

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 6 2002

OFFICE OF  
MANAGING DIRECTOR

86-285

James L. Oyster, Esq.  
108 Oyster Lane  
Castleton, Virginia 22716-9720

Re: V.I. Stereo Communications Corp., WVIS (FM),  
Christiansted, St. Croix, U.S.V.I.  
Request for Waiver of Regulatory Fee  
Fee Control No. 00000RROG-02-006

Dear Mr. Oyster:

This is in response to your request dated November 26, 2001, filed on behalf of V.I. Stereo Communications Corp. (VIS) that the Office of Managing Director (OMD) reconsider its decision denying your request for waiver and deferral of the fiscal year (FY) 2001 regulatory fee of \$850.00 for Station WVIS(FM), Christiansted, St. Croix, U.S.V.I. See Letter from Mark Reger, Chief Financial Officer, Office of Managing Director, to James L. Oyster, Esq. (dated Nov. 1, 2001) (*VIS Letter*).

In the *VIS Letter*, we found that VIS had submitted no arguments or information to support its claim of financial hardship as a basis for a waiver or deferral of the FY 2001 regulatory fee and we therefore denied VIS's request for relief. In your petition for reconsideration, you assert for the first time that VIS should not be required to pay the FY 2001 regulatory fee because VIS has not operated Station WVIS(FM) since December 22, 1999, the Commission terminated VIS's license for the station on December 23, 2000, and VIS was not the licensee for the station at the time the FY 2001 regulatory fee was due.<sup>1</sup> Citing Letter from Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, to James L. Oyster, Esq. (dated Oct. 25, 2001) (stating that because station WVIS(FM) has been off the air since December 22, 1999, "the Commission's public and internal databases will be modified to indicate that the broadcast license . . . for station WVIS expired as a matter of law as of 12:01 a.m., December 23, 2000").

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<sup>1</sup> The Commission required licensees to file FY 2001 regulatory fees between September 10, 2001, and the close of business on September 26, 2001. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Report and Order*, 16 FCC Rcd 13,525, para. 33 (2001); *Public Notice, Extension of Fiscal Year 2001 Regulatory Fee Filing Window*, 2001 WL 1078406 (dated Sept. 17, 2001).

Given that VIS's license for WVIS(FM) terminated on December 23, 2000, and based on your statement in the petition for reconsideration that VIS was not operating the station during the fiscal year at issue, including the date on which the FY 2001 regulatory fee was due, we grant VIS's request for waiver of the \$850.00 FY 2001 regulatory fee.<sup>2</sup>

If you have any questions concerning this letter, please call the Revenue and Receivables Operation Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark A. Reger', written over a horizontal line.

 Mark A. Reger  
Chief Financial Officer

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<sup>2</sup> See generally *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Memorandum Opinion and Order*, 10 FCC Rcd 10891, para. 15 (1995) (determining that the Commission will “grant petitions for waivers of the regulatory fees on grounds of financial hardship from licensees of broadcast stations which are dark (not operating).”

**ORIGINAL**

RECEIVED

FCC

Before the

**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

**RECEIVED**

**NOV 26 2001**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ACCOUNT PROCESSING  
GROUP-DPT/RR/TMT

In re Annual Regulatory Fee for )  
V.I. STEREO COMMUNICATIONS CORP. )  
WVIS (FM), Christiansted, St. Croix, U.S.V.I. )

To: Managing Director

**PETITION FOR RECONSIDERATION**

V.I. Stereo Communications Corp., licensee of FM broadcast station WVIS, St. Croix, U.S.V.I. ("WVIS"), by its counsel, hereby submits its petition for reconsideration of the Commission's letter ruling, dated November 1, 2001, denying waiver of the annual regulatory fee for 2001. In support whereof, the following is stated:

1. The Commission's Public Notice, released August 7, 2001, clearly stated:

"Responsibility for payment of that [regulatory] fee rests with the current holder of the permit or license at the time payment is due." As indicated in the attached Exhibit 1, the Commission has held that the WVIS license expired December 23, 2000. Since WVIS was not the licensee at the time payment was due, it should not be responsible for making the payment.

2. The Commission should have waived the fee in any event. The station has been off the air since December of 1999. WVIS was dark for the entire period in question as recognized by the Commission in Exhibit 1. As such, it was impossible for the station to make any money or for Mr. Bahr to receive any salary from the station.

