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October 23, 2006

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OCT 23 2006

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244
Comments on Media Ownership

Dear Ms. Dortch:

On behalf of Spanish Broadcasting System, Inc., there is transmitted herewith an original and fourteen (14) copies of its Comments on Media Ownership pursuant to the above-referenced docket numbers.

Should there be any questions concerning the enclosure, kindly communicate directly with undersigned counsel.

Respectfully submitted,

Bruce A. Eisen

Enclosure

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OCT 23 2006

Federal Communications Commission
Office of the Secretary

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 | ) | MB Docket No. 06-121 |
| | ) | |
| 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 | ) | MB Docket No. 02-277 |
| | ) | |
| Cross-Ownership of Broadcast Stations and Newspapers | ) | MM Docket No. 01-235 |
| | ) | |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets | ) | MM Docket No. 01-317 |
| | ) | |
| Definition of Radio Markets | ) | MM Docket No. 00-244 |

TO: The Commission

**SPANISH BROADCASTING SYSTEM, INC.**

**COMMENTS ON MEDIA OWNERSHIP**

Spanish Broadcasting System, Inc. ("SBS"), hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking, FCC 06-93, released July 24, 2006 ("Further Notice"). In support thereof, the following is shown:

## Background

SBS is the largest Hispanic-controlled radio broadcasting company in the United States. SBS and its affiliates currently own and/or operate 20 stations in six of the top-10 Hispanic markets, including New York, Los Angeles, Miami, Chicago, San Francisco and Puerto Rico.

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SBS also owns a full-service television station and a Class-A television station in the Miami, FL television market. The Commission's Further Notice seeks comments from the public with regard to radio and television ownership issues resulting from a ruling by the United States Court of Appeals for the Third Circuit in Prometheus Radio Project, et al. v. FCC, 373 F.3rd 372 (2004), stay modified on rehearing, No 03-3388 (3rd Circuit September 3, 2004), cert. denied, 73 U.S.L.W. 3466 (US June 13, 2006) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177). The Court in Prometheus stayed and remanded certain media ownership rules that the Commission had adopted in its 2002 Biennial Review Order, 18 FCC Rcd 1360 (2003) ("2002 Biennial Review Order"), which the Court affirmed in part and remanded in part.

As a result of the remand order and the Commission's Further Notice, comments are sought on all six of the extant media ownership rules which include (1) the local television ownership limit; (2) the local radio ownership limit; (3) newspaper broadcast cross-ownership ban; (4) radio television cross-ownership limit; (5) dual network ban; and (6) UHF discount on the national television ownership limit. SBS will limit its comments to the radio television cross-ownership limit and the local radio ownership limit.

## Local Radio Ownership Rule

The Commission's local radio ownership rule has prohibited the common ownership of same service radio stations that serve substantially the same area. As a result, in a radio market with 45 or more commercial radio stations, a party may own, operate or control up to eight commercial radio stations, not more than five of which are in the same service. In a radio market with between 30 and 44 commercial radio stations, a party may own, operate or control up to seven commercial radio stations, not more than four of which are in the same service. In a radio market with between 15 and 29 commercial radio stations, a party may own, operate or control up to six commercial radio stations, not more of four of which are in the same service. Finally, in a radio market with 14 or fewer commercial radio stations, a party may own, operate or control up to five commercial radio stations, not more than three of which are in the same service, except that a party may not own, operate or control more than 50% of the stations in that market. These limitations are presently embodied in §73.3555(a) of the Commission's Rules.

Local radio ownership limits are nearly as old as the Communications Act, itself. However, the advance of technology and the increased number of media outlets led to a relaxation of the local radio ownership rules in the early 1990s, and this was broadened further with the enactment of the Telecommunications Act of 1996,[1] which repealed such standards as the national radio ownership cap and set ownership limits based upon the number of stations in a given market. The restrictions set forth in the Commission's rules at the time of passage used a signal contour method to define a "local radio market," and this standard was used to resolve whether or not ownership complied with the limits. Because of some significant anomalies caused by this methodology, the signal contour method was ultimately revoked. Instead, radio stations licensed to communities in an Arbitron Metro market were counted as being in the "local radio market" notwithstanding the contours and strengths of their signals. Significantly, this element of the Biennial Review Order was not questioned by the Prometheus Court.

