

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

JUN 16 2000

OFFICE OF THE SECRETARY

In the Matter of	)	DA 00-322
	)	
Amendment of Section 73.202(b),	)	MM Docket No. <u>98-112</u>
Table of Allotments, FM Broadcast Stations	)	RM-9027
(Anniston and Ashland, AL, College Park,	)	RM-9268
Covington, and Milledgeville, Georgia	)	RM-9384

To: Mass Media Bureau

**PETITION FOR RECONSIDERATION**

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June 16, 2000

Preston W. Small (Small), by his attorney, hereby seeks reconsideration of the April 28, 2000 *Report and Order*, DA 00-322 (*Report and Order*) (65 Fed. Reg. 31498 (May 18, 2000)). In support whereof, the following is respectfully submitted:

1) The Commission is required to discuss matters of decisional significance in its orders. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (the function of a reviewing court “is to assure that the agency has given reasoned consideration to all the material facts and issues”); *see also Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) (FCC reversed for failing to examine an alternative issue which “should have been examined in a reasoned decision making process.”). The *Report and Order* under review instantly suffers from a failure to discuss matters of decisional significance, it fails to follow precedent, it is otherwise irrational, and reconsideration is required.

2) While the *Report and Order* states that the Commission “will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area,” *Report and Order*, ¶ 7, the *Report and Order* substantially fails to discuss the issues raised in Mr. Small’s competitive filings. By failing to discuss directly Mr. Small’s comments the Commission stumbles in the darkness and fails to engage in reasoned decision making and reconsideration is warranted. Because the Commission’s failure to discuss the facts presented by Mr. Small is so complete, there is no effort to recite each omitted item here. Such an exercise would amount to resubmitting pleadings the Commission has already ignored. The purpose of the instant reconsideration pleading is to remind the Commission of its obligation to review submissions and comment upon matters of decisional significance as well as to highlight various facts to demonstrate that *Report and Order* is unreasoned.

3) In analyzing a station move to an urbanized area the Commission examines three areas of concern: 1) signal population coverage; 2) size and proximity of the proposed city to the urban

center; and 3) the interdependence of the proposed community and the urban center utilizing the eight *Tuck* factors. *Parker and Port St. Joe, Florida*, 11 FCC Rcd. 1095 ¶ 7 (Alloc. Br. 1996). While the interdependence factor is the most important area considered in making an allocation decision involving the proposed reallocation of a facility to an urbanized area, *Faye & Richard Tuck*, 3 FCC Rcd. 5374 ¶ 28 (Comm'n 1988), the *Report and Order* mishandles all three areas of inquiry.

4) Signal population coverage -- This issue involves an examination of "the degree to which the proposed station could provide service not only to the suburban community, *but also to the adjacent metropolis.*" *Parker and Port St. Joe, Florida*, 11 FCC Rcd. 1095 ¶ 7 (emphasis added). While the *Report and Order* notes that "we recognize that this will result in Station WHMA providing a 70 dBu signal to 45% of the Atlanta Urbanized Area," *Report and Order*, ¶ 7, the *Report and Order* fails to discuss the fact that substantially all of WHMA's proposed signal would include coverage of the and the *Report and Order* fails to discuss the fact that WHMA's proposed signal will entirely cover "the adjacent metropolis." See Page 7 and Attachment L, Figure 6, of Mr. Small's August 31, 1998 *Comments and Counterproposal*. The *Report and Order* fails to discuss the fact that WNNX's proposed transmitter site is located within the city limits of the Atlanta urban center. *Id.* The *Report and Order* fails to discuss the fact that 77.7% of WNNX's proposed city grade service contour would lie over the Atlanta Urbanized Area. See Page 3 and Attachment L (at page 3) of Mr. Small's August 31, 1998 *Comments and Counterproposal*. These facts demonstrate that the purpose of WNNX's proposal is to serve the urbanized area rather than provide local service to College Park, yet the *Report and Order* is mute about these facts.<sup>1</sup> The Commission also fails to

