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

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DEC - 4 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments, FM Broadcast Stations)
(Auburn, Northport, Tuscaloosa, Camp Hill,)
Gardendale, Homewood, Birmingham, Dadeville,)
Orrville, Goodwater, Pine Level, Jernison, and)
Thomaston, Alabama)

DA 02-2063

MM Docket No. 01-104
RM-10103
RM-10323
RM-10324

To: The Commission

**OPPOSITION TO
MOTION TO STRIKE**

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DEC 4 2002 014
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 4, 2002

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Preston W. Small (Mr. Small), by his attorney, hereby opposes the November 21, 2002 *Motion to Strike (Morion)* tiled by ~~Cox~~ Radio, Inc. and Radio South, Inc. In opposition thereto, the following is respectfully submitted:

1) The *Motion* seeks to strike Mr. Small's November 8, 2002 *Opposition to Petition for Reconsideration* on the asserted grounds 1) that Mr. "Small is not an interested party in this proceeding and has no standing to oppose the *Petition for Reconsideration*," and 2) because "the Small Pleading raises no issue of law or facts which, even if true, would result in denial of the *Petition for Reconsideration*." *Motion*, at 1. Movants' asserted procedural and substantive grounds do not support a motion to strike. In fact, Movants asserted grounds demonstrate a fundamental lack of knowledge of Commission proceedings.

A. Movants Misrepresent The Meaning of "Interested Person" As Used In Rulemaking and Application Proceedings

2) *Motion* claims that "[Mr. Small's] contempt for the orderly administration of agency business is visible on the face of the pleading. The Commission has no choice but to strike it." *Morion*, at 3.¹ Movants argue that Mr. Small is not an "interested person" with a "legitimate interest" in the subject rulemaking and that he lacks "standing" because he not likely to suffer a "substantial injury" as a result of the rulemaking. Movants rely upon three cases in support of their notion, and they even argue that the Commission cannot "expand the right of participation since the right of participation in agency proceedings is created by the **APA**, not the Communications Act." *Motion*, ¶ 3. Movants' legal analysis on this procedural point is obviously fundamentally flawed.

3) In his November 21, 2002 *Reply* comments which Mr. Small submitted in support of his ability to participate in the instant proceeding through his *Opposition* filing, Mr. Small reported that

¹ Movants use of the word "contempt" is curious since it is their *Petition* which made Mr. Small interested in the instant proceeding by asserting illegal *ex parte* communications concerning Mr. Small's interests in MM Docket 98-112. As discussed below, Movants misrepresent the legal meaning of "interested person" as applied to rulemaking proceedings.

The Commission has explicitly determined that in FM allocation proceedings a “party” is not required to have “an economic stake in the proceeding or . . . an intention to file a license application” and the Commission’s policy is “to consider all comments and proposals timely received in the course of rule making proceedings.” *Amendment of Section 73.606(b), Table of Assignments. Television Broadcast Stations (Hampton-Norfolk- Portsmouth-Newport News, Virginia), Report and Order*, 53 R.R.2d 53 ¶ 7 (Pol. Rules Div. 1983). Relying upon § 1.400, the Commission determined that “in rulemakings, the common definition of ‘interested person’ should be applied – that is, one who is interested in the proceeding.” *Id.* The precedent cited above fully supports Mr. Small’s right to participate in the instant proceeding via opposition after learning of RSI’s and WNNX’s *ex parte* comments which attacked Mr. Small’s interests at issue in MM Docket 98-112 which caused Mr. Small to become “interested.”

Mr. Small’s November 21, 2002 **Reply**, MM Docket 01-104, ¶ 2 (footnotes omitted). Moreover, 47 C.F.R. § 1.400 provides that a person can become a “party” to a rulemaking proceeding through the filing of, *inter alia*, properly served “responsive pleadings.” Because Mr. Small filed a properly served opposition in the instant proceeding, he is a “party”. Also, the rulemaking reconsideration provision found at § 1.429, unlike reconsideration pursuant to § 1.106, does not require a new participant to show cause why participation could not have commenced at an earlier time. *Amendment of Procedures for Reconsideration of Actions in Notice and Comment Rulemaking Proceedings. Memorandum Opinion and Order*, 57 F.C.C.2d 699 ¶ 2 (FCC 1975).

