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

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of	)	FCC 01-324
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-112 /
Table of Allotments, FM Broadcast Stations	)	RM-9027
(Anniston and Ashland, AL, College Park,	)	RM-9268
Covington, and Milledgeville, Georgia)	)	RM-9384

To: The Commission

**PETITION FOR RECONSIDERATION  
AND MOTION TO REOPEN THE RECORD**

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## SUMMARY

The Commission's November 8, 2001 *MO&O*, FCC 01-324, which denied Mr. Small's application for review discusses, for the first time, the applicability of the *Eatonton* case, WHMA's<sup>1</sup> first attempt to relocate WHMA to the Atlanta Urbanized Area, to WHMA's second effort to relocate to the Atlanta Urbanized Area as proposed in the subject rulemaking proceeding. Because this is Mr. Small's first opportunity to address the Commission's consideration of the *Eatonton* proposal, reconsideration is appropriate. Reconsideration is also warranted because the Commission denied Mr. Small the opportunity to present a complete record and because Commission consideration of relevant information which has been presented to the staff is in the public interest.

The Commission's first discussion of *Eatonton* does not properly analyze that case. The Commission completely ignores the fact that *Eatonton* stands for the proposition that a proposal to relocate to an urbanized area will not be approved, even if there is technical compliance with the Commission's allocation priorities, if the proposed community of license is intertwined with the surrounding urbanized area. Moreover, the *MO&O*'s comparison of WHMA's proposal to relocate WHMA as presented in the subject rulemaking proceeding to WHMA's rejected 1991 relocation proposal, requires the Commission to reopen the record in this proceeding. The Commission's comparison ignores the fact that WHMA no longer proposes to serve the urbanized area with the class C3 facility specified in its rulemaking comments, WHMA now seeks to serve the Atlanta Urbanized Area with a much larger class C2 facility. The Commission's failure to consider WHMA's C2 proposal in its recent comparison is unreasoned and the record in this rulemaking proceeding must be reopened to permit the public to comment upon WHMA's C2 proposal.

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<sup>1</sup> WHMA is used herein to refer to the station being relocated from Anniston, AL to the Atlanta Urbanized Area because that is the reference used in the comments in this proceeding. The current call sign is WWWQ.

The staff erred by failing to consider that College Park's population is only 0.9% of the Atlanta Urbanized Area. The staff incorrectly compared College Park's population to only the City of Atlanta's. The staff placed complete reliance upon the fact WHMA's city grade contour would cover "only" 45% of the Atlanta Urbanized Area without considering, *inter alia*, that WHMA's transmitter is proposed to be placed in central city, that nearly all of WHMA's proposed city grade contour is over the central city, and that WHMA's 60 dBu contour would cover substantially all of the urbanized area.

The staff erroneously determined that the *Tuck* analysis does not apply in a case where "only" 45% of the urbanized area will be covered. The 50% rule applies only when the transmitter is located beyond the urbanized area but a signal is nevertheless placed over the urbanized area; the 50% rule does not apply when the transmitter is placed within the urbanized area. *Eatonton* holds that location of the proposed transmitter "within the Atlanta Urbanized Area, rais[es] the question under Commission policy as to whether a first local service preference is warranted, in light of the fact that Atlanta has substantially more than one local service."

Regarding the *Tuck* analysis performed by the staff, the staff failed to discuss the sliding scale based upon the proximity and size of the proposed community to the urbanized area which scale informs about the quantum of evidence required to show interdependence, the weights to be assigned to each *Tuck* factor, or how each *Tuck* factor informs on the interdependence issue. Moreover, the staff errs by concluding that College Park's possession of a zip code, a phone book, and an elected government are better indicators of economic interrelationships than, *inter alia*, Atlanta's ownership of 60% of College Park to operate the world's busiest airport. The *Tuck* analysis attempts to determine the extent to which there are intertwined relationships, it is not "a best out of 8" as the staff finds.