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<sup>1</sup> The *Report and Order* fails to discuss any conclusions which may be drawn from the fact that this is the second time a party has attempted to move WHMA from Anniston to the Atlanta Urbanized Area. The first attempt to move the station to Sandy Springs was rejected by the Commission. See, *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580 (1991), *app. for rev. dismissed*, 12 FCC Rcd. 8392 (1997), *app. for rev. dismissed*, (continued...)

explain why, if the intent is to provide service to College Park, a lower class station would not be sufficient for the purpose. The *Report and Order* fails to make a definitive finding on the signal coverage issue, but when these facts are considered, the signal population coverage issue counsels against granting the proposal.

5) Size and proximity of the proposed city to the urban center -- The *Report and Order* finds that the 5.2% population figure (proposed city compared to urban center population) does not “preclude favorable consideration as a first local service.” *Report and Order*, at ¶ 8. While a 5.2% figure may not preclude an allotment, the *Report and Order* incorrectly fails to specifically find that the size and proximity issue goes against the proposal. A population of 1/7 (14.3%) or less “runs counter to treating [the community] as a distinct community.” *Parker and Port St. Joe, Florida*, 11 FCC Rcd. 1095 ¶ 8. Clearly, a 5.2% population ratio requires a finding that the proposed city of allocation is small and closely situated to the urban center. *See e.g.*, page 8 ¶ 13, page 11 ¶ 18 of Mr. Small’s August 31, 1998 *Comments and Counterproposal* (College Park has a small population which is located close to urban center and the urban center owns 60.4% of the land area of the proposed community through Atlanta’s ownership of the Atlanta-Hartsfield Airport located in College Park); *see also WNNX’s Petition*, at page 14 ¶ 18 Item 10 (Atlanta’s Airport is “a major source of revenue to College Park.”). Because the most important issue in this type of case is the

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<sup>1</sup>(...continued)

13 FCC Rcd. 2104 (1998). It is clear that the common thread between WNNX’s current proposal and the rejected earlier proposal is the fact that both proposals would serve Atlanta. The *Report and Order* utterly fails to explain why a second effort to relocate a station to the Atlanta urbanized area does not indicate an intent to serve that urbanized area rather than the proposed city of license. *See* Pages 5- 7 of Mr. Small’s August 31, 1998 *Comments and Counterproposal*. While the *Report and Order* states that the Commission “will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area,” *Report and Order*, ¶ 7, the Commission’s failure to discuss this second effort to move WHMA to the Atlanta market, but to a different community, constitutes a failure to engage in reasoned decision making.

interdependence analysis using the *Tuck* factors, an otherwise unacceptable population ratio may, in fact, be acceptable depending upon a correct *Tuck* analysis. However, the fact that an otherwise objectionable population ratio may be acceptable after the *Tuck* analysis, does not relieve the Commission of the obligation to find that the size and proximity issue clearly goes against WNNX's proposal.

6) As discussed above, the signal population coverage and size and proximity of the proposed city to the urban center issues must be resolved against WNNX's College Park proposal. After finding that WNNX loses on the first two issues, a rational approach would shift the burden to WNNX to demonstrate that its proposal passes muster under a *Tuck* analysis. Footnote 5 of the *Report and Order* lists the *Tuck* factors as

(1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. We have considered a community as independent when a majority of these factors demonstrates that the community is distinct from the urbanized.

For the purposes of the following discussion, we shall accept at face value the statement in the *Report and Order* that "we have considered a community as independent when a majority of these factors demonstrates that the community is distinct from the urbanized area." *Report and Order*, n. 5.<sup>2</sup> Even using this obviously erroneous standard, the *Report and Order* draws the incorrect ultimate

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<sup>2</sup> The Commission must reconsider whether the analysis is really a "best out eight" competition as the *Report and Order* suggests. The rule is that

(continued...)

conclusion. The following is a discussion of each of the eight *Tuck* factors including an indication as to whether a particular issue can be found in WNNX's favor.

