

ORIGINAL

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

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In the Matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 04-318
Table of Allotments)
FM Broadcast Stations) RM No. - 11040
(Culebra, and Vieques Puerto Rico)

To: Assistant Chief, Audio Division
Office of Broadcast License Policy
Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Western New Life, Inc. ("Petitioner")¹, permittee and operator by Special Temporary Authority ("STA") of Station WXXZ-FM (the "Station"), by its counsel, respectfully submits its Reply to the Oppositions to Petition for Reconsideration filed by Aerco Broadcasting Corporation ("Aerco") and V.I. Stereo Communications Corp. ("VISCC"). Aerco believes the Vieques allotment cannot be downgraded as long as an expression of interest was filed. Aerco does not believe a comparison between the existing and proposed arrangement of allotments is necessary. VISCC opposes the deletion or downgrade of the Vieques allotment because of its pending application for review concerning the Vieques allotment.² Neither party addresses the public interest concerns raised by Petitioner throughout this proceeding and neither party refutes Petitioner's argument that, under appropriate circumstances, a vacant allotment can be downgraded. Those circumstances exist in this case, and the Commission should downgrade the

¹ Western New Life is the successor-in-interest to the original petitioner, La Gigante Radio Corporation, by way of an assignment application (BAPH-20041220AAY) which was granted on April 25, 2005, and consummated on May 30, 2005. For convenience, "Petitioner" shall refer to both La Gigante Radio Corporation and Western New Life.

² Assuming that VISCC's application for review concerning the Vieques allotment is still pending, Petitioner urges the Commission to resolve that pleading promptly. If the Commission reverses itself and grants VISCC's Application for Review, then this proceeding is moot, and VISCC will have another opportunity to construct at Vieques. However, if the Application for Review is denied, then the Commission could and should take the actions requested by Petitioner in this proceeding.

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vacant and unapplied for Vieques allotment, and change the Culebra allotment from Channel 254A to Channel 291A.

IT WAS NOT PREMATURE FOR PETITIONER TO INITIATE THIS PROCEEDING.

Despite being awarded a construction permit to provide Culebra with its first local service, Petitioner has been prohibited from obtaining a license for the facility on *any* channel. VISCC was one of the instigators of the rulemaking proceeding that is at the heart of Petitioner's inability to obtain a license for its operation at Culebra. Long ago, VISCC was the licensee of Station WVIS(FM), then licensed to Christiansted, VI on Channel 291B. As part of the rule making proceeding in MM Docket No. 91-259³, VISSC asked the Commission to amend the FM Table of Allotments and move the allotment of Channel 291B from Christiansted, VI to Vieques, PR. The Commission's *Report and Order* in MM Docket 91-259 adopted VISCC's requested change the change became effective in 1995. Six years later, in 2001, the FCC deleted VISCC's license for WVIS because it never constructed at Vieques, and had been off the air more than 12 consecutive months at Christiansted. After the decision to cancel the license in 2001, the call sign for WVIS was deleted.

Once the Commission took those two actions, there was no easy way for Petitioner to be aware of any claim VISCC might have to the Vieques allotment. Petitioner filed its petition for rule making to initiate this proceeding in good faith. Had it known of the existence of VISCC's pending application for review, it would have raised the matter in the initial petition and urged resolution of that pleading starting in 2004 when the petition to initiate this proceeding was filed.

As a procedural matter, Petitioner does not believe VISCC's application for review needs

³ See *Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan and Vieques, Puerto Rico and Christiansted and Frederiksted, Virgin Islands, Report and Order in MM Docket No. 91-259*, 10 FCC Rcd 6673 (1995); recon denied, *Memorandum Opinion and Order*, 11 FCC Rcd 16392 (1996); app. for review. denied, *Memorandum Opinion and Order*, 12 FCC Rcd 10055 (1997); further recon. denied, *Memorandum Opinion and Order*, FCC 99-147, released June 21, 1999 (64 Fed. Reg. 48307, September 3, 1999).

to be resolved before a ruling on Petitioner's reconsideration request can take place. If VISCC's Application for Review is granted, then any changes adopted in this proceeding would have to be reversed, and there would be no auction of the Vieques allotment. VISCC would be given a second opportunity to construct on Channel 291B at Vieques. If the Commission denies VISCC's Application for Review, then whatever decision is reached in this proceeding will stand. In any event, Petitioner urges the Commission to promptly resolve VISCC's application for review so that whatever is ultimately decided in this docket can be implemented without delay.

