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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	FCC 02-201
	)	
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 SECOND MOTION TO REOPEN THE RECORD**

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## Summary

The Commission's discussion of the supplement issue in the July 25, 2002 *Memorandum Opinion and Order (MO&O)*, FCC 02-201, is clearly erroneous. The Commission states that referral of a matter from the staff to the Commissioners does not present an opportunity to file supplemental information. That is certainly incorrect if the manner of referring the case precludes a petitioner from presenting the entire case to the Commissioners. While the subject *MO&O* incorrectly cites § 1.106(a) as the legal authority to refer rulemaking matters to the Commissioners, reference to either § 1.106(a) or § 1.429(a) does not explain why the matter was referred, that is, what is so unusual about this case that required the use of a non-routine decision making process? Moreover, the Commission is clearly erroneous when it states that Mr. Small's argument on this matter was "wholly unsupported." Mr. Small cited the 5<sup>th</sup> Amendment as well as a D.C. Circuit case. The position was supported, but the Commission failed to discuss the support. Due Process concerns required that the Commission either to let Mr. Small file a supplement to the March 30, 2001 *Petition for Reconsideration and Request for Protection* or the Commission must consider those arguments as presented in Mr. Small's December 5, 2001 petition for reconsideration.

The Commission cannot use its decision making processes to deny a petitioner the opportunity to present its entire case, especially where the petitioner has made it clear that the Commissioners needed to see more information than was presented in a petition for reconsideration filed with the staff which, by longstanding Commission rule and case history, should not contain repetitive information. The Commission must clarify whether it considered Section C of Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*, concerning the application of the urban relocation policy to the instant case, a matter which was raised with the staff in Mr. Small's initial comments filed in this case and omitted from the initial decision in this case. If the Commissioners are denying Mr. Small an opportunity to present his whole case to them, the

Commissioners must clearly state a) that Mr. Small is being denied the opportunity and b) the reasons why Mr. Small is being denied that opportunity. By merely ruling that Mr. Small may not present the information via supplement the Commissioners have left it unclear whether they considered the information as presented in the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*. Moreover, the Commissioners must explain why Mr. Small has not been afforded an opportunity to comment upon whatever important matter caused the March 30, 2001 petition for reconsideration to be referred to the Commissioners for decision. The Commission has completely failed to explain what matter was of such importance that staff decision was not appropriate and Mr. Small has been denied the opportunity to comment upon whatever important matter caused the referral.

The Commissioners err when finding that Mr. Small's discussion in his December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* was frivolous because the subject matter at issue concerned the Commission's first discussion of a 10 year-old staff decision. Staff decisions have the same legal force and effect as the Commissioners' orders and Commission orders do not have a limited shelf life. Consequently, the reasons the Commission provided do not support the finding that Mr. Small's criticism of the Commission's first analysis of the 1991 *Eatonton and Sandy Springs* decision was frivolous.

As discussed above, the staff failed to address the issue of the applicability of the *Tuck* analysis to this case. The Commissioners determined that the 1991 *Eatonton and Sandy Springs* decision is relevant to the instant proceeding because they rely upon it in their November 8, 2001 *Memorandum Opinion and Order* to support the staff's decision. It is not frivolous to challenge the Commission's reasoning. However, in the subject *MO&O*, the Commissioners appear to have shifted course and determined, for the first time, that the 1991 *Eatonton and Sandy Springs* is not

relevant to this case. This is a mind boggling determination given the fact that the same station is being moved into the same urbanized area.

During the April-June 2002 time period Mr. Small was threatened with a \$10 million law suit if he continued to litigate his position in this case. The seller of Station WHMA to WNNX indicated that it would receive \$10 million in additional consideration if the relocation order became final by April 2003 under a contract which requires the payment if the relocation approved by the FCC is "substantially similar" to the one the Commission rejected in the 1991 *Eatonton and Sandy Springs* rulemaking proceeding. WNNX considers the two relocation efforts to be substantially similar even if WNNX previously advised the Commission, apparently falsely, that the two proposals are not similar at all. The Commission must reopen the record to determine whether WNNX made false statements to the Commission in an effort to have its rulemaking proposal approved.

Finally, threatening Mr. Small with a law suit if he presents information to the Commission is a serious abuse of the Commission's processes. The Commission must reopen the record to determine whether WNNX was a party to, or authorized, the threats of suit made against Mr. Small for the purpose of keeping him from presenting his case to the Commission.

Preston W. Small (Mr. Small), by his attorney, hereby seeks reconsideration of the Commission's July 25, 2002 *Memorandum Opinion and Order (MO&O)*, FCC 02-201, which denied Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*. Moreover, because new information has come to light indicating that WNNX views its current Station WHMA relocation proposal as "substantially similar" to the Station WHMA relocation proposal which was denied in the *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) (1991 *Eatonton and Sandy Springs*) case, and because improper threats of civil action have been made against Mr. Small if he continued to exercise his litigation rights in the instant proceeding, the Commission should reopen the record in this proceeding to explore these matters. In support whereof, the following is respectfully submitted:

**A. Procedural Matters**

**1. § 1.106 Does Not Apply to Rulemaking Proceedings**

1) Paragraph 2 of the subject *MO&O* states that Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection* was referred to the Commissioners by the staff pursuant to 47 C.F.R. § 1.106(a). The Commission's November 8, 2001 *Memorandum Opinion and Order*, 16 FCC Rcd. 19857 (FCC 2001) does not cite any rule provision which explains the referral and the subject *MO&O* contains the Commission's first citation to any rule in explanation of how it came to be that the Commissioners ruled upon Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection* which had been filed with the staff. Nevertheless, the record is not at all clear how or why Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection* came to be before the Commissioners.

2) First, 47 C.F.R. § 1.106(a)(1) provides that "for provisions governing reconsideration of Commission action in notice and comment rulemaking proceedings, see §1.429. This §1.106 does

not govern reconsideration of such actions." Accordingly, the citation to § 1.106(a) in the *MO&O* as the reason for the referral cannot be correct because that rule does not apply to the instant rulemaking proceeding and the matter did not find its way to the Commissioners via § 1.106(a).<sup>1</sup>

3) It is noted that Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* contains references to § 1.106 rather than § 1.429. Mr. Small regrets the erroneous citations and apologizes for any inconvenience the incorrect references might have caused.<sup>2</sup> While portions of the two rules are similar, compare 47 C.F.R. § 1.429(b)(1),(2) and § 47 C.F.R. § 1.106(c)(1), there are some textual differences. Accordingly, the Commission should clarify whether or not there are any substantial differences between § 1.106 and § 1.429 for the purpose of deciding the instant case.

## **2. The *MO&O* Is Confusing: Why Was The Case Referred to the Commissioners?**

4) The subject *MO&O*, at ¶ 2, states that the Commission's rules "permit the Commission to act on any matter and, as here, allow the staff to refer any matter to the Commission." While that is true, it is not the Commission's policy for the Commissioners arbitrarily to select pleadings pending before the staff for consideration by the full Commission nor is it the Commission's policy for the staff to refer matters to the Commissioners without reason. Absent an explanation of why there was a referral to the Commissioners, or an explanation why the Commissioners instructed that

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<sup>1</sup> Equally erroneous are the citations to 47 C.F.R. § 1.106(k)(3) and § 1.106(b)(3) found at footnotes 5 & 6 of the subject *MO&O*.

<sup>2</sup> Given the Commission's failure to date to consider any of Mr. Small's arguments in a serious manner, beginning with the first decision in this case, 15 FCC Rcd. 9971 (Alloc. Br. 2000), which did not discuss a single issue raised by Mr. Small concerning the *Tuck* test and related matters even though Mr. Small was the first filed, and only, competitor, in this proceeding, it seems doubtful that Mr. Small was the source of any Commission confusion on the citation. Undersigned counsel noticed the incorrect references in the subject *MO&O* immediately upon reading the brief order, even if he had earlier made the same mistake in the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*. Earlier in the proceeding Mr. Small cited the correct rule section for use in rulemaking proceedings. See e.g. Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection*, at 1 ¶ a.1.

the matter be sent to them, it is not possible to determine whether the procedures utilized in this case are regular and proper and whether Mr. Small's procedural and substantive rights were protected.

