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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

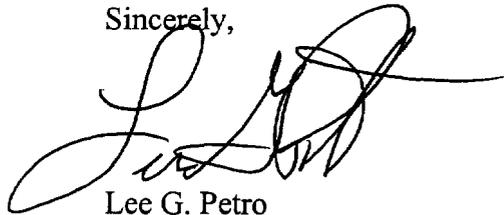
**Re: Petition for Reconsideration and Reinstatement
Amendment of Section 73.202(b), Table of Allotments – Auburn, Alabama
Auburn Network, Inc., Petitioner**

Dear Ms. Salas:

Transmitted herewith, on behalf of Auburn Network, Inc., is an original and four (4) copies of its Petition for Reconsideration and Reinstatement.

Should there be any questions, please contact undersigned counsel.

Sincerely,



Lee G. Petro

Enclosures

cc: Ms. Nancy Joyner, 3-A267
Federal Communications Commission

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Auburn Network, Inc.

Amendment of Section 73.202(b), Table of
Allotments, FM Broadcast Stations
(Auburn, Alabama)

MM Docket: _____

RM: _____

TO: CHIEF, ALLOCATIONS BRANCH

PETITION FOR RECONSIDERATION AND REINSTATEMENT

Pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. §1.106 (2000), Auburn Network, Inc. ("Auburn"), by and through its attorneys, hereby submits this "Petition for Reconsideration and Reinstatement" regarding its Petition for Rulemaking filed on February 7, 2001 (the "Petition"). The Petition was returned on April 4, 2001 for failing to protect the pending application of Station WWWQ(FM), Channel 263C2, College Park, Georgia (BPH-20010112ABQ) (the "Application").¹

As discussed more fully below, the Petition was returned prematurely. While the Application, as filed on January 12, 2001 would preclude the allocation of Channel 263A at Auburn, Alabama, on February 23, 2001, WNNX LICO, Inc. ("WNNX") filed an amendment to the Application to specify a new tower site, moving the site to the north-northeast of the tower site specified in the Application (the "Amendment"). Prior to its receipt of the April 4, 2001 Dismissal Letter, Auburn filed a Supplement to the Petition on April 6, 2001, specifying a modified proposal which incorporated a site restriction resulting in a fully-spaced allocation for Channel 263A at

¹ Section 1.106 of the Commission's rules permit the filing of a Petition for Reconsideration within thirty days of the action by delegated authority. As such, this pleading is timely filed.

Auburn, Alabama. In light of the available fully-spaced site, Auburn respectfully requests that the Petition be reinstated.

BACKGROUND

Auburn filed its original Petition for Rulemaking on July 7, 2000 seeking the allocation of Channel 263A at Auburn, Alabama. The filing of this petition was based on the Commission's grant of the petition for rulemaking to change of community of license of Station WWWQ(FM) from Anniston, Alabama to College Park, Georgia. *Anniston Alabama et al.*, 15 FCC Rcd 9971 (2000), *recon. denied*, DA 01-333 (Feb. 9, 2001) (the "Anniston Rulemaking"). However, since this rulemaking had not reached finality, e.g. a Petition for Reconsideration was filed by a third party, the Commission returned Auburn's petition on November 20, 2000, stating that the Commission would not entertain petitions for rulemaking that are contingent upon the resolution of a separate rulemaking procedure.

Despite the ongoing status of the rulemaking proceeding, WNNX filed the Application, seeking a one-step upgrade from those facilities specified in the still-pending Anniston Rulemaking. That application was accepted for filing by the Audio Services Division on January 28, 2001. Thus, even though the underlying allocation of Channel 263C3 at College Park was not yet final, WNNX attempted to further modify the facilities to specify a Class C2 facility at College Park. On February 23, 2001, WNNX filed an amendment to the Application proposing to change the tower site of the not-yet-final facilities further to the north-northeast. This amendment was accepted for filing by the Audio Services Division on March 8, 2001.

Fortunately, the newly proposed site for the not-yet-final facilities will permit the allocation of Channel 263A at Auburn, Alabama, with a slight site restriction. Recognizing that WNNX's amendment would permit the allocation of Channel 263A at Auburn, Alabama, Auburn filed a Supplement to the then-pending Petition. However, two days prior to Auburn's filing of the Supplement, the Commission issued the Dismissal Letter, thus passing each other in the mail.