PETITIONER SHOULD NO LONGER BE PENALIZED FOR ITS PUBLIC SERVICE.

Aerco's Opposition accuses Petitioner of bringing this problem on itself by commencing operations on Channel 293A (the channel where the construction permit was first awarded) after the Report and Order in MM Docket 91-259 had changed the allotment to Culebra from Channel 293A to Channel 254A. Aerco believes Petitioner should simply wait until the other stations required to move in that 1995 decision complete their moves, which would then allow Petitioner to commence operation on Channel 254A.

Petitioner commenced operation on Channel 293A because at the time it believed in good faith it was doing nothing wrong. Every other licensee involved in the Docket 91-259 proceeding was allowed to continue operating at pre-R&O channels and communities until the moves ahead of them in the daisy chain were completed. None of the facilities ordered to move as a result of the decision in that docket were forced to abandon their pre-R&O channels until operation on the pre-R&O channel prevented implementation of the post-R&O arrangement of allotments. Expecting to be treated like every other affected party, Petitioner's predecessor commenced operation on Channel 293A, which was the pre-R&O channel allotted to Culebra.

Petitioner was surprised and frustrated when advised by the Commission that its

operation on Channel 293A violated FCC rules and procedures. Its mission was to provide first local service to Culebra. But the Commission said it could not do so on Channel 293A because that channel was deleted from the Table of Allotments when Docket 91-259 was decided.⁴ Since 1995, Petitioner has been unable to obtain a license to operate on the old channel (293A) or the new channel (254A) at Culebra through no fault of its own. Aerco believes Petitioner and the residents of Culebra should wait until all the changes adopted in the Docket 91-259 R&O are implemented before new service to Culebra commences. Petitioner believed Culebra deserved better and sought special temporary authority (STA) to operate on Channel 291A, which the Commission granted because it advances the important public interest goal of providing first local service to a community. How important is first local service there? Just last month the island of Culebra was evacuated as Tropical Storm Chris approached.⁵ No explanation of the importance of a local radio station in that situation is necessary. Petitioner's initiative in constructing at its peril to provide an important public service should be applauded not punished.

Aerco claims Petitioner's STA "effectively blocks the proposed use of the allocated channels to both Culebra, and more importantly, to Vieques, PR."⁶ Nothing could be further from the truth. Existing FM operators and construction permits issued for new FM facilities do not have to protect the current operation of WXZX. Petitioner's STA was granted on a secondary basis. Like an FM translator, should a any full power FM facility file a minor change application that encroaches on Petitioner's current operation of WXZX by STA, then Petitioner would be ordered by the FCC to modify its operations of WXZX to ameliorate the problem or cease operations. Petitioner's purpose in initiating this rule making proceeding was to finally,

⁴ Ironically, every other affected facility has been allowed to continue operation at pre-R&O facilities, even though the pre-R&O allotments should all be deleted from the Table of Allotments. This might explain why, more than 10 years after the decision, the changes adopted in that docket have yet to be fully implemented.

⁵ See attached AP News item dated August 2, 2006.

⁶ Aerco Opposition at p.2.

after over a decade of waiting, obtain a frequency where it can obtain a license for its operation of WXXZ, insuring the continuation of the first local service Culebra residents have come to rely upon.

SUFFICIENT PRECEDENT EXISTS TO SUPPORT THE DOWNGRADE OF THE VACANT VIEQUES ALLOTMENT.

Petitioner has cited *Bethel Springs, Tennessee*, 17 FCC Rcd 14472 (2002) as a case that supports the outcome desired by Petitioner. The Report and Order in the instant docket (DA-06-1308, released June 23, 2006) attempted to distinguish Bethel Springs from this case, but in its Petition for Reconsideration, Petitioner demonstrated that the facts in the two cases are really very similar. But Bethel Springs is not the only case that supports the result Petitioner seeks in this case.

