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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, For the Following Communities:	)	
Athens, Ohio	)	MM Docket No. 93-165 RM-8247
Hermantown, Minnesota	)	MM Docket No. 93-206 RM-8284
Balsam Lake, Wisconsin	)	MM Docket No. 93-213 RM-8351
Taylorville, Illinois	)	MM Docket No. 93-256 RM-8326

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

PETITION FOR RECONSIDERATION

Lakeside Broadcasting, Inc. (Lakeside), by its attorneys, now seeks reconsideration of the November 23, 1994 Order (DA 94-1270) which purports to establish a new window to file applications for, inter alia, the communities listed above.

Background

On January 25, 1994, the Commission released three separate orders allotting new FM channels to Athens, Ohio (DA 93-1584), Hermantown, Minnesota (DA 93-1547), and Taylorville, Illinois (DA 93-1582). A summary of each order was duly published in the Federal Register on January 28, 1994 (59 FR

4007 and 4008). Each order established a window for filing applications for those channels that opened on March 11, 1994 and closed on April 11, 1994. In response to these orders, Lakeside filed timely applications for construction permits for the Athens (File No. BPH-940411MG), Hermantown (File No. BPH-940408MZ), and Taylorville (File No. BPH-940408MY) channels.

On February 11, 1994, the Acting Chief, Allocations Branch released a Report and Order (DA 94-100) allocating Channel 285C3 to Balsam Lake, Wisconsin and establishing a window of March 29, 1994 to April 28, 1994 for filing applications for that channel. The Report and Order was published in the Federal Register on February 22, 1994 (59 FR 8415). In response to that Report and Order, Lakeside filed a timely application for a construction permit for the Balsam Lake channel (File No. BPH-940428MZ).

On February 25, 1994, the Commission issued a public notice freezing comparative proceedings (FCC 94-41) (hereinafter Freeze Order). In the public notice, the Commission announced that the Mass Media Bureau "will not issue cutoff lists or adopt FM filing windows for new filing opportunities..." The Freeze Order purported to suspend any cutoff lists or orders establishing filing windows. The Freeze Order was not published in the Federal Register.

On August 4, 1994, the Commission released an order modifying its freeze (FCC 94-204). The Commission announced that window filing periods that were purportedly suspended by the February 25 order "will be reopened for a full 30-day period by future Public Notice and by publication in the Federal Register." The Commission held that applications filed during a suspended filing window would be considered filed during the reopened window.[1] In the order that Lakeside is seeking reconsideration of, new filing windows were purportedly opened for the four communities that Lakeside already filed applications for.

Analysis

The instant Order was based upon the assumption that the February 25 Freeze Order validly suspended the filing windows for communities where an order setting a filing window was released and published in the Federal Register. That assumption is invalid. The orders establishing allocations and the original filing windows were all published in the Federal Register. That publication in the Federal Register was pursuant to Section 552(1) of the Administrative Procedure

[1] Despite that explicit instruction that applications already filed would be accepted and considered filed during the reopened window, Lakeside's four applications were returned by the Chief, FM Branch by letters dated December 15, 1994. The return of those applications will be the subject of a separate petition for reconsideration to be filed by Lakeside.

Act, (APA) 5 U.S.C. 552(1). The APA, after setting forth the various agency activities requiring publication, also mandates publication in the Federal Register of:

> "each amendment, revision, or repeal of the foregoing." 5 U.S.C. 552(1)(E).

The Freeze Order was never published in the Federal Register.

It is thus clear that under the law there is a validly promulgated, duly published allocation with a specified filing window. Lakeside filed its applications within the specified filing windows. Since the Freeze Order was not published in the Federal Register, it could not amend, revise, or repeal the Report and Orders establishing the filing windows. Lakeside was therefore not only entitled to file within the window, but in law was required to so file. Indeed, any application filed beyond the window must be dismissed as untimely.

Since there has already been a valid filing window to file applications for each of the channels in question, no purpose would be served by opening another filing window. Indeed, the instant order is an attempt to treat the initial orders establishing the original filing windows as nullities. In fact, it is the Freeze Order that had no legal effect, and the Commission has no authority or right to ignore the validly promulgated and published orders establishing filing windows.

The public interest would be served by rescinding the instant order and limiting the Commission's consideration to

applications that were filed during the valid filing window. Any potential applicant had the opportunity to file during the validly established filing window, so no cognizable prejudice can be said to result from the refusal to open a second filing window. In recent years, the Commission has placed great emphasis on its "responsibility to provide service to the public in the most efficient, expeditious manner possible and on the fact that delaying the initiation of new service disserves the public interest." Hillebrand Broadcasting, Inc., 1 FCC Rcd 419, 61 RR 2d 633, 634 (1986). The instant Order can only cause further delays in initiating service to the public, particularly in the case of Taylorville, Illinois, where no competing application was filed with Lakeside's application. There is no legitimate reason to impose a delay because there has already been one valid filing window during which any applicant could have filed an application.

Accordingly, Lakeside asks that the Order opening a new filing window for the communities listed above be rescinded and that the Commission only consider the applications filed during the previous valid filing windows (to the extent such applicants preserve their rights to review consideration of their applications).

Respectfully submitted,

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Date: December 22, 1994

CERTIFICATE OF SERVICE

I, Louise M. Juarez, do hereby certify that on the 22nd day of December 1994, a copy of the foregoing "Petition for Reconsideration" was sent first-class mail, postage pre-paid to the following:

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