3. The Commission has held that the station was off the air, and no further proof of financial hardship should be required. The Commission's pronouncement that the quality of proof was insufficient is arbitrary and capricious. By definition, a station that is off the air is

unable to obtain income from broadcast operations. The Commission's ruling here would require WVIS to spend more money on accountants documenting the fact that it had no income than the amount to be saved in annual fees. This effectively precludes meaningful relief by making the cost of prosecuting rights greater than the benefit. The Commission should accept the licensee's word as sufficient proof of financial hardship in cases such as this. Otherwise, the Commission is in effect denying relief prior to consideration of the request for relief.

4. The fact is that the Commission granted WVIS a waiver of its annual fee in 1997, acknowledging the fact that the station was off the air as sufficient grounds for granting the relief without requiring further documentation. A copy of that ruling is attached as Exhibit 2. Ironically, the instant situation involved greater hardship because the station was forced to remain on the air at a time when doing so was causing it to have negative cash flow. This, in and of itself, was an unconstitutional taking of property in violation of the due process clause of the U.S. Constitution.

5. The Commission has ruled (Exhibit 1) that the station could not remain silent because Section 403(l) of the Telecommunications Act of 1996 ("1996 Act") required station licenses to be forfeited automatically if a station were off the air for 12 consecutive months. This went into effect February 9, 1997. Under previous law, WVIS could have remained off the air pending implementation of its move to Vieques and would, as a matter of Commission policy, have been entitled to a waiver of the annual fee due to its status as a silent station. However, the impact of the 1996 Act was to force WVIS to stay on the air and lose money, thereby depriving it of the right to waiver of the annual fee absent proof that would be more expensive than the amount of the fee. This was presumably to serve the public interest -- despite the fact that the Commission had already ruled that it would be in the public interest to delete the station from St. Croix and

move it to Puerto Rico. Given the obvious inconsistencies presented by the above legal positions, it is patently clear that the Commission's denial of waiver in the instant case violated the due process requirements of the U.S. Constitution. In contrast, a grant of waiver would serve the public interest since these funds could be used to assist in placing the station on the air in Vieques.

6. In the event the Commission does not grant reconsideration, it is respectfully requested that the Commission at least reduce the amount of the fee and waive any interest or penalties. Since the station was off the air, it was not serving anyone. Therefore, the minimum fee should be applied. Furthermore, since the license was terminated as of December 23, 2000, the fee should be *pro rated* to cover only the two months when a license was held. Thus, at a minimum, the Commission should reduce the amount of the fee.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that reconsideration be granted.

Respectfully submitted,

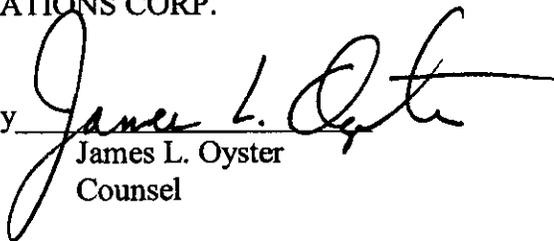
Law Offices  
JAMES L. OYSTER  
108 Oyster Lane  
Castleton, Virginia 22716-9720

(540) 937-4800

November 26, 2001

V.I. STEREO COMMUNI-  
CATIONS CORP.

By

  
James L. Oyster  
Counsel

# **EXHIBIT 1**

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

OCT 25 2001

In Reply Refer To  
1800B3-GDG/CNM

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

James L. Oyster, Esq.  
108 Oyster Lane  
Castleton, VA 22716-2839

In re: WVIS(FM), Vieques, PR  
Facility ID No. 69631

File No. BPH-20010411AAD  
Application for Minor Modification

File No. BSTA-20010413AAX  
Request for Technical Special  
Temporary Authority

Dear Mr. Oyster:

This letter concerns: (1) the referenced application filed April 11, 2001 by V.I. Stereo Communications Corp ("VISC"), licensee of FM broadcast station WIVS(FM), Vieques, Puerto Rico, for minor modification of its outstanding construction permit BPH-19970116IF, (2) the referenced request filed April 13, 2001 for technical special temporary authority to operate with the facilities specified in its pending application, and (3) informal objections filed March 3, 2001 by Rafael Encarnacion and May 11, 2001 by Aureo A. Matos regarding the station's past and proposed operations.

Section 403(l) of the Telecommunications Act of 1996<sup>1</sup> provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary." See *Implementation of Section 403(l) of the Telecommunications Act of 1996* ("Implementation Order"), 11 FCC Rcd 16599 (1996); see also 47 C.F.R. § 73.1740(c).