ARGUMENT

1. The Commission will Entertain a Petition for Reconsideration Where Previously Unknown Facts are Brought to Light.

Section 1.106(c) of the Commission's rules set specific guidelines for the filing of a Petition for Reconsideration. Specifically, there are three conditions under which the Commission will consider such a request:

- i. The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
- ii. The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.
- iii. The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

In light of WNNX's filing of the Amendment on February 23, 2001, clearly the instant case warrants reconsideration. The February 7, 2001 Petition was filed based on engineering information which was subsequently modified. As such, there was no opportunity, prior to the filing of the Petition, to present the alternative reference coordinates. Once Auburn learned that WNNX had further revised its proposed facilities, Auburn studied whether the Petition could be modified to specify coordinates that would comply with Section 73.207. Thus, under Section 1.106(c)(1), the Commission should reconsider the dismissal of the Petition for Rulemaking based on information that was not available at the time of the filing of the Petition.

Further, as discussed *infra*, the Commission's staff can consider the allocation of Channel 263A at Auburn in reference to either the original allocation of Channel 263C3 at College Park specified in the rulemaking decision, and affirmed in the *Memorandum Opinion and Order*, or with respect to the upgrade proposal contained in the Amendment. Thus, under Section 1.106(c), the instant Petition can be granted.

2. As amended, the Petition for Rulemaking will be fully-spaced to the WWWQ facility specified in the amended application.

As demonstrated in the Supplement to Auburn's Petition, the allocation of Channel 263A will comply with the allocation spacing rules under Section 73.207. Specifically, the Supplement demonstrated that with a slight site restriction (2.7 kilometers) of the proposed reference coordinates, Channel 263A at Auburn, Alabama is fully-spaced to the proposed site of the Channel 263C2 at College Park, Georgia.

Since WNNX has specified a site from which they will operate, it would elevate form over function to require full spacing to the coordinates provided in the January 2001 application, thus precluding Auburn from the operation of a new Auburn station on Channel 263.

3. As amended, the Petition for Rulemaking will be fully-spaced to the WWWQ facility approved in Anniston Proceeding.

Furthermore, the only currently authorized site for the College Park allocation will be fully-spaced to proposed Auburn site. The Commission's staff issued its November 2000 Letter stating that the proceeding was still pending, not that the proposed allocation of Channel 263A at Auburn, Alabama violated the spacing restrictions in Section 73.207.

Auburn has filed a Petition to Deny against the January 2001 application, due to fact that, under any recognized interpretation of the Commission's rules, the Application was contingent upon a separate proceeding, and thus should be dismissed. When the January 2001 application is dismissed, the current authorized site for WWWQ will be protected.

4. The Return of the Petition for Rulemaking Would Be Contrary to the Public Interest

Auburn Network has worked over the past year to bring a new service to Auburn. Auburn's proposed site will be fully-spaced to either the Class C3 facility specified in the Anniston

Rulemaking, or the amended Class C2 application. Auburn should not be prevented from getting an additional service due to hypertechnical interpretation of the Commission's rules. Affirmation of the return of the Petition would be arbitrary and capricious and would not be in the public interest.

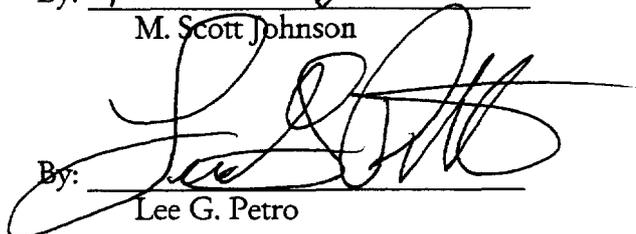
CONCLUSION

On the basis of the arguments presented herein, Auburn Network, Inc. respectfully requests that the February 7, 2001 Petition for Rulemaking be reinstated *nunc pro tunc*, and that full consideration be given to the allocation of Channel 263A at Auburn, Alabama. Auburn has proposed facilities that are fully spaced to both the facilities specified in the underlying rulemaking proceeding, and those specified in its proposed operation of a Class C2 facility at College Park. Under either circumstance, Auburn should be permitted to proceed with the allocation of a new FM broadcast station at Auburn, Alabama, providing a new FM service for that community.

Respectfully submitted,

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May 2, 2001