5) Footnote 1 of the November 8, 2001 *Memorandum Opinion and Order*, 16 FCC Rcd. 19857 (FCC 2001), discusses that Mr. Small "states that if the staff considers this pleading to be repetitious, that it be referred to the Commission as an Application for Review. The Petition has been referred to the Commission and is being considered as an Application for Review." One previously expressed view point is that the matter was referred to the Commissioners because Mr. Small requested referral if there were a finding of repetition. See WNNX's January 28, 2002 *Opposition to Petition for Reconsideration and Motion to Reopen the Record*, at 10. However, the November 8, 2001 *Memorandum Opinion and Order* contains no finding of repetition and the subject *MO&O* clarifies that repetition was not the reason for referral.

6) The subject *MO&O*, ¶ 2, for the first time, explains that the staff referred the matter to the Commissioners pursuant to § 1.106(a) [§ 1.429(a)?] and 47 C.F.R. § 0.5(c). § 0.5(c) provides that the staff may refer matters to the Commission "upon concluding that it involves matters warranting the Commission's consideration." However, the record of this proceeding is bare regarding which issues the staff felt it could not handle and which therefore warranted the Commissioners' consideration. See Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*, 1-2 (Commission has failed to explain why the case was referred to the Commissioners and referral appears to have occurred under the "new and novel" argument prong found at 47 C.F.R. § 0.283(b)). The rules cited in the subject *MO&O* merely provide for a particular, and non-routine, decision making route which will be utilized in appropriate cases, however, citation to the rule sections does nothing to explain what is important about the instant case which requires a non-routine decision making process. The public is entitled to know what issues the staff felt were

so important that it had to refer the matter to the Commissioners and Mr. Small must be afforded an opportunity to comment upon those important issues, whatever they might be.

7) The subject *MO&O*, ¶ 2, states that the staff referred the matter to the Commissioners pursuant to § 1.106(a), however, footnote 3 of the subject *MO&O* cites 47 C.F.R. § 0.5(c) for the proposition that the "Commission may instruct the staff to refer any matter to it for action." Thus, the *MO&O* is unclear whether the staff referred the matter to the Commissioners or whether the Commissioners instructed the staff to refer the matter to them. If the Commissioners, in fact, instructed the staff to refer the matter to them as indicated in footnote 3, the Commissioners have failed to explain why that instruction was given. That is, the Commissioners have failed to explain what is so important about this case which compelled the Commissioners to pull the March 30, 2001 *Petition for Reconsideration and Request for Protection* and related pleadings from the staff. Absent a reasoned explanation of what the Commission is doing, the referral action is arbitrary. Moreover, the Commissioners have not afforded Mr. Small the opportunity to comment upon whatever matter the Commissioners feel is so important that a non-routine decision making process is required in this case and Mr. Small's Due Process rights have been violated.<sup>3</sup>

### **3. It is an Unfair Surprise to Deny a Party the Opportunity to Present Its Whole Case**

8) The Commissioners' consideration as an application for review of a petition for reconsideration filed with the staff is an unusual event notwithstanding the fact that the procedure

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<sup>3</sup> It is not Commission policy for the Commissioners to take matters from the staff to expedite channel allotment rulemaking proceedings nor is it Commission policy to take matters from the staff to expedite the construction of broadcast stations. Even if it were Commission policy to pull reconsideration pleadings from the staff for the purpose of expediting broadcast related proceedings, as of March 30, 2001, when Mr. Small filed the *Petition for Reconsideration and Request for Protection* which was reviewed by the Commissioners as an application for review in the November 8, 2001 *Memorandum Opinion and Order*, the channel had already been allocated into the Atlanta Urbanized Area and WNNX was already operating at the relocated site within the City of Atlanta. See WNNX's license application bearing File No. BLH-20010109AAD (WNNX files for a station license for the City of Atlanta site). Accordingly, seeking to foster prompt institution of service could not have been the reason the Commissioners gave the referral instruction.

is authorized by the rules. Because it is not standard operating procedure for the Commissioners to rule on pleadings filed with the staff, it certainly is a “surprise” when the Commissioners pull pleadings from the staff and it certainly is “unfair” when that procedure prevents a party from being able to present its whole case to the Commissioners. If the instant case presents issues which are of such import so as to require the decision making shortcut employed by the Commissioners, then the Commission must explain why those heretofore secret, but important, issues have not been highlighted and why Mr. Small is not entitled to address those critical issues.

9) It is even more “surprising” and “unfair” to employ the decision making shortcut when the Commission fails to explain why it is employing the procedure, especially where the subject *MO&O* is not clear regarding whether the Commission considered the arguments contained in Section C of Mr. Small’s December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* as well as related information filed in subsequent pleadings.<sup>4</sup> Given the complete lack of explanation regarding why the case was referred to the Commissioners, the assertion in the *MO&O*, ¶ 2, that “applicants and petitioners cannot claim surprise or unfairness when the Commission invokes these procedures” is wholly arbitrary. The subject *MO&O* states that “contrary to Small’s wholly unsupported claim, the referral of a matter to the Commission pursuant to Section 1.106(a) [1.429(a)?] does not create an opportunity for the filing of an additional pleading or ‘supplement.’” It seems reasonable to conclude that the Commission would not have discussed the “supplement” issue if the very same issues which would have been filed in the supplement were considered by the Commission via the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the*

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<sup>4</sup> Page 10 of Mr. Small’s December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* is clear that the reason the record was to be reopened was to take evidence regarding the Commission’s comparison of two of WNNX’s relocation proposals while not considering the fact that WNNX has applied for a larger station class. The case does not need to be reopened to consider the applicability of *Tuck* because that matter was presented to the staff in Mr. Small’s August 31, 1998 *Comments and Counterproposal*, at 2-3 and other pleadings.

*Record*<sup>5</sup> and the Commission should clarify whether Mr. Small is being denied an opportunity to present his full case to the Commissioners.<sup>6</sup>

10) Moreover, if the Commissioners did not consider the arguments made in Section C of Mr. Small's December 5, 2002 *Petition for Reconsideration and Motion to Reopen the Record* the Commissioners should explain when Mr. Small should have presented his entire case to the Commissioners given the fact that the case was referred to the Commissioners and given the fact that Mr. Small could not reargue to the staff in his March 30, 2001 *Petition for Reconsideration and Request for Protection* matters which had already been argued and rejected by the staff.<sup>7</sup> See e.g., *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 2002 FCC LEXIS 2253, ¶ 15, (FCC 2002) (FCC 02-130) ("the Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already

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<sup>5</sup> See Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*, at 11 ¶ 21 (discussion of urban relocation policy is presented "in addition to the arguments presented in Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection*.").

<sup>6</sup> The subject *MO&O*, ¶ 3, states that Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* is "denied," not "dismissed." While this might indicate a merits determination of the issue, and issue which the Commission indicated could not be submitted via supplement, because the record in this proceeding is unclear as to what the Commission is doing or why it is doing it, the public cannot presume to know what the Commission meant by the use of one single word rather than another word and clarification is required.

<sup>7</sup> The staff orders in this case, 15 FCC Rcd. 9971 (Alloc. Br. 2000) and 16 FCC Rcd. 3411 (Alloc. Br. 2001), discuss the *Tuck* factors and apply them without ever ruling upon Mr. Small's argument that the *Notice of Proposed Rulemaking*, 13 FCC Rcd. 12738 ¶ 6 (Alloc. Br. 1998) repeats WNNX's incorrect argument that *Tuck* does not apply to this case. By claiming that WNNX's proposal is "analogous" to a relocation to a relocation outside of an urbanized area, 16 FCC Rcd. 3411, ¶ 6, it appears that staff determined that *Tuck* does not apply to WNNX's proposal because of the 45% coverage proposed by WNNX. However, there has been no direct ruling on the applicability of the *Tuck* test to the instant case, even though Mr. Small raised the issue in his initial *Comments*, at 2-3, and in his March 30, 2001 *Petition for Reconsideration and Request for Protection*, at 7 ¶ 8. The public is entitled to a clear ruling regarding whether the *Tuck* test applies in this case. If the *Tuck* test does not apply, the Commission should explain why the staff devoted so much ink to the topic because it is not at all clear from the Commission's decisions.

presented."). Even the subject *MO&O*, ¶ 2, states that "reconsideration is not available to reargue the relevance of this [the 1991 *Eatonton and Sandy Springs*] case."<sup>8</sup>

11) There are at two problems with a procedure which denies Mr. Small the opportunity to present the arguments contained in Section C of the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*. First, a ruling which prohibits Mr. Small from making the Section C arguments on the grounds that they should have been reargued in the March 30, 2001 *Petition for Reconsideration and Request for Protection* changes, without prior notice or rulemaking, in violation of the Administrative Procedure Act, the long standing policy which disdains repetition of arguments in petitions for reconsideration. See *Telecommunications Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("when an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms."). There was no notice that matters had to be reargued in a petition for reconsideration and implementing that rule in the middle of this proceeding violates the Administrative Procedure Act's notice and comment rulemaking requirements and violates Mr. Small's 5<sup>th</sup> Amendment Due Process rights by imposing new pleading rules after the pleadings had been filed.

