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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)	)	
Table of Allotments	)	MM Docket No. 98-112
FM Broadcast Stations	)	RM - 9027
(Anniston and Ashland, Alabama;	)	RM - 9268
College Park, Covington, Milledgeville	)	RM - 9384
and Social Circle, Georgia)	)	

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**OPPOSITION TO**  
**“PETITION FOR RECONSIDERATION**  
**AND MOTION TO REOPEN THE RECORD”**

WNNX LICO, Inc.

Mark N. Lipp  
Michael D. Berg  
Shook, Hardy & Bacon, LLP  
600 14th Street, N.W.  
Suite 800  
Washington, DC 20005  
(202) 783-8400

Its Counsel

January 28, 2002

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## SUMMARY

WNNX LICO, Inc. (“WWWQ”), licensee of Station WWWQ(FM) (formerly WHMA(FM)), College Park, GA, opposes the Petition for Reconsideration and Motion to Reopen the Record submitted December 5, 2001 by Preston W. Small (“Small”). Small argues that despite having filed comments, reply comments, two previous petitions for reconsideration and eleven pleadings in all, Small has not had an opportunity to comment on the applicability of the Eatonton, GA, et al, case to the current proposal for College Park, GA. Small also uses this opportunity to comment on WWWQ’s pending application for a Class C2 facility (filed on January 12, 2001) and then to reargue the facts pertinent to the Tuck showing of whether College Park is an independent community.

Small does not meet the standards set forth in Section 1.429 or 1.115(g) of the Commission’s Rules to justify the filing of a petition for reconsideration to the Commission decision on review. This is a third petition for reconsideration and each of the arguments set forth in Small’s instant reconsideration have been made and fully considered by the Commission, or could have been made by Small with ordinary due diligence at an earlier stage.

The applicability of Eatonton, GA was fully addressed by WWWQ in its original petition (filed November 6, 1997) and in its reply comments on (September 15, 1998). Commission staff gave this issue the treatment it deserved, i.e., whether or not College Park is deserving of a first local service is not dependent on whether such a finding was made for Sandy Springs, GA eleven years ago under then applicable facts and legal authority.

With regard to the pending application for Class C2 status, Small could have argued its relevance in its petition for reconsideration (filed March 12 and refiled March 30, 2001) or it could have more properly addressed the matter in the context of the application itself (BPH-20010112ABQ). Contrary to Small’s belief, WWWQ was unable to file the Class C2 application

earlier because it was filed as a result of the Commission's decision in MM Docket 98-93 creating the Class C0 classification.

As for the Tuck showing, WWWQ made an extensive and compelling showing that College Park is an independent community. College Park has its own local government providing municipal services to its residents, numerous local businesses, and social and cultural organizations and events in which the residents share a commonality of purpose. A large body of case law exists and was cited as precedent for the finding of independence here. Small is clearly wasting the Commission's time and resources with his latest attempt. His petition for reconsideration should be summarily dismissed with prejudice.

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**OPPOSITION TO  
“PETITION FOR RECONSIDERATION AND MOTION TO REOPEN THE RECORD”**

1. WNNX LICO Inc. (“WWWQ”), licensee of WWWQ(FM) (formerly WHMA(FM)), College Park, GA, by its counsel, respectfully submits this Opposition to the above-referenced filing (“Recon. Petition III”) by Preston W. Small (“Small”) on December 5, 2001. That filing should be summarily dismissed, the proceeding should be terminated and any further Small requests for reconsideration, however titled, should be rejected with prejudice.

2. This Opposition addresses Small’s third petition for reconsideration of the decision granting WWWQ’s College Park, GA reallocation proposal and denying Small’s mutually exclusive Social Circle, GA proposal. Report and Order (Proceeding Terminated), 15 FCC Rcd 9971 (2000) (“Original Decision”). The full Commission has affirmed the Original Decision, denied Small’s second Petition, and ratified the staff’s denial of Small’s first Petition for Reconsideration: “We have thoroughly reviewed the staff Memorandum Opinion and Order as well as the earlier Report and Order [Original Decision, citation omitted] and find that there are no errors of law or new facts

that would warrant reversing the staff action. Accordingly, we deny [Small's second petition for reconsideration]." Memorandum Opinion and Order (Proceeding Terminated), FCC 01-324, rel. November 8, 2001 ("Commission MO&O").<sup>1</sup> Yet Small persists with a third groundless petition. Like its two predecessors ("Recon. Petition I," filed June 16, 2000; ("Recon. Petition II") filed March 12, 2001 and refiled March 30, 2001, "Recon. Petition II". Recon. Petition III should be rejected swiftly. It fails to meet the legal standards for reconsideration or reopening of the record, and provides no basis to undo a decision that will provide first local services to two communities, but new service to approximately 1.7 million people, and the elimination of two short spacings and existing interference.