Preston W. Small (Mr. Small), by his attorney, hereby seeks reconsideration of the Commission's November 8, 2001 *Memorandum Opinion and Order (MO&O)*, FCC 01-324 which denied Mr. Small's *Application for Review*. In support whereof, the following is respectfully submitted:

## A. PROCEDURAL ISSUES

### 1. Consideration of the March 30, 2001 Petition as an Application for Review

1) The Commission's November 8, 2001 *MO&O*, n. 1, states that Mr. Small requested consideration of his March 30, 2001 *Petition for Reconsideration and Request for Protection* as an application for review to be referred to the Commissioners if the staff found it repetitious.<sup>2</sup> While the *MO&O* states that Mr. Small's "Petition has been referred to the Commission and is being considered as an Application for Review," the *MO&O* does not state that the staff referred Mr. Small's *Petition for Reconsideration and Request for Protection* to the Commissioners because the staff found the pleading repetitious, or because it found that new policy was required, or because it found that the case presents "new and novel arguments." 47 C.F.R. § 0.283(b)(2), (4), (5); 47 C.F.R. § 106(a)(1).

2) It does not appear that the staff considered Mr. Small's *Petition for Reconsideration and Request for Protection* repetitious because the *MO&O* discusses for the first time the earlier attempt to move WHMA to the Atlanta Urbanized Area.<sup>3</sup> Moreover, it does not appear that the *MO&O*

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<sup>2</sup> Obviously Mr. Small did not consider the March 30, 2001 pleading to be repetitious or he would not have filed it.

<sup>3</sup> Mr. Small raised the prior WHMA relocation case, *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* 13 FCC Rcd 2104 (1998), in his initial *Comments and*  
(continued...)

announces new or changed policy because the *MO&O* contains absolutely no discussion concerning the need for a policy change or any indication that a policy change is being implemented. It is well settled that the Commission may announce new policies only upon a reasoned basis which is stated in the record. *See Achnar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1448 (D.C. Cir. 1995), citing, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 US 923 (1971); *Telecommunications Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (DC Cir 1986).

3) Because Mr. Small's *Petition for Reconsideration and Request for Protection* is not repetitious, and because the *MO&O* does not create new policy, it appears that Mr. Small's *Petition for Reconsideration and Request for Protection* was referred to the Commissioners under "new and novel arguments" prong of 47 C.F.R. § 0.283(b)(2), (4), (5). Mr. Small is unaware of any case in which the Commission has applied its policy prohibiting a "technical manipulation" of the allocation rules to preclude, or to authorize, the second attempt to move an FM station into an urbanized area after denial of a first attempt which sought to move to the same urbanized area. Accordingly, it appears that the instant case is one of first impression and properly referred to the Commissioners under the "new and novel argument" prong.

## **2. Authorization To File The Instant Petition for Reconsideration**

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<sup>3</sup>(...continued)

*Counterproposal*, at 5-7, filed August 31, 1998; next in his June 16, 2001, *Petition for Reconsideration*, at 2 n. 1; and finally in his March 30, 2001 *Petition for Reconsideration and Request for Protection*, at 4-6. If the staff did, in fact, consider Mr. Small's March 30, 2001, *Petition for Reconsideration and Request for Protection* repetitious, the *MO&O*'s discussion, for the first time, of the earlier attempt to move WHMA to the Atlanta Urbanized Area indicates that the staff erred by failing to discuss the case in its earlier orders.

4) The Commission authorizes petitions for reconsideration of a denial of an application for review pursuant to 47 C.F.R. §1.115(g)(1),(2) and § 1.106(b)(1),(2). These sections generally authorize reconsideration petitions where there have been new “events,” or “changed circumstances,” or “facts unknown” which have arisen “since the last opportunity to present such matters.” As discussed above, the *MO&O* contains the Commission’s first discussion of the *Eatonton* case, even though Mr. Small raised the issue previously. Thus, the instant filing is Mr. Small’s first opportunity to address the Commission’s view of how the *Eatonton* case should be applied in this case and the instant petition for reconsideration is properly filed under the new “events,” or “changed circumstances,” or “facts unknown” which have arisen “since the last opportunity to present such matters” provisions found at § 1.106(b)(2).

