NORTH
TRUE NORTH

MEAN DECLINATION
1966