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

NOV - 8 2002

In the Matter of)	
)	
Airlendment of Section 73.202(b),)	MM Docket No. 98-1 12
Table of Allotments,)	RM-9027
FM Broadcast Stations)	RM-9268
(Anniston and Ashland, Alabama,)	RM-9384
College Park, Covington, and)	
Milledgeville, Georgia))	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

CONSOLIDATED OPPOSITION

I. WNNX LICO, Inc. ("WNNX"), licensee of **WWWQ(FM)**, College Park, Georgia, hereby opposes (1) the "Petition for Reconsideration and Second Motion to Open the Record" (filed August 19, 2002); (2) the "Statement for the Record, Motion for Protection, and Notice of Resubmission of Petition for Reconsideration and Second Motion to Reopen the Record and Notice of Resubmission of Motion to [sic] For Leave to File Supplement" (filed September 3, 2002); (3) the "Motion for Leave to Supplement Petition for Reconsideration and Second Motion to Reopen the Record (filed September 3, 2002); (4) the "Petition for Reconsideration and Second Motion to Reopen the Record" (filed September 3, 2002); (5) the "Motion for Leave to Submit Errata to Petition for Reconsideration and Second Motion to Reopen the Record"; and finally, (6) the "Motion for Leave to Submit Information Concerning an Improper Ex Parte Communication" (filed October 30, 2002), all filed by Preston Small in the above-captioned proceeding.

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¹ This pleading is timely filed on the date specified in 67 Fed. Reg. 65354 (October 24, 2002).

2. **Despite** an avalanche of paper filed by Small, there are really only two issues before the Commission.’ First, **whether** Small is entitled to file a *fourth* petition for reconsideration of the original staff order in this proceeding.³ Second, whether, as Small alleges, a violation of the Commission’s *ex parte* rules have occurred in this proceeding.

I. The Fourth Petition For Reconsideration Should be Dismissed As Frivolous and Repetitious.

3. Small’s fourth **petition** for reconsideration should be dismissed pursuant to Section 1.429(i).⁴ It is not entitled to any consideration whatsoever. The Commission’s rules and case law clearly permit only one petition for reconsideration. An order that dismisses or denies a petition for reconsideration *cannot* be the subject of another petition for reconsideration. Section 1.429(i) states: “Any order disposing of a petition for reconsideration which modifies rules adopted by the **original** order is, to **the** extent of such modification, subject to reconsideration in the same manner as the original order. *Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.*” (emphasis added). Similarly, Section 1.106(k)(3) states, “A petition for reconsideration of an order which has been previously denied on reconsideration may **be** dismissed by the staff as **repetitious.**”

² The other various motions – motions for **leave** to file other papers such as supplements and errata and motions for protection – should all be dismissed as moot once the relevant issues are disposed of.

³ See *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, Memorandum Opinion and Order (FCC 02-102, rel. July 25, 2002) (“*Third MO&O*”); Memorandum Opinion and Order, 16 FCC Rcd 19857 (2001), (“*Second MO&O*”); Memorandum Opinion and Order, 16 FCC Rcd 3411 (M.M. Bureau, 2001); and *Report and Order*, 15 FCC Rcd 9971 (2000).

⁴ The Commission cited Section 1.106 as the **basis** for reconsideration. *Third MO&O* at ¶ 2. However, **rule** making proceedings are governed by the more specific provisions of Section 1.429. **Nevertheless**, whichever section is appropriate, **the** Commission has clear authority to dismiss Small’s fourth petition for reconsideration. See 47 C.F.R. §§ 1.106(k)(3); 1.429(i).

4. This is true even if the second petition for reconsideration purports to raise new issues. “The Communications Act, our rules, and the need for administrative orderliness require petitioners to raise issues in a timely manner. Accordingly, unless the public interest would be served by reconsideration, Section 1.429(i) of our rules limits subsequent reconsiderations to modifications made to the original order on reconsideration.” *Amendment of Part 95 of the Commission’s Rules*, 17 FCC Rcd 8520, 8527 (2002).⁵ In short, unless Preston W. Small can convince the Commission that the public interest merits a fourth reconsideration, he is not entitled to any further consideration.

5. The “issues” he has raised hardly demand reconsideration in the public interest. First, Small requests reconsideration because he feels his due process rights were violated by having the Commission rather than the staff decide his case.⁶ That is an odd allegation, since the Commission, not the staff, is the final arbiter. In any event, it is not a claim upon which relief can be granted. Second, Small requests reconsideration of the Commission’s finding that his previous argument was frivolous.⁷ The argument that the Commission found frivolous was that Small had purported to raise “new facts” or “changed circumstances” by bringing to the Commission’s attention a ten-year old case. It appears that Small didn’t understand what was frivolous about his claim. To put it as simply as possible, it is frivolous because a 10-year-old case does not constitute “new facts” or “changed circumstances.”

⁵ The same rule is true under Section 1.106. “A second petition for reconsideration is not contemplated under the rules.” *Warren Price Communications, Inc.*, 7 FCC Rcd 68.50 (1992).

⁶ Pet. for Recon at 4.

⁷ *Id.* at 8-13.