In your October 18, 2001 response to our September 5, 2001 inquiry regarding the station's operational status, you indicate that the station "has been off the air for more than 12 consecutive months, since December 22, 1999." You argue, however, that under Section 403(l) only the station's former authorization in Christiansted, St. Croix, Virgin

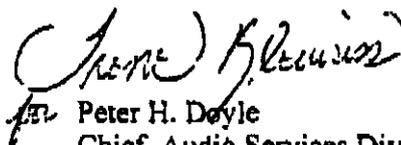
<sup>1</sup>Pub. L. No. 104-104, 110 Stat. 56 403(l)(1996), codified in 47 U.S.C. §312(g) and 47 C.F.R. §73.1740(c).

Islands should expire and that its permit to modify the station's facilities in Vieques, Puerto Rico should remain valid. We disagree. When a station's license expires pursuant to Section 403(l), all of its associated authorizations expire concurrently. *Implementation Order*, 11 FCC Rcd at 16601. Similarly, associated applications become moot.

As the station has been off the air since December 22, 1999, the Commission's public and internal databases will be modified to indicate that the broadcast license (File No. BLH-19870114KB) for station WVIS EXPIRED as a matter of law as of 12:01 a.m., December 23, 2000. Consequently, we HEREBY DELETE the station's call sign WVIS(FM) and DISMISS AS MOOT VISC's application for minor modification (File No. BPH-20010411AAD), VISC's request for technical special temporary authority (File No. BSTA-20010413AAX), and the informal objections filed by Messrs. Encarnacion and Matos.

Finally, we note that it is imperative to the safety of air navigation that any prescribed painting and illumination of the station's tower be maintained until the tower is dismantled. Accordingly, the owner of the tower where the referenced station's transmitting antenna is located is required, pursuant to 47 U.S.C. § 303(q), to maintain the tower in the manner prescribed by our rules and the terms of the cancelled license. See 47 C.F.R. §§ 17.1 *et seq.* and 73.1213. See also, *Report and Order* in MM Docket 95-5, 11 FCC Rcd 4272 (1996).

Sincerely,



Peter H. Doyle  
Chief, Audio Services Division  
Mass Media Bureau

cc: Rafael Encarnacion  
1194 Mancha Real Dr.  
Orlando, FL 32807

Aureo A. Matos  
P.O. Box 7  
Moca, PR 00676

William D. Silva, Esq.  
5335 Wisconsin Avenue, N.W.  
Suite 400  
Washington, D.C. 20015-2002

## **EXHIBIT 2**

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

August 31, 1998

OFFICE OF  
MANAGING DIRECTOR

James L. Oyster, Esq.  
108 Oyster Lane  
Castleton, VA 22716-9720

Re: Request for Waiver of Regulatory Fee  
VI Stereo Communications Corp.

Dear Mr. Oyster:

This is in response to your request for a waiver of the Fiscal Year (FY) 1997 regulatory fee for FM Radio Station WVIS, Christiansted, St. Croix, Virgin Islands, licensed to VI Stereo Communications Corporation. You maintain that FM Radio Station WVIS was dark and not operating. The Commission's records indicate WVIS resumed broadcasting on August 2, 1998.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15, released June 22, 1995, the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore, waive the fee requirement for stations which have ceased operation.

Thus, because WVIS(FM) was dark when payment of the fee was due, your request is granted, and the FY 1997 regulatory for VI Stereo Communications Corporation is waived. However, because WVIS has resumed operation, the waiver is limited to the FY 1997 regulatory fee.

If you have any questions concerning the waiver, please call the Chief, Fee Section, at (202) 418-1995.

Sincerely,

  
Mark Reger  
Chief Financial Officer

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

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NOV 26 2001

Federal Communications Commission  
Office of Secretary

In re Application of )  
V.I. Stereo Communications Corp. ) Facility ID No. 69631  
FM Station WVIS, Vieques, PR ) File Nos. 20010413AAX.  
BPH-20010411AAD

To: Chief, Mass Media Bureau

**PETITION FOR RECONSIDERATION**

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**SUMMARY OF FILING**

This is a petition for reconsideration of a letter ruling by the Commission staff, which terminated the WVIS license and dismissed as moot an authorization to move the station to a new community of license. The intent of the law ("1996 Act") applied by the Commission was to eliminate "dormant" facilities and not to "punish" licensees for failing to operate. This is a reallocation case and not a "dormant facility" case. Therefore, the law's intent does not apply here.

