

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
WHTV Broadcasting Corp. d/b/a Digital TV One) File No. _____
)
Request for Permanent Waiver of Commission)
Rules Regarding Transition of Broadband)
Radio Service and Educational Broadband)
Service to Revised Band Plan)

To: Chief Wireless Telecommunications Bureau

PETITION TO DENY WHTV WAIVER REQUEST

Hispanic Information and Telecommunications Network, Inc. ("HITN"), by counsel, hereby submits its Petition to Deny the above referenced waiver request of WHTV Broadcasting Corp. ("WHTV") which seeks a permanent exemption from the mandated band-plan transition, the low power operating requirements and the new rules for the Broadband Radio Service ("BRS") and the Educational Broadband Service ("EBS") adopted by the FCC in a recent major rule revision.¹ Specifically, the requested waiver seeks to exempt BRS and EBS stations operating as part of WHTV's high power wireless cable system at San Juan, Puerto Rico from having to transition to the new band plan and the related band specific power limitations. While WHTV attempts to downplay the impact of its requested waiver by only referencing its potential impact on one neighboring system in the US Virgin Islands, it inexplicably fails to mention the

¹ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order ("*Broadband Services Order*") and Further Notice of Proposed Rulemaking ("*FNPRM*") in WT Docket 03-66, FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004). A summary of the *Broadband Services Order* was published in the Federal Register on December 10, 2004, 69 Fed. Reg. 72,020, and the Rules became effective January 15, 2005. WHTV has sought exemption from the panoply of post transition operating requirements contained in Section 27 of Part 47 of the Code of Federal Regulations.

devastating impact that a grant of such proposal would have on other co-channel and adjacent-channel EBS and BRS stations licensed all over Puerto Rico, when WHTV operates only in San Juan. As will be demonstrated herein, the waiver request, unsupported by signature or affidavit of any Commission licensee is procedurally defective and must be dismissed. Further, a grant of an opt out waiver for WHTV and presumably the nine related San Juan stations would create a daisy chain effect that would unfairly preclude all BRS and EBS stations in Puerto Rico from having the ability to transition to the new band plan, and would thereby frustrate the important Commission goals underlying the recently adopted rule changes across a wide and important geographic area. Further, the WHTV waiver request would unfairly place on such prejudiced neighboring licensees the entire burden and expense of figuring out how to operate in conformity with the Commission's post transition rules in the face of WHTV's continued high powered operations of the San Juan system. The net effect of this would be to allow WHTV to potentially forever prevent affected licensees from utilizing large swaths of their new GSAs adjacent to the WHTV system. Accordingly, HITN respectfully requests that the Commission promptly deny WHTV's waiver request so that affected licensees in Puerto Rico will be able to have certainty regarding their transition plans.

I. Standing

HITN, founded in 1981, is a 501(c)(3) non-profit corporation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN-TV, the first and only 24-hour a day Spanish language public interest television channel in the United States, is presently carried on the Dish Network,

DirecTV and the Time Warner and Comcast Cable Networks. HITNet, a satellite-based broadband service delivered via HITN's state of the art satellite platform at the Brooklyn Navy Yard, New York, is currently providing Internet access to the most underprivileged schools and libraries throughout Puerto Rico. HITN also holds over 60 station authorizations in the Educational Broadband Service ("EBS") for facilities throughout the United States and Puerto Rico. Among HITN's EBS holdings are B and D Group stations at Fajardo (WNC698 & WNC706), Jayuya (WND680 & WND679), Maricao (WND557 & WND558) and Aguadilla (WNC700 & WNC725), Puerto Rico.² (collectively the "HITN Stations").

In order to establish standing, a petitioner must make specific allegations of fact sufficient to demonstrate that grant of the subject application would cause the petitioner to suffer a direct, distinct and palpable injury.³ Additionally, the petitioner must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.⁴

Under the old ITFS rules, each of the HITN Stations was awarded a protected service area ("PSA") by the FCC and each was licensed to operate at high power from tall transmitter

² HITN is also an applicant for B and D group stations at Luquillo, Puerto Rico, the denial of which are presently on appeal to the US Court of Appeals for the District of Columbia Circuit as Case no. 05-1283. Such stations would also significantly overlap those of the San Juan B & D Group Channels.

³ See, *Minnesota PCS*, 17 FCC Rcd. at 128, ¶ 6; *Black Crow*, 16 FCC Rcd. at 15644-45, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; *Americatel Corporation*, Memorandum Opinion, Order, Authorization and Certificate, 9 FCC Rcd. 3993, 3995, ¶ 9 (1994) ("*Americatel Corporation*"); *Applications of Lawrence N. Brandt and Krisar, Inc.*, 3 FCC Rcd 4082, ¶ 7 and n. 5 (1988); See also, *Duke Power v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) ("*Duke*"); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

sites. Due to an increase in size of PSAs in 1995 from 15 to 35 miles six of the PSAs awarded to the HITN Stations also significantly overlap the PSAs of the relevant co-channel and adjacent-channel San Juan EBS stations.⁵ The San Juan Stations, operating from a primary common high elevation transmit site at Aguas Buenas, Puerto Rico and utilizing various booster facilities in and around the San Juan market, are leased to WHTV and would be included under WHTV's waiver request. Under the old service rules, both the HITN Stations and the San Juan Stations were free to attempt to serve households within the overlapping portions of their PSAs from their respective high-power high-site stations so long as they did not interfere with each other. Under the new rules, which became effective January 10, 2005, overlap areas have been bifurcated to create hard partitioned non-overlapping geographic service areas ("GSAs"). Post transition to the new bandplan, protection to adjacent GSAs is to be guaranteed by signal strength limitations at the GSA boundaries.⁶ In the case of four of the HITN Stations, the new GSA boundary with relevant San Juan Stations will occur within less than 16 miles of WHTV's main transmission site.

WHTV proposes to continue high power operations across the full EBS/BRS spectrum band from its transmit radiation center height at 1500 feet above mean sea level, as well as the continued use of its several high power booster stations, without regard to the new band-plan, or

⁴ See *Americatel Corporation*, 9 FCC Rcd. at 3995, ¶ 9; *Black Crow*, 16 FCC Rcd. at 15645, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; See also *Duke*, 438 U.S. at 72, 74, 78, 81.