**I. FOR ITS FAILURE TO SUPPORT RECONSIDERATION LEGALLY OR FACTUALLY, AND TO END THE LONG LINE OF BASELESS RECONSIDERATION REQUESTS THAT HAS PROLONGED THIS PROCEEDING SUBSTANTIAL PUBLIC COST, RECON. PETITION III SHOULD BE REJECTED SWIFTLY AND WITH FINALITY**

3. Recon. Petition III provides yet another compelling basis for its summary rejection: in essence, it is an extraordinary, third petition for reconsideration which repeats arguments already raised in Recon. Petitions I and II and rejected by the Commission after ample, clear analysis. All litigation must end. That is why the Commission limits reconsideration to narrow circumstances. It is also why the Commission has a policy disfavoring, and sanctioning where appropriate; repetitious filings that abuse the administrative process. Recon. Petition III therefore merits more than rejection for its shortcomings. The Commission should take steps to make it the last of a long line of baseless attempts to resurrect the lesser of the two competing proposals.

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1. "FCC public notice of Small's Recon. Petition III was issued January 8, 2002 (Report No. 2523), and Federal Register publication occurred January 11, 2002, establishing January 28, 2002 as the filing deadline for oppositions. Hence, WWWQ's instant Opposition to the Recon. Petition III is timely filed.

4. Since the original decision no facts have changed to undermine or call it into question. Nor has Small adduced anything to show such changes, or that he has been deprived of an opportunity to be heard on any matter of decisional significance that he did not know about or could not have discovered through ordinary due diligence.<sup>2</sup> See 47 C.F.R. Sects. 1.115(g) and 1.429. It is time for the Commission to recognize the Small approach for what it is: a distortion of the bounds of reconsideration to encompass “new developments” that are generated solely by Small’s own parade of groundless pleadings that raise issues, somewhat in altered guises, already fully addressed by the Commission. These pleadings are packaged in arcane procedural constructs and in allegations that Commission disposition of Small’s own reiterated arguments are new developments warranting reconsideration. They are, however, merely repackaged rejects or matters of no decisional significance.

5. Consequences of this approach are the diversion and wasting of Commission resources, unnecessary expense to WWWQ, and needless delay in the termination of this proceeding and the resulting certainty to all concerned. The Commission has directed its Bureaus not to tolerate such results. According to the Commission, “[a] pleading may be deemed frivolous . . . if there is ‘no good reason to support it’ . . . or [is] ‘based on arguments that have been specifically rejected by the Commission . . . or [having] no plausible basis for relief.’” *Commission Taking Tough Measures Against Frivolous Pleadings*, 11 FCC Rcd 3030 (1996), citing 47 C.F.R. Sect. 1.52 and *Implementation of Cable Television Consumer Protection Act*, 9 FCC Rcd 2642, 2657 (1993).<sup>3</sup>

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2. See, e.g., 47 C.F.R. §§ 1.429, 1.115

3. Nationwide Communications, Inc., FCC 98-7, Memorandum Opinion and Order, 13 FCC Rcd 5654 (1998) (the Commission does not need to allow the administrative processes to be obstructed or overwhelmed by captious or obstructive protests); Kin Shaw Wong, FCC 97- (continued...)

6. In support of swift rejection of Recon. Petition III, after a background summary, WWWQ provides below a brief catalog of its arguments and their prior resolution in this docket; an indication of the lack of decisional significance of its claims; and a perspective on the unassailable, core decision the Commission has made: College Park is an independent community warranting a first local radio service under the applicable criteria. Small has made no headway against this pivotal criterion, and the rest of his allegations pale in relative importance. Prior WWWQ Oppositions to Small Petitions for Reconsideration are attached to this Opposition and are incorporated herein in full by reference.)

### BACKGROUND

7. The Notice of Proposed Rule Making, 13 FCC Rcd 12738 (1998) (“NPRM”), in this docket set forth two mutually exclusive proposals. WWWQ proposed the reallocation of Channel 263C from Anniston, Alabama to College Park, Georgia as a Class C3 station to provide that community’s first local service.<sup>4</sup> Small, licensee of Station WLRR(FM), Channel 264A, Milledgeville, Georgia, initially proposed the substitution of Channel 264C3 for Channel 264A, and reallocation of Channel 264C3 to Covington, Georgia as that community’s second local service. In response to the NPRM, Small filed a Counterproposal which proposed reallocating Channel 264C3 to Social Circle, Georgia, instead, as that community’s first local service.