The staff incorrectly construed language in the Implementation Order in a manner that expanded the intent of the 1996 Act, contrary to the specific wording of the IO and the requirements of the Administrative Procedure Act.

The Commission should avoid an interpretation that would render the law unconstitutional. By expanding the scope of the law, the Commission has rendered the Act "punitive" in nature and thus unconstitutional because it violates due process requirements relating to the right to notice and hearing.

V.I. Stereo Communications Corp. ("VISC"), by its counsel, herewith submits its Petition for Reconsideration of the Mass Media Bureau's letter ruling of October 25, 2001, terminating the WVIS license and dismissing the above-captioned applications as moot. In support whereof, the following is stated.

#### Background

1. The Commission's ruling (at p. 1) states that Section 403(l) of the Telecommunications Act of 1996 (the "1996 Act") [Pub. L. No. 104-104, 110 Stat. 56 403(l)(1996), *codified* in 47 U.S.C. Section 312(g) and 47 C.F.R. Section 73.1740(c)] provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary."

2. Section 73.1740(c) of the Commission's Rules, *codifying* the above statutory provision reads as follows:

c) The license of any broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires as a matter of law at the end of that

period, notwithstanding any provision, term, or condition of the license to the contrary.

3. Both the statute and implementing rule are silent regarding the question of construction permits that a licensee may hold in conjunction with a broadcast license. The order (*11 FCC Rcd 16599 (1996); 1996 FCC LEXIS 2616; 3 Comm. Reg. (P & F) 109, at para. 6*) implementing the statutory provision ("Implementation Order" or "IO") states, in pertinent part: "With the expiration of a station's license, all associated authorizations related to that station necessarily would become null and void because there can be no such continued authority absent a valid station license." The Implementation Order further states:

8. We are revising these rules without providing prior public notice and an opportunity for comment because the rules being modified are mandated by the applicable provisions of the 1996 Act. We find that notice and comment procedures are unnecessary, and that this action therefore falls within the "good cause" exception of the Administrative Procedure Act ("APA").<sup>n8</sup> The rule changes adopted in this Order do not involve discretionary action on the part of the Commission. Rather, they simply codify provisions of the 1996 Act.

<sup>n8</sup> See *5 U.S.C. § 553(b)(B)* (notice requirements inapplicable "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

4. Paragraph 8 mandates that the Implementation Order be considered only to the degree required by the statute. Because the 1996 Act was silent on the question of construction permits held in conjunction with a license, the Implementation Order cannot be used as a vehicle to expand the meaning of the Act or the rules adopted pursuant thereto. By its own language, the Implementation Order was intended to codify and not to interpret the 1996 Act.

#### Policy Issues

5. In the instant case, VISC applied for and was granted a construction permit to move WWIS to Vieques, Puerto Rico. It did so as required by the Commission's prior ruling in *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Canovanas,*

*Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan, and Vieques, Puerto Rico, and Christiansted and Frederiksted, VI*), MM Docket No. 91-259, released September 16, 1996, 11 FCC Rcd. 9871 (1996); *affirmed* 12 FCC Rcd. 10055 (1997) and 1999 FCC LEXIS 2828.

6. In the 1997 order, at FN 3, the Commission stated: "In this connection, we note that in this proceeding, we reallocated Station WVIS, Channel 291B, from Christiansted, Virgin Islands, to Vieques. This will provide service to the entire area and to the population losing service from the reallocation of Station WSAN to Las Piedras." The reallocation of WVIS from Christiansted to Vieques was ruled to serve the interests of the Communications Act of 1934, as amended. The Commission has determined, by final order, that the public interest is no longer served by operation of WVIS in Christiansted. The public interest is served by operation of the station in Vieques, Puerto Rico.

7. The sole basis for requiring WVIS to continue to operate in Christiansted, following deletion of the allocation to Christiansted, was the 1996 Act and corollary rule whose purpose was to delete "dormant" facilities. However, the Christiansted facility was not merely dormant, it was a lame duck, already scheduled for elimination. WVIS was and is perfectly willing to have its Christiansted facility terminated, provided that its construction permit to operate in Vieques be allowed to continue in full force. Since the Commission had already ruled that the public interest would be served by terminating the authority to operate in Christiansted in favor of commencement of a new facility in Vieques, it would have been consistent with that ruling to delete the Christiansted authorization and substitute therefor a permit that would allow WVIS to be built in Vieques. The intent of the 1996 Act was not served by using it to delete a facility that was already being deleted and in the process deleting the Vieques facility which was in the

process of being birthed. The Vieques authorization certainly was not the "dormant" station the 1996 Act was designed to eradicate, and the Commission erred in treating it as such.