But just as anomalies were responsible, in part, for a change in the way the Commission defines local radio markets, SBS suggests that there should be other exceptions to regulating the ownership limits when arguments for exceptions are premised upon solid facts that show good

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1 Pub. L. No. 104-104, 110 Stat. 56 §202(h) (1996).

cause for reaching a different conclusion. For instance, Arbitron considers Puerto Rico to be a single market within its radio market rankings.[2] Radio ownership limits in the Commonwealth of Puerto Rico are, therefore, treated just as they would be in any market on the mainland. Yet, there are significant differences that adhere to Puerto Rico and that the Commission should consider when it reviews its rules on local radio ownership.

The Commission has been presented with data and information over the years to show that Puerto Rico has a unique combination of mountainous terrain and spectrum scarcity. Programming alternatives available to residents of Puerto Rico have historically been reduced because the terrain has resulted in grossly inferior signal coverage. The Commission has acknowledged this remarkable handicap, and has found that the presence of mountainous terrain throughout the island prevents many areas from receiving adequate service. See, e.g., Ponce Television Corporation, 1 FCC Rcd 1167 (1986), recon. denied 2 FCC Rcd 5878 (1987). See, also, Channel 7, Inc., 4 FCC Rcd 5258 (1989). The difficulty in signal coverage is not, of course, a problem that exists only with regard to television broadcasting. AM and FM coverage is similarly disadvantaged. The unique terrains of Puerto Rico and the Virgin Islands, have caused the Commission to adopt special power and height limits to FM station classes in those locations. These limits are greater than limits afforded to the rest of the United States. For example, the class contour for a Puerto Rico Class B FM station is 78 kM compared to 52 kM for the mainland. For a Class A station the difference is 42 kM compared to 28 kM. The proposed contour protection method recognizes these increased limits. See § 73.211(3). In addition to the noted terrain problems, Puerto Rico suffers from a very poor economic base, so

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[2] See Attachment.

any station hoping to provide quality programming which fails to serve a substantial portion of the market may, itself, face severe viability questions.

All of this means that the use of Arbitron designations for markets like Puerto Rico are inappropriate. The island's topography and its geographic isolation places Puerto Rico in a highly unusual position. Its geography significantly obstructs local broadcast signals and, because of its isolation, it fails to receive out-of-market broadcast signals from beyond the island, a factor ordinarily considered in determining limits on ownership. These elements combine to make Puerto Rico's broadcast milieu wholly unlike the rest of the United States.

Puerto Rico should not be considered as a single market. If there are to be limits on radio ownership, contour overlaps are far more sensible for purposes of determining ownership limits on this heavily populated island, and that methodology should be utilized as an exception to the existing market definition premised on Arbitron designations. The contour overlap protections are reasonable because they would not affect the station count in the market that might otherwise result from out-of-market signals. Since Puerto Rican listeners are unable to receive service from out-of-market signals, the need for local stations to provide wide ranging public service is all the more crucial.

In 2001 Arbitron entered Puerto Rico to inaugurate its audience measuring service. Before that, both the Commission and advertisers considered Puerto Rico to be made up of separate and distinct markets and recognized that the distance and terrain factors in the Commonwealth were significant for varying reasons. Most importantly, the Commission understood that the mountainous terrain and overall mileage distance between the island's cities made it technically impossible for any single AM or FM station to provide island-wide coverage.

For instance, SBS radio stations are licensed to San Juan, Ponce, Mayaguez, Bayamon, San *German, Fijardo, Guayama and Hormigueros. In order to achieve island-wide coverage, all radio* licensees need to operate two or more stations that duplicate programming. This is an astounding difference from mainland markets, and places Puerto Rico radio stations at a distinct disadvantage.