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3. (...continued)  
177, Memorandum Opinion and Order, 12 FCC Rcd 6987 (1997) (repetitious petition for reconsideration is subject to summary dismissal); Western Maine Cellular, Inc., DA 92-1706, Memorandum Opinion and Order, 7 FCC Rcd 8648 (1992) (expense of time and resources to address frivolous pleadings is contrary to the public interest).

4. WWWQ also proposed the allotment of Channel 261C3 to Anniston, Alabama and Channel 264A to Ashland, Alabama as new local services.

8. After analyzing the competing WWWQ and Small proposals, the Report and Order (“R&O”), 15 FCC Rcd 9971 (2000), adopted the proposal set forth by WWWQ. The R&O concluded that the public interest benefits in adopting the WWWQ proposal (which included, among other things, first local service to College Park, Georgia and Ashland, Alabama, new service to approximately 1.7 million people and elimination of a grandfathered short-spacing) were superior to the public interest benefits that would be realized in adopting the Small proposal.

9. In the MO&O, the Commission determined that WWWQ adequately demonstrated College Park’s entitlement to first local service consideration because of its independence from Atlanta. The Commission re-evaluated WWWQ’s proposal in light of the standards set forth in prior case precedent, Huntington Broadcasting Co., 192 F.2d 33 (D.C. Cir. 1951); RKO General (KFRC), 5 FCC Rcd 3222 (1990); and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).

10. In the MO&O, the Commission correctly applied the appropriate factors to WWWQ’s proposal and fully discussed the facts which led to the finding that College Park is a thriving, independent community in need of its own local station. The MO&O reaffirmed that WWWQ’s proposal satisfies the Tuck analysis -- the extent to which the station will provide service to the entire Urbanized Area, the relative population of the suburban and central city and, most importantly, the independence of the suburban community. MO&O at para.6. In the MO&O, the Commission emphasized that independence of the proposed community from the central city is the most critical factor. Id. Indeed, in the MO&O, the Commission once again analyzed all eight (8) factors of the Tuck analysis, and reached the same conclusion – College Park, Georgia is most deserving of a first local service.]

## ARGUMENT

### II. THE ALLEGATIONS IN RECON. PETITION III HAVE BEEN “ASKED AND ANSWERED” FULLY ONE OR MORE TIMES PREVIOUSLY IN THIS PROCEEDING, OR OTHERWISE FAIL TO PROVIDE ANY BASIS FOR RECONSIDERATION OR REOPENING OF THE RECORD.

11. In the paragraphs which follow, WWWQ lists arguments made by Small in Recon. Petition III and indicates for each where and when it has previously been addressed during the instant proceeding, or otherwise establishes the failure of the allegation to undermine the already reaffirmed result. This analysis is arranged in “Allegation” and “Response” format.

12. Allegation: Having discussed the applicability of the Eatonton<sup>5</sup> case for the first time in its November, 2001 decision, the Commission must afford Small an opportunity to comment now on that discussion. Eatonton seems to be the basis for much of Recon. Petition III.

Response: Eatonton itself was not discussed expressly by the Commission previously because, as the Commission stated, Eatonton itself has no bearing on the instant case. Eatonton, decided eleven years ago, denied a request to relocate the predecessor station of WWWQ to Sandy Springs, Georgia. That request was made by the prior licensee, had nothing to do with College Park, Georgia, and is distinguished by the Commission in its November decision at para. 2. The comparison required in the instant case is of the public interest benefits to be achieved by the mutually exclusive Small proposal for Social Circle, GA and the WWWQ proposal for College Park. The Commission decided that comparison in favor of WWWQ, under current applicable law, and articulated its reasons fully. Tuck, the controlling 1998 decision in this case, had not been decided at the time of Eatonton. No comparison to the case from eleven years ago is required, nor would it serve any useful purpose. The only reason the Commission addressed it is because Small has raised

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5. Eatonton and Sandy Springs, GA, and Anniston and Lineville, Alabama, 6 FCC Rcd 6580 (1991), application for review dismissed, 12 FCC Rcd 8392 (1997), application for review dismissed 13 FCC Rcd 2104 (1998).

it. The Commission responded correctly: Eatonton does not affect its decision here. For the Commission to reopen the record or grant reconsideration to test that judgment would be absurd. Nothing requires the Commission to afford Small an opportunity to comment on the obvious. Small has provided no support for “his right” to comment or have the record reopened for a case found to be inapplicable and irrelevant to the instant case. It is a fundamental principle of administrative law that an agency need not even address every non-germane, insignificant element introduced into the record by a party, much less reopen a closed record to allow discussion of the irrelevance of the material.