12) Second, such a ruling deprives Mr. Small of his Fifth Amendment right to due process by denying him the opportunity present material portions of his case to the Commissioners and denies him meaningful review of the staff's initial decision. The *MO&O*'s finding, at paragraph 2, that Mr. Small's argument that he must be permitted an opportunity to present his entire case to the Commissioners is "wholly unsupported" is clearly erroneous. Mr. Small plainly argued, *inter alia*, that "absent an opportunity to present this information, Mr. Small's due process rights are violated." December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*, at 3 ¶ 5; February

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<sup>8</sup> As explained in Section B.3 below, Mr. Small disagrees with the conclusion that his December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* merely reargued matters which had already been addressed.

6, 2002 *Reply to Opposition to Petition for Reconsideration and Motion to Reopen the Record*, at 5 ¶ 8. Moreover, Mr. Small argued that "notice and a meaningful opportunity to challenge the agency's decision are the essential elements of due process" citing *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997). February 6, 2002 *Reply to Opposition to Petition for Reconsideration and Motion to Reopen the Record*, at 6 ¶ 8. Clearly, the Commissioners err when finding that Mr. Small's position was "wholly unsupported." Instantly, there was no notice that the seldom used shortcut decision making procedure was going to be utilized, Mr. Small was not afforded any opportunity to file a supplement to present his entire case even though he specifically requested the opportunity, and Mr. Small was prohibited by long standing Commission rules and policy from repeating arguments in the March 30, 2001 *Petition for Reconsideration and Request for Protection* filed with the staff. Given these circumstances, if Mr. Small's arguments found in Section C of his December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* are not considered by the Commissioners, Mr. Small is denied a meaningful opportunity to present his case in violation of his due process rights.

#### **B. Criticism of Commission Reasoning is not "Frivolous"**

13) Mr. Small objects to the Commission's determination that Mr. Small's criticism of the Commission's first discussion of the 1991 *Eatonton and Sandy Springs* case was "frivolous." *MO&O*, ¶ 2. Without reference to any rule or case precedent, the Commission presents three reasons to support its "frivolous" finding, none of which supports the finding. As discussed below, it is standard administrative practice that litigants are required to raise issues with the Commission if the decision is contrary to their interests and that is all Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* does. There is nothing remotely frivolous in Mr. Small's request for relief.

## **1. Commission Precedent Does Not Have An Expiration Date**

14) The Commission explains that its first analysis of the 1991 *Eatonton and Sandy Springs* case as contained in the November 8, 2001 *Memorandum Opinion & Order* is immune from critical examination because the case at issue is "ten-year[s] old." The age of the case merely means that it is precedent of long standing -- the age of a case discussed by the Commission does not somehow protect the Commission's discussion of the case and the Commission provides no authority in support of the proposition. The Commission has not previously ruled that its decisions are subject to some form of the doctrine of desuetude, that is, the Commission has never previously ruled that its orders have a limited shelf life. Adopting the doctrine in the middle of this case violates the Administrative Procedure Act's notice and comment requirements and violates Mr. Small's 5<sup>th</sup> Amendment Due Process rights by retroactively imposing a new procedural rule for the purpose of ruling against Mr. Small's position after the pleadings had been filed.

## **2. The 1991 "Staff Decision" Is A Commission Decision**

15) The Commission's "frivolous" determination attempts to minimize the import of the 1991 *Eatonton and Sandy Springs* case by stating that the case is a "staff decision." *MO&O*, ¶ 2. The Commission's determination that its first analysis of the 1991 *Eatonton and Sandy Springs* case made in the November 8, 2001 *Memorandum Opinion and Order* is immune from critical examination because the 1991 *Eatonton and Sandy Springs* decision is merely a "staff decision" overlooks 47 C.F.R. § 0.5(c) which provides that, with the exception of review, "actions taken under delegated authority have the same force and effect as actions taken by the Commission." *See also* 47 U.S.C. § 155(c)(3) ("any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission."); 47 C.F.R. § 1.102(b) (actions taken pursuant to delegated authority

are effective upon release). The fact is, the 1991 *Eatonton and Sandy Springs* case is the law of the land and the decision is not entitled to less weight because it is a "staff decision" especially where the case has served as precedent for more than 10 years.

### 3. Mr. Small's December 5, 2001 Petition Did Not "Reargue" Relevance

16) The Commission states that "reconsideration is not available to reargue the relevance" of the 1991 *Eatonton and Sandy Springs* decision. *MO&O*, ¶ 2. Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* does not seek to "reargue the relevance" of the 1991 *Eatonton and Sandy Springs* decision. Until the Commissioners issued their November 8, 2001 *Memorandum Opinion and Order*, 16 FCC Rcd. 19857 (FCC 2001), the Commission had not discussed the 1991 *Eatonton and Sandy Springs* decision in the instant proceeding. In the November 8, 2001 *Memorandum Opinion and Order* the Commissioners determined that the 1991 *Eatonton and Sandy Springs* decision was relevant for the purpose of comparing WNNX's 1997 relocation proposal to the relocation proposal discussed in the 1991 *Eatonton and Sandy Springs* decision.<sup>9</sup>

17) Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* does not "reargue the relevance" of the 1991 *Eatonton and Sandy Springs* decision because the Commissioners themselves clearly determined that the case was relevant as evidenced by their reliance upon the case. The December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* takes issue with the Commissioners' analysis of the 1991 *Eatonton and Sandy Springs*

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<sup>9</sup> The Commission has not explained why the 1991 *Eatonton and Sandy Springs* case can be relevant for the purpose of comparing two of WNNX's Station WHMA relocation proposals, but not for other purposes such as demonstrating that the *Tuck* test is applicable when the transmitter and/or proposed city of license are to be located in an urbanized area, without regard to the proposed coverage area, and why it is not relevant to the issue of whether WNNX used the 1991 *Eatonton and Sandy Springs* decision as a blue print to manipulate the Commission's allocation rules to achieve something which had already been denied in contravention of the Commission's policy that it will not "blindly" apply its allocation rules to permit relocation into urbanized areas.

decision and a) faults the Commissioners for engaging in a comparative analysis of the two attempts to relocate Station WHMA from Anniston, AL to the City of Atlanta without discussing why such a comparison is not considered a technical manipulation of the rules to achieve relocation of a signal into the Atlanta Urbanized Area, b) argues that Commission's technical superiority discussion comparing the two WHMA proposals is not relevant to an urban relocation analysis, and c) argues that if the Commission wishes to compare the 1991 WHMA relocation proposal, the proper comparison is with WNNX's current intent to provide C2 service to the Atlanta Urbanized Area, as evidenced by File No. BPH-20010112ABQ, rather than the C3 service specified in WNNX's 1997 *Petition for Rulemaking*, and that the record should be reopened so that the comparison may be made upon proper evidence. See December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*, at 4-11. There is nothing repetitive or "frivolous" in any of this. Mr. Small is required to exhaust his administrative remedies before proceeding to the appeals court, if that becomes a necessary step, and Mr. Small is well within his rights to challenge new Commission reasoning which seeks to support the decision to grant WNNX's proposal over Mr. Small's. See e.g., *MCI Telecommunications Corporation v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998) (Commission's reasoning offered in a rulemaking found "plainly inadequate"). See also *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) citing *American Tel. & Tel Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) ("where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action.").