When licenses were originally awarded to various entities in Puerto Rico, the Commission never allocated the authorizations on an island-wide basis, but instead assigned frequencies to distinct communities. This is further evidence to conclude that Puerto Rico is <u>not</u> an island market, but rather consists of historically separate multiple city markets. The fact that Arbitron entered Puerto Rico some years ago and treated it as a single market for its <u>own business purpose</u> does not support a conclusion that the island should continue to constitute a single market. Arbitron began to offer island-wide audience measurements as opposed to city-wide audience measurements in order to gain an economic business model for itself and not for the radio stations in Puerto Rico. The company's own business purpose, while undoubtedly self-serving, should not be confused with the reality of over-the-air coverage of the island by the AM and FM radio stations that are licensed to individual communities. The market definition, as applied by Arbitron, does not fit actual broadcast practice and conditions in Puerto Rico for the reasons explained earlier.

There are presently more than 120 radio stations licensed to Puerto Rico. The proposed rules would limit ownership to eight stations throughout the island with only five of one service. SBS submits that such a limit would prevent broadcasters from adequately serving the citizens of the Commonwealth and would significantly diminish competition. In fact, there are at least three distinct Puerto Rican radio markets. Moreover, to adequately serve the island, stations must be strategically located in the population centers of San Juan, Mayaguez and Ponce. Applying the current limits, an FM broadcaster would be able to serve the public of Puerto Rico with only one full service station and a partial service station. The economics of operating broadcast facilities in Puerto Rico are radically different than those that exist in the rest of the United States. Absent the ability to simulcast network programming throughout the island, radio stations cannot be truly competitive.[3]

The attached technical exhibit demonstrates that the anomaly of Puerto Rico does not fit into the Arbitron designated market proposed by the Commission. Intervening terrain prevents certain radio stations licensed to the island to truly compete with one another because their respective signals cannot be heard in each other's community. It is therefore unreasonable to conclude that such diverse stations operate within a single market, and this is true whether or not a station's service area is measured in the manner set forth in Section 73.313(c) of the Rules or by the Longley-Rice radio propagation model.[4] The exhibit depicts 60 dBu coverage from three

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3 Puerto Rico has historically been thought of as a group of separate markets. See, e.g., The EAS Operational Zones which split up the island into seven different operational areas due to various political and terrain issues. Unlike mainline markets, the primary EAS operational area in Puerto Rico (San Juan) does not include most of the radio stations within the defined market. In addition, the Office of Management and Budget treats the cities Mayaguez, Ponce, and San Juan as district Metropolitan Statistical Areas. See, OMB Bulletin No. 06-01 Corrected (December 5, 2005).

4 The Longley-Rice radio propagation model is used to make predictions of radio field strength at specific points based on the elevation profile of terrain between the transmitter and each specific reception point.

SBS affiliated radio stations based on both the FCC curves and Longley-Rice. None of the *stations come close to covering the island.*[5]

**TV/Radio Cross-Ownership**

SBS urges the Commission to repeal the radio/television cross-ownership rule because it is no longer necessary. The rule does not significantly promote competition, localism or diversity since radio and television stations today compete in distinct product markets.

The TV/radio cross-ownership restriction has always reflected concern for the continued diversification of control of the media of mass communications. Spectrum scarcity was at the heart of the rule, and for a prolonged time, the rule had legitimacy. However, the media explosion that our nation has witnessed over the past 25 years has significantly diminished the rationale for the radio/television cross ownership rule. Subsequent to the United States Supreme Court's decision in Red Lion Broadcasting Company v. FCC, 395 U.S. 367 (1969), the Commission relied upon the scarcity argument to justify a number of restrictions in the ownership of broadcast facilities, a natural outgrowth of the media landscape as it matured. Nevertheless, the relentless advance of technology to better serve consumers has transformed the marketplace into a far different arena than existed prior to and directly after the Red Lion decision. There is now a prodigious roster of media outlets that includes cable television, multi-point distribution service, UHF and VHF television, AM and FM radio, direct broadcast satellites, newspapers, magazines, low-power television, low-power FM, computer services, DVD players, web pages and on-line services, direct mail, telephone yellow pages, outdoor