8. Not only would it have been consistent with the Commission's final order in the *Canovanas* rulemaking, there is ample precedent that a permit for modification of permit may be converted to a permit for a new station. This precedent was cited in VISC's letter to the Commission, dated October 18, 2001, which is referenced in the instant letter ruling.<sup>1</sup> That precedent clearly establishes that there is no procedural impediment to the relief that has been requested in this proceeding. The Commission has the authority to recharacterize the Vieques permit as a permit for a new station with the result that deletion of the Christiansted license, in accordance with the 1996 Act, would not require deletion of the Vieques construction permit. The recharacterization would allow the permit to stand on its own, apart from the requirement that the Christiansted license be deleted. That relief would further the intent of the 1996 Act, which is to delete dormant facilities -- which intent is served by deletion of the Christiansted authorization but is disserved by deletion of the Vieques authorization (which is in the process of being activated as opposed to being "dormant").

9. As previously indicated, the Act and the Rules are silent on the issue of associated permits. While the Implementation Order does discuss the issue, it is silent on the issue of recharacterization of a permit so that it could stand on its own and thus would not suffer the same fate as the license. Of course, the Commission had no reason to consider the situation at issue

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<sup>1</sup> It is well established that the Commission may recharacterize a modification permit to be a permit for a new station, and that it may do so even during the licensing phase of the application process. This was done in the case of WCGR/WRSB, Canandaigua, NY. The permit was originally issued as a modification of WCGR to change frequency from 1550 KHz to 1310 KHz. In the license application (BL-970418AA), it was requested that the application be recharacterized as an application for a new station on 1310 so that WCGR could continue to operate on 1550 KHz. The Commission approved that request, and the license for 1310 was granted as a new station, bearing call letters WRSB. *See also, In the Matter of WBOW, Terre Haute, Indiana* (letter ruling of June 4, 1993).

here, which is clearly unique. The Commission was, undoubtedly, considering the normal situation in which facilities are merely being modified, but the station remains essentially the same station, serving the same community of license but with different technical facilities. Indeed, the wording in the Implementation Order refers to "associated authorizations related to that station." The staff interprets this wording to apply to the instant case, but it may be equally argued that the Vieques authorization is not "related" to "that station," referring to the "Christiansted" station. It is clear they are not "related" in the sense that the one is a "dormant" station whereas the other clearly is not. To the contrary, it is one that is ready to be activated but for the action of the Commission in this case.

10. Clearly, this is not the situation envisioned by the Commission in the Implementation Order. The IO envisioned rules designed to eliminate "dormant" stations in accordance with the intent of the 1996 Act. The 1996 Act was not intended to eliminate facilities that were being modified pursuant to a rulemaking that had ordered elimination of the station in one community and modification of the authorization to establish a new station elsewhere. The Commission could not have had such a situation in mind when it adopted the IO because, by its very terms, the IO was intended only to implement the 1996 Act and clearly situations such as this are beyond the scope of the 1996 Act. The Christiansted allocation has already been eliminated by rulemaking. The 1996 Act was not intended to treat allocations that have already been deleted by Order of the Commission. That would, at best, be redundant. Likewise, the 1996 Act was not intended to delete an authorization, such as the Vieques authorization, intended to establish a new facility in a new community. Again, that authorization was not "related" to the dormant station because that authorization was intended to establish a new facility in a new community and not to merely continue in force a "dormant" facility.

11. Furthermore, the Commission staff has failed to state any basis for deleting the construction permit in this instance other than its reference to the Implementation Order. The staff failed to articulate why the Implementation Order requires the deletion of the Vieques permit in light of the fact that the permit is a *de facto* permit for a new station in Vieques and thus should not be treated in the same manner as cases that do not involve the establishment of a new station in a new community. Certainly, the Statute has no language requiring this result. The rules have no language requiring this result. The Implementation Order has no language pertaining to this unique situation where the permit involves a *de facto* new station, not related to "that station," i.e. the "dormant" Christiansted allotment that was already deleted pursuant to rulemaking.