⁵ The relevant co-channel San Juan stations would include WLX323 (B-Group), licensed to the University of Puerto Rico and WLX322 (D-Group), licensed to Puerto Rico Medical Association. The relevant Adjacent-channel stations would include WLX321 (A-Group) licensed to Catholic Archdiocese of San Juan, WLX315 (C-Group) licensed to Caribbean University, and WHT654 (E-Group) licensed to Victor Ginorio Gomez. (collectively the "San Juan Stations")

⁶ *Broadband Services Order* at ¶ 108.

any height and power limitations contained within part 27 of the Commission's Rules. HITN desires to move to new low power uses, and no longer desires to continue operating high power service under the old rules. WHTV's proposed continued high power operations would completely undermine HITN's ability to transition each of its adjacent market stations to the new bandplan and operational power limitations. Any low power two-way transmissions from such HITN stations in the lower band segment within large areas of HITN's GSAs would be drowned out by WHTV's neighboring co-channel and adjacent-channel high-power transmissions. In the face of such continued high-power operations by closely spaced neighboring stations, HITN, in order to be able to provide any meaningful service at all over its stations, would be forced to forsake its desired transition to the new bandplan and forego all benefits and potential services enabled under the new rules, and instead unwillingly seek a similar transition waiver for its stations. Only in this fashion could HITN hope to compensate for the undesired San Juan signals that would continue to bombard its GSAs. Any such HITN requested waiver would in turn have a similar impact on other adjacent market stations, and the impact would snowball until no station on the B or D channels on the island of Puerto Rico would be able to complete a transition to the new bandplan.⁷

HITN has been eager to transition its Puerto Rico facilities to the new band-plan, so that it may begin providing new broadband services in its market areas to schools, libraries and eventually in conjunction with a wireless operator, to the general public. Such services are seen as complimentary to HITN's HITNet services currently available in Puerto Rico via Satellite.

⁷ Presumably other licensees on other channels neighboring the WHTV San Juan system would be similarly impacted and similarly precluded from accomplishing the transition.

The San Juan Stations' continued operation of their facilities at high power under WHTV's requested waiver would preclude HITN's transition to the new band-plan, and therefore HITN would sustain a real and personal injury by virtue of a grant of the requested waiver. Further, such injury would be avoided by simply denying the requested waiver. Accordingly, HITN has demonstrated both the direct injury and causal link necessary for standing under 47 USC § 309(d)(1).

II. Argument

As an initial matter, WHTV's waiver request is defective since it attempts to modify the licensing rights and obligations of Commission EBS and BRS licenses without so much as a signature from such licensees. In its waiver, WHTV requests numerous permanent and fundamental exemptions from various provisions of the Commission's rules, presumably on behalf of no fewer than nine EBS and BRS stations licensed by the FCC to entities other than WHTV. However, such waiver request is not signed by any of the licensees that are supposedly seeking the rule waivers, nor is the document supported by affidavits or declarations from such licensees evidencing in any way that it is their intention and desire to be forever exempted from the benefits and obligations of the Commission's mandated transition and operational requirements. Accordingly, because it cannot be verified that the licensees that would be primarily involved individually desire such waivers, the request is defective and must be summarily dismissed without consideration.

The FCC in its *Broadband Services Order* stated that, while it was declining to allow multi-channel video programming distributors ("MVPD") to simply opt-out of the transition, it would consider individual opt-out waiver requests on a case-by-case basis for MVPDs "that

provide MVPD service to five percent or more of the households within their respective GSAs.”⁸ However, nowhere in WHTV’s waiver request does it claim, much less provide evidence, that it provides MVPD service to five percent or more of the households in its relevant GSA. Accordingly, WHTV’s waiver request is deficient and must be dismissed without further consideration.

While WHTV devoted a great deal of discussion in its waiver request to the expenditures that it has made to develop its San Juan system, it spent no time at all discussing the impact of its proposal on co-channel and adjacent-channel stations, including all of HITN’s stations, located in nearby markets on the island of Puerto Rico. It is negligent at the minimum for an entity seeking a waiver of the Commission’s technical operating rules to devote no discussion at all to the potential impact of such a waiver on neighboring stations, much less provide no technical exhibits regarding the significant impacts of such a request.⁹ The burden is always on the moving party seeking a waiver of the FCC’s operating technical rules to demonstrate that its proposed operations will not adversely impact the operations of neighboring potentially affected licensees. Here WHTV has utterly failed to address this essential element and its rule waiver request is therefore defective and must be dismissed without further consideration.

Currently there are thirty-two (32) EBS and BRS stations licensed to the thirty-five mile wide by one-hundred and five mile long island, of which only nine (9) are associated with

⁸ See *Broadband Services Order* at ¶¶ 75-77.

⁹ While in all fairness, it is possible that WHTV, being an operator, thinks in terms of impact on other neighboring commercial systems like the one it references in the Virgin Islands, the fact remains that its San Juan system is cobbled together from individual EBS and BRS channel groups, and any rule waiver request must examine the impact of its proposed operations on all potentially affected neighboring facilities. It is also inexcusable that WHTV did not serve its waiver request on HITN, and as far as HITN can tell on any other potentially affected EBS or BRS licensees.

WHTV's San Juan system. Of the remaining twenty-three stations, eighteen shared co-channel and adjacent-channel PSA overlaps with San Juan stations and could legitimately be expected to receive GSA boundary protection from such stations under the new rules. Additionally, given the small size of the island, no station in Puerto Rico will be unaffected by the daisy chain effect that will occur if overlapping stations are prevented from making the transition to the new band-plan by WHTV's attempted opt-out.

While it is true that HITN did not focus on the opt-out discussion in the recent rulemaking, it was not clear at that time what impact such opt-out proposals would have. This initial opt-out request by WHTV has brought home the magnitude of the problem. While it was anticipated that a few small systems in remote areas might seek an opt-out, HITN had never imagined that a single opt-out proposal might preclude the transition of eight of HITN's licensed EBS facilities, affecting a full thirty-two of HITN's channels. Further, it was not anticipated that such an opt-out request could have a daisy chain effect precluding the transition of stations over a wide geographic area. Therefore, to the extent possible, HITN requests that the Commission also consider this opposition in its evaluation of the opt-out discussion in the FNPRM and the reconsideration of its Broadband Services Order and its FNPRM in WT Docket 03-66.

Attached are overlap maps that demonstrate incredibly tight spacing of EBS and BRS stations on the island of Puerto Rico.¹⁰ As discussed above, the PSAs of four of the HITN Stations encompass the current main transmit site of the corresponding co-channel and adjacent channel San Juan stations and thus, the new GSA boundary line between such stations lies within

¹⁰ See Puerto Rico EBS & BRS Maps by Channel Group, attached hereto as exhibit 1.

16 miles of such transmit site.¹¹ Because all such stations in their pre-transition parameters operate at high power from relatively high transmission points, HITN's receive sites, when oriented toward HITN's relevant transmit site are able to receive such signal over the interfering signal from the co-channel and adjacent channel San Juan Stations. Under the new rules, as part of a transition to a new band-plan all EBS and BRS stations are to reduce power in the lower and upper segments of the band, thereby enabling neighboring stations to deploy low power mobile, transportable and fixed broadband devices designed to operate in such band segments. In order to ensure interference free operation of such low power systems within each licensee's GSA, neighboring co-channel and adjacent channel stations are required to reduce their signal levels to prescribed limits by the time they reach the dividing GSA boundary.

