

00-123

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From: "Jim Oyster" <pearl@monumental.com>
To: "Secretary" <MMBSecretary@fcc.gov>
Date: Tue, Jan 22, 2002 2:33 PM
Subject: Please find for filing the attached petition for reconsideration directed to the Commission.

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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

PETITION FOR RECONSIDERATION

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

1. Petitioner requests reconsideration based on the fact that the Commission failed to address Petitioner's claim of "[p]rocedural error."

2. In footnote 1 of its order of December 20, 2001 (FCC 01-367), the Commission faults Ocean Communications for raising facts for the first time in the Application for Review. However, the Commission completely ignores the fact that Petitioner was precluded from addressing the facts at the appropriate time because the staff based its decision on an unauthorized and untimely pleading that petitioner was never given an opportunity to refute (see para. 3-4 of the Application for Review).

3. A petition for reconsideration was filed in order to seek relief from that error, but petitioner was denied relief that would have permitted the staff to consider other matters so as to correct the record. Now the Commission says the Application for Review must be denied because the pertinent facts were not considered by the staff -- but that is because the staff refused to grant the relief requested that would have permitted it to pass on the facts in question.

Petitioner had no choice but to seek relief at the Commission level because of the refusal of the staff to follow correct procedure.

4. It is undisputed that the rulemaking was denied based on "evidence" submitted outside the context of the rules coupled with the staff's examination of the facts outside the record of the rulemaking. The denial of the instant application for review allows the staff's (outside-the-record) finding to stand - notwithstanding the fact that it is demonstrably in error. Petitioner understands that the Commission should not be required to make findings of fact in the first instance -- thus Section 1.115 of the Rules. However, when an allegation is made of procedural error that resulted in an error on the record, the correct procedure is to remand to the staff and afford Petitioner an opportunity to place such facts on the record as may be required to cure the errors in the record (which flowed from the unauthorized pleading and the staff's outside-the-record analysis and not from a failure on the part of Petitioner to submit appropriate pleadings at the appropriate time, as authorized by the rules).

5. The Commission states in footnote 1 that "we note that there is no evidence of reasonable assurance of the actual availability of a transmitter site at this alternative location." There is no requirement that a petitioner demonstrate reasonable assurance of availability in rulemaking Comments unless directed to do so by the Commission. Petitioner was never directed to submit such evidence. Furthermore, its petition for rulemaking stood unopposed when the time for filing comments and reply comments had expired. It has been told after-the-fact that it should have submitted evidence of site availability but also told that it is too late to do so (when there was no such requirement within the confines of the authorized pleading cycle). The Commission has failed to address the procedural error in its order. At a minimum, the Commission should remand the proceeding to the staff with a direction that additional evidence

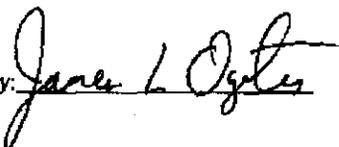
be submitted. An order certainly cannot stand on a failure to submit evidence that was never required.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Commission grant the instant petition for reconsideration.

Respectfully submitted.

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OCEAN COMMUNICATIONS

By: 

(540) 937-4800
January 22, 2002

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing Petition for Reconsideration by first class U.S. mail, postage prepaid, or by hand delivery, on or before the 22nd day of January, 2002, to the following:

Richard F. Swift, Esq.
2175 K Street, N.W., Suite 350
Washington, D.C. 20037
Counsel for International Broadcasting Corporation

By: 