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[5] The FM stations are WIOA (San Juan), WIOB (Mayaguez) and WIOC (Ponce).

advertising and motion picture advertisements on the actual screen. Spectrum scarcity is no longer a powerful *defense to curtail certain media concentrations.*

The growth of content-oriented technology may not put questions of diversity completely to rest, but it does place the prospect of a rule contemplating TV/radio cross-ownership restrictions in a different light. Hence, the Commission must consider all significant media available to consumers today before it can reasonably conclude that cross-ownership limits remain justified. The number of independent market voices in any given area should not be measured simply by the number of radio and television stations, but, rather, by the entire mix of media outlets.

All television channels, radio stations, cable systems and newspapers constitute traditional independent voices. If allowance is further made for the increasing proliferation of media, some of which are noted above, then it is likely that only the smallest markets will be deemed non-competitive as a result of certain broadcast acquisitions. TV/radio cross-ownership restrictions, therefore, should apply only to those few markets judged insufficiently competitive. In the rare event that a TV/radio cross-ownership case might raise the prospect of anti-competitive behavior, appropriate steps could be taken outside the confines of a specific Commission rule or regulation.[6]

The Commission should also recognize that TV and radio are separate markets. Local advertising placed on radio, TV and in newspapers are, for the most part, directed at different classes of consumers. The cross-ownership restrictions can actually impair vigorous competition between broadcasters and multi-channel competitors because under current market conditions, a

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6 The United States Department of Justice, for example, could exert jurisdiction over a prospective acquisition that raised anti-competitive questions.

local broadcaster simply cannot dominate either the advertising market or influence consumers through its programming.

There are additional theories of competition that also call for the repeal of the TV/radio cross-ownership rule. For instance, many believe that the number of competitors in most markets evolve to produce the best possible balance, and that mature markets usually result in a market share held by three separate competitors. Those who follow this tenet propose that the ideal natural equilibrium for most, if not all, important markets throughout the economy is three major generalists along with a lesser amount of smaller specialists. Hence, three local broadcast voices may be the most appropriate number for both effective competition and for a reasonable level of profitability and long term viability. Whether or not one subscribes to the "rule of three," it seems reasonable to conclude that today's marketplace so differs from past decades, that a rule limiting ownership in TV/broadcast cross-ownership situations no longer enjoys the kind of currency that can be said to serve the public interest.

## Conclusion

SBS urges the Commission to repeal its TV/radio cross-ownership rule and to specifically exclude Puerto Rico from the existing and flawed Arbitron metro market definition.