4) Movants’ reliance upon *Philco Corporation v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), *Motion*, ¶ 3, makes it abundantly clear that Movants are attempting to mislead the Commission regarding the meaning of “interested person” as that term is applied to public rulemaking proceedings. The instant proceeding is a rulemaking proceeding with no standing requirement. *Hampton-Norfolk- Portsmouth-Newport News, Virginia, Report and Order*, 53 R.R.2d 53 ¶ 7 (Pol. Rules Div. 1983). *Philco Corporation* is a license renewal application proceeding conducted pursuant under § 309 of the Act which requires that only parties with standing may protest license

applications.’ Mr. Small’s right to participate in the instant rulemaking proceeding is limited only by his own desire to participate in a rulemaking proceeding which is open to the public.

5) Movants rely upon *ATX, Inc. v. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994), *Morion*, ¶ 3, for the proposition that before a person may participate in an FM allocation proceeding it must have a “legitimate interest” which Mr. Small purportedly lacks. Movants remain misleading. First, *ATX, Inc.* is a formal application proceeding before an ALJ to determine whether an airline certificate should be granted. *ATX, Inc.* is not a rulemaking case like the instant one, it is an application proceeding **like** those conducted by the Commission under § 309.

6) Second, *ATX, Inc.* involves interpretation of “any person” as that term is used at 14 C.F.R. § 302.14(b), the case does not interpret the Communications Act nor the Commission’s rules. The *ATX, Inc.* court could not have more clearly stated the basic administrative law concept that the right of participation in agency proceedings can only be made in the context of the “statutory and regulatory schemes governing the proceeding in which intervention is sought . . .” *ATX Inc.*, 41 F.3d at 1529 n. 13 & n. 14.³ Movants’ reference to DOT regulations regarding intervention is completely meritless because that very same case clearly contemplates that reference must be made to the Communications Act and to the Commission’s requirements to determine who is entitled to participate in a particular proceeding.

² The court of appeals long ago determined that “the Article III restrictions under which this court operates do not, of course, apply to the FCC. The Commission may choose to allow persons without Article III ‘standing’ to participate in FCC proceedings . . .” *California Ass’n of the Physically Handicapped v. FCC*, 778 F.2d 823, 826 n. 8 (D.C. Cir. 1985); *see also Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). While the Commission requires Article 111-type standing to protest applications under § 309 of the Act, the Commission does not require Article 111-type standing for participation in rulemaking proceedings and the Commission certainly has the legal authority to open public rulemaking proceedings to the public.

³ The court in *ATX, Inc.* was concerned about congressional participation in a “quasi-judicial” application review process, *ATX Inc.*, 41 F.3d at 1529, not a citizen’s right to participate in a rulemaking proceeding.

7) Third, while Movants cite *Envirocore of Utah v. NRC*, 194 F.3d 72, 79 n. 7 (D.C. Cir. 1999) for the proposition that “the Commission does not have the power to expand the right of participation” in rulemaking proceedings, *Motion*, ¶ 3, Movants completely fail to understand that the Commission is, in fact, the entity to which courts look in ascertaining the meaning of the “statutory and regulatory schemes governing the proceeding in which intervention is sought” for the purpose of determining who is entitled to participate in a proceeding. *ATX, Znc.*, 41 F.3d at 1529 n.

14. The Commission has determined that rulemaking proceedings are open to the public and the court of appeals has determined that Article III standing is not a requirement under the Communications Act to participate in Commission proceedings. *California Ass’n of the Physically Handicapped v. FCC*, 778 F.2d 823, 826 n. 8 (D.C. Cir. 1985); *see also Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976) (proceedings before the Commission are not Article III proceedings and are not limited by standing requirements; parties participating in Commission proceedings have standing in the appeals court to complain about procedural fairness even if they would lack standing regarding the subject matter of the Commission proceeding). Movants’ assertion that the Commission cannot open its rulemaking proceedings to the public is profoundly absurd.