12. Moreover, the staff has articulated no basis for denial of the requested recharacterization. The Commission's failure to articulate a basis for its denial of the requested relief is particularly significant under the circumstances of this case since the Commission has already ruled that deletion of the station from Christiansted and establishment of a new station in Vieques serves the requirements of the Communications Act. As a result, there is a ruling requiring the relief requested herein (the rulemaking order, deleting the station from Christiansted and adding it to Vieques) and no rationale provided for the subsequent denial of this relief. Such a ruling cannot stand.

13. It is also noted that there is no discussion provided of the intent of the 1996 Act. It is apparent that the intent of the 1996 Act was to eliminate, without hearing, "dormant" licenses, as discussed above. As also discussed above, the purposes of the 1996 Act do not apply to the circumstances of this case. When the Commission, by rulemaking, deleted the WVIS allocation at Christiansted, it had made a clear ruling that the purposes of Section 307(b) of the Act were no

longer served by continuing service at Christiansted. Rather, the purposes of Section 307(b) were served by establishment of service in Vieques. Accordingly, the WVIS authorization was modified to effectuate those purposes.

14. Application of the 1996 Act to delete the "dormant" facility in Christiansted was not required because that allocation had already been eliminated by rulemaking. More importantly, deletion of the permit for a new facility in Vieques is contrary to the purposes of the 1996 Act since that is not a "dormant" facility but one in the process of being birthed. This case cannot be compared to a permit for modification of a "dormant" facility that might be resurrected through the modification permit -- which is what the Commission had in mind in the Implementation Order. The rulemaking is final. The Christiansted permit is not subject to revival. What is at issue here is establishment of a new facility in Vieques -- a matter totally outside the scope of the 1996 Act and the IO, which purported to simply codify the 1996 Act and not to interpret it or expand on it.

15. Clearly, the purpose of the 1996 Act was to eliminate "dormant" facilities -- nothing more and nothing less (certainly the Commission has not articulated any other purposes). That intent is presumably in accord with other dictates of the Communications Act of 1934, as amended. The "other" dictates of the Act in this situation required establishment of new service in Vieques. Deletion of the authorization to serve Vieques is not consistent with the "purposes" of the 1996 Act, which is concerned with "dormant" facilities and not the establishment of new facilities, which in this case is an act in progress. The purpose of the 1996 Act, when placed in context of the Act as a whole, requires reconsideration of the Commission's order deleting the Vieques authorization, since deletion of that authorization is outside the scope of the 1996 Act. Indeed, the staff's ruling in the instant case has rendered the 1996 Act a "punitive" provision.

Since use of the 1996 Act as a punitive provision would render the Act unconstitutional (because the Act forecloses the right to a hearing), there is a presumption that such use is not intended.

16. Accordingly, in keeping with the purposes of the Act as a whole coupled with the intended purposes of the 1996 Act, it is clear that the staff had no basis for deleting the Vieques permit for the sake of eliminating the dormant Christiansted facility. This purpose would best be served by a grant of the modification application and/or STA and not by dismissal of those applications. The only other conceivable purpose of the 1996 Act would be to "punish" VISC for being off the air for more than 12 months. However, it would be unconstitutional to use the 1996 Act to punish VISC because there are no hearing rights associated with the 1996 Act. To the extent the Commission staff is of the opinion that it had no choice in the matter because of its reading of the Implementation Order, it should refer this matter to the full Commission, which does have the authority to clarify its position on the intended purposes of the IO.

#### Administrative Procedure Act

17. As indicated in para. 3, the Implementation Order was adopted without utilizing the notice and comment procedures of the Administrative Procedure Act ("APA"). In so doing, the Commission stated that it was not engaged in discretionary action but was merely codifying the 1996 Act. However, the staff's interpretation of the Implementation Order makes the IO do more than simply codify the 1996 Act. While the 1996 Act and the Rules are in fact silent on the issue of what happens to permits held in conjunction with a license, the staff's interpretation of the IO expands on the 1996 Act. The Implementation Order states: "With the expiration of a station's license, all associated authorizations related to that station necessarily would become null and void because there can be no such continued authority absent a valid station license."