Respectfully submitted,

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October 23, 2006

# ATTACHMENT 1

## ARBITRON RADIO MARKET RANKINGS: FALL 2006

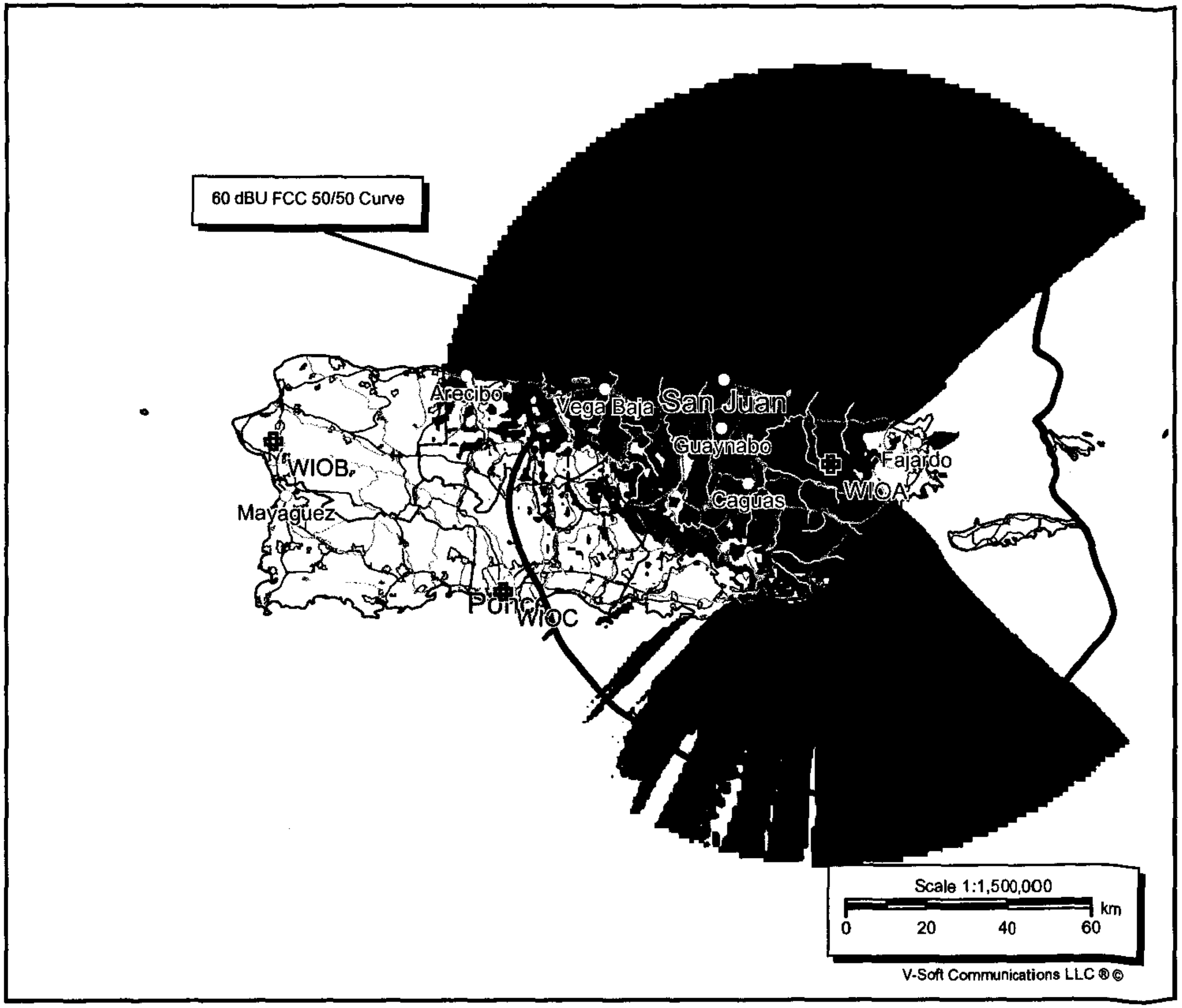
1-50 51-100 101-150 151-200 201-250 251-299