8) Fourth, Mr. Small has a “legitimate interest” in assuring that he is not harmed by rule violators who seek to persuade the Commission through illegal *ex parte* comments. Movants completely fail to discuss why Mr. Small cannot protect his “legitimate interest” in MM Docket 98-112 in the very proceeding in which Mr. Small is attacked by an *exparte* presentation. Movants invited Mr. Small’s participation by making an issue of him, they cannot reasonably complain merely because Mr. Small has accepted the invitation

9) The fact that Mr. Small’s interest arose from Movants’ illegal *exparte* communications does not mean that Mr. Small is not “interested” in the subject rulemaking proceeding. Quite to the contrary, Mr. Small is very interested in seeing that the Commission’s restricted rulemaking

processes are not corrupted by Movants' illegally made comments and that Mr. Small is not harmed by those illegally made comments. While Movants claim that Mr. Small is contemptuous of the Commission's requirements regarding participation in public rulemaking proceedings, it is clear that Movants are purposely, and in bad faith, attempting to mislead the Commission regarding the fundamental difference between a rulemaking and an application proceeding and the differing requirements of participation which pertain to each type of proceeding.⁴ Movants' claim that Mr. Small is not an "interested" person for the purpose of participating in the instant rulemaking proceeding is so obviously flawed that the *Motion* must be found to be frivolous and interposed for the improper purpose of obstructing Mr. Small's proper participation in the instant proceeding.

B. The Merits of the Case

10) In support of their *Motion* Movants argue that "the Small Pleading raises no issue of law or fact which, even if true, would result in denial of the Petition for Reconsideration." *Motion*, ¶ 1. Movants argue further that "Small raises no opposition to the grant of the petition for reconsideration" because Mr. Small's *Opposition* is "repetitive, irrelevant, and erroneous," because even if there were an *ex parte* violation, the violation "could make no difference to this proceeding," because the *Cut and Shoot* policy "does not even apply in this case," and because Mr. Small "engages in unsupported speculation regarding a purported relationship between Cox and Radio South, or between WNNX LICO, Inc. and" others. Movants conclude that Mr. Small "advances no claim upon which relief can be granted, the proper action is dismissal of the pleading." In support of these arguments, Movants refer to their "separate Reply filed simultaneously". *Motion*, ¶¶ 5-6.

⁴ RSI/WNNX are represented by a former Commission section chief who directed FM allocation rulemaking proceedings. It is simply not plausible to believe that the former section chief does not comprehend the difference between a rulemaking and an application proceeding. It appears that the former section chief is using his credentials to try to confound this proceeding.

11) It is not clear why the Movants consider that arguments dealing with the merits of the case are appropriately raised in a motion to strike. However, because Movants have made the merits an issue in their *Motion*, Mr. Small shall respond. Because Mr. Small is responding to the *Motion's* merits arguments, as supported by the *Reply*, the Commission should consider these matters and Mr. Small's response thereto. *Cf. Falcon Telecable*, 13 FCC Rcd. 2598 n. 4 (Cable Services Bureau 1998) (supplemental merits arguments considered in the context of a motion to **strike**).

12) Movants claim that the serious matter raised in Mr. Small's *Opposition* are "repetitive, irrelevant, and erroneous." *Motion*, ¶ 5. Movants claim that the *Opposition* is "repetitive" "because Small has raised virtually the identical arguments twice before – once in MM Docket No. 98-1 12, and once in a letter to the FCC's General Counsel." *Reply*, ¶ 3. However, Mr. Small has raised the matter only once in the instant proceeding. Because the Commission is not required to consider arguments and factual allegations made in one proceeding in the context of another proceeding, *see Beehive Telephone Company, Inc. v. FCC*, 179F.3d 941,945 (D.C. Cir. 1999), disputed matters are properly brought to the Commission's attention in each proceeding. If Movants find this basic administrative requirement "repetitive," they need to address that issue elsewhere.

13) Movants argue that Mr. Small's *Opposition* is "irrelevant," *Motion*, ¶ 5, "because Small does not state a claim for any relief that can be granted as a result of the alleged violation. Small asks that the Commission dismiss the Petition for Reconsideration, but Small's allegations are directed only towards Radio South and its counsel. Since Cox is a party to the Petition for Reconsideration as well, dismissal is not a remedy that can be granted." *Reply*, ¶ 3. That is plainly a false statement. Footnote 1 of the *Opposition* clearly states that "Cox Radio, Inc. and its counsel are also responsible for their role in participating in the *ex parte* violation." Accordingly, RSI and WNNX cannot avoid dismissal of the *Petition* based upon "clean hands" as Cox's hands are not

clean. In any event, even if Cox were clean, that would not mean that unclean RSI and WNNX ride Cox's coattails and they would properly be excluded from consideration for relief.