7) Issue (1)—work patterns. The *Report and Order* fails to discuss Mr. Small's census data evidence on work patterns and does not make a finding on the issue. Mr. Small's *Comments* provided irrefutable census data evidencing College Park's dependence upon the City of Atlanta for jobs and for workers, yet the *Report and Order* completely ignores this information.<sup>3</sup> Does this factor support WNNX's proposal—No.

8) Issue (2)—whether the proposed community has a local newspaper. The *Report and Order* finds that "College Park does not have its own local newspaper." Does this factor support WNNX's proposal—No. The *Report and Order* improperly tries to give this issue to WNNX by creating a new policy in this area, that is, the policy now requires a demonstration that another community has a

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<sup>2</sup>(...continued)

the required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criterion -- relative size and proximity -- suggests that the community of license is simply an appendage of a large central city. When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary to support a Huntington exception. On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city.

*Faye & Richard Tuck*, 3 FCC Rcd. 5374 ¶ 34. As discussed above, WNNX's proposed community is small and closely proximate to the urban center, the transmitter is to be located in the urban center, and the urban center even owns more than half of the proposed community's land area. Consequently, lesser evidence is required to show interdependence instantly. The preceding argument is not meant to suggest that there is a shortage of evidence demonstrating interdependence in this case, only to raise the point that the Commission's failure to make an explicit finding against WNNX's proposal on the "relative size and proximity" issue lead to the obvious error that the "best out of eight" wins the argument.

<sup>3</sup> The Commission has stated that it is "particularly interested in evidence showing a commonality of interest based upon mutual economic reliance between the specified community and the larger metropolitan area." *Faye & Richard Tuck*, 3 FCC Rcd. 5374 ¶ 37. The failure of the *Report and Order* to discuss the most important issue considered by the Commission in making allocation decisions in urban relocation cases constitutes a failure to engage in reasoned decision making and reconsideration is required.

local newspaper. *Report and Order*, ¶ 8. However, the issue is not whether another community has a local newspaper, the issue is whether the proposed community is independent of the urban center as evidenced by possession of its own local newspaper. See page 14 ¶ 24 of Mr. Small's August 31, 1998 *Comments and Counterproposal*. The fact that College Park is dependent upon another community for a particular service is indicative of urbanized dependence, and not independence as the *Report and Order* suggests.<sup>4</sup>

9) If the *Report and Order* seeks to change the requirements of this *Tuck* factor, from one which requires a demonstration that the proposed community has a local paper, to one which requires a neighboring community to have local paper, the delegated authority lacks the authority to change Commission policy. Moreover, such a change in policy would be irrational because 1) another community's independence from the central city is irrelevant to whether the proposed

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<sup>4</sup> Paragraph 8 of the *Report and Order* is just plain wrong when it finds that "The South Fulton Neighbor specifically excludes Atlanta." The *South Fulton Neighbor* is published by Neighbor Newspapers, Inc. located in Marietta, GA, a community to the northwest of Atlanta; College Park is located to the south of Atlanta, about 23 miles from Marietta. Far from being a "local" paper, the *South Fulton Neighbor* is a regional weekly paper which, based upon a review of the June 7, 2000 edition, serves the Atlanta Metro area. An examination of the advertisements shows that the entire Atlanta Metro Area, including businesses located in Atlanta, are interested in reaching the readership of the *South Fulton Neighbor* and the news stories cover a number of communities. Indeed, among other advertisements for Atlanta based businesses, at pages 6B and 7B of the June 7, 2000 edition of the *South Fulton Neighbor* the City of Atlanta published legal notices seeking persons to fill attorney positions with the City of Atlanta. These announcements were previously published on page 5B of the May 31, 2000 edition of the *South Fulton Neighbor*. Strangely, for a paper which the Commission finds to be a good indicator of College Park's independence from Atlanta, three of the three opinion articles with by-lines found on the Opinion page of the June 7, 2000 edition, page 4A, show "Atlanta" in bold-faced type as the writer's place of business. Similarly, in the May 31, 2000 edition of the *South Fulton Neighbor*, each of the two opinion articles with by-lines show "Atlanta" in bold-faced type as the writer's place of business. The Commission must explain how a regional newspaper published in a non-adjacent community far removed from College Park, which newspaper relies upon Atlanta based business people for its published newspaper opinions, and which newspaper offers regional news coverage and advertisements, including information about Atlanta, evidences College Park's independence from the Atlanta.