| Rank | Type | DST | Qual Type | Market Name | Metro 12+ Population |
|---|---|---|---|---|---|
| 1 | CM | BH | S | *New York, NY* | *15,291,100* |
| 2 | CM | BH | S | Los Angeles, CA | 10,826,600 |
| 3 | CM | BH | S | Chicago, IL | 7,738,000 |
| 4 | CM | BH | S | San Francisco, CA | 5,891,900 |
| 5 | CM | BH | S | Dallas-Ft. Worth, TX | 4,838,600 |
| 6 | CM | BH | S | Houston-Galveston, TX | 4,469,900 |
| 7 | CM | BH | S | Philadelphia, PA | 4,360,200 |
| 8 | CM | BH | S | Washington, DC | 4,176,300 |
| 9 | CM | BH | S | Atlanta, GA | 4,085,000 |
| 10 | CM | B | S | Detroit, MI | 3,888,300 |
| 11 | CM | BH | S | Boston, MA | 3,838,800 |
| 12 | CM | BH | S | Miami-Ft. Lauderdale-Hollywood, FL | 3,533,000 |
| 13 | CM | - | QD | Puerto Rico | 3,296,800 |
| 14 | CM | BH | S | Seattle-Tacoma, WA | 3,257,200 |
| 15 | CM | H | S | Phoenix, AZ | 3,058,000 |
| 16 | CM | B | S | Minneapolis-St. Paul, MN | 2,662,100 |
| 17 | CM | BH | S | San Diego, CA | 2,497,000 |
| 18 | CM | BH | * | Nassau-Suffolk (Long Island), NY | 2,373,900 |
| 19 | CM | BH | S | Tampa-St. Petersburg-Clearwater, FL | 2,314,300 |
| 20 | CM | B | S | St. Louis, MO | 2,282,700 |
| 21 | CM | B | S | Baltimore, MD | 2,257,900 |
| 22 | CM | BH | S | Denver-Boulder, CO | 2,194,800 |
| 23 | CM | H | S | Portland, OR | 2,001,600 |
| 24 | CM | B | S | Pittsburgh, PA | 1,998,800 |
| 25 | CM | BH | * | Riverside-San Bernardino, CA | 1,806,800 |
| 26 | CM | B | S | Cleveland, OH | 1,794,200 |
| 27 | CM | BH | S | Sacramento, CA | 1,785,400 |
| 28 | CM | B | S | Cincinnati, OH | 1,721,200 |
| 29 | CM | BH | S | San Antonio, TX | 1,586,000 |
| 30 | CM | BH | S | Kansas City, MO-KS | 1,575,300 |
| 31 | CM | H | S | Salt Lake City-Ogden-Provo, UT | 1,554,200 |
| 32 | CM | BH | S | Las Vegas, NV | 1,484,400 |
| 33 | CM | BH | S | Charlotte-Gastonia-Rock Hill, NC-SC | 1,456,600 |
| 34 | CM | BH | S | Orlando, FL | 1,448,600 |
| 35 | CM | H | * | San Jose, CA | 1,436,400 |
| 36 | CM | BH | S | Milwaukee-Racine, WI | 1,433,300 |
| 37 | CM | B | S | Columbus, OH | 1,422,700 |
| 38 | CM | H | S | Providence-Warwick-Pawtucket, RI | 1,393,500 |
| 39 | CM | BH | NA | Middlesex-Somerset-Union, NJ | 1,382,800 |
| 40 | CM | B | S | Indianapolis, IN | 1,328,100 |
| 41 | CM | B | S | Norfolk-Virginia Beach-Newport News, VA | 1,327,600 |
| 42 | CM | BH | S | Austin, TX | 1,252,400 |
| 43 | CM | BH | S | Raleigh-Durham, NC | 1,184,200 |
| 44 | CM | B | S | Nashville, TN | 1,158,800 |
| 45 | CM | B | S | Greensboro-Winston-Salem-High Point, NC | 1,131,200 |
| 46 | CM | BH | S | West Palm Beach-Boca Raton, FL | 1,116,800 |
| 47 | CM | B | S | Jacksonville, FL | 1,083,700 |
| 48 | CM | B | S | Oklahoma City, OK | 1,075,700 |
| 49 | CM | B | S | Memphis, TN | 1,060,700 |
| 50 | CM | BH | S | Hartford-New Britain-Middletown, CT | 1,047,700 |