14) Movants argue that the relief requested in the *Opposition* cannot be granted because Mr. Small "argues that the Commission should not create an exception to a policy that does not even apply in this case." *Motion*, ¶ 5. Movants clarify that "Small misses the point entirely, which is that *Cut and Shoot* does not even apply" given the facts of the instant case. *Reply*, ¶ 4. Mr. Small did not initially raise the issue of carving an exception to the *Cut and Shoot* policy, Movants did. *Petition*, ¶¶ 9-10. Perhaps Movants wish that they had not made *ex parte* comments against Mr. Small's interests in MM Docket 98-112 merely to suggest that the Commission "carve out a very narrow exception to *Cut and Shoot* in recognition of the unusual, special facts of this case where, but for an abuse of process in another rulemaking proceeding, Cox's and Radio South's Counterproposals faced no obstacles to grant." *Petition*, at 10.

15) It is Movants who "miss the point." Mr. Small does not care whether *Cut and Shoot* applies in the instant case. Mr. Small is very concerned, however, that in an effort to try to gain a special exception to a policy, Movants have used the instant proceeding to attack Mr. Small's interests in MM Docket 98-112. Because the *Motion* states so certainly that *Cut and Shoot* does not apply to the instant proceeding, Movants' *ex parte* attack upon Mr. Small's interests in MM Docket 98-112 is wholly gratuitous. The *Motion* trivializes Movants' purported need to discuss Mr. Small in the instant proceeding. *See* WNNX/RSI' November 8, 2002, *Opposition*, MM Docket No. 98-112, ¶ 9 (WNNX/RSI implore the Commission that they "had to discuss this proceeding [MM Docket 98-112] because the instant proceeding was the reason its [RSI's] rule making was dismissed"). Because Movants are so confident that *Cut and Shoot* does not apply to the instant proceeding, Movants' argument highlights the fact that the only reason that Mr. Small is mentioned at all in the instant proceeding is for the purpose of injuring Mr. Small in MM Docket 98-112.

16) Movants argue that there is no evidence of an undisclosed relationships between and among RSI, WNNX, Cox, and Auburn Network, Inc. *Motion*, ¶ 5. Movants claim they have no “preexisting contractual relationship between them.” *Reply*, ¶ 5. However, Movants fail to explain the relationship which obviously exists in light of the fact that Cox and WNNX filed a joint *Petition* in MM Docket 01-104 for the gratuitous purpose of making an *ex parte* attack against Mr. Small’s interests in MM Docket 98-112. Movants’ claim that there is no contractual relationship between them is obviously false – by filing the joint *Petition* Movants agreed to create a “joint” legal product. Each party’s work was consideration in the contract and there was obviously an offer and an acceptance of the joint effort because counsel to both Cox and WNNX signed the pleading. Then, of course, there is the fact of the \$10-\$20 million payment -- Mr. Lipp’s WNNX client is interested in spending \$10-\$20 million so that Mr. Lipp’s RSI client can obtain a grant in the instant proceeding. Mr. Small’s November 8, 2002 Opposition, MM Docket 01-104, ¶¶ 15-16. This is the elephant in the room which Movants’ November 21, 2002 *Reply* completely ignores. Moreover, WNNX asserts the right to speak to the Commission on RSI’s behalf, *see* WNNX/RSI’s November 8, 2002 *Consolidated Opposition*, MM Docket 98-112, ¶ 9 (where WNNX explains that RSI “had” to take certain actions, including an attack against Mr. Small) and RSI asserts a reciprocal right to speak to the Commission for WNNX. *See* RSI/WNNX’s November 21, 2002 *Reply*, MM Docket 01-104, ¶ 6 (RSI asserts, *inter alia*, a claim of libel against Mr. Small in response to the allegation that WNNX misrepresented information). There is ample evidence of undisclosed relationships among these parties and an investigation to determine whether those parties have improperly manipulated the Commission’s rule making processes for their private benefit is warranted.⁵

⁵ Movants assert an argument for WNNX claiming that WNNX was not served with a copy of Mr. Small’s November 8, 2002 Opposition, MM Docket 01-104, because “Small did not serve either WNNX or Mr. Lipp in his capacity as counsel to WNNX with a copy of this pleading. Indeed, service was made upon Mr. Lipp and Erwin G. Krasnow together, who are counsel only to Radio

(continued...)

