

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

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

In re Applications of) MM DOCKET NO. 135
)
 THE PETROLEUM V. NASBY CORPORATION) File No. BRH-890601RB
)
 For renewal of Station WSWR(FM))
 Shelby, Ohio)
)
 THE PETROLEUM V. NASBY CORPORATION) File Nos. BTCH-921019HX
) and BTCH-921019HY
)
 For transfer of control of)
 Station WSWR(FM), Shelby, Ohio)

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To: The Review Board

REPLY TO OPPOSITION OF THE MASS MEDIA BUREAU
 TO PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Pursuant to §§ 1.4(b) and 1.106 of the Commission's Rules, the Petroleum V. Nasby Corporation (Nasby), licensee of Station WSWR(FM), Shelby, Ohio, by its counsel, hereby submits its reply to the opposition of the Mass Media Bureau (Bureau) to Nasby's petition for reconsideration and/or clarification, which the Bureau filed in this proceeding on July 19, 1995. As will be demonstrated, the Bureau's opposition incorrectly argues the procedural standards applicable to Nasby's petition and wholly fails to address any of the substantive matters raised in Nasby's petition. Accordingly, the Board should dismiss the Bureau's opposition and grant reconsideration as requested by Nasby.

I. Nasby has properly sought reconsideration under the Commission's Rules.

1. At ¶ 3 (page 2) of its opposition, the Bureau states that Nasby has failed to demonstrate that reconsideration is warranted, alleging that Nasby is required to show "either a material error or

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omission in the [Board's] Decision or raise[s] additional facts not known or not existing until after [Nasby's] last opportunity to present such matters." *Id.* The Bureau further states that "[r]econsideration is not granted for the purpose of debating matters on which the Board has already deliberated and spoken." In support of its allegations, the Bureau cites the Commission's decision in *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert denied*, 383 U.S. 967 (1966) and Section 1.106(c) of the Commission's Rules (47 C.F.R. § 1.106(c)).

2. First, Nasby sought reconsideration pursuant to § 1.102(a) and 1.106 of the Commission's Rules. Subsection (b)(1) of § 1.106 provides in pertinent part that "any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken." 47 C.F.R. § 1.106(b)(1). Nasby is clearly a party to the proceeding and is clearly adversely affected by the action taken by the Board. The only limitation to this subsection is where a party seeks reconsideration of a decision of the Commission on application for review (subsection b(2)), which limitation is clearly inapplicable to Nasby's request for reconsideration of action taken by the Board.

3. Secondly, the Bureau's reliance on the Commission's decision in *WWIZ* to support its position is also entirely misplaced. The *WWIZ* decision appears to have been decided by the

Commission prior to the Commission's current rules for reconsideration set forth at § 1.106 of the Code of Federal Regulations and the current rules which provide for intermediate review by the Review Board of an initial decision issued by an administrative law judge. The *WWIZ* decision involved review by the Commission of its earlier decision affirming the findings and conclusions of the presiding hearing examiner. The *WWIZ* decision is more akin to § 1.106(b)(2) of the Commission's Rules, referred to above. Obviously this rule does not apply to the case at hand which involves a petition for reconsideration before the Board and not the full Commission and which petition on its face does not seek reconsideration which would involve any of the matters contained in subparagraph (b)(2) of § 1.106.

4. Similarly, the Bureau's reliance on subsection (c) of § 1.106 of the Commission's Rules is erroneous. Subsection(c) provides the circumstances under which reconsideration may be appropriate in instances where reconsideration relies on facts not previously presented to the Commission or designated authority. Once again, a review of Nasby's petition clearly reflects that reconsideration is not being sought on the basis of new facts. Rather, Nasby has permissibly sought reconsideration on matters which were raised *sua sponte* by the Board, were not addressed by the initial decision and consequently were not briefed by the parties nor raised in oral argument as oral argument was not held in this proceeding. Indeed, if Nasby failed to seek reconsideration of the matters on which it now seeks

reconsideration, Nasby potentially could have been found by the Commission or reviewing court to have waived appeal of these matters. Nasby obviously is not going to risk any such potential loss of rights. Nasby has properly sought reconsideration of the Board's *Decision* and there is absolutely no excuse for the Bureau to continue to obstruct the proper resolution of this proceeding.¹

II. *The Bureau has failed to address any of the substantive matters raised in Nasby's petition.*

5. From a public interest standpoint, it is equally shocking

¹ Nasby has informally urged the Bureau to consider the matters raised in its petition for reconsideration in the hopes of an earlier resolution of this proceeding. As is apparent, Bureau counsel has indicated to the undersigned that it continues to hold to its position that Nasby's license should not be renewed. Given the record evidence in this proceeding for which the Bureau did not seriously challenge and in the instance of the transfer of control issues, did not raise any exceptions to the ALJ's handling of those issues, Nasby believes that the Bureau should be reminded that the United States Court of Appeals has noted that:

[t]he American Bar Association's Model Code of Professional Responsibility expressly holds a "government lawyer in a civil action or administrative proceeding" to higher standards than private lawyers, stating that government lawyers have "the responsibility to seek justice" and "should refrain from instituting or continuing litigation that is obviously unfair." Model Code of Professional Responsibility EC 7-14 (1981).

Government lawyers, we have no doubt, should also refrain from continuing litigation that is obviously pointless, that could easily be resolved, and that wastes Court time and taxpayer money.

Freeport-McMoRan Oil & Gas Company v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1992) (emphasis added).

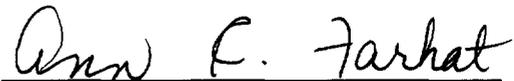
that the Bureau's opposition entirely fails to address any of the substantive matters raised by Nasby in its petition for reconsideration. But then this is not all that surprising to Nasby. Throughout this entire proceeding the Bureau has neglected to fully avail itself of the requisite procedural rights it had, for example, of conducting depositions of Nasby principals which Nasby invited the Bureau to undertake or to challenge the record evidence in this proceeding. Instead, the Bureau continues to cling to its unsupported conclusion that Nasby should not be allowed to remain a Commission licensee, notwithstanding the record evidence, and now the decision of the Review Board and the presiding administrative law judge to the contrary.

6. The Bureau's attachment of an application for review of the Board's *Decision* which it apparently lodged with the full Commission does not cure its failure to substantively respond to Nasby's petition. As previously noted, the application for review was in fact lodged with the full Commission, is not properly before the Review Board, and will not be acted upon by the Commission until such time as the Board acts on the instant petition for reconsideration. See § 1.104(c) of the Commission's Rules. Moreover, the application for review addresses the Board's *Decision* and does not remotely address the substantive matters on which Nasby seeks reconsideration. Consequently, Nasby is under no obligation and has no intention of addressing the contents of the Bureau's application for review at this time.

For the foregoing reasons and the reasons set forth in its

petition for reconsideration, The Petroleum V. Nasby Corporation respectfully requests that the Review Board dismiss the opposition of the Mass Media Bureau and grant Nasby's petition for reconsideration and/or clarification.

Respectfully submitted,



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July 31, 1995

CERTIFICATE OF SERVICE

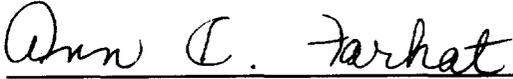
Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, certifies that on July 31, 1995, she caused copies of the foregoing *Reply to Opposition of the Mass Media Bureau to Petition for Reconsideration and/or Clarification* to be served by hand (or by U.S. first class mail, postage prepaid) on the following individuals:

The Honorable Joseph A. Marino (by hand)
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The Honorable Marjorie R. Greene (by hand)
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