18) Footnote 5 of the subject *MO&O* erroneously cites 47 C.F.R. § 1.106(k)(3) in support of the proposition that a "ruling denying reconsideration may not be treated as modification of original order and therefore such ruling is not subject to further reconsideration." The correct citation appears to be 47 C.F.R. § 1.429(i). However, the text of both provisions read to the effect that a petition for reconsideration of an order which has been previously denied on reconsideration "may

be dismissed by the staff as repetitious."<sup>10</sup> Neither rule states that further reconsideration is prohibited<sup>11</sup> and footnote 5 incorrectly states that the Commission's rules provide that a "ruling denying reconsideration may not be treated as a modification of original order and therefore such ruling is not subject to further reconsideration." Each rule provides that further reconsideration may be sought, but that repetition is to be avoided.

19) Because appellate litigation rules are stringent in that a claim may be dismissed by an appeals court if remedies have not been exhausted, while at the same time the exhaustion requirement is not crystal clear, *see e.g. Time Warner Entertainment Co., L.P. v. FCC*, 12 CR 268 144 F.3d 75, 81 n. 7 (D.C. Cir. 1998) ("given the apparent tension in our cases [regarding exhaustion], a prudent counsel when in doubt should seek reconsideration before the Commission."),<sup>12</sup> and because neither § 1.106(k)(3) nor § 1.429(i) on foreclose filing for reconsideration in the manner stated in footnote 5, and because the Commission often times

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<sup>10</sup> When a pleading is dismissed as "repetitious" there is an indication that the Commission considers that nothing more need be said on the topic and that the available administrative remedies have been exhausted. When the Commission adds further substantive discussion in a reconsideration order, especially where the discussion goes beyond the pleadings then under review, such as the Commission's foray into the comparative analysis of WNNX's 1991 and 1997 Station WHMA relocation proposals, there is an indication that an avenue for relief remains open on those aspects of the case and exploring those avenues is not "frivolous," it is required practice.

<sup>11</sup> The Commission has, on countless occasions, considered petitions for reconsideration of orders which denied reconsideration. *See e.g. Southern Communications Systems, Inc.*, 2001 FCC LEXIS 5538 n. 1 (FCC 2001) (FCC 01-298); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fifth Memorandum Opinion and Order*, 15 FCC Rcd. 22810 ¶¶ 3, 6, 8 (FCC 2000); *Interconnection and Resale Obligations Pertaining To Commercial Mobile Radio Services, Order on Reconsideration of Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd. 16221 ¶ 4 (FCC 2000).

<sup>12</sup> In *Time Warner Entertainment Co., L.P. v. FCC* Judge Randolph, concurring in part and dissenting in part, writes that all perceived procedural and substantive errors must be brought to the Commission's attention before litigation is filed in the court of appeals. 144 F.3d at 82-5. *See also Omnipoint Corporation v. FCC*, 2 CR 816 78 F.3d 620, 635 (D.C. Cir. 1996) ("this Court has construed § 405 to require that complainants give the FCC a 'fair opportunity to pass on a legal or factual argument' before coming to court.").

considers further reconsideration petitions, filing for reconsideration of new Commission reasoning is appropriate in order to bring relevant legal and factual matters to the Commission's attention.<sup>13</sup> See e.g., *MCI Telecommunications Corporation v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998) (Commission's reasoning offered in a rulemaking found "plainly inadequate"). See also *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) citing *American Tel. & Tel Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) ("where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action.").

**C. The Relevance of the 1991 *Eatonton and Sandy Springs* Decision**  
**1. There Was No Prior Ruling On Relevance**

20) To the extent that the Commission's statement that "reconsideration is not available to reargue the relevance of" the 1991 *Eatonton and Sandy Springs* decision, *MO&O* ¶ 2, can be read to indicate that the Commission had, at some earlier point in this proceeding, determined that the 1991 *Eatonton and Sandy Springs* decision is not relevant to the instant proceeding and that Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* sought to argue against something which had already been decided, reconsideration is required. To be sure, until the Commission discussed the 1991 *Eatonton and Sandy Springs* decision in its November 8, 2001 *Memorandum Opinion and Order*, the Commission had declined previous invitations to discuss the most important case cited in this rulemaking proceeding. On the other hand, the Commission never made a relevance ruling regarding the 1991 *Eatonton and Sandy Springs* decision. To the

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<sup>13</sup> To the extent that the Commission now interprets its rules to foreclose the filing of reconsideration petitions to challenge the reasoning found in a reconsideration order, meaning that a party could proceed to the court of appeals to raise factual and legal arguments which are not presented first to the Commission, the change to the long standing exhaustion requirement being made in the instant proceeding is without prior notice or rule making in violation of the Administrative Procedure Act and in violation of Mr. Small's 5<sup>th</sup> Amendment Due Process rights by denial of the opportunity to present his case to the Commission. See *Telecommunications Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("when an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.").

extent that the subject *MO&O* indicates that the Commission's prior silence constitutes an adverse ruling on relevance, the proposition is not supportable.

21) Commission determinations must be made on the record. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (an agency must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"). Moreover, the FCC may not argue positions in the court of appeals which are not contained within the order being reviewed. *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) *citing SEC v. Chenery*, 318 US 80, 95 (1943); *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997) ("court must consider reasons given by agency in its order, not by agency counsel" in the appeals court). All that the public knows from the record of the instant rulemaking proceeding is that the Commission had failed, until its November 8, 2001 *Memorandum Opinion and Order*, to discuss a case which is substantially similar to the one presented instantly and that the reason for that failure had not been previously provided until now when the Commission determines, erroneously, that Commission precedent may not be relied upon if it is 10 years old or if it is a staff order.

## **2. There Is No Explanation For The Reversal of The Relevance Determination**

22) The Commission itself determined that the 1991 *Eatonton and Sandy Springs* decision was relevant by using it in the November 8, 2001 *Memorandum Opinion and Order* as support for the grant of WNNX's rulemaking request. Apparently, Mr. Small's criticism of the Commission's analysis of the 1991 *Eatonton and Sandy Springs* decision had some effect as the Commission now appears to write that the case is irrelevant to the matters presented instantly. However, the subject *MO&O* completely fails to explain why the 1991 *Eatonton and Sandy Springs* case is now deemed irrelevant after having earlier decided that the case was relevant. The Commission is required to

explain why it is departing from a past practice and because it has not done so here, the Commission's relevance determination is arbitrary. See *Achernar Broadcasting Company v. FCC*, 62 F.3d 1441, 1448-49 (D.C. Cir. 1995) citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("agency may not divert from prior policy without reasoned analysis").

### **3. WNNX Considers the 1991 Case Relevant to This Proceeding**

#### **a. WNNX Dismissed the 1991 *Anniston and Sandy Springs* Litigation to Proceed Instantly**

23) Footnote 4 of the *MO&O* provides the citation to the staff's 1991 *Eatonton and Sandy Springs* decision, but the citation omits the subsequent history. By failing to consider the entire citation string the Commission misses a glaring example of why the 1991 *Eatonton and Sandy Springs* decision is relevant to the instant case. The full citation string is *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). At the time WNNX filed its November 6, 1997 *Petition for Rulemaking* WNNX erroneously believed that it could maintain both rulemaking petitions on file and offer the Commission a deal "that should the Commission adopt the changes requested in this Petition, WHMA agrees to withdraw the pending Application for Review and to have MM Docket No. 89-585 dismissed with prejudice." WNNX's November 6, 1997 *Petition for Rulemaking*, at 1. WNNX even stated that its

purpose in filing the instant [the November 6, 1997] petition is to postpone any further review or litigation concerning MM Docket No. 89-585 . . . . While WHMA certainly prefers a favorable resolution of MM Docket No. 89-585 . . . . [T]he 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.

WNNX's November 6, 1997 *Petition for Rulemaking*, at 3.