17) Movants assert that “even if Small were an ‘interested party’ with the ability to participate in this proceeding – which he is not – his pleading is utterly devoid of any reason why the Commission should not grant the Petition for Reconsideration.” *Motion to Strike*, ¶ 5. Movants support this position in their November 21, 2002, *Reply*, ¶ 7, by claiming that “one searches in vain for the ‘blatant, disqualifying misrepresentations’ that Small alleges were made by these parties.” The false statement is presented in ¶ 20 of Mr. Small’s November 8, 2002, *Opposition to Petition for Reconsideration*, MM Docket 01-104. There Mr. Small quotes from the subject *Petition for Reconsideration* where Movants make an equity plea that they placed detrimental reliance upon staff action which warrants relief from the *Cut and Shoor* rule. Mr. Small demonstrated that RSI knew long before the staff acted in the instant case that RSI’s ability to upgrade its station would be subject to delay pending finality in MM Docket 98-112. Moreover, WNNX, Cox, and their counsel were fully aware that finality in MM Docket 98-112 might delay licensing matters for other stations. *See Petition for Reconsideration*, MM Docket 01-104, at 14 (improvement to WNNX’s Station WWWQ(FM), the station at issue in MM Docket 98-112, under File No. BPH20010112ABQ is being delayed pending finality of MM Docket 98-112).⁶

s(...continued)

South.” *Reply*, MM Docket 01-104, n. 5. 47 C.F.R. § 1.47(d) provides that service may be effectuated by mailing a copy of the pleading to a party’s attorney. WNNX’s attorney obviously received service of the *Opposition* because he is replying to it. Movants do not cite any authority for the purported requirement that in order to comply with the *ex parte* rules Mr. Small must provide WNNX’s counsel with multiple copies of the same pleading to cover all of the clients, known and unknown, whom Mr. Lipp might represent. Movants’ assertion that Mr. Small is “engaging in the same behavior he has complained of,” *Reply*, MM Docket 01-104, n. 7, is obviously false. Mr. Small served WNNX’s counsel while no one served Mr. Small or any of Mr. Small’s representatives; the two situations are not even remotely similar. Movants’ ridiculous service argument is intended to deflect the Commission’s attention from serious matters

⁶ Movants rely upon three application proceedings in support of their equity-based detrimental reliance argument, however, these are not rulemaking proceedings. The single rulemaking proceeding upon which Movants rely, MM Docket **02-1** 14, was filed by RSI/WNNX’s shared counsel and, like at least two of the application proceedings upon which Movants rely, it is

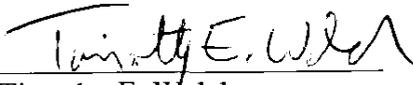
(continued...)

18) This is not merely a question of disparate treatment of similarly situated parties as Movants claim. *Reply*, ¶ 7. This case presents a question of whether Movants misrepresented facts or lacked candor in their plea for equitable relief in blaming the staff for their predicament when it is clear beyond argument that RSI had already been warned that it would be subject to delay pending resolution of MM Docket 98-112. Movants do not, because they cannot, justify their plea for equitable relief in light of RSI's actual prior knowledge that delays would arise. Despite failing to address their prior knowledge concerning delay, Movants seek equitable relief through a detrimental reliance argument which attempts to blame staff action for their predicament without regard to their own prior, actual knowledge that they could face administrative delays improving their stations. Movants are free to argue that the *Cut and Shoot* rule does not apply to them, they are not free to blame the staff for a purported "surprising" delay when the staff has previously warned them that delay would arise and they are not free to attack Mr. Small's interests in MM Docket 98-112.

WHEREFORE, the *Motion* must be denied and a determination made whether the *Motion* was improperly filed to obstruct Mr. Small's ability to participate in the instant proceeding.

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Respectfully submitted,
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“(...continued)
non-final. While opposing shared counsel obviously has knowledge of the action taken in MM Docket 01-104, there is nothing the Commission's computer data base for MM Docket 02-114 which indicates that he has advised the staff in that proceeding of the action taken in MM Docket 01-104. *Cf.* 47 C.F.R. § 1.65. Perhaps the same fate which has befallen MM Docket 01-104 awaits MM Docket 02-114 after the staff becomes aware of it.

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of December 2002 served a copy of the foregoing OPPOSITION TO MOTION TO STRIKE by First-class United States mail, postage prepaid, upon the following:

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