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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

January 9, 1995

BY HAND

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In re Amendment of §73.202(b)
Athens, OH (MM Docket No. 93-165, RM-8247)
Hermantown, MN (MM Docket No. 93-206, RM-8284)
Balsam Lake, WI (MM Docket No. 93-213, RM-8351)
Taylorville, IL (MM Docket No. 93-256, RM-8326)

Dear Mr. Caton:

Enclosed herewith for filing, on behalf of our client, Yvonne L. Baum-Olson, are an original and four (4) copies of her "OPPOSITION TO PETITION FOR RECONSIDERATION" in the above-captioned proceeding.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,



Howard J. Braun
Diane L. Mooney

Enc.

cc: As on Certificate of Service (all w/enc.)

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Before the
Federal Communications Commission
Washington, D.C. 20554

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JAN 29 1995

FEDERAL COMMUNICATIONS COMMISSION
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In re Amendment of)	
Section 73.202(b))	
Table of Allotments)	
FM Broadcast Stations)	
)	
Athens, Ohio)	MM Docket No. 93-165
)	RM-8247
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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: Acting Chief, Allocations Branch

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OPPOSITION TO PETITION FOR RECONSIDERATION

YVONNE L. BAUM-OLSON ("Baum-Olson"), by her attorneys and pursuant to §1.106(g) of the Commission's Rules, hereby opposes the December 22, 1994 Petition for Reconsideration ("Petition") filed by Lakeside Broadcasting, Inc. ("Lakeside") regarding the Commission's Order, DA 94-1270, released November 23, 1994 in the above-captioned proceeding.¹ In support whereof, it is shown as follows:

Background

1. In Report and Order (MM Docket No. 93-213), 9 FCC Rcd 689 (1994) ("Report and Order"), the Acting Chief, Allocations Branch

¹ On December 28, 1994, Baum-Olson requested an extension of time until January 10, 1995, within which to file the instant Opposition. Baum-Olson specifically opposes that portion of Lakeside's Petition concerning Channel 285C3 at Balsam Lake, Wisconsin, as further discussed infra.

established a March 29, 1994 - April 28, 1994 window period for the filing of new FM applications on Channel 285C3 at Balsam Lake, Wisconsin. That filing window was later suspended by the Commission's Public Notice, FCC 94-41, released February 25, 1994 ("Freeze Order"), freezing comparative broadcast proceedings. Nevertheless, on April 28, 1994, Lakeside filed an application for Channel 285C3 at Balsam Lake (File No. BPH-940428MZ), which appeared as received on FCC Public Notice, Report No. 15810, released May 20, 1994. Lakeside's application was later returned by Public Notice, Report No. 22048, released December 21, 1994.²

2. On August 4, 1994, the Commission released Public Notice (FCC 94-204), 9 FCC Rcd 6689 (1994) ("Modification Order"), modifying its comparative broadcast freeze. Specifically, the Commission announced that window filing periods suspended by the Commission's earlier Freeze Order, like that for Channel 285C3 at Balsam Lake, "will be reopened for a full 30-day period by future Public Notice and by publication in the Federal Register." (Modification Order at ¶3.) The November 23, 1994 Order at issue herein subsequently established a new January 6, 1995 - February 6, 1995 filing window for Channel 285C3 at Balsam Lake as well as nineteen other channels in various communities.

3. In its Petition, Lakeside seeks reconsideration of the

² On July 18, 1994, Baum-Olson filed a Consolidated Motion to Dismiss Lakeside's application and the competing application of Lightwood Broadcasting Co. ("Lightwood") for Channel 285C3 at Balsam Lake (File No. BPH-940429MA) on the grounds that the applications were improperly filed in contravention of the Commission's Freeze Order. Lightwood's application was also subsequently returned by Public Notice, Report No. 22048, released December 21, 1994.

November 23, 1994 Order alleging, albeit erroneously, that since the Commission's Freeze Order was never published in the Federal Register, the original filing window for Channel 285C3 at Balsam Lake was invalidly suspended and, therefore, the Commission cannot legally establish a new filing window for the facilities or accept applications not previously filed between March 29, 1994 - April 28, 1994.

4. However, as further shown below, Lakeside is bound by its **actual notice** of the Freeze Order **whether or not** the Commission was required to publish same in the Federal Register, consistent with Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). See also 47 C.F.R. §0.445(e). Moreover, the preclusion of further applications for Channel 285C3 at Balsam Lake, as urged by Lakeside, would severely, and unfairly, prejudice Baum-Olson and other potential applicants for this facility, who, like Baum-Olson, properly refrained from filing their own applications in conformance with the Freeze Order. Clearly, such applicants rightly deserve the opportunity to do so in the newly-established window. Accordingly, Lakeside's Petition should be summarily dismissed or denied, pursuant to §1.106(j) of the Rules.