5) A second ground authorizing the instant petition emanates from the Commission’s decision to consider Mr. Small’s March 30, 2001 *Petition for Reconsideration and Request for Protection* as an application for review without affording Mr. Small an opportunity “to file a supplemental pleading to ensure that the material reviewed by the Commission is complete.” While the *MO&O* relies upon Mr. Small’s statement in footnote 3 of his March 30, 2001 *Petition for Reconsideration and Request for Protection* regarding referral of the pleading to the Commissioners, the Commission did not permit Mr. Small “to file a supplemental pleading to ensure that material reviewed by the Commission is complete” as Mr. Small requested. This constitutes a new “event” or a “changed circumstance” which has arisen “since the last opportunity to present such matters.” § 1.106(b)(2)(i). Absent an opportunity to present this information, Mr. Small’s due process rights are violated and this changed circumstance requires that the petition be accepted.

6) A third basis authorizing the instant petition arises from the fact that the *MO&O* fails to discuss why the Commission denied Mr. Small's request "to file a supplemental pleading to ensure that material reviewed by the Commission is complete." Mr. Small does not consider the *Petition for Reconsideration and Request for Protection* to be repetitious, and based upon the Commission's *Eatonton* discussion in the *MO&O*, neither does the Commission. Mr. Small's March 30, 2001 was drafted to avoid repetition of issues rejected by the staff and, consequently, some material was not included in the March 30, 2001 *Petition for Reconsideration and Request for Protection*. In order to exhaust administrative remedies and to insure the Commission's consideration of material information, these important matters must be presented to the Commissioners. While the *MO&O* is not clear why the Commissioners denied Mr. Small's request to present supplemental information upon determination that the matter would be handled as an application for review, the public interest is served by the Commission's consideration of the full record of this proceeding. 47 C.F.R. § 1.106(c)(2). Instantly the staff has been presented with the information presented herein, excluding the response to the Commission's first *Eatonton* discussion, of course, which discussion first arose in the Commission's recently released *MO&O*.

## **B. THE *MO&O* INCORRECTLY ANALYZES THE *EATONTON* CASE**

### **1. *Eatonton* Does not Permit Technical Manipulation of the Allocation Rules**

7) The *MO&O*, ¶ 2, states that "we would also like to address the reference by Preston Small to a decision in which the staff denied a proposal" to relocate WHMA to the Atlanta Urbanized Area. The *MO&O* then "distinguishes" the earlier proposal to relocate WHMA to the Atlanta Urbanized Area from WHMA's subject rulemaking proposal to relocate to the Atlanta Urbanized Area by finding 1) that the earlier proposal "would have resulted in interference to reception of FM radio

service” while WHMA’s subject rulemaking proposal apparently presents some lesser amount of interference, or at least that’s the implication because no finding to that effect is made in the *MO&O*, 2) because the community in the earlier proposal was not incorporated while the community in WHMA’s subject rulemaking proposal is incorporated, or at least that’s the implication because no finding to that effect is made in the *MO&O*, 3) because the community in the earlier proposal “received all of its governmental services from either Atlanta or Fulton County” where WHMA’s subject rulemaking proposal apparently relies upon some lesser amount of outside services, or at least that’s the implication because no finding to that effect is made in the *MO&O*, and 4) because many of the civic organizations in the community in the earlier proposal “listed Atlanta addresses” while WHMA’s subject rulemaking proposal apparently presents more civic organizations which do not use Atlanta addresses, or at least that’s the implication because no finding to that effect is made in the *MO&O*. The Commission next finds that WHMA’s subject rulemaking proposal to relocate WHMA to the Atlanta Urbanized Area has additional benefits not found in WHMA’s 1991 relocation proposal because WHMA’s subject rulemaking proposal A) will result in elimination of two short spacings, B) will eliminate interference to just over 2,300 persons, and C) will result in no new interference.