community is independent of the central city and 2) the proposed community's dependence upon another community in the urbanized area indicates a dependent community, not an independent one.

10) The *Report and Order* utterly fails to explain that any change in policy is intended and reconsideration is required because the Commission is required to articulate the public interest considerations behind policy changes. To wit, if the Commission wishes to change its policy of requiring a demonstration that the proposed community has its own local newspaper, to one in which the demonstration is that the independence of the proposed community is shown through dependence of the proposed community upon another community for a newspaper, the Commission must discuss the issues raised herein.

11) Issue (3)—whether community leaders consider the proposed community to be independent. The *Report and Order* makes no finding on the issue. Does this factor support WNNX's proposal—No.

12) Issue (4)—local government and elected officials. The Commission finds that there is an elected mayor and city council, and finds this issue in WNNX's favor.<sup>5</sup>

13) Issue (5)—own local, telephone company provided phone book or zip code. The Commission finds that College Park has its own zip code and local post office, and finds this issue in WNNX's favor.<sup>6</sup>

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<sup>5</sup> The *Report and Order* fails to discuss the fact that Atlanta owns 60%+ of College Park through Atlanta's ownership of the Hartsfield-Atlanta International Airport, the significant tax revenues generated by this facility or the airport's monumental effect upon other local businesses nor the impact Atlanta's money has upon College Park's local politics. Standing alone, the existence of a local government merely indicates that a community exists for allocation purposes, it does nothing to show the whether the community is dependent upon another community. *See Carney, Michigan*, 2000 FCC LEXIS 2478 ¶ 4 (released May 12, 2000) (Alloc. Br.).

<sup>6</sup> The *Report and Order* fails to discuss Mr. Small's argument that the existence of elected officials and a zip code may be sufficient for determining whether a population group is a community for allocation purposes, but does nothing to show that one community is independent (continued...)

14) Issue (6)–own commercial establishments. The Commission finds this issue in WNNX’s favor.<sup>7</sup>

15) Issue (7)–whether the proposed city and central city are part of the same advertizing market. The Commission makes no finding on this issue. Does this factor support WNNX’s proposal–No.

16) Issue (8)–municipal services. The Commission finds this issue in WNNX’s favor.<sup>8</sup>

17) Thus, our count shows a 4 to 4 tie on the *Tuck* factors as determined by the Commission in the *Report and Order*, although as discussed above, *Report and Order*’s finding that College Park meets the “local newspaper” criteria cannot be given any credit. Accordingly, WNNX’s proposal does not demonstrate that a “majority” of the factors evidence independence. Because WNNX did

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<sup>6</sup>(...continued)

of another. Zip codes are assigned by the US Post Office to suit its delivery needs and Redskins Park, now Fed Ex Field, has its own zip code.

<sup>7</sup> The *Report and Order* fails to discuss that various of the “major employers” listed in WNNX’s *Petition*, page 9, ¶ 18, Item 1, exist because of the Airport owned by the City of Atlanta. WNNX states that “two of the most visible signs of College Park’s economic independence are the Hartsfield Airport and the City-owned and operated Convention Center.” *WNNX Petition*, page 12, ¶ 18, Item 6. As it turns out, the Hartsfield-Atlanta Airport is one of the most visible signs that College Park is dependent upon the City of Atlanta because the City of Atlanta owns the airport. The Commission’s failure to discuss the airport issue, not to mention WNNX’s reliance upon the airport as a basis purportedly demonstrating independence, constitutes a failure to engage in reasoned decision making. When one arrives in the terminal at the airport, one is greeted with a sign which says “Welcome to Atlanta Bill Campbell Mayor,” notwithstanding the fact that the airport is located in College Park. How the *Report and Order* managed to miss this elephant as it walked by is unknown, ignoring the issue would seem to require an affirmative effort. Regardless, the failure to discuss the airport constitutes a failure to engage in reasoned decision making.