6. Next, Small argues that Bridge Capital Investors II (“BCI”) abused the Commission’s processes by filing suit against Small in state court in Georgia.’ This claim is absurd. There cannot be an *abuse* unless there is a *use* of Commission processes. BCI is invoking state court processes to further its ends, not Commission processes. Since it is not invoking Commission processes, it cannot be abusing Commission processes. Next, Small states that the Commission must reopen the record to determine “whether WNNX was a party to, or authorized, the threats of suits made against Mr. Small....” WNNX states unequivocally that it is not a party to or authorized any threats against Mr. Small. WNNX has no knowledge of any of the allegations Small’s counsel refers to and there is no shred of evidence offered by Small that WNNX has said anything that it is being accused of. Mr. Small’s accusations are irresponsible, inflammatory, libelous and an act of desperation. The record should not be reopened.

7. Small accuses WNNX’s counsel of being a principal in the legal proceedings against him and demands that WNNX disclose any information it might have regarding the civil action.⁹ These accusations require no answer other than to state unequivocally that WNNX’s counsel has played no role in any legal proceedings involving Small other than to act as WNNX’s counsel in this proceeding, and that neither WNNX nor WNNX’s counsel has any information about the civil action other than what is in the public record.

II. There Has Been No Violation of the *Ex Parte* Rules as Small Alleges.

8. Small’s “Motion for Leave to Submit Information Concerning an Improper *Ex Parte* Communication” should also be denied. There has been no *ex parte* rule violation. The facts are these: On October 9, 2002, Radio South, Inc. (“Radio South”) jointly, with another interested party, filed a petition for reconsideration of the Report and Order in MM Docket No.

⁸ *Id.* at 20-23; Motion for Leave to Supplement.

01-104, an entirely different proceeding. In that petition for reconsideration, Radio South requested that the Commission reinstate its petition for rule making, which had been dismissed because it was contingent upon this instant proceeding. Radio South urged that the Commission reinstate its petition because the only reason this proceeding has yet to become final was Small's repetitious and abusive filings

9. Small's claim that Radio South's filing is an impermissible *ex parte* presentation is incorrect because the filing does not fit within the category of communications that are prohibited under the rules. First, the rules prohibit *ex parte* "presentations" to "decision-making personnel." 47 C.F.R. § 1.1208.¹⁰ The Radio South petition for reconsideration was not a "presentation" for two reasons. A "presentation" does not include a report required by the Commission's Rules. See *KMAP, Inc.*, 72 F.C.C.2d 241, 250 [¶ 25] (1979) (submission following Notice of Apparent Liability was not a "presentation"). Likewise, the *ex parte* rules do not interfere with a party's ability to freely participate in other proceedings. *Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 F.C.C.2d 49, 57 (1965). Radio South had to file its petition for reconsideration or lose its rights, and in doing so had to discuss this proceeding because the instant proceeding was the reason its rule making was dismissed. Thus, the *ex parte* rules do not apply to the filing in MM Docket No. 01-104 at all. Second, since Radio South filed the petition for reconsideration in a different, unrelated proceeding, it cannot be considered a "presentation" in this proceeding. See *Midwest Television, Inc.*, 10 Rad. Reg. 2d 947 (1967); *KMAP, Inc.*, *supra* 72 F.C.C.2d at 250 (communication in a different proceeding

⁹ Pet. for Recon. at 22.

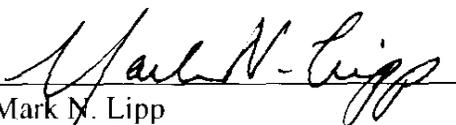
¹⁰ Small states that the rules prohibit *ex parte* "communications." That is incorrect, as a reading of the rules will easily confirm. Only those communications that are "presentations" to "decision-making personnel" are prohibited. See 47 C.F.R. §§ 1.1200 *et seq.*

excluded from scope of "presentation"). Finally, Radio South's petition for reconsideration was nor directed to "decision-making personnel." It was filed with the Secretary of the Federal Communications Commission. This fact, in itself, removes it from the scope of the *ex parte* rules. See *KMAP, Inc., supra.*, 72 F.C.C.2d at 249 [¶ 22].¹¹

IO. The purpose of the *ex parte* rules is to ensure that Commission decisions are made fairly and with the participation of all parties involved. Small is aware of the Radio South filing, and if he has any substantive comments to offer, he has an opportunity to do so, since the Commission's rules grant him a period in which to reply in this proceeding.

WHEREFORE, for the foregoing reasons, the Commission should dismiss the six pleadings named above without further discussion

Respectfully submitted,
WNNX LICO, INC.



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November 8, 2002

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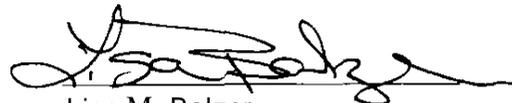
¹¹ counsel for WNNX also serves as co-counsel for Radio South. However, this does *not* convert an otherwise permissible filing into an impermissible *ex parte* contact. See *Telecommunications of Oregon, Inc.*, 9 F.C.C.2d 1004 at ¶ 12 (counsel is not restricted from representing a party in discussions with the Commission by virtue of his representing other clients in restricted proceedings); *Ex Parte Rules, supra*, 1 F.C.C.2d 49 at ¶ 22 (*ex parte* rules do not bar normal Communications by attorneys who are representing the interests of other clients in other proceedings).

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 8th day of November, 2002, I have mailed the foregoing "Consolidated Opposition" to the following:

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