1-50 51-100 101-150 151-200 201-250 251-299

# ATTACHMENT 2

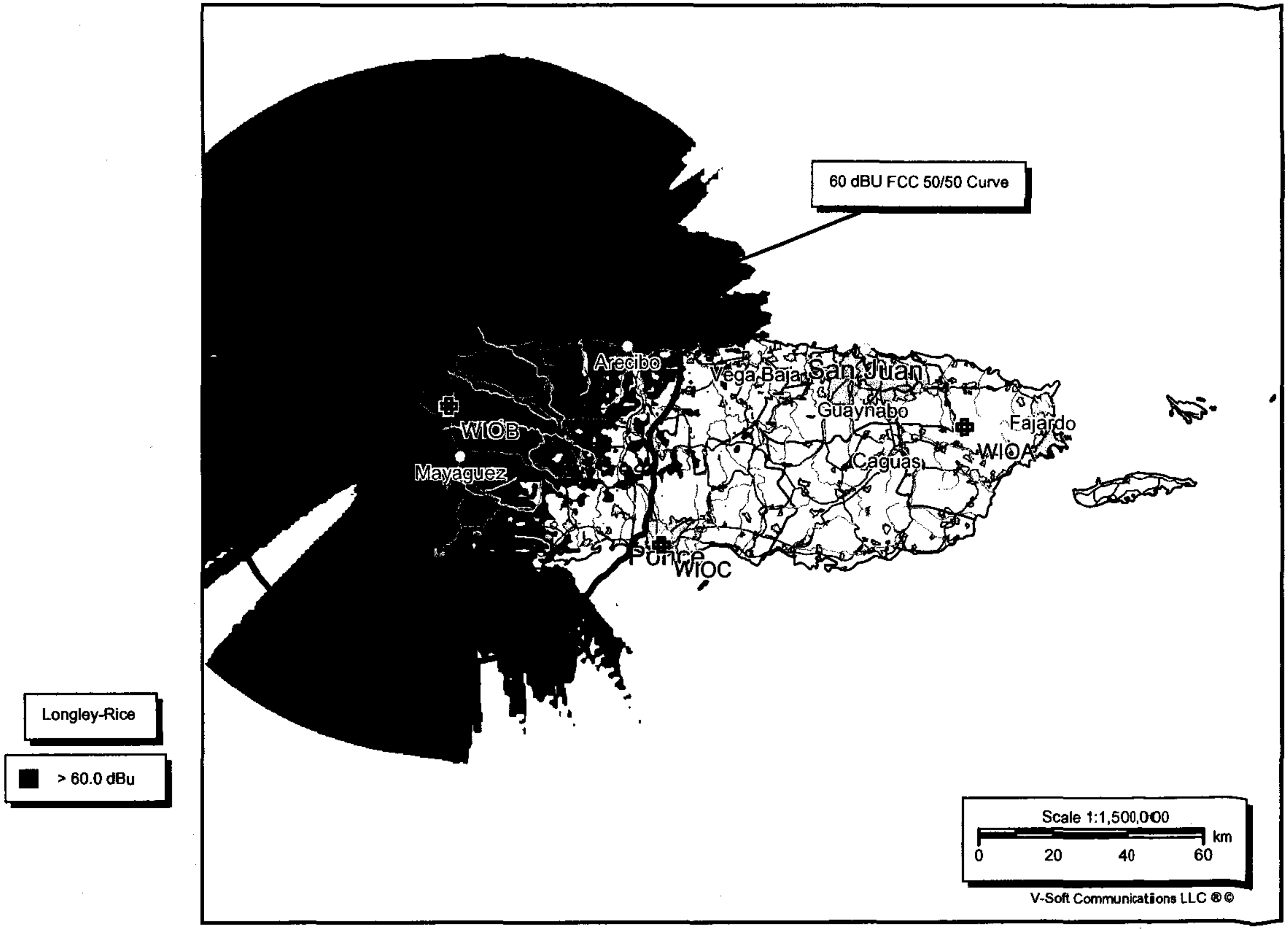
Longley-Rice WIOA