24) The Commission's 1998 dismissal of WNNX's second application for review filed in its effort to relocate the Anniston station to the Atlanta Urbanized Area was prompted by WNNX's

December 11, 1997 *Request to Withdraw Application for Review* which was filed because WNNX could not maintain conflicting rulemaking proposals on file, that is, WNNX could not receive a grant of a license for the subject channel at Sandy Springs and also receive a license for the same channel at College Park where the transmitter for each station was to be located in the City of Atlanta. See *Frederiksted, Virgin Islands and Culebra and Carolina, Puerto Rico*, 10 FCC Rcd. 13627 ¶ 2 (Alloc. Br. 1995) (filing of a subsequent conflicting rulemaking proposal constituted abandonment of the first rulemaking proposal); cf. *1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, First Report and Order*, 14 FCC Rcd. 5272 n.2 (FCC 1998); 47 C.F.R. § 73.3518 (the Commission could not grant conflicting construction permit applications which proposed substantially similar engineering, but which proposed service to different cities). Ignoring the history of the effort to relocate Station WHMA into the Atlanta Urbanized Area has caused the Commission to overlook the interrelated nature of WNNX's two relocation proposals and the interrelated nature of WNNX's two proposals is not eliminated merely by lopping off the end of a citation string.

**b. WNNX Views The Two Relocation Proposals as "Substantially Similar"**

25) The contract submitted with the November 26, 1996 WNNX/Sapphire Broadcasting, Inc. WHMA assignment application (File No. BALH-961118GM) provides that the seller of the station would receive a premium payment from WNNX of between \$10 million and \$20 million if Station WHMA were moved to the Atlanta Urbanized Area. File No. BALH-961118GM, Exhibit No. 1, Asset Purchase Agreement, at 5 § 2.4 (copy attached hereto). At the time File No. BALH-961118GM was filed an application for review of the 1991 *Eatonton and Sandy Springs* decision was pending and WNNX assumed prosecution of that litigation. See e.g., WNNX's November 6, 1997 *Petition for Rulemaking*, at 3 (WNNX explains that on July 28, 1997 it submitted a further application for

review in prosecution of the first proposal to move Station WHMA from Anniston, AL to the Atlanta Urbanized Area).

26) The contract between WNNX and Sapphire Broadcasting, Inc. submitted with File No. BALH-961118GM does not require that WNNX obtain a reversal of the 1991 *Eatonton and Sandy Springs* decision in order for Sapphire Broadcasting, Inc. to receive additional consideration. § 2.4 of the Asset Purchase Agreement WNNX submitted in File No. BALH-961118GM provides that success is obtained if the Commission grants a “substantially similar” proposal compared to the one at issue in the 1991 *Eatonton and Sandy Springs* decision. It cannot be doubted that WNNX and Sapphire Broadcasting, Inc. consider that WNNX’s 1997 *Petition for Rulemaking* presents a “substantially similar” Station WHMA relocation proposal to the one at issue in the 1991 *Eatonton and Sandy Springs* case.

27) From April through June 2002 Thomas Gammon, a media broker, acting on behalf of Sapphire Broadcasting, Inc. and its president Hoyt Goodrich, contacted both the undersigned counsel and Mr. Small numerous times. Mr. Gammon advised them that if Mr. Small continued to litigate matters in the instant rulemaking proceeding that Sapphire Broadcasting, Inc. would sue Mr. Small for \$10 million. Mr. Gammon explained that the WNNX/Sapphire Broadcasting, Inc. Asset Purchase Agreement requires the issuance of a final order on the Station WHMA Anniston to Atlanta relocation “within six (6) years of the Closing Date” of the WNNX/Sapphire Broadcasting, Inc. transaction in order for Sapphire Broadcasting, Inc. to be eligible for the additional payment of \$10-\$20 million.<sup>14</sup> See File No. BALH-961118GM, Exhibit No. 1, Asset Purchase Agreement, at 5 § 2.4

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<sup>14</sup> Because Sapphire Broadcasting, Inc. and Hoyt Goodrich’s threat to sue Mr. Small is an event which occurred since the last time Mr. Small had an opportunity to present matters to the Commission, the issue is properly raised at this time. 47 C.F.R. § 1.429(b)(1). Moreover, until the threat was made, it was not evident that WNNX considered that its current Station WHMA proposal was “substantially similar” to the 1991 Station WHMA relocation proposal because WNNX previously represented to the Commission that “the only similarity between this and the previous  
(continued...)

for the contract provision regarding this timing (copy attached hereto). It is believed that the closing of the WNNX/Sapphire Broadcasting, Inc. transaction occurred on or about April 27, 1997. Thus, WNNX must attempt to obtain a final order to relocate into the Atlanta Urbanized Area by April 27, 2003 in order for Sapphire Broadcasting, Inc. and Hoyt Goodrich to receive the additional \$10 million payment.<sup>15</sup>

28) Clearly the earlier proposal to relocate Station WHMA to the Atlanta Urbanized Area is relevant to the instant proceeding because WNNX/Sapphire Broadcasting, Inc. consider that the two relocation proposals are “substantially similar” to trigger a \$10 million payment to Sapphire. Because WNNX believes that the 1991 relocation proposal and its current relocation proposal are “substantially similar,” the Commission cannot conclude that they are so different that the 1991 *Eatonton and Sandy Springs* decision is irrelevant to the instant proceeding.<sup>16</sup> Moreover, given the

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<sup>14</sup>(...continued)

proposal is that the same station is involved.” WNNX’s September 15, 1998, *Reply Comments*, at 2 ¶ 1. It now appears that WNNX’s statement made in the *Reply Comments* was false when made and the Commission should determine whether this false statement disqualifies WNNX in view of long standing Commission policy which prohibits the making of false statements.

<sup>15</sup> § 5.5 of the WNNX/Sapphire Broadcasting Agreement, copy attached, provides that WNNX “shall take such actions . . . to assure, complete and evidence the transactions provided for in this Agreement.” During the course of the instant rulemaking proceeding undersigned counsel and Mr. Small were unaware of this time line until Mr. Gammon included it as part of Hoyt Goodrich and Sapphire Broadcasting, Inc.’s threat of suit against Mr. Small. Mr. Small has previously requested prompt and consolidated action in the interest of moving this proceeding along. See footnote 8 at page 3 of Mr. Small’s February 6, 2002 *Reply to Opposition to Petition for Reconsideration and Motion to Reopen the Record* (noting Mr. Small’s efforts to have FCC documents published to expedite the pleading cycles); see also *id.*, at 5 ¶ 7 (explaining that Mr. Small wanted an opportunity to supplement the March 30, 2001 *Petition for Reconsideration and Request for Protection* to obtain a consolidated order rather than multiple orders). Mr. Small has acted without knowledge of Goodrich’s and Sapphire’s needs and he cannot be faulted either for how the administrative process works generally, nor for how this case has progressed specifically, nor for how this case affects a non-party to the proceeding.

<sup>16</sup> Mr. Gammon was the party behind the Station WHMA relocation proposal at issue in the 1991 *Eatonton and Sandy Springs* case. Mr. Gammon indicated that he took a real beating in that case and that he is looking to recoup some money via the instant Station WHMA relocation proposal.  
(continued...)

fact that WNNX's two relocation proposals are substantially similar, the Commission is required to treat them similarly or adequately explain why different treatment is being provided, an explanation which is lacking instantly. *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (the Commission must adequately explain why it is treating similar situations differently).

29) The Commission has previously explained in the instant proceeding that WNNX prevails instantly on the *Tuck* analysis, while in the 1991 *Eatonton and Sandy Springs* the *Tuck* analysis went against the Station WHMA relocation proposal. While Mr. Small continues to disagree with that conclusion because, *inter alia*, the Commission has not attributed any weighting to the *Tuck* factors nor analyzed them correctly, that conclusion can be taken as a given for the purposes of the following argument. Even if WNNX prevails on the *Tuck* test the Commission has not once indicated in the instant proceeding why WNNX's 1997 rulemaking proposal does not constitute a technical manipulation of the Commission's allocation rules to achieve something which was previously prohibited. The instant petition brings before the Commission new information, that is, the fact that it has become apparent that WNNX and Sapphire Broadcasting, Inc. consider WNNX's 1997 rulemaking petition to be "substantially similar" to the 1991 Station WHMA relocation proposal and the Commission must explain why WNNX's effort to relocate Station WHMA into the Atlanta Urbanized Area using the 1991 *Eatonton and Sandy Springs* decision as a road map does not constitute a technical manipulation of the allocation rules to achieve something which is prohibited.