8) The *MO&O* completely fails to discuss why this one-upmanship<sup>4</sup> of WHMA’s proposal presented in the subject rulemaking proceeding over WHMA’s 1991 proposal to relocate WHMA

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<sup>4</sup> The Commission has long prohibited “one-upmanship” efforts to better a proposal which has been filed with the Commission and which has passed the pertinent cut-off date. *See American Radio-Telephone Service, Inc.*, 93 F.C.C. 2d 1138 ¶ 10 (FCC 1983); *see also RKO General Inc.*, 60 R.R. 2d 1215 ¶ 346 n. 77 (ALJ 1986).

to the Atlanta Urbanized Area is not the sort of “technical manipulation” of the allocation rules which the Commission has vowed to prevent. The Commission has clearly determined that

we have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission’s 307(b) related policies.

*Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, Memorandum Opinion and Order*, 5 FCC Rcd. 7094 ¶ 14(FCC 1990); Mr. Small’s August 31, 1998 *Comments and Counterproposal*, at 5-7 (Mr. Small’s discussion about WHMA’s intent to serve the Atlanta and the Urbanized Area.).

9) WHMA’s November 6, 1997, *Petition for Rulemaking*, p. 1, even offers the Commission a deal that if the Commission grants WHMA’s College Park proposal, “WHMA agrees to withdraw the pending Application for Review” then pending in WHMA’s earlier filed WHMA-to-Atlanta Urbanized Area proceeding. WHMA also stated that “the two factors (interference and lack of independence) which caused the FCC to deny the Sandy Springs proposal are not present in WHMA’s College Park proposal . . .” WHMA’s November 6, 1997, *Petition for Rulemaking*, at 2. Further demonstrating that WHMA was merely replacing one proposal with another in a “technical manipulation” of the Commission’s rules is WHMA’s statement that

While WHMA certainly prefers a favorable resolution of [the Sandy Spring proceeding] . . . WHMA believes it would conserve Commission resources to offer a simpler, less controversial proposal which complies fully with the Commission’s technical rules and policies with regard to change in community of license. Nevertheless, the Commission should not assume that WHMA has abandoned the Sandy Springs proposal or has conceded in any way that there is a fatal deficiency in the pending proposal.

WHMA’s November 6, 1997, *Petition for Rulemaking*, at 3.

10) What is crystal clear from the record is that WHMA is not at particular where it moves, provided that the location is somewhere within the Atlanta Urbanized Area. WHMA's rulemaking proposal is nothing more than clear "technical manipulations" of the allocation rules to present a better case than the rejected 1991 case. The Commission's complete failure to discuss the issue of WHMA's target changing geared toward gaining entry into the Atlanta Urbanized Area is unreasoned and irrational. Mr. Small's August 30, 2001 *Comments and Counterproposal*, at 5-7.

11) The "technical manipulation" issue is, and always has been, important to this case, even if the Commission fails to address it in order after order. The plain meaning of "technical manipulation" is a proposal which, on its face, attempts to satisfy whatever criteria the Commission considers in making an allocation decision, but which nevertheless should be denied because the proposal proposes prohibited service to an already adequately served urbanized area. That is the whole purpose served by the *Huntington* doctrine -- it keeps metropolitan areas from acting like black holes which draw in radio services which would lead to § 307(b) allocation concerns.

12) The *MO&O* clearly prefers WHMA's proposal to relocate WHMA to the Atlanta Urbanized Area as stated in the subject rulemaking proceeding over WHMA's proposal which was rejected in 1991. However, by engaging in a merits comparison of WHMA's 1991 and relocation proposal and WHMA's relocation proposal submitted in the instant rulemaking proceeding, the *MO&O* acknowledges that this case is nothing but an exercise to determine whether WHMA's rulemaking proposal contains "adequate" technical improvements over its 1991 relocation proposal. The Commission must either grant reconsideration or reasonably explain how WHMA's second proposal to relocate to the same urbanized area, including WHMA's use of the *Eatonton* case as a template, does not constitute a "technical manipulation" of the Commission's allocation rules in an

effort to move to the Atlanta Urbanized Area. To date, the Commission has failed to provide this reasoning in three orders.