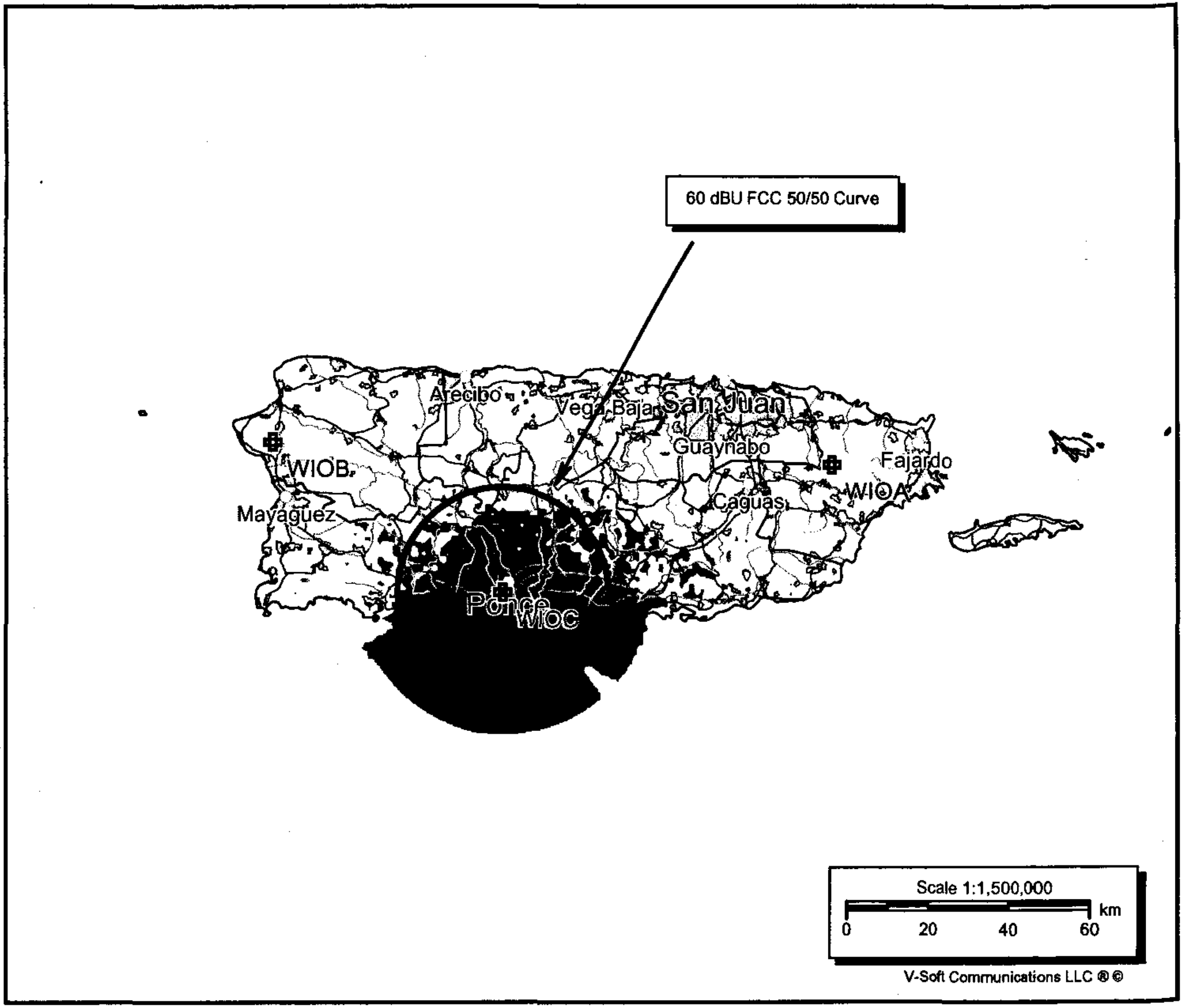

Longley-Rice

> 60.0 dBu

Longley-Rice WIOB



Longley-Rice WIOC




Longley-Rice

> 60.0 dBu