30) The WNNX/Sapphire Broadcasting, Inc. Asset Purchase Agreement demonstrates that WNNX acquired Station WHMA for the purpose of relocating Station WHMA to the Atlanta urbanized area without regard to the ultimate location of the relocated Station WHMA, except that the location and coverage must be "substantially similar" to that proposed in the 1991 Station

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<sup>16</sup>(...continued)

Clearly, the 1991 *Eatonton and Sandy Springs* is relevant regarding both legal and factual matters.

WHMA relocation proceeding. The WNNX/Sapphire Broadcasting, Inc. Asset Purchase Agreement further demonstrates that WNNX's instant relocation proposal exists merely because WNNX felt it would be the most convenient method of achieving that objective. See WNNX's November 6, 1997 *Petition for Rulemaking*, at 3 ¶ 4. The identity of the proposed community of license is not a concern under the WNNX/Sapphire Broadcasting, Inc. Asset Purchase Agreement, the only concern is that the relocated Station WHMA be "substantially similar in population, square miles, and location" compared to the relocation proposal at issue in the 1991 *Eatonton and Sandy Springs* case. The designation of College Park as the proposed city of license was a mere matter of convenience in an effort to improve upon the failed 1991 *Eatonton and Sandy Springs* relocation proposal and a clear technical manipulation of the rules to achieve something which had been denied.

**D. Threatened Civil Action Against Mr. Small Is An Abuse of the Commission's Processes**

31) While the basis of a suit by Hoyt Goodrich and Sapphire Broadcasting, Inc. against Mr. Small is not readily apparent because Mr. Small has no contractual relationship with either Sapphire Broadcasting, Inc. or Hoyt Goodrich, see §§ 3.3, 3.8, 4.3 of the Asset Purchase Agreement found in File No. BALH-961118GM (WNNX and Sapphire Broadcasting, Inc. represent and warrant that execution of the agreement does not give rise to a contractual breach or default and that the contract contains a complete list of contracts), it has long been Commission policy that it is a serious abuse of process to make threats to file a civil suit for the purpose of preventing the filing of information with the Commission. See *Patrick Henry*, 69 F.C.C.2d 1305, 1314 ¶ 18 (FCC 1978). In *Patrick Henry* the Commission designated a renewal applicant for hearing to determine, *inter alia*, whether the applicant abused the Commission's processes "by attempting to coerce petitioners to deny by the threat, or actual filing, of retaliatory civil actions against petitioner."<sup>17</sup>

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<sup>17</sup> See also *Kaye Smith Enterprises*, 98 F.C.C.2d 675 ¶16 (Rev. Bd. 1984) ("intimidation or harassment of witnesses requires threats of reprisals or some other unnecessary and abusive conduct (continued...)

32) The Commission has long held that “abuse of process is serious willful misconduct which directly threatens the integrity of the Commission’s licensing processes.” *Trinity Broadcasting of Florida, Inc.*, 14 FCC Rcd. 13570 ¶ 101 (FCC 1999) (license renewal application denied for abuse of process) citing *Character Qualifications*, 102 F.C.C.2d 1179, 1227-29 ¶¶ 102-06 (FCC 1986). The Commission is required to discuss matters of decisional significance, 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”), and abuse of process is clearly a matter of decisional significance.

33) When undersigned counsel informed Mr. Gammon that neither Sapphire Broadcasting, Inc. nor Hoyt Goodrich had any grounds to sue Mr. Small, Mr. Gammon responded that “when people get backed into a corner they can do crazy things.” See Mr. Small’s attached Certification for a discussion of how the threat of civil action if litigation did not cease was presented by Mr. Gammon to Mr. Small. The fact that the threatened suit against Mr. Small would be baseless and apparently, based upon Mr. Gammon’s comment, the product of a mind which might not be functioning rationally given the necessity and the pressure of requiring a final Commission order in this proceeding, merely serves to highlight the retaliatory nature of the threat.<sup>18</sup>

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<sup>17</sup>(...continued)

reasonably calculated to dissuade a witness from continuing his or her involvement in a proceeding.”); *Harvit Broadcasting Corp.*, 35 F.C.C.2d 94 (Rev. Bd. 1972) (“charges of attempted inducement, enticement, coercion, or other improper influence on Commission witnesses raise a serious and substantial public interest question.”); *Chronicle Broadcasting Co.*, 19 F.C.C.2d 240 ¶ 9 (Rev. Bd. 1969), rev. denied, 23 FCC 2d 162 (FCC 1970) (participation in a Commission proceeding does not open one up to “attempts to harass, intimidate, and coerce them to discontinue their involvement in the proceeding” by way of direct threat of “reprisal for his involvement in a Commission proceeding”). Mr. Gammon was advised on numerous occasions, by the undersigned and by Mr. Small, not to contact Mr. Small directly, yet he did so repeatedly.

<sup>18</sup> 18 U.S.C. § 1505 provides, in pertinent part, that  
Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and  
(continued...)

34) It is difficult to believe that the esteemed counsel for WNNX had anything to do with the threats proffered by Mr. Gammon on behalf of Hoyt Goodrich and Sapphire Broadcasting, Inc.<sup>19</sup> However, given WNNX's continuing contractual relationship to Sapphire Broadcasting, Inc., undersigned counsel is compelled to request that WNNX respond and disclose any information it might have, including copies of any and all pertinent documents, about the threatened civil suit which threat sought to prevent Mr. Small from litigating his position in this case. Mr. Small has been litigating this case before the Commission for more than five years and it is absurd for a party to claim at this late date that Mr. Small's actions are actionable. This is a very serious matter and the threats of severe civil liability made against Mr. Small if he proceeded to file documents in a

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<sup>18</sup>(...continued)

proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress-- Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1512(b) provides, in pertinent part, that

Whoever corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -- (1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to -- (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding \*\*\*shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1515 defines "corruptly" as

acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

<sup>19</sup> If finality is not achieved by April 27, 2003, WNNX does not have to pay \$10 million to Sapphire Broadcasting, Inc. under the Asset Sale Agreement and it would appear, on the surface anyway, that WNNX would not be in any hurry to speed the litigation along by way of participating in a plan to threaten Mr. Small. On the other hand, it is possible that WNNX calculated that it could pay Mr. Gammon a sum smaller than \$10 million by engaging Mr. Gammon to act in such a manner that Mr. Small would feel compelled to raise an issue with the Commission thereby adding time to the case resolution and thereby helping WNNX to avoid the \$10 million payment to Sapphire Broadcasting, Inc. Of course, without an inquiry into WNNX's knowledge of the facts and circumstances surrounding the threats proffered by Mr. Gammon, it is not possible to draw any conclusions at this time.

federal agency proceeding cannot be tolerated. Accordingly, if WNNX fails to respond, the Commission must compel a response to examine the facts and circumstances surrounding the threats made against Mr. Small.<sup>20</sup>

### **E. Conclusion**

35) This case got off on the wrong foot, and never regained its balance, when the rulemaking notice at paragraph 6 incorrectly indicated that the *Tuck* test does not apply to WNNX's proposal. The case stayed on the wrong foot when the staff's initial order in this case failed to address a single one of Mr. Small's *Tuck* related comments, including Mr. Small's argument that *Tuck* applies because WNNX is placing the transmitter in the Atlanta Urbanized Area. Still leading with the wrong foot, the staff erred by ruling that WNNX's relocation proposal was "analogous" to a situation in which a station is to be located outside of an urbanized area and that the Atlanta-Hartsfield Airport is not a relevant to an economic analysis in this case because no one lives there. Still stumbling the Commission next utilized its decision making process in a manner designed to prevent Mr. Small from presenting his whole case to the Commissioners. Last, the Commissioners have now ruled that case precedent is not entitled to consideration if it is a "staff" decision, or if it is "ten year[s] old," and that Mr. Small may not timely contest the reasoning and conclusion published in an order.