18. The fact is that the 1996 Act says no such thing, and the Commission has held that a modification permit can be severed from the original license and treated as a permit for a new station.<sup>2</sup> The Commission's language in the Implementation Order, relating to associated authorizations, was not dictated by the 1996 Act. As such, the staff's expanded interpretation of the IO (to include reallocation authorizations as well as "dormant" authorizations) was not exempt under the APA, and the alleged basis for exemption, set forth in the Implementation Order, does not apply to its interpretation. Furthermore, the courts have clearly held (*Air Transport Association of America v. Department of Transportation*, 900 F.2d 369, 372 (1990)):

It is well established that the exemption under section 553 ... does *not* apply to agency action that "substantially alter[s] the rights or interests of regulated" parties. *American Hosp. Ass'n. v. Bowen*, 266 App. D.C. 190, 834 F.2d 1037, 1041 (D.C.Cir. 1987). The Penalty Rules fall outside the scope of the exception because they substantially affect civil penalty defendants' "right to avail [themselves] of an administrative adjudication." *National Motor Freight Traffic Ass'n. v. United States*, 268 F. Supp. 90, 96 (D.D.C. 1967) (three-judge panel), *aff'd mem.*, 393 U.S. 18, 21 L. Ed. 2d 19, 89 S. Ct. 49 (1968). ... Consequently, we hold that the Penalty Rules are invalid and that the FAA may not initiate new prosecutions until it has complied with the procedural requirements of the APA.

The court further stated, at 375:

Section 553's notice and comment requirements are essential to the scheme of administrative governance established by the APA. These procedures reflect Congress' "judgment that . . . informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979). Equally important, by mandating "openness, explanation, and participatory democracy" in the rulemaking process, these procedures assure the legitimacy of administrative norms. *Weyerhaeuser Co. v. Costle*, 191 App. D.C. 309, 590 F.2d 1011, 1027 (D.C.Cir. 1978). For these reasons, we have consistently afforded a narrow cast to the exceptions to section 553, permitting an agency to forgo notice and comment only when the subject matter or the circumstances of the rulemaking divest the public of any legitimate stake in influencing the outcome. *See, e.g., Batterton v.*

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<sup>2</sup> See footnote 1.

Marshall, 208 App. D.C. 321, 648 F.2d 694, 704 (D.C.Cir. 1980); American Bus Ass'n. v. United States, 201 App. D.C. 66, 627 F.2d 525, 528 (D.C.Cir. 1980). In the instant case, because the Penalty Rules substantially affected civil penalty defendants' right to avail themselves of an administrative adjudication, we cannot accept the FAA's contention that the Rules could be promulgated without notice and comment.

19. In the instant case, the Commission has held that VISC's modification permit must be deleted as a matter of law, without the right to a hearing. Whether or not the Commission could have interpreted the 1996 Act to require such a result, the Commission could not do so without following the requirements of the APA. The Commission's holding here clearly goes beyond the literal reading of the 1996 Act and involves "discretionary" interpretation by the Commission, presumably not intended by the IO. Accordingly, the staff should reconsider its holding, based as it is on a discretionary interpretation not intended by the Implementation Order. The discretionary policy enunciated by the Commission in its letter ruling is of no legal impact because it was not adopted pursuant to the notice and comment procedures required by the APA and is apparently contrary to the intent of the IO.

#### Due Process

20. Because the ruling must be reversed based on statutory provisions, it is not necessary for the Commission to reach the constitutional issues raised by the ruling. The constitutional issues are discussed herein assuming the Commission does not reverse on statutory grounds, as it should. The letter ruling issued by the Commission staff deprived Mr. Bahr of his life's work of 30 years without a hearing or even the right to participate in a notice and comment proceeding under the APA. To the Commission staff, this may have been a mere ministerial act required by law. To Mr. Bahr, he was being deprived of his livelihood without a hearing and without justification.

21. With a stroke of a pen, Mr. Bahr lost everything. No reasoned justification was given for this decision to deprive Mr. Bahr of his life's work other than a reference to the "1996 Act." However, the 1996 Act was presumably aimed at eliminating "dormant" facilities and not aimed at punishment of presumed offenders. From Mr. Bahr's perspective, the 1996 Act was not applicable to his circumstance. Mr. Bahr had no intention of retaining a dormant facility in an effort to stockpile frequencies. He was attempting to establish a new facility in Vieques and was ready, willing and able to commence such operations immediately upon grant of his site change application. There was no known purpose for continuing to operate in Christiansted since the Commission had deleted the Christiansted allotment. The station had been destroyed by a hurricane with the result that it would have cost many thousands of dollars to restore service, without any prospect of revenues, and with no reasonable purpose in doing so. In effect, Mr. Bahr was punished for failing to conform to a law that was not even intended to cover his particular circumstances, and Mr. Bahr's punishment was rendered without a hearing.