13. Eatonton does serve the useful purpose, however, of illustrating the red herring expedition to which Small would reduce this proceeding. Granting Small’s requests would extend the vicious circle that Small has caused throughout this case: Small makes an unsound, unsupported, even nonsensical, claim; the Commission answers it to assure completeness of the record; and Small then uses the FCC answer as a pretextual “new development” to petition for reconsideration or reopening of the record. This pattern must be broken now. No rule, precedent, authority nor equity requires otherwise.

14. Allegation: Eatonton requires rejection of reallocations where the city of license is “intertwined” with, rather than independent from, the surrounding urban area, and the FCC decided that criterion wrongly in favor of WWWQ.

Response: This issue was fully addressed in RD1 (at paras. 7-10), RD2 (at paras. 3-9) and RD3 (at para. 2). The FCC has already reconsidered Small’s point twice. No one has the right to seek reconsideration of the same point repeatedly, as Small has done here. The right to reconsideration is severely limited to showings that Small has not made and cannot make. 47 C.F.R. Sects. 1.115, 1.429. Enough is enough.

15. Even more important, however, whether via Eatonton or another route, the finding of the independence of College Park is impregnable; it is miles away from being a close question. The record is replete with support for it, both factual and legal precedent. WWWQ's original petition, filed November 6, 1997, provided extensive support for satisfaction of all eight Tuck factors. Even more support was addressed in WWWQ's Reply Comments of September 15, 1998. The record is voluminous on College Park's lack of "intertwining" and the original decision and the Commission MO&O recognized that.

16. Allegation: The FCC erred in its application of the Tuck criteria as to the population of College Park in the context of the surrounding area and the extent of coverage of the urbanized area.

Response: This was raised by Small in Recon. Petitions I, II and now III. It was rejected by FCC in Recon. Decisions 2 and 3.

17. Allegation: "The Commission's comparison [of the 1991 and current reallocation proposals, which comparison is irrelevant to the instant case, ignores the fact that 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 rule making proceeding must be reopened to permit the public to comment upon WHMA's C2 proposal." Recon. Petition III, p. ii. "Eatonton does not permit technical manipulation of the allocation rules." Recon. Petition III, p. 4.

Response: WWWQ's application for C2 authority was of course the subject of FCC public notice; Small had full opportunity to make his views known then, but apparently failed to do so. Small's failure to do that in the application proceeding, where they belong, does not entitle him to reopen the reallocation proceeding now. The independence of College Park is not dependent upon the class of station; it is a function of multiple factors which the Commission has weighed fully. There is no guarantee that the C2 application will be granted; if it is, its coverage of the city of license, and all the other factors that the Commission found to make College Park an independent community warranting its first local service, will be unaffected. C2 status was not available until a

change in FCC rules provided for it in the Second Report and Order in MM Docket 98-93, 15 FCC Rcd 21649 (2000), the Commission created the Class C0 designation and delineated a procedure for reclassifying certain Class C stations to Class C0. After that rule (Sec. 1.420(g) - note 2 and Sec. 73.3573 - note 4) became effective, Station WWWQ filed to increase to Class C2 and “triggered” the reclassification of two Class C stations both of which subsequently filed applications for Class C facilities placing some doubt as to whether WWWQ can attain Class C2 status. The point is that circumstances changed after this rule making proposal was instituted. The possibility of filing for a Class C2 facility did not present itself until January 2001. This application is hardly a “technical manipulation” of the rules nor is the specification of College Park as the community of license an indication that WWWQ is manipulating the rules. WWWQ did not file the petition in the Eatonton case but inherited the previous license’s position in the proceeding. WWWQ chose to relicense the station to College Park, as the community it was interested in serving. Ironically it is Small again that does what it accuses WWWQ of doing. Small’s station originally petitioned to change the community of license to Covington, GA. Yet when he became aware of the WWWQ’s conflicting petition, he looked for any community in his proposed coverage area that would serve as a first local service. Indeed, it is Small not WWWQ that has committed what he describes as a “technical manipulation” of the rules.

18. Allegation: Procedural discussion of the Small request that the Commission staff refer Small’s March 30, 2001 Petition for Reconsideration, which was identical to the Small Petition of March 12, to the Commission as an Application for Review if the staff considered the identical March 30 petition to be repetitious of the March 12 petition. Recon. Petition III, pp. 1- 2.

Response: The significance of this discussion is that the third Small Petition for Reconsideration was referred to the full Commission, which denied it and terminated the proceeding.

MO&O, Nov. 8, 2001.