36) The Commission's determination that the Commission may use its procedural rules and its decision making processes to deny Mr. Small the opportunity to present his whole case is clearly erroneous and the finding of Mr. Small's criticism of the Commission's first discussion of the 1991

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<sup>20</sup> Just as this pleading was being finalized for filing Mr. Small received notice of a civil complaint filed against him by Bridge Capital Investors II and it is believed that Hoyt Goodrich is a principal of that entity. There has been insufficient time to review that complaint to include discussion of it in this pleading and Mr. Small may seek leave to supplement this pleading after he has had an opportunity to fully review the complaint. It is noted that Bridge Capital Investors II is not a party to the WNNX/Sapphire Asset Purchase Agreement, nor does Bridge Capital Investors II have a contract with Mr. Small and it appears that Hoyt Goodrich has filed a retaliatory action which is intended to obstruct the instant proceeding.

*Eatonton and Sandy Springs* case as “frivolous” is plainly wrong. Additionally, Mr. Small has previously argued that the 1991 *Eatonton and Sandy Springs* decision is relevant for instructing that the *Tuck* analysis applies to proposals which propose a transmitter within the City of Atlanta regardless of the percentage of coverage of the urbanized area and that the *Tuck* test applies when the community of license is located within the urbanized area. Mr. Small also argued that the 1991 *Eatonton Sandy Springs* decision should be the starting point of any analysis considering WNNX’s proposal to relocate Station WHMA to the Atlanta Urbanized Area.

37) In a reasoned decision the Commission is required to consider material matters which are brought to its attention. *Achernar Broadcasting Company v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995). The Commission’s finding of irrelevance regarding the 1991 *Eatonton and Sandy Springs* case which sought to relocate WHMA from the same location to the same urbanized area, where the first relocation proposal was dismissed by WNNX for its own litigating convenience to pursue the proposal thus far granted by the Commission, and where WNNX considers the second proposal to be “substantially equivalent” to its first, and preferred, proposal, seems to Mr. Small to be a mind boggling error of a magnitude not seen since the Zeppelin Company included a smoking lounge and doped the skin of the Hindenburg with the chemical components of rocket fuel or perhaps since the Titanic’s captain gave the “full speed” ahead order in a North Atlantic iceberg field. Finally, the Commission must investigate whether WNNX had any role in the threats made by Hoyt Goodrich and Sapphire Broadcasting, Inc., through Mr. Gammon, because the threats were calculated to prevent Mr. Small from presenting information to the Commission in this proceeding and the threats constitute a serious abuse of the Commission’s processes.

38) A reasoned decision in this case would come to terms with, *inter alia*, the 1991 *Eatonton and Sandy Springs* case, the applicability of the *Tuck* test to this case, the misapplication of the *Tuck* factors to the facts of the case, the continuing failure to provide a weighting of the various *Tuck*

factors, the failure to apply a sliding scale on the quantum of evidence required to show economic interdependence where the proposed city of license is located within the urbanized area and closely proximate to, and much smaller than, the central city of the urbanized area, the fact that at the outset of the proceeding WNNX relied upon the City of Atlanta's Atlanta-Hartsfield International Airport, located in College Park and occupying 60% of the land area of College Park, as a key factor purportedly demonstrating the economic independence of College Park from the Atlanta Urbanized Area, and the exclusion of the Atlanta-Hartsfield Airport from the economic analysis on the most dubious ground that nobody resides at the airport. That is, the decision in this case should be based upon the facts and not focus upon trying to knock Mr. Small out of the proceeding by a) ignoring Mr. Small's presentations of material matters over the course of several years, b) by using a decision making process which is designed to limit Mr. Small's ability to present his case to the Commissioners, or c) by indicating that Mr. Small is not entitled, unlike everyone else, to argue against the substance of Commission orders. From the beginning, and to date, Mr. Small has not been fairly treated in this proceeding. However, through the exhaustion of administrative remedies, Mr. Small remains hopeful that the Commission will begin looking at this case with the critical, reasoned eye required by law.

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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September 3, 2002

Respectfully submitted,  
PRESTON W. SMALL

  
Timothy E. Welch  
His Attorney

## ASSET PURCHASE AGREEMENT

THIS AGREEMENT is made and entered into as of November 6, 1996 by and between SAPPHIRE BROADCASTING, INC., a Delaware corporation ("Seller"), and SUSQUEHANNA RADIO CORP., a Pennsylvania corporation ("Buyer").

### WITNESSETH:

WHEREAS, Seller is the licensee of, and owns and operates, AM Radio Station WHMA-AM and FM Radio Station WHMA-FM ("Stations"), which are currently licensed to Anniston, Alabama; and

WHEREAS, Seller desires to sell, assign, transfer and deliver, and Buyer desires to purchase, certain assets used or useful in the operation of the Stations under the terms and subject to the conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the parties, intending to be legally bound, hereby agree as follows:

### ARTICLE 1

#### TRANSFER OF ASSETS

1.1 Transfer of Assets. Upon the terms and subject to the conditions contained herein, on the Closing Date (as defined in Article 8), Seller shall transfer to Buyer, by instruments of transfer and conveyance reasonably acceptable to counsel for Buyer and counsel for Seller, and Buyer shall purchase from Seller, to the extent permitted by law, all of Seller's right, title and interest in the Assets (as defined below), free and clear of any and all liens, encumbrances, claims, charges or other liabilities except as otherwise stated herein. The term "Assets" shall mean all of the following property of Seller used or useful to the business or operation of the Stations:

2.3 Balance of Purchase Price. At the Closing, in addition to the Escrow Deposit to be delivered to Seller by the Escrow Agent pursuant to Section 2.2 hereof, Buyer shall deliver to Seller by wire transfer payable in immediately available funds the aggregate amount of Fourteen Million Three Hundred Thousand Dollars (\$14,300,000).

2.4 Additional Payment. In the event the Federal Communications Commission ("FCC") grants a Construction Permit ("CP") without any "material adverse conditions" (as hereinafter defined in this Section 2.4) to WHMA-FM for a location that will provide coverage substantially similar in population, square miles and location to that shown on Schedule 2.4, which CP grant has become a Final Order (as defined in Section 5.4(d)), Buyer will pay to Seller, upon program test authority or six (6) months from the date the CP grant has become a Final Order, whichever occurs sooner, an amount, in addition to the amount set forth in Section 2.1, as follows:

(a) If the CP is for a Class C-1 FM facility or greater the amount will be Twenty Million Dollars (\$20,000,000);

(b) If the CP is for a Class C-2 FM facility, the amount will be Thirteen Million Dollars (\$13,000,000);

(c) If the CP is for a Class C-3 facility or below, the amount will be Ten Million Dollars (\$10,000,000).

Additional consideration as set forth in a, b, or c above shall only be due and owing by Buyer to Seller if Buyer obtains the Final Order for a CP within six (6) years of the Closing Date. Buyer shall have the right to transfer or assign the Stations and to have such transferee or assignee assume the obligations set forth in this Section. If the FCC does not approve any relocation of WHMA-FM to a location meeting the criteria of this Section 2.4, no additional payment is due Seller.

affecting the enforcement of creditors' rights or remedies generally, and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law).

3.3 Absence of Conflicts. Except as set forth on Schedule 3.2 or Schedule 3.9, the execution and delivery of, and the performance of its obligations under this Agreement by Seller and the consummation by Seller of the transactions contemplated hereby:

(a) Do not (with or without the giving of notice or the passage of time or both) violate or result in the creation of any lien on any of the Assets under any provision of law, rule or regulation or any order, judgment, injunction, decree or ruling applicable to Seller;

(b) Do not conflict or result in a breach or termination of, or constitute a default or give rise to a right of termination under Seller's articles of incorporation or pursuant to any material contract or other instrument to which Seller is a party or by which any of the Assets may be bound, or result in the creation of any lien upon any of the Assets.

3.4 Governmental Consents and Consents of Third Parties. Except for the required consent of the FCC with respect to the Licenses and as set forth on Schedule 3.4 or Schedule 1.1(d), the execution and delivery of, and the performance of Seller's obligations under this Agreement and Seller's consummation of the transactions contemplated hereby do not require the consent, waiver, approval, permit, license, clearance or authorization of, or any declaration or filing with, any court or public agency or other authority, or the consent of any person under any agreement, arrangement or commitment of any nature which Seller is a party to or bound by or which the Assets are bound by or subject to, the failure of which to obtain would have a material adverse effect on the operation of the Stations.

property licenses have been properly recorded in the appropriate public recording offices.