## 2. Technical Superiority Is Irrelevant to a *Huntington* Analysis

13) The Commission’s recitation of reasons why it prefers WHMA’s subject rulemaking proposal to relocate WHMA to the Atlanta Urbanized Area over the earlier proposal loses sight of two important aspects of the 1991 *Eatonton* case. First, *Eatonton* determined that for § 307(b) allocation purposes, WHMA’s 1991 proposal to relocate to Sandy Springs in the Atlanta Urbanized Area was “heavily” favored because it would be the “first local service.” *Eatonton*, 6 F.C.C. Rcd. 6580, ¶ 20. The Commission clearly considered that, absent the *Tuck* analysis, the 1991 WHMA relocation proposal was favored under the § 307(b) analysis. However, WHMA did not prevail on the “first local service” issue because it proposed a transmitter located within the Atlanta Urbanized Area. *Eatonton*, 6 F.C.C. Rcd. 6580 ¶ 20.

14) Because no community in the *Eatonton* case could claim a first local preference, the *Eatonton* case was decided on the examination of engineering matters such as populations served, areas covered, signal overlaps, short spacings, and interference matters under the Commission’s fourth allotment priority, the “other public interest matters” catchall prong. *Eatonton*, 6 F.C.C. Rcd. 6580 ¶ 27. Instantly, Mr. Small proposes first local service to Social Circle. If WHMA is not entitled to a first local service preference under the third allotment priority, Mr. Small’s proposal prevails.<sup>5</sup>

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<sup>5</sup> The important question in the instant case is not whether as a matter of engineering practice WHMA’s subject rulemaking proposal is superior to WHMA’s 1991 relocation proposal, and the question is not whether College Park exists as an identifiable community for allocation purposes. The important examination looks at the relationship between College Park and the Atlanta Urbanized Area.  
(continued...)

15) The second oversight in the *MO&O*, ¶ 2, is the failure to discuss how the various factors recited in that paragraph demonstrate College Park's economic independence from the Atlanta Urbanized Area. The *MO&O* fails to discuss the *Tuck* factors and how the various factors recited in *MO&O*, ¶ 2, demonstrate College Park's economic independence from the Atlanta Urbanized Area. The *MO&O* finds important the facts that College Park is incorporated, that College Park has some civic organizations with College Park addresses, and that College Park provides some local government services, but the *MO&O* fails to explain how those circumstances demonstrate College Park's economic independence from the Atlanta Urbanized Area. Standing alone, community incorporation, existence of civic organizations, and provision of government services, say absolutely nothing about one community's relationship to another.<sup>6</sup>

16) In the 1991 *Eatonton* case the Commission determined that

the mere fact that there are some economic, political, and cultural organizations that identify themselves with Sandy Springs establishes that Sandy Springs is sufficiently independent from Atlanta to warrant the grant of a first local service preference. In fact, given the intensity and diversity of human activity in urbanized areas, it is commonplace that organizations emerge that identify themselves with some geographic component of the urbanized area, such as a neighborhood, subdivision, or political district. The test here is not whether such institutions exist, but what they indicate about the relationship between the suburb and the metropolis.

*Eatonton*, 6 F.C.C. Rcd. 6580 ¶ 26.

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<sup>5</sup>(...continued)

Area and the question is whether College Park is economically intertwined with the Atlanta Urbanized Area such that the Urbanized Area's radio signals are attributed to College Park, a circumstance which would remove WHMA's claim to first local service.

<sup>6</sup> Regarding the incorporation of a community, the Commission states in ¶ 26 of the *Eatonton* case that incorporation "may result in more indicia of independence." (Emphasis added). *Eatonton* does not determine that incorporation equals independence. Neither *Eatonton* nor the *MO&O* explain how community incorporation, standing alone, demonstrates the extent and nature of inter-community relationships.

17) The *MO&O* does not at all explain the relationship between College Park and the Atlanta Urbanized Area. Moreover, the *MO&O* treats ¶ 26 of the *Eatonton* case as if the few factors discussed in ¶ 26 constitute a blue print to success such that if one meets the few points raised, one prevails. However, ¶ 26 is clear that the list presented there is not exhaustive and that the Commission relied upon only “a few facts” to demonstrate that Sandy Springs had substantial ties to the Atlanta Urbanized Area. Examination of those “few facts” in no way implies that those factors are controlling in all cases and in the instant case there are substantial factors showing economic interdependence which the Commission has, up to this time, completely ignored.