In its waiver request WHTV requests authority to continue high powered operations indefinitely across all band segments without regard to GSA boundary signal strength limits or tower height limitations within close proximity to GSA boundaries. The result of such a waiver if granted will be the continued presence of a 53 dbm signal from a facility with a radiation center at 1500 ft AMSL a scant 16 miles, or less, from four HITN GSA boundaries. In addition, WHTV also operates a number of booster stations within closer proximity to HITN's GSA boundaries, which it will continue to operate without regard to the current rules. Thus, if HITN were to transition its facilities to the new band plan it would not receive the protections

¹¹ The main transmit site for San Juan Stations WLX321, WLX323, WLX315, WLX322 & WHT654 lies only 14.3 miles from the GSA boundary with HITN's B and D Group stations at Fajardo (WNC698 & WNC706) and 16.2 miles HITN's B & D Group stations at Jayuya (WND680 & WND679). HITN's stations at Maricao (WND557 & WND558) also share an overlap with the San Juan stations, and would thus be directly affected although to a lesser degree. HITN's stations at Maricao and Aguadilla (WNC700 & WNC725) would also be affected by the daisy chain preclusionary effect that the San Juan opt-out would have on HITN's stations at Jayuya. If the Jayuya stations must remain high powered to compensate for the San Juan opt-out then HITN's Maricao and Aquadilla stations would also have to remain high powered to counter the effects of the San Juan stations as well as the Jayuya stations.

contemplated in the new rules. Accordingly, any low power cellular operations attempted in the lower band segment within the bulk of HITN's GSA would be drowned out by the undesired signal from the high powered San Juan wireless cable system. The cost of designing any system that could overcome the presence of such high co-channel; and adjacent-channel interference would require so many cells as to be economically prohibitive.

Thus, one result of WHTV's waiver will be to deny HITN the ability to operate its neighboring stations in the manner contemplated under the FCC's new EBS rules. In fact, in order to retain any beneficial use of its channels, HITN would be forced to seek a similar opt-out waiver for transition to the new band-plan in order to maintain a high enough desired to undesired signal ratio at its receive sites. However, under such a scenario, HITN would be substantially restricted to providing traditional EBS programming on all of its channels. In turn, HITN's stations at Maricao and Aguadilla would be similarly prevented from making the transition and consequently would also need to seek a waiver. This daisy chain of waivers would essentially occur on every EBS and BRS channel group by virtue of the effect of co-channel or adjacent-channel interference originating from WHTV's proposed operations.¹²

Accordingly, it can be seen that WHTV's proposed waiver would result in denial of transition rights and service capabilities by virtually every other EBS and BRS station on the island of Puerto Rico. Such a broad geographic impact would frustrate the Commission's stated

¹² This effect can be observed from the Puerto Rico EBS and BRS station maps supplied by HITN for each channel group. See exhibit 1 hereto.. While HITN did not plot adjacent channel overlaps, it is clear from the maps provided that where overlaps are not present or do not daisy chain by co-channel, they certainly would by adjacent-channel.

goals in adopting new rules and a modified band-plan. Accordingly, the financial impact on WHTV of a transition to the new band-plan while regrettable cannot outweigh the prejudicial effect that the grant of its requested waiver would have on neighboring EBS and BRS stations such as HITN's, nor the adverse impact that such waiver would and on the implementation of the Commission's new band-plan as well as its new service rules and policies across a wide geographic area.

Thus, HITN respectfully requests that for the reasons set forth herein that the above-referenced waiver request be denied

Respectfully submitted,

HISPANIC INFORMATION AND
TELECOMMUNICATIONS NETWORK, INC.

By:



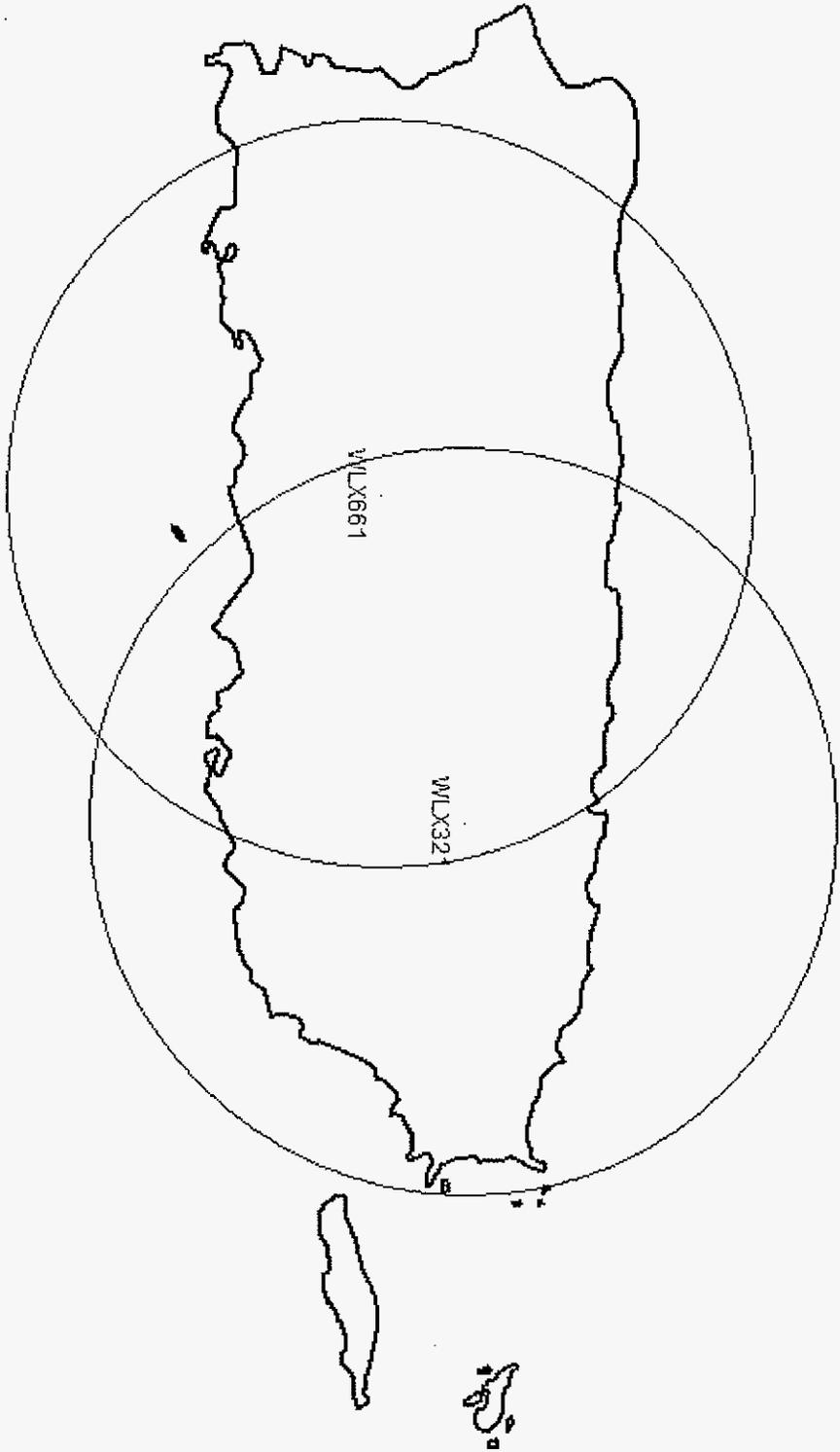
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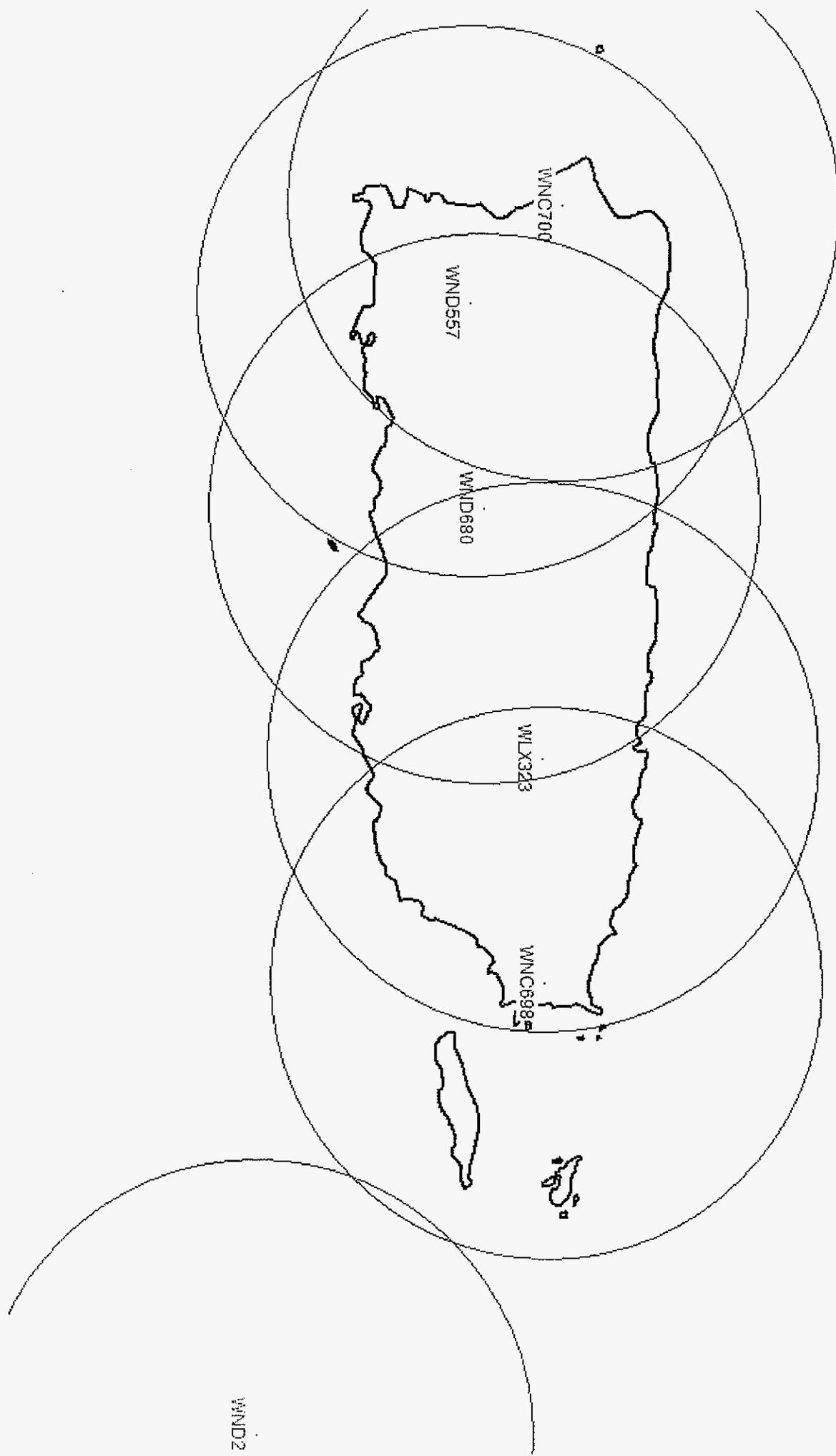
December 1, 2005