3.8 Contracts.

(a) With respect to the Contracts, Schedule 1.1(d) sets forth an accurate and complete list of all amendments, modifications and supplements thereto by which the Stations or the Assets are bound, except (A) each contract (including trade agreements) for the sale of time at the Stations, and (B) contracts which are cancelable by Seller or its assignee without breach or penalty on not more than sixty (60) days notice. Complete and correct copies of all of the written Contracts except for those in (A) above, including all amendments, modifications and supplements thereto, have been delivered to Buyer.

(b) To the best of Seller's knowledge, (i) each Contract is legal, valid and enforceable against Seller in accordance with its terms; (ii) neither Seller nor any other party thereto, is in material breach of or in material default under any Contract; and (iii) there has not occurred any event which, after the giving of notice or the lapse of time or both, would constitute a material default under or result in the material breach of any Contract.

(c) Schedule 1.1(d) indicates for each Contract listed thereon whether consent or approval by any party thereto is required thereunder for consummation of the transactions contemplated hereby.

3.9 Litigation, Environmental Compliance and Compliance with Law.

(a) Litigation. To the best of Seller's knowledge, except as described on Schedule 3.9, (i) there are no claims, investigations, actions, suits or administrative, arbitration or other proceedings pending or threatened against Seller which would, individually or in the aggregate if adversely determined, have a material adverse effect on the financial condition or the operation of the Stations or which would give any third party the right to enjoin the transactions contemplated by this Agreement, (ii) there is no basis for any claim, investigation, action, suit or

been set forth in this Agreement or any Schedule or certificate attached hereto which was prepared by Seller or delivered by Seller pursuant to this Agreement.

#### ARTICLE 4

##### BUYER'S REPRESENTATION AND WARRANTIES

Buyer hereby represents and warrants to Seller as follows:

4.1 Organization and Standing. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Pennsylvania and has full and complete authority to enter into and perform this Agreement. Buyer has the authority to own or lease its properties and to carry on its business as it is now being conducted and as it will be conducted at the Closing.

4.2 Authorization and Binding Effect of Agreement. Buyer's execution and delivery of, and the performance of its obligations under this Agreement and the consummation by Buyer of the transactions contemplated hereby, have been duly authorized and approved by all necessary corporate action on the part of Buyer. Buyer has the corporate power and corporate authority to execute, deliver and perform its obligations under this Agreement and to consummate the transactions hereby contemplated. This Agreement constitutes the legal, binding and valid obligation of Buyer enforceable against it in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting the enforcement of creditors' rights or remedies generally, and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law).

4.3 Absence of Conflicts. Buyer's execution and delivery of, and the performance of its obligations under this Agreement by Buyer and the consummation by Buyer of the transactions contemplated hereby:

(a) Do not (with or without the giving of notice or the passage of time or both) violate (or result in the creation of any claim, lien, charge or encumbrance on any of the assets or properties of Buyer under) any provision of law, rule or regulation or any order, judgment, injunction, decree or ruling applicable to Buyer in any manner which would have a material adverse effect on the assets, business, operation or financial condition or results of operations of Buyer, or on the ability of Buyer to fulfill its obligations under this Agreement and consummate the transactions contemplated by this Agreement;

(b) Do not (with or without the giving of notice or the passage of time or both) conflict with or result in a breach or termination of, or constitute a default or give rise to a right of termination or acceleration under the corporate charter or by-laws of Buyer or any agreement, commitment or other instrument which Buyer is a party to or bound by or by which any of its assets or properties may be bound.

4.4 Government Consents and Consents of Third Parties. Except for the required consent of the FCC and the consent of Buyer's lenders, Buyer's execution and delivery of, and performance of its obligations under this Agreement and the consummation by Buyer of the transactions contemplated hereby, do not require the consent, waiver, approval, permit, license, clearance or authorization of, or any declaration of filing with, any court or public agency or other authority, or the consent of any person under any agreement, arrangement or commitment of any nature to which Buyer is a party or by which it is bound.

4.5 Broker's or Finder's Fees. Other than Larry Patrick, no agent, broker, investment banker or other person or firm acting on behalf of or under the authority of Buyer or any affiliate of Buyer is or will be entitled to any broker's or finder's fee or any other commission or similar fee, directly or indirectly, in connection with the transactions contemplated by this Agreement.

of any party hereto to consummate the transactions contemplated by this Agreement, Buyer and Seller shall use its or their good faith efforts to cure the same as expeditiously as possible; and

(d) If the FCC Consent contains any materially adverse condition, the party upon which that condition is imposed shall use its best, diligent and good faith efforts to remove the same before the Closing Date; provided that, as to any such condition that is a condition to Seller's continued operation of the Stations, Seller shall use its commercially reasonable efforts to comply therewith.

The term "FCC Consent" shall mean an order issued by the FCC consenting to the acquisition by Buyer of the Station. The term "Final Order" shall mean an FCC order which is not reversed, stayed, enjoined, set aside, annulled or suspended and with respect to which no timely filed request for administrative or judicial review, reconsideration or stay is pending, and as to which the time for filing any such request, or for the FCC to set aside its order on its own motion, has expired.

5.5 Further Assistance. After the Closing of this Agreement, Buyer and Seller shall take such actions and properly execute and deliver such further instruments as, in the reasonable opinion of counsel for Buyer or Seller, as the case may be, may be necessary or desirable to assure, complete and evidence the transactions provided for in this Agreement.

## ARTICLE 6

### CONDITIONS PRECEDENT TO BUYER'S OBLIGATION

The obligation of Buyer to consummate the transactions contemplated by this Agreement is subject to satisfaction, on or before the Closing Date, of each of the following conditions, any or all of which Buyer shall have the right to waive at its sole option and risk:

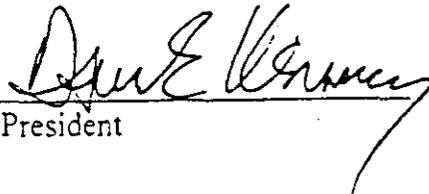
6.1 Representations and Warranties True. All representations and warranties of Seller shall be true and correct in all material respects on and as of the Closing Date.

15.13 Counterparts. This Agreement may be executed in any number of counterparts, and by either party on separate counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

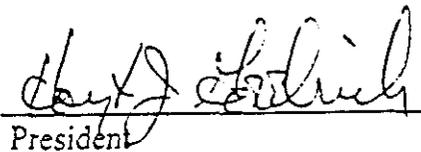
15.14 Schedules and Exhibits: Recording. Unless otherwise specified herein, each Schedule and Exhibit referred to in this Agreement is attached hereto, and each such Schedule and Exhibit is hereby incorporated by reference and made a part hereof as if fully set forth herein. To the extent permitted by the FCC, the Schedules shall not be filed with the FCC or otherwise disclosed or made public.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed as of the date first written above.

SUSQUEHANNA RADIO CORP.

By:   
President

SAPPHIRE BROADCASTING, INC.

By:   
President

CERTIFICATE OF SERVICE

I hereby certify that I have this 3<sup>rd</sup> day of September 2002 served a copy of the foregoing PETITION FOR RECONSIDERATION AND SECOND MOTION TO REOPEN THE RECORD by First-Class United States mail, postage prepaid, upon the following:

Mark N. Lipp  
Shook, Hardy and Bacon  
600 14<sup>th</sup> Street, N.W. Suite 800  
Washington, D.C. 20005-2004

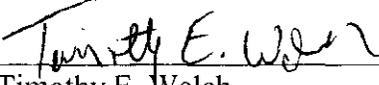
Kathy Archer, Vice President  
CapStar Broadcasting Partners  
600 Congress Avenue #1400  
Austin, TX 78701

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

James R. Bayes  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Kevin F. Reed  
Dow Lohnes & Albertson PLLC  
1200 New Hampshire Ave., N.W. #800  
Washington, D.C. 20036

Erwin G. Krasnow  
Verner Liipfert Bernhard McPherson and Hand  
901 15<sup>th</sup> Street, N.W.  
Washington, D.C. 20005

  
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Timothy E. Welch