19. Allegation: Small's fourth Petition for Reconsideration is an authorized pleading because Small was not afforded the opportunity to supplement his third Petition for Reconsideration "to ensure that the material reviewed by the Commission is complete." Recon. Petition III, p. 3.

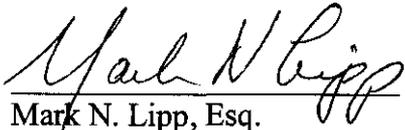
Response. "Absurdity" is defined by Black's Law Dictionary as, inter alia, "inconsistent with the plain dictates of common sense; logically contradictory . . ." It is absurd to claim that Small was entitled to supplement, when Small himself asked that the Petition in question be referred to the Commission as an application for review if the staff found it to be "repetitious." Clearly Small's counsel anticipated referral, and had every opportunity to assure completeness beforehand. Commission rules strictly limit, but provide for, supplementation of petitions for reconsideration. Nothing entitled Small to supplement, and nothing entitles him to a third shot at reconsideration now because he was not given what he was not entitled to in any event.

### **III. CONCLUSION; RELIEF SOUGHT**

20. For the reasons stated, Small's latest reconsideration attempt should be summarily dismissed with prejudice. See Exhibit A hereto. He has filed eleven pleadings in this docket and thus has had more than ample opportunity to make his argument. The Commission's past treatment of applicable case law including Eatonton, Georgia has been appropriate. The pending Class C2 application was filed over a year ago and prior to Small's second petition for reconsideration. The showing of College Park's independence has been fully pleaded and decided. College Park clearly deserves a first local service. There is no basis for re-litigating any issue.

Respectfully submitted,

WNNX LICO, Inc.

By:   
Mark N. Lipp, Esq.  
Michael D. Berg, Esq.  
Shook, Hardy & Bacon L.L.P.  
600 14th Street, N.W.  
Suite 800  
Washington, D.C. 20005-2004  
(202) 783-8400

January 28, 2002

**EXHIBIT A**

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

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(Anniston and Ashland, Alabama; College Park,	)	
Covington, Milledgeville and	)	
Social Circle, Georgia)	)	

**THIRD MEMORANDUM OPINION AND ORDER**  
(Proceeding Terminated)

By the Commission:

Adopted: \_\_\_\_\_

Released: \_\_\_\_\_

The Commission has before it a Petition for Reconsideration filed by Preston Small directed to the Memorandum Opinion and Order, FCC 01-324, released November 8, 2001. WNNX LICO Inc. filed an Opposition to Petition for Reconsideration. Preston Small filed a Reply to Opposition to Petition for Reconsideration. After a complete review of the record in this proceeding and pursuant to Section 1.115(g), we deny the Petition for Reconsideration.

Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Preston Small IS DENIED.

IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

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**CERTIFICATE OF SERVICE**

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy & Bacon L.L.P., do hereby certify that on this 28th day of January, 2002, I have mailed the foregoing Opposition to Petition For Reconsideration And Motion to Reopen the Record to the following:

Robert Hayne, Esq.  
Allocations Branch  
Federal Communications Commission  
Mass Media Bureau  
445 12th Street, SW  
Room 3-A262  
Washington, DC 20554

James R. Bayes, Esq.  
Rosemary C. Harold, Esq.  
Wiley, Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006  
(Counsel to Jefferson-Pilot  
Communications Company)

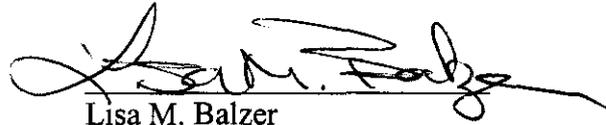
Kathy Archer  
Vice President  
Southern Star Communications, Inc.  
600 Congress Avenue  
Suite 1400  
Austin, TX 78701

Joan Reynolds  
Brantley Broadcast Associates  
415 North College Street  
Greenville, AL 36037

Erwin G. Krasnow, Esq.  
Shook, Hardy & Bacon, L.L.P.  
600 14th Street, N.W.  
Suite 800  
Washington, D. C. 20005-2004  
(Counsel to Radio South, Inc.)

Timothy E. Welch, Esq.  
Hill & Welch  
1330 New Hampshire Avenue, NW  
Suite 113  
Washington, DC 20036  
(Counsel to Preston W. Small)

Werner K. Hartenberger, Esq.  
Kevin F. Reed, Esq.  
Kevin P. Latek, Esq.  
Dow Lohnes & Albertson, P.L.L.C.  
1200 New Hampshire Avenue, NW  
Suite 800  
Washington, DC 20036  
(Counsel to Cox Radio, Inc.)

  
Lisa M. Balzer