In the Report and Order in *Weaverville, Palo Cedro and Alturas, California*, 21 FCC Rcd 5131 (2006), (“Weaverville R&O”) the Commission approved a request by a licensee to change a station’s community of license to provide first local service to a new community. To enable that change, the licensee proposed the downgrade of a vacant allotment (from Channel 267C to Channel 268C1) at Alturas, CA. IT also proposed allotting Channel 277C as a replacement full Class C allotment for Alturas.

In the Notice of Proposed Rulemaking in the case (DA 05-727, released March 18, 2005) the Commission observed that the new Class C allotment at Alturas appeared to be “an attempt to remediate a decrease in potential service from the downgrade of the [vacant] Channel 267C at Alturas; however, because Channel 267C at Alturas is a vacant allotment and no service is currently provided using that channel, there is no need to address a potential loss of service.” NPRM at p.2. Thus, downgrades of vacant allotments are permissible when such action results in a preferential arrangement of allotments.

Starting from the premise that the existing versus proposed arrangement of allotments must be compared using the criteria set forth in *Revision of FM assignment Policies and Procedures*,⁷ the Commission adopted the licensee's proposal. The Weaverville R&O concluded that retaining the *status quo* would advance only priority 4 "other public interest matters" while providing first local service to a new community would advance priority 3. There was no separate discussion of the downgrade of the vacant allotment. Just the decision that, compared to retention of the existing arrangement of allotment, downgrading a vacant allotment in order to provide a first local service resulted in a preferential arrangement of allotments.

The Commission approved the downgrade of a vacant allotment over objection in *Othello, East Wenatchee and Cashmere, Washington and Wallace, Idaho*, 6 FCC Rcd 6476 (1991) ("Othello R&O"). That proceeding was initiated when a licensee proposed to simply upgrade its authorized allotment from Channel 248C2 to Channel 248C1.⁸ No first local service was proposed, so only priority 4 (other public interest matters) was advanced. To facilitate the simple upgrade, two existing facilities had to change frequencies and a vacant allotment in Wallace, Idaho needed to be downgraded from Channel 248C to Channel 248C2. Each of the two licensees of the facilities that would need to change from one Class A frequency to another filed to oppose the proposal. In spite of the objections, the Commission approved the requested upgrade even though it required the downgrade of a vacant allotment.

Providing the community of license "with a wide coverage area FM transmission service" by virtue of the upgrade was all the justification necessary for the approval of the downgrade of the vacant allotment. As for the two licensees who objected to having to change frequencies, the Commission said:

⁷ 90 FCC2d 88 (1982).

⁸ During the proceeding, the licensee voluntarily applied for a modification to change its authorized channel to Channel 248C3.

Under Commission policy, all affected stations will be afforded a significant period of time before they are required to change to the new frequencies. It is generally not necessary for a change in frequency to take place until use of the existing frequency actually prevents a newly authorized station from inaugurating service.⁹ (citations omitted; emphasis added).

Petitioner is certain that the “significant period of time” was never intended to stretch beyond a decade. However, by extension, that policy should have allowed Petitioner’s predecessor to commence operation on Channel 293A (the channel of its initial construction permit) until its operation there would prevent another station moved in Docket 91-259 from inaugurating service. If the policy had been applied to Petitioner, then WXZX would not now be operating under STA as a tenuous secondary service. It would be a fully authorized primary service, waiting patiently for everyone else ahead of it in the Docket 91-259 daisy chain to make their required moves.

Petitioner was never afforded that luxury. Since the R&O in Docket 91-259 was released, Petitioner was not allowed to obtain an authorization for the pre-R&O channel, and it cannot obtain one for its post-R&O channel because the other stations ordered to move in that proceeding have not done so.

CONCLUSION

On reconsideration, the Commission must weigh whether retention of the current arrangement of allotments serves the public better than the arrangement proposed by Petitioner. The question then is simple: Is providing first local service to Culebra (advancing priority 3) even though it requires downgrade of a vacant unapplied for allotment a superior proposal to retaining the status quo (advancing priority 4). The answer is clear. Petitioner’s proposal is superior.¹⁰

⁹ Othello R&O at 6477.

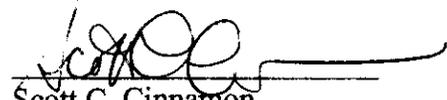
¹⁰ And to the extent adopting its proposal requires action on VISCC’s pending application for review, Petitioner urges the Commission expedite consideration of that pleading.