### **3. Comparison of WHMA’s Proposals Requires that the Record be Reopened**

18) In assessing, for the first time, whether WHMA’s subject rulemaking relocation proposal is technically superior to WHMA’s prior Atlanta relocation proposal, the Commission failed to consider that WHMA is currently proposing to upgrade from the C3 class which WHMA sought in the subject rulemaking proceeding to a C2 via the Commission’s policy which permits class upgrades via minor modification application.<sup>7</sup> The Commission’s comparison of WHMA’s intent to provide class C3 service to the Atlanta Urbanized Area, as that intent is found in the closed record of the underlying rulemaking proceeding, to WHMA’s earlier expression of intent to provide class C1 service to the Atlanta Urbanized Area, is unreasoned because it ignores the fact that WHMA’s current intent is to provide class C2 service to the Atlanta Urbanized area.

19) Because the parties have not been afforded an opportunity to address WHMA’s intent to provide service to the Atlanta Urbanized Area via class C2 service in the record of the closed

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<sup>7</sup> WHMA’s pending C2 upgrade application, File No. BPH-20010112ABQ, is currently subject to a petition to deny.

rulemaking, and because the Commission considers comparison of WHMA's various service proposals to be important, the Commission must reopen the record of this rulemaking proceeding and allow sufficient time to permit the public to comment upon whether the allocation of a C2 facility to WHMA in the Atlanta Urbanized Area serves the public interest. A class C3 authorization authorizes 25 kW ERP at 100 meters for a class contour of 39 km; a class C2 authorization authorizes 50 kW ERP at 150 meters for a class contour of 52 km. 47 C.F.R. § 73.211(b). A class C2 station is substantially larger than a class C3 station and examination of a C2 rulemaking proposal could change the Commission's analysis. A reasoned decision which compares WHMA's proposals to serve the Atlanta Urbanized Area cannot ignore WHMA's C2 proposal.

20) It is noted that in the instant rulemaking proceeding WHMA could have requested the C2 facility it now seeks via its minor modification application. However, WHMA filed for a C3 facility instead so that the proposal would appear better than its rejected 1991 Atlanta Urbanized Area relocation proposal on the very points upon which the Commission now relies. *See* WHMA's November 6, 1997 *Petition for Rulemaking*, at 2-4 (WHMA's summary of why its C3 proposal is better than its C1 proposal). WHMA's "go low" approach is nothing but a technical manipulation of the Commission's allocation rules to move WHMA into the Atlanta Urbanized Area.

### **C. THE HUNTINGTON DOCTRINE**

#### **1. Size and Proximity to the Urban Center**

21) In addition to the arguments presented in Mr. Small's March 30, 2001, *Petition for Reconsideration and Request for Protection*, at 9-10, the Commission is advised that the population comparison involved in this portion of the *Huntington* doctrine is the proposed city's population to the Urbanized Area's population. The population comparison seeks to determine the relative sizes

of the dog and the tail, or to determine whether there are two dogs. The larger the proposed community is compared to the Urbanized Area, the more likely it will operate as an independent entity, such as Minneapolis or St. Paul compared to that urbanized area. College Park's population is a minuscule 0.9% of the population of the Atlanta Urbanized Area and there is not a single case presented in the record in which the Commission has authorized relocation to an urbanized area with that level of population disparity. See Mr. Small's August 31, 2001, *Comments and Counter-proposal*, at 4-5, 8 & n. 7, citing, *Bay St. Louis and Poplarville, MS*, 10 F.C.C. Rcd. 13144, 13145 ¶ 6 (1995); *D'Iberville and Wiggins, MS* 10 F.C.C. Rcd. 10796, 10797 ¶ 4 (1995).<sup>8</sup> Despite this *de minimis* population level, the staff nevertheless determined that College Park's population was "substantial." *MO&O*, 16 F.C.C. Rcd. 3411 n. 4. This finding is completely unsupported and the staff failed to consider Mr. Small's argument and evidence.