Baum-Olson Has Standing to Oppose Lakeside's Petition

5. Baum-Olson is clearly a party to the instant proceeding with ample legal grounds to oppose the subject Petition in light of her prior opposition to Lakeside's Balsam Lake application (see n.1, supra). Moreover, Baum-Olson is the original proponent of Channel 285C3 at Balsam Lake, having filed a September 17, 1993

Counterproposal and Comments ("Counterproposal") in response to the Mass Media Bureau's Notice of Proposed Rulemaking (MM Docket No. 93-213), 8 FCC Rcd 4936 (1993), which resulted in the allotment of Channel 285C3 as Balsam Lake's first aural transmission service. See Report and Order, supra. As shown, Lakeside's requested relief would effectively preclude Baum-Olson from filing her own application for the facilities. Accordingly, Baum-Olson has standing herein as a party whose interests would be adversely affected by a grant of Lakeside's Petition. See §1.106(b)(1).

**The Freeze Order was Effective with Respect
to Lakeside Regardless of Federal Register Publication**

6. Lakeside's request for rescission of the subject Order is premised on its incorrect contention that the Commission's failure to publish its Freeze Order in the Federal Register, contrary to §552(a)(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. §552(a)(1) (§3(a) of original APA), supposedly rendered the comparative broadcast freeze a "nullity" with respect to the prior Balsam Lake filing window. However, even assuming, arguendo, that the Freeze Order was required to be, but was not, published in the Federal Register, Lakeside is bound by its actual notice of same.

7. Specifically, in Kessler, supra, the Court of Appeals held, inter alia, that under §3(a) of the APA and §7 of the Federal Register Act, 49 Stat. 502 (1935), 44 U.S.C. §307, the Commission's order imposing a freeze on the acceptance of certain broadcast applications pending the adoption of relevant new rules was effective with respect to applications tendered for filing after

the order was adopted, but prior to Federal Register publication, where the applicants in question had actual knowledge of the order at the time of filing. The Court agreed that, under such act provisions, "... a person having actual knowledge of a procedural rule change is bound by it, even though it has not then been published." Id. at 690, citing, U.S. v. Aarons, 310 F.2d 341, 346 (2d Cir. 1962). In the instant case, Lakeside does not deny that it had actual knowledge of the Freeze Order, which was released a full two months prior to the filing of its Balsam Lake application. Hence, Lakeside cannot claim that the Freeze Order was ineffective as to it, and, in fact, Lakeside was required not to submit its application during the prior Balsam Lake window.

8. The Court in Kessler further held that "Section 3(a) [of the APA] does not provide in terms that a procedural rule will be ineffective until it is published," as Lakeside apparently would have the Commission believe. Id. Rather, the freeze order in Kessler, like that herein, did not require Lakeside "to resort to" unpublished procedure, contrary to §3(a) of the APA, but only to temporarily forebear from filing its application. Thus, enforcement of the unpublished freeze order in Kessler, as here, was fully consistent with the APA, particularly where the applicants had actual notice of same.

Rescission of the Subject Order would Severely and Unfairly Prejudice Baum-Olson and Other Potential Applicants

9. Lakeside also erroneously claims that "no purpose would be served by opening another filing window" for Balsam Lake and that

"no cognizable prejudice would result" to any other party should the Commission refuse to do so. To the contrary, as shown, the failure to reopen a filing window for Balsam Lake would irreversibly harm Baum-Olson by entirely precluding her application as well as any other potential applicants for the facility.

10. Lakeside seeks to preclude competition for the Balsam Lake FM channel. It has no right to free itself of competing applications. In short, Baum-Olson has a demonstrated commitment to promptly construct the Channel 285C3 facilities to serve Balsam Lake. See Counterproposal, supra. Under these circumstances, neither Baum-Olson nor any other potential applicant should be prevented from filing an appropriate application or otherwise penalized for properly adhering to the Freeze Order in this case. While Lakeside would like to get a "leg up" in the comparative hearing, it clearly cannot do so.

Conclusion

WHEREFORE, in light of the foregoing, Lakeside's December 22, 1994 Petition for Reconsideration of the Commission's November 23, 1994 Order should be summarily dismissed or denied.

Respectfully submitted,

YVONNE L. BAUM-OLSON

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Her Attorneys

Dated: January 10, 1995

CERTIFICATE OF SERVICE

I, Laura Pietrucha, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 9th day of January 1995, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**OPPOSITION TO PETITION FOR RECONSIDERATION**" to the following:

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* Hand Delivered