WHEREFORE, Petitioner respectfully requests that the Commission reconsider its decision in the R&O and amend the FM Table of Allotments by substituting Channel 291A for Channel 254A at Culebra and substituting/downgrading Channel 291B to Channel 254A at Vieques.

Respectfully submitted,

WESTERN NEW LIFE, INC.

By:



Scott C. Cinnamon
Law Offices of Scott C. Cinnamon, PLLC
1090 Vermont Ave., N.W.
Suite 800, #144
Washington, D.C. 20005
(202) 216-5798

Its Counsel

September 7, 2006



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September 6th, 2006

Storm Prompts Tourists' Evacuation

Aug 2nd - 9:47am

By LAURA CANDELAS
Associated Press Writer

SAN JUAN, Puerto Rico (AP) - Tourists evacuated two small islands off the coast of Puerto Rico on Wednesday as Tropical Storm Chris gained strength in the eastern Caribbean and was expected to become the first hurricane of the Atlantic season.

The storm had top sustained winds of 65 mph as it skirted the northern Leeward Islands and moved west-northwest toward the U.S. Virgin Islands, the British Virgin Islands and Puerto Rico.

A hurricane watch was issued for the southeastern Bahamas and the Turks and Caicos Islands, the National Hurricane Center said. The watch issued at 11 a.m. EDT meant hurricane conditions of winds of at least 74 mph were possible within 36 hours.

The storm was expected to pass at least 100 miles north of Puerto Rico, but up to 8 inches of rain was likely to cause flash floods and mudslides, authorities in the U.S. territory warned.

"We'll see the effects of heavy rain and wind gusts from the periphery of the system," said Rafael Mojica, a meteorologist with the National Weather Service.

Some 600 tourists evacuated Culebra and Vieques, islands off Puerto Rico's east coast.

"Everybody left," said Jacinto Jiminez, owner of a hotel on Culebra, about 17 miles offshore. "Whenever there is a storm warning they try to get most of the people out."

Puerto Rico's consumer affairs agency dispatched dozens of inspectors to ensure stores complied with an order to freeze prices on basic necessities.

There were no reports of major damage or injuries as Chris swirled past the Leeward Islands.

In Anguilla, the storm caused heavy rain and strong winds overnight but the storm was much less severe than expected because it shifted to the north at the last minute, said Elizabeth Klute, director of the disaster management agency for the British Caribbean territory.

"It just kind of skirted us," Klute said. "It's moving on."

People in the islands of Antigua and St. Maarten awoke to a light rain. There were no reports of major flooding or other damage from the storm.

Forecasters said the storm could hit anywhere from south of Cuba to Florida by late this weekend.

The first named storm of the 2006 season, Tropical Storm Alberto, swept over Florida in mid-June, then

plowed northward along the U.S. coast past the Outer Banks. It was blamed for one death.

Last year's hurricane season was the worst in more than 150 years of records. A record number of tropical storms and hurricanes formed, including the devastating Hurricane Katrina.

Associated Press writers John Pain in Miami, Marvin Hokstam in St. Maarten, Colin James in Antigua and Clive Bacchus in St. Kitts contributed to this report.

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CERTIFICATE OF SERVICE

I, Scott C. Cinnamon, do certify that I have on this 7th day of September, 2006, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Reply to Opposition to Petition for Reconsideration" to the following:

John A. Karousos, Assistant Chief *
Audio Division, Media Bureau
Federal Communications Commission
Washington, D.C. 20554

Sharon P. McDonald *
Audio Division, Media Bureau
Federal Communications Commission
Washington, D.C. 20554

James L. Oyster, Esq.
Law Offices of James L. Oyster
108 Oyster Lane
Castleton, VA 22716-9720
Counsel to V.I. Stereo Communications Corp, et al.

Francisco R. Montero, Esq.
Michael W. Richards, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Counsel to Raul G. Rivera Menendez

John A. Borsari
Borsari & Associates
P.O. Box 100009
Arlington, VA 22210
Counsel to Aerco Broadcasting Corp.

Richard F. Swift, Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W., Suite 200
Washington, D.C. 20036-3101
Counsel for International Broadcasting Corporation


Scott C. Cinnamon

* - by electronic mail with USPS confirmation