## 2. Signal Population Coverage

22) As discussed in Mr. Small's June 16, 2000 *Petition for Reconsideration*, at 2-3, signal population coverage 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 staff's *Report and Order*, 15 F.C.C. Rcd. 9971, ¶ 7, notes that "we recognize that this will result in Station WHMA providing a 70 dBu signal to 45% of the Atlanta Urbanized Area," the staff failed to consider at all many important coverage facts Mr. Small raised.

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<sup>8</sup> In cases involving proposed relocations to an area outside the boundaries of an Urbanized Area the Commission may compare the proposed city of license's population to the central city's population. See *Ada, Newcastle and Watonga, OK*, 11 F.C.C. Rcd. 16896 ¶ 15 (1996); *Scotland Neck and Pinetops, NC*, 7 F.C.C. Rcd. 5113 ¶¶ 2, 4 (1992).

23) The staff failed to consider that WHMA's transmitter will be located in the central city of Atlanta. Mr. Small's *Comments and Counterproposal*, n. 6. The staff failed to consider that WHMA's proposed city grade signal will entirely cover "all of the Atlanta central city." Page 7 and Attachment L, Figure 6, of Mr. Small's August 31, 1998 *Comments and Counterproposal*. The staff failed to consider that 77.7% of WHMA's proposed city grade contour would lie over the Atlanta Urbanized Area. Mr. Small's August 31, 1998 *Comments and Counterproposal*, at 3. The staff failed to consider that WHMA's 60 dBu contour "will cover substantially all, if not all, of the Atlanta Urbanized Area." Mr. Small's August 31, 1998 *Comments and Counterproposal*, at 7. The staff completely fails to discuss these facts or explain why, in light of these facts, WHMA's proposal to provide a 70 dBu signal to 45% of the Atlanta Urbanized Area somehow makes these other figures acceptable or somehow renders them inconsequential.

24) The staff's complete failure to consider these substantial coverage issues is unreasoned and irrational. These facts demonstrate that the purpose of WNNX's proposal is to serve the Atlanta Urbanized Area rather than provide local service to College Park. Mr. Small's June 16, 2000 *Petition for Reconsideration*, at 2-3. The staff failed to explain why, if WHMA's intent is to provide service to College Park, a lower class station would not be sufficient for the purpose. *Id.* WHMA current proposal to increase WHMA from a C3 to a C2 must now be considered in reviewing the staff's complete failure to consider these important urbanized area/central city coverage issues, issues which were first brought to the staff's attention in Mr. Small's August 30,

1998 *Comments and Counterproposal*; see also Mr. Small's June 16, 2000 *Petition for Reconsideration*, at 2-3.<sup>9</sup>

### **3. Interdependence and the Applicability of the *Tuck* Analysis**

#### **a. The Staff Erroneously Concluded that *Tuck* Does not Apply**

25) The staff failed to engage in reasoned decision making when it determined that “the Commission only requires a showing pursuant to *Faye and Richard Tuck* in proposals providing 50% coverage to an Urbanized Area.” *MO&O*, 16 F.C.C. Rcd. 3411 ¶ 6. The staff's decision to ignore the coverage issues/transmitter location issues which Mr. Small raised, while placing total reliance upon the 45% coverage issue, is contrary to the *Eatonton* case which determined that the location of the proposed transmitter “within the Atlanta Urbanized Area, rais[es] the question under Commission policy as to whether a first local service preference is warranted, in light of the fact that Atlanta has substantially more than one local service.” *Eatonton*, 6 F.C.C. Rcd. 6580 ¶ 20. The amount of urbanized area covered by the city grade contour is an irrelevant consideration when the proposed location is within the urbanized area. Mr. Small's August 30, 2001 *Comments and Counterproposal*, at 3-4. There is nothing cited in the record of this proceeding which supports the staff's conclusion that the 50% rule controls regardless of the location of the proposed transmitter.