EXHIBIT 1

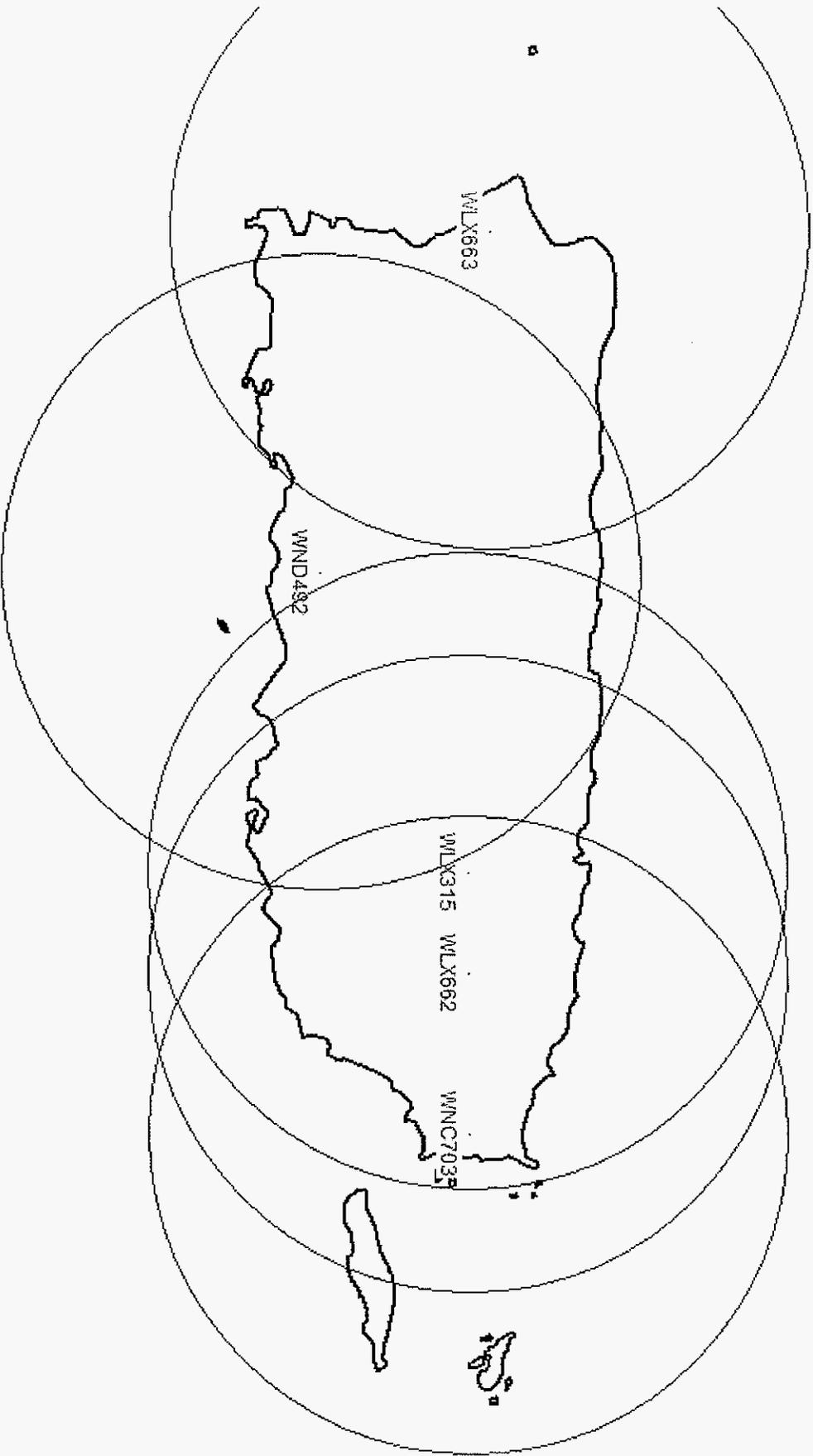
PUERTO RICO A GROUP



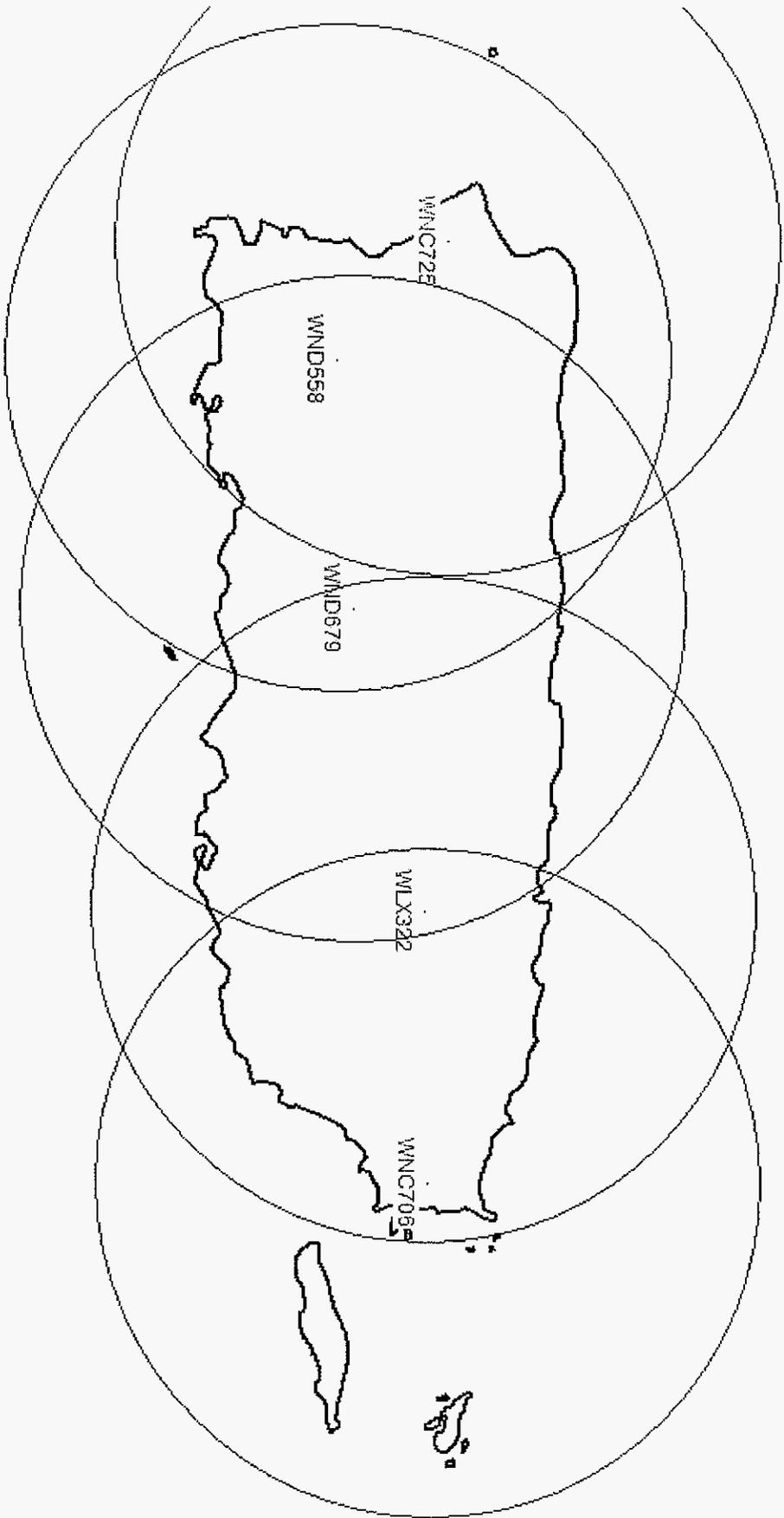
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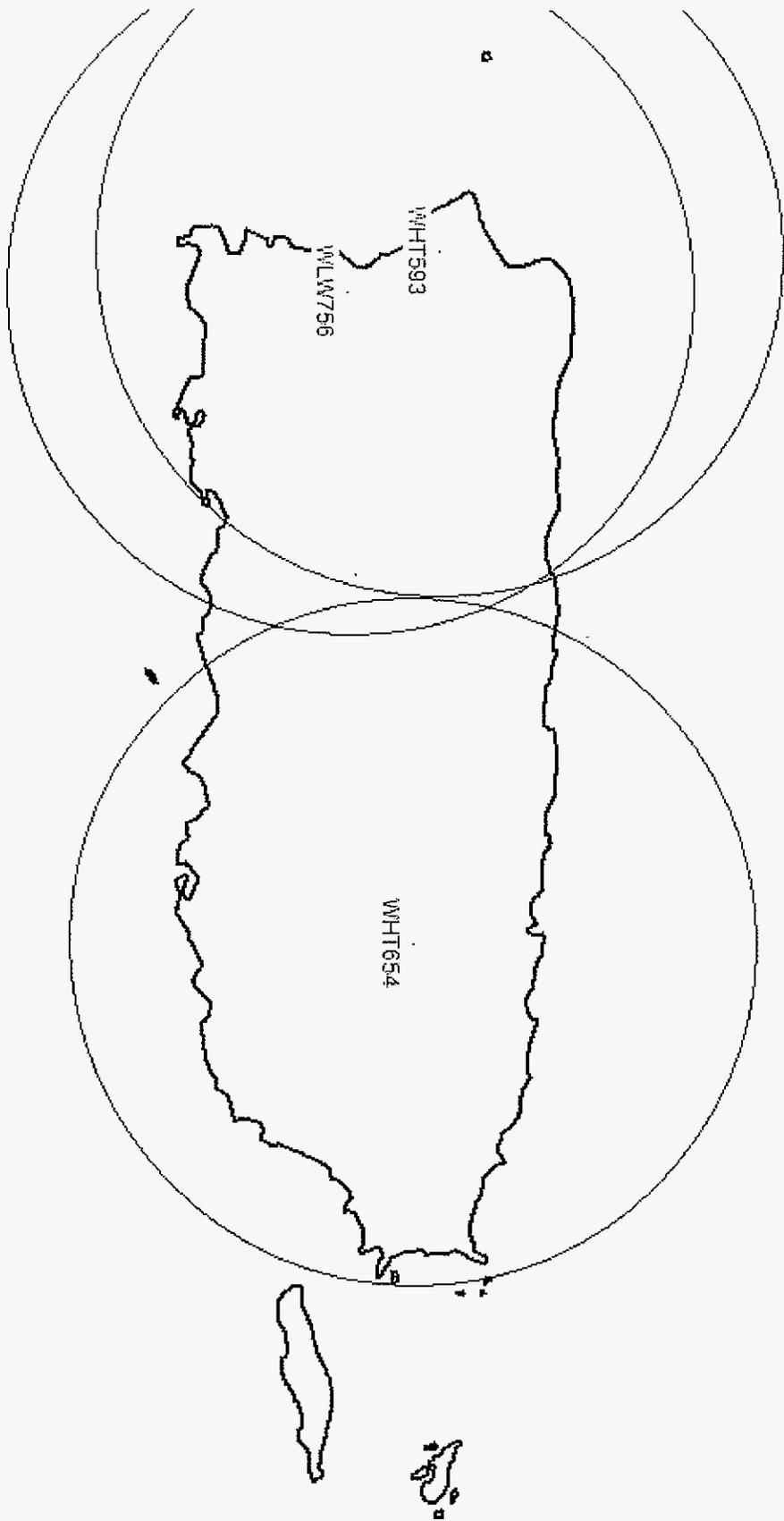
PUERTO RICO C GROUP