22. The application of this law to Mr. Bahr is analogous to a hypothetical law that all FCC employees must work continuously, without more than 4 days interruption, or they would be automatically terminated from employment without the right to retirement. Could such a law be constitutional? Would Commission employees willingly accept such a termination simply because Congress passed the law without believing they had a right to some type of explanation. To be sure, our government would be better served if employees never got sick and were never out of work for more than 4 consecutive days. Such a law would serve legitimate purposes. Would those purposes justify the end of an employee's career?

23. Fortunately, we have a Constitution designed to protect not only government employees but also all citizens against senseless acts of government. The court has very clearly

ruled that actions of the type involved here are unconstitutional. In the case of *Trinity Broadcasting of Florida, Inc. and Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network v. Federal Communications Commission*, 341 U.S. App. D.C. 191; 211 F.3d 618, at p. 624; 2000 U.S. App. LEXIS 8918; 20 Comm. Reg. (P & F) 432 (2000), the court considered 2 arguments that the revocation of license in that case was unconstitutional:

(1) the Commission's interpretation of [the rule] is unreasonable; and (2) even if the Commission's interpretation is reasonable, the regulation failed to provide fair notice that [the interpretation] was required.

In *Trinity*, the Court found that the Commission's interpretation was reasonable but that it failed to provide fair notice of its interpretation in the rules that it had promulgated. The Court stated, 211 F. 3d 618 at 628 and 631:

Because "due process requires that parties receive fair notice before being deprived of property," we have repeatedly held that "in the absence of notice--for example, where the regulation is not sufficiently clear to warn a party about what is expected of it--an agency may not deprive a party of property by imposing civil or criminal liability." *GE*, 53 F.3d at 1328-29. We thus ask whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform...."

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Finally, [the rule's] underlying purpose cannot provide the fair notice required by due process. Before an agency can sanction a company for its failure to comply with regulatory requirements, the agency "must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation]." *Chrysler*, 158 F.3d at 1356. General references to a regulation's policy will not do.

24. It is clear that the instant regulations do not meet the "ascertainable certainty" test that the courts have established. Certainly VISC could not have reasonably ascertained that failing to operate in Christiansted would result in termination of its right to move to Vieques. The rule does not address that issue. The 1996 Act does not address the issue. The Implementation Order does not address the issue in a manner that meets the ascertainable

certainty standard as it relates to a permit for a completely new facility. In any event, the Implementation Order was not referenced in the rule and thus was inadequate to provide the fair notice required by due process. As discussed above, the intent of the Act is to eliminate "dormant" facilities, and this is not a "dormant" facility case. This is a case involving VISC's efforts to establish a new facility and not its efforts to retain an authorization in a "dormant" state. The Commission's ruling does not effectuate the purposes of the 1996 Act unless those purposes are to punish offenders for being off the air. If that is the purpose of the 1996 Act, the Act is clearly unconstitutional. Because VISC's permit was deleted without due process of law, the Commission's ruling must be vacated.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Commission grant reconsideration as requested herein and restore the VISC authorizations in full force and effect. It is further requested that the Vieques permit be recharacterized as an authorization for a new facility at which time the license to operate in Christiansted may be deleted. Furthermore, it is respectfully requested that the Commission grant the site change application that was dismissed pursuant to the Commission's ruling.

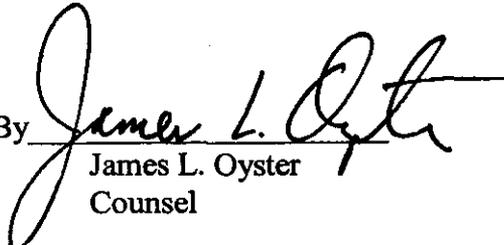
Respectfully submitted,

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November 21, 2001

V.I. STEREO COMMUNICATIONS CORP.

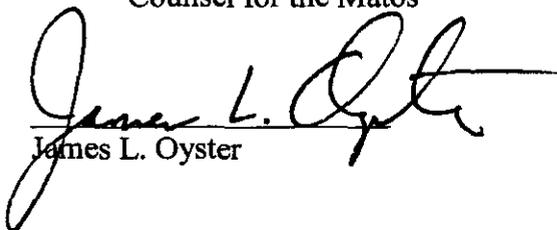
By

  
James L. Oyster  
Counsel

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, on or before the 21st day of November, 2001, to the following (this service is for informational purposes and should not be construed as a concession that the party served is an interested party in this proceeding):

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