26) The staff failed to consider the fact “that the Atlanta Urbanized Area is so large that it is simply not possible to cover much more than half of the area [with a city grade signal] with even an optimally located Class C3 facility.” Mr. Small's *Comments and Counterproposal*, at 4. The staff's decision has the bizarre consequence that the larger the urbanized area, the more likely it is

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<sup>9</sup> WHMA's pending C2 upgrade application, File No. BPH-20010112ABQ, is currently subject to a petition to deny.

that a station can migrate near it, notwithstanding the Commission's policy which seeks to prevent urban migration. Moreover, the staff's decision that the 45% coverage issue controls instantly gives an overriding, but improper, priority to the signal coverage issue when the most important issue in an urbanized area relocation case is the economic interdependence of the proposed city and the urbanized area. *MO&O*, 16 F.C.C. Rcd. 3411 ¶ 6; *Faye & Richard Tuck*, 3 F.C.C. Rcd. 5374, 5378 ¶¶ 34, 36 (FCC 1988); Mr. Small's August 30, 2001 *Comments and Counterproposal*, at 8.

#### **b. The Tuck Analysis**

27) An analysis of the eight *Tuck* interdependence factors is to be made in the context of a sliding scale in which

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. at 5378 ¶ 34. Mr. Small's August 30, 1998, *Comments and Counterproposal*, at 9. However, the staff failed to discuss the sliding scale, the weights to be assigned to each *Tuck* factor, or how each *Tuck* factor informs on the interdependence issue.

28) The staff clearly erred when it determined that "we have considered a community as independent when a majority of these [*Tuck*] factors demonstrates that the community is distinct from the urbanized area." *Report and Order*, 15 F.C.C. Rcd. 9971 n. 5. As discussed above, WHMA's proposed community is small and closely proximate to the urban center, the transmitter is to be located in the Central City. Consequently, lesser evidence is required to show interdependence.

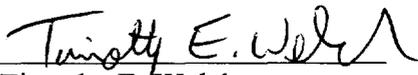
29) In any event, this is not a best out of eight competition, but a determination of “mutual economic reliance between the proposed city and the urbanized area. *Faye and Richard Tuck*, 3 F.C.C. Rcd. 5374 ¶ 37; Mr. Small’s June 16, 2000 *Petition for Reconsideration*, at 9. The staff’s position that College Park’s possession of a zip code, a phone book, and an elected government are better indicators of economic interrelationships than the Central City’s ownership of 60% of College Park to operate the world’s busiest airport, Mr. Small’s August 30, 1998 *Comments and Counterproposal*, at 10-12, better than the multiple businesses in College Park which feed from the airport, Mr. Small’s August 30, 1998 *Comments and Counterproposal*, at 16-17, better than College Park’s need to import thousands of workers to fill jobs at the airport and at the other College Park businesses, Mr. Small’s August 30, 1998 *Comments and Counterproposal*, at 12-13, better than the enormous tax revenue generated by the airport and split by College Park and Atlanta, with Atlanta receiving three times more of the money than College Park, Mr. Small’s August 30, 1998 *Comments and Counterproposal*, at 14, and better than the evidence showing College Park relies upon regional transportation systems in addition to the international airport, Mr. Small’s August 30, 1998 *Comments and Counterproposal*, at 13-14, is, with all due respect, unreasoned at best. The staff’s *Tuck* determination is unreasoned because the facts in the record clearly indicate that College Park is the very small tail of a very large dog in the Atlanta Urbanized Area.. Mr. Small’s June 16, 2000 *Petition for Reconsideration*, at 9-10. Very small College Park is obviously very substantially intertwined with the surrounding Atlanta Urbanized Area.

WHEREFORE, in view of the information presented herein and in the earlier submitted documents, it is respectfully submitted that reconsideration is warranted and that Mr. Small's proposal be granted.

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December 5, 2001

Respectfully submitted,  
PRESTON W. SMALL

  
Timothy E. Welch

His Attorney

## CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of December 2001 served a copy of the foregoing PETITION FOR RECONSIDERATION AND MOTION TO REOPEN THE RECORD by First-Class United States mail, postage prepaid, upon the following:

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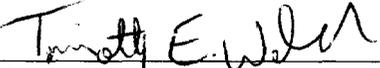
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