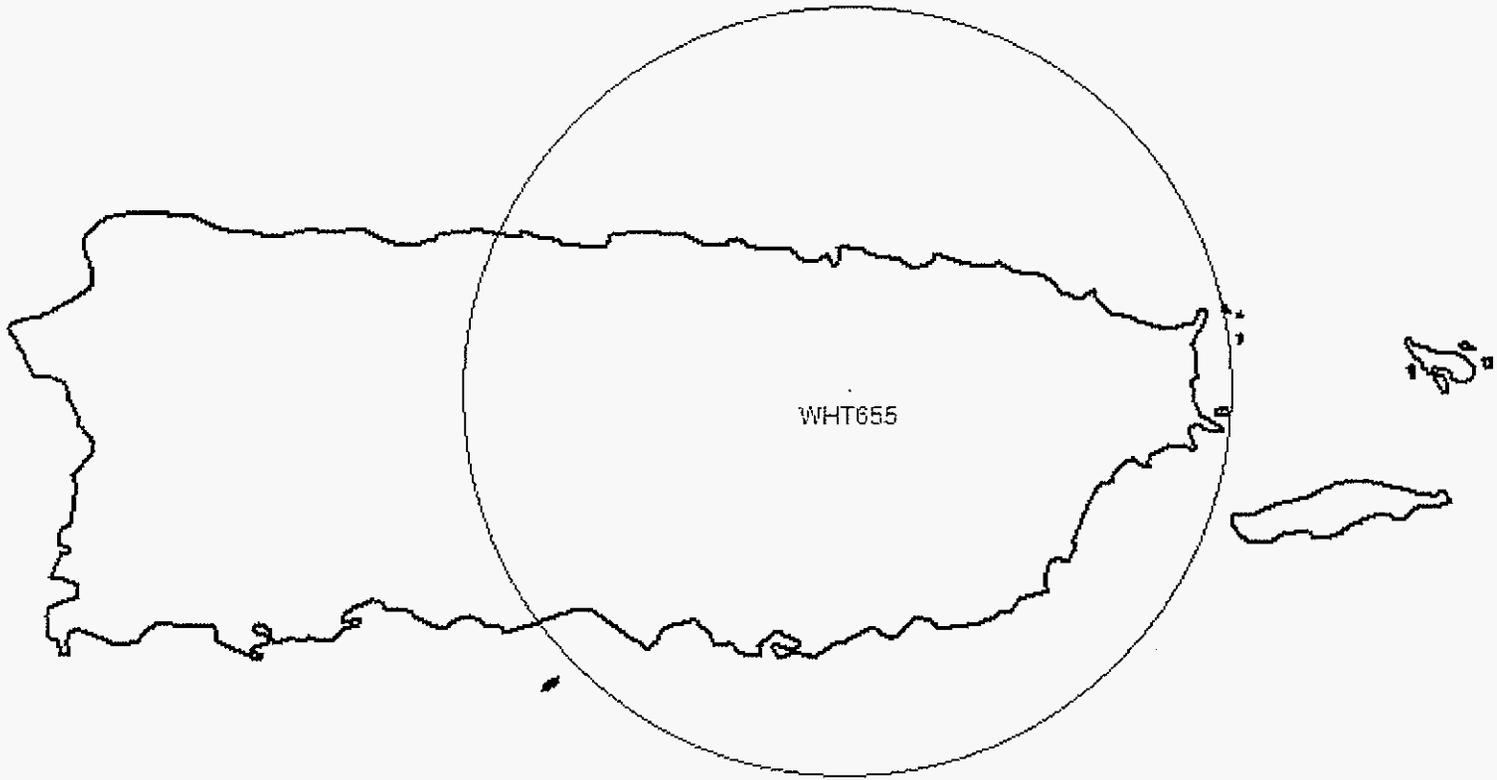
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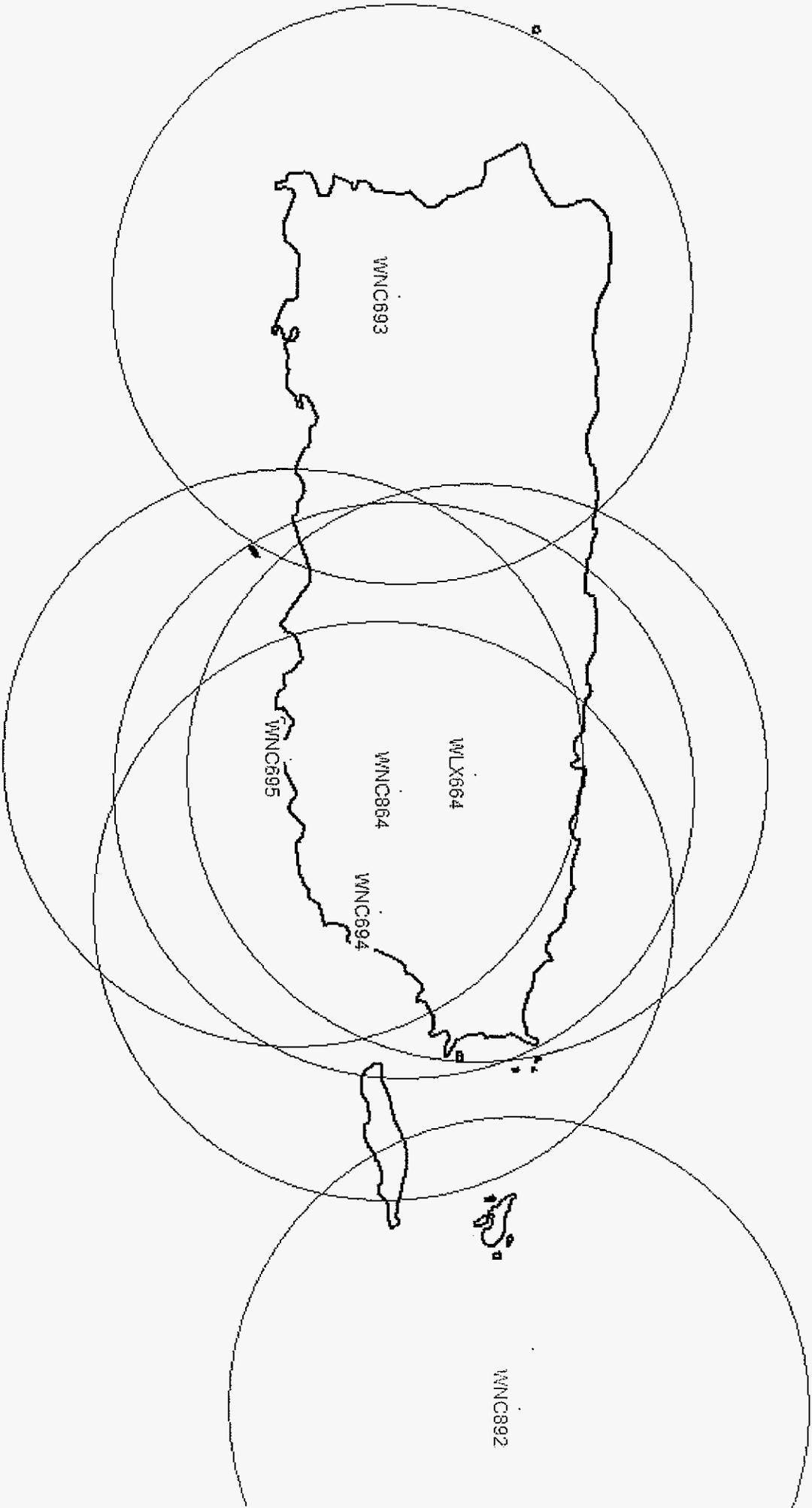
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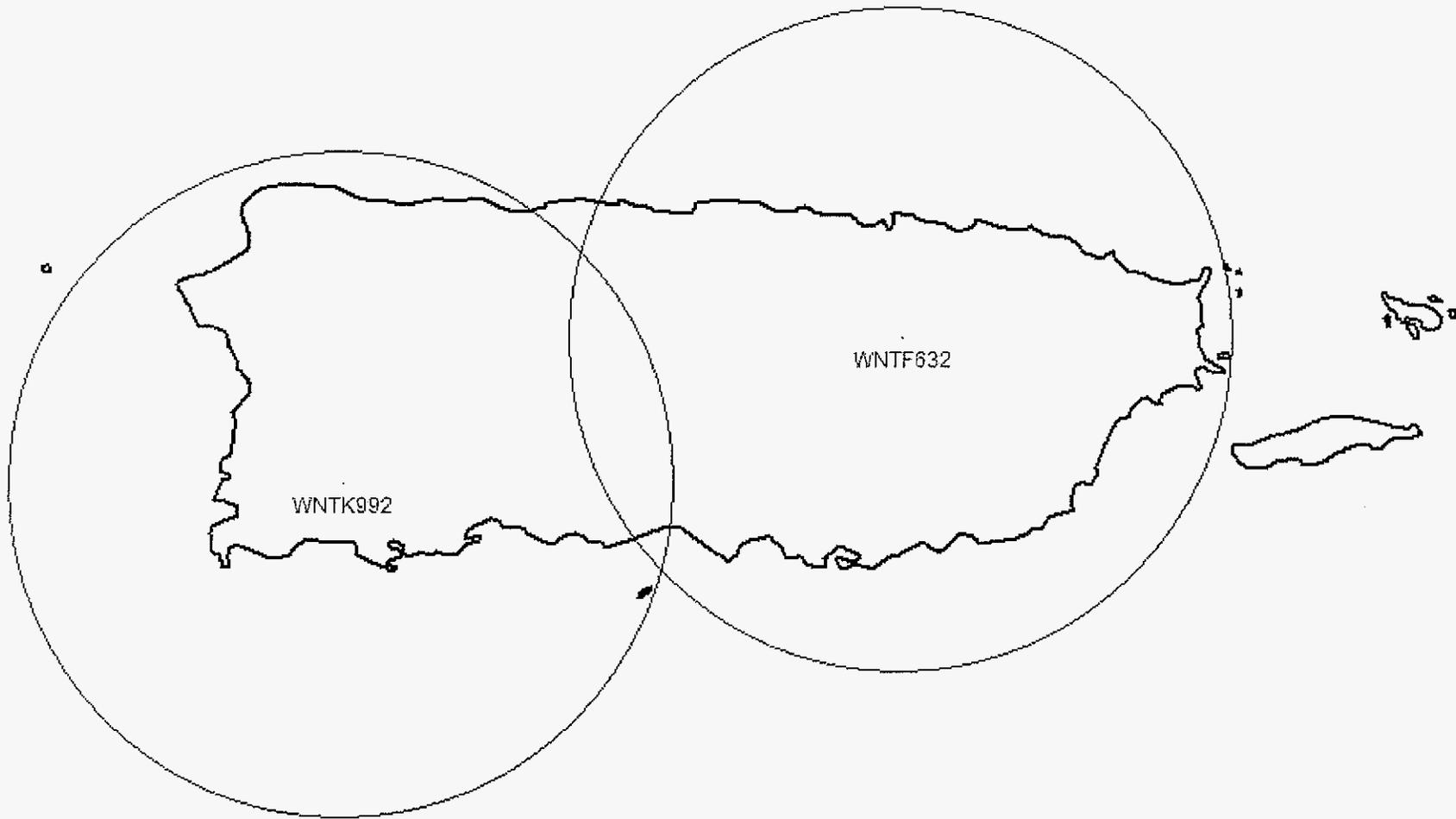
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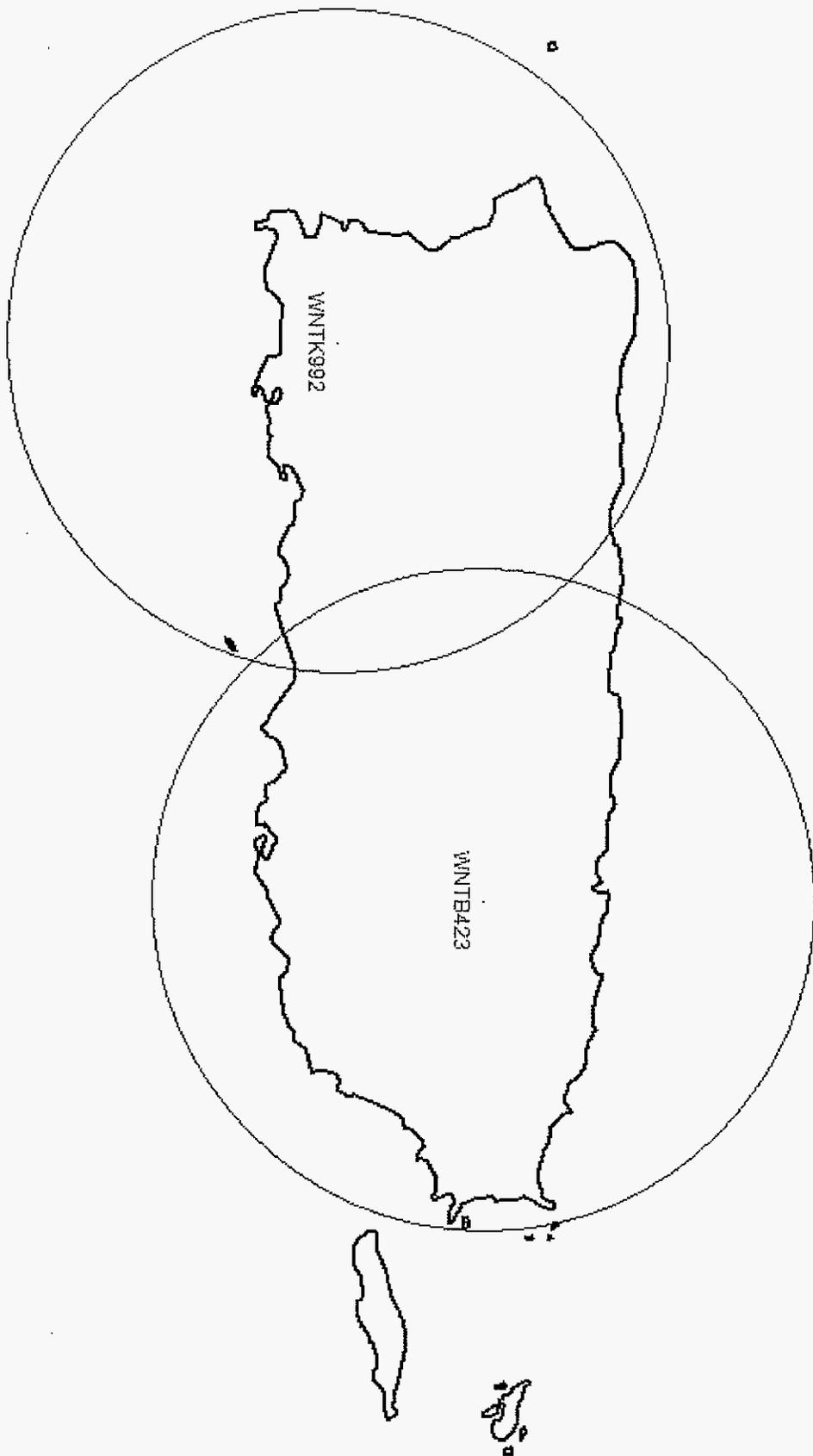