<sup>8</sup> The Commission fails to discuss that the City of Atlanta provides water, sewer, power, and gas services to more than half of the land area of College Park. *See e.g.*, page 11 ¶ 18 of Mr. Small’s August 31, 1998 *Comments and Counterproposal*. College Park has a population of just over 20,000 persons while the Airport employs approximately 33,000 persons and services millions of passengers each year. Thus, the provision of these services by the City of Atlanta to College Park are a substantial indication of interdependence and the Commission’s failure to discuss these facts amounts to a failure to engage in reasoned decision making.

not demonstrate that a majority of *Tuck* factors showed independence, the finding in the *Report and Order* that College Park is independent is clearly erroneous and must be reversed.

18) While WNNX must lose when counting who wins the *Tuck* issues, the more important consideration, as discussed above, is the economic relationship between the proposed city and the urbanized area. The *Report and Order* utterly fails to discuss the integrated nature of the proposed city of license and the urbanized area and the City of Atlanta. Jobs, taxes, and transportation in College Park are all driven by the City of Atlanta and by the urbanized area. College Park is as independent of the City of Atlanta and of the urbanized area as the electron of a non-ionized hydrogen atom is of the proton which has captured it and the *Report and Order* must be reconsidered.

19) If the Commission wishes to uphold the conclusion in the *Report and Order*, it must discuss the substantial issues raised in the comments and the reply comments, such as the work patterns and airport issues. The Commission must explain the balancing it uses when the proponent of a move to an urbanized area loses on the “signal population coverage” and the “size and proximity of the proposed city to the urban center” issues. The *Report and Order* improperly required Mr. Small to prevail on a majority of the *Tuck* factors in order to prevail when precedent requires that Mr. Small’s burden is reduced because WNNX loses on the signal population coverage” and the “size and proximity of the proposed city to the urban center” issues.

20) Regardless of how the burden of proof is allocated, the purpose of the exercise is to determine “mutual economic reliance” between the proposed city and the urban center, *Faye and Richard Tuck*, 3 FCC Rcd. 5374 ¶ 37, the Commission must explain how the various of the *Tuck* factors, such as a community’s possession of a zip code, or of a local newspaper, or of an elected government, demonstrate economic independence of community located in an urbanized area from

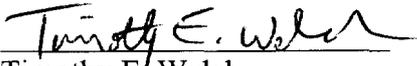
the urban center. These issues, on their face, merely indicate the existence of a cognizable community, but do nothing to explain the economic relationship between two communities.

21) The Commission must explain whether the *Tuck* factors are weighted differently, and if not, why not. For instance, is the possession of a zip code more, or less, demonstrative of economic dependence than is the ownership of more than half of the proposed community by the central city, or are these considerations equal in determining economic interdependence? Is the existence of a local government as indicative of economic dependence as is jobs data taken from the US Census which shows work patterns between the proposed city and the urban center? Should substantial land ownership by the central city in the proposed community, an issue currently missing from the list of *Tuck* factors, be added to the list of issues which must be examined to determine economic dependence of a proposed community? Mr. Small presented evidence that such land ownership creates a substantial economic dependence in this case, but the Commission completely ignored the information. Substantial land ownership by the central city in the proposed city obviously is part of an economic dependence analysis, especially where Atlanta uses that land ownership to employ more than 50% more people than the population of College Park in order to operate the busiest airport in the world.

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June 16, 2000

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His Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of June 2000 served a copy of the foregoing PETITION FOR RECONSIDERATION by First-Class United States mail, postage prepaid, upon the following:

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