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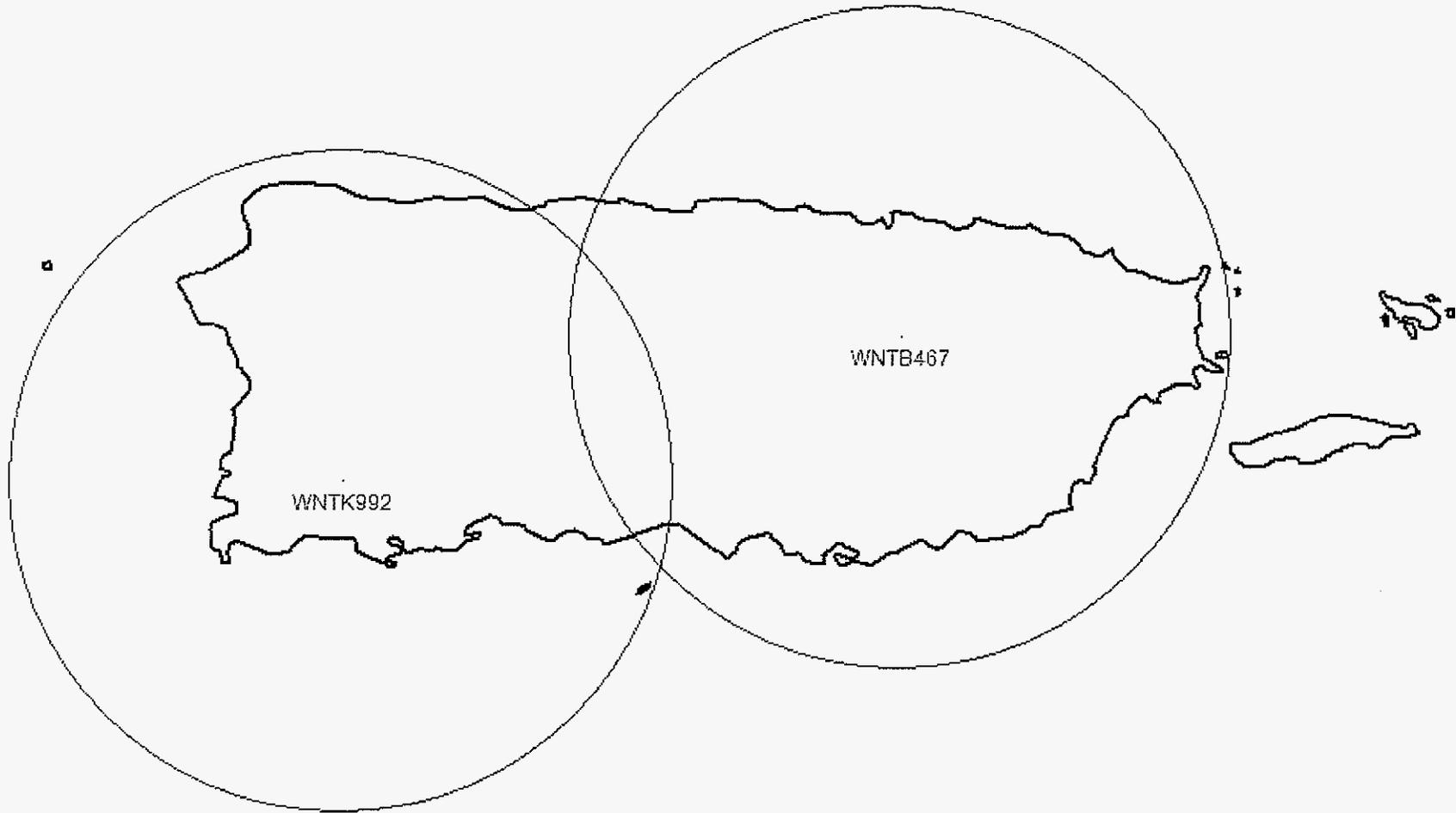
PUERTO RICO H1



PUERTO RICO H2



PUERTO RICO H3



CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing Petition to Deny WHTV Waiver Request of Hispanic Information and Telecommunications Network, Inc. were served this 1st day of December, 2005 on the following parties via first class mail of the United States Postal Service, or such other method as indicated, to the following addresses:

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