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

MM Docket No. 93-165

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Athens, Ohio) RM-8247

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1995; Released: October 12, 1995

By the Chief, Policy and Rules Division:

1. On January 25, 1994, the Commission released a *Report and Order* (MM Docket No. 93-165), 9 FCC Rcd 507 (1994), allotting Channel 240A to Athens, Ohio. That *Report and Order* established a filing window for that channel that was scheduled to open on March 11, 1994, and close on April 11, 1994. In response to the United States Court of Appeals' holding in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the Commission, on February 25, 1994, 8issued a *Public Notice*[1] announcing a stay of the application window in this and other proceedings, and freezing the filing of applications for all new FM stations. The freeze was lifted on August 4, 1994,[2] and on November 23, 1994, the Commission issued an *Order* that established new 30-day application filing windows in fifteen docketed proceedings, including this one.[3] It opened a new application window lasting from January 6, 1995, to February 6, 1995, for Channel 240A in Athens, Ohio.

2. In its Petition for Reconsideration, David W. Ringer ("Ringer" or "petitioner") asks that the *Order* establishing the January 6 - February 6, 1995, filing window be reconsidered.[4] Ringer argues that the February 25, 1994, *Public Notice* suspending the original filing window was never published in the Federal Register. Moreover, petitioner contends, the *Public Notice* was unclear as to whether "window periods which already [had] been opened and had yet to close were being cancelled or postponed," and whether it applied to filing windows that had already been announced even if they had not yet opened at the time of the *Public Notice*. In this regard, petitioner states that it and another communications attorney unsuccessfully sought declaratory rulings "on the issue of whether open window filing periods had been cancelled or postponed."[5] Therefore, it asserts, the Commission never gave actual or constructive notice that the Athens, Ohio, filing window period had been suspended. As a result, it maintains, the *Public Notice* did not effectively suspend the Athens, Ohio, window, the filing window announced by the *Order* should not be applied to the Athens, Ohio, proceeding, and only applications filed during the original window should be considered.[6]

3. An Opposition to Petitions[7] for Reconsideration ("Opposition") was filed by Nelsonville TV Cable, Inc. ("NTVCI"). In its Opposition, NTVCI argues that, irrespective of whether the *Public Notice* was published in the Federal Register, it clearly applied to the Athens situation, Ringer had actual knowledge ofthe freeze and it had that knowledge prior to the opening of the original Athens filing window. NTVCI asserts that Ringer would not be prejudiced by the rescheduled filing window even if more applicants filed during that window than had done so during the originally scheduled window. Ringer, it continues, had no right to expect that only the number of applications filed during the original window would have been filed absent the freeze as it has no way of knowing how many potential applicants were deterred from filing by the *Public Notice*. NTVCI argues, however, that it would be prejudiced by reconsideration of the *Order* because, in reliance on the *Public Notice* and that *Order*, it did not file an application during the originally scheduled filing window, but planned to do so during the rescheduled window.

4. In its "Reply to Opposition to Petition for Reconsideration," Ringer renews its argument that the Commission's *Public Notice* was so unclear that it "could not have served to suspend the Athens window." As a result, it continues, the Athens window has been "completed and there is no justification to open a second window at this time." Moreover, petitioner concludes that any harm that would be suffered by NTVCI should the Commission cancel the Athens filing window established in the *Order* would be its own fault for having gambled that the *Public Notice* was effective in staying the original window.

5. Ringer's "Petition for Reconsideration" will be denied. It is clear that, irrespective of whether the *Public Notice* was published in the Federal Register, petitioner had actual knowledge of it. It is virtually axiomatic that an agency may require a person to adhere to procedures which are

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[1] *Public Notice*, "FCC Freezes Comparative Proceedings" ("*Public Notice*"), 9 FCC Rcd 1055 (1994).

[2] *Public Notice*, "Modification of FCC Comparative Proceedings Freeze Policy," 9 FCC Rcd 6689 (1994).

[3] *See Order* (DA 94-1270)("*Order*"), 9 FCC Rcd 6844 (1994).

[4] Petitioner has also filed a Motion for Stay of the effectiveness of that *Order*. That Motion was not acted upon prior to the application window period's expiration. That and our disposition of Petitioner's Petition for Reconsideration render the stay motion moot and it will be dismissed.

[5] Attached to Ringer's Petition for Reconsideration was a copy of an Emergency Petition for Declaratory Ruling ("Emergency Petition") filed by counsel for unidentified clients and Comments in Support of Emergency Petition for Declaratory Ruling ("Comments") filed by counsel for the Petitioner. The Emergency Petition sought clarification of whether applications would be accepted by the Commission where filing windows had already been announced. It stated that unidentified members of the Commission's staff had given conflicting opinions on whether the Commission's "suspension" of the filing windows meant that they had been cancelled. Petitioner filed comments expressing support for the Emergency Petition and sought clarification of other issues concerning the *Public Notice* that are not pertinent here.

[6] Ringer and three other applicants filed during the original window.

[7] A second reconsideration petition had been filed by Lakeside Broadcasting, Inc., but has since been withdrawn. *See Memorandum Opinion and Order* in MM Docket Nos. 93-203, 93-206, 93-213 and 93-256, 10 FCC Rcd 3874 (1995).

unpublished to the extent of the person's actual and timely notice.[8] Petitioner's complaint that the *Public Notice* was so unclear that it did not provide, and could not have provided any party with actual knowledge is unavailing. That *Notice* clearly states:

> Further, during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing windows for new filing opportunities or require the filing of amendments, integration proposals, or hearing fees.... Any such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze.

This quite obviously means that cutoff lists or orders establishing filing windows that were adopted prior to the freeze were suspended.[9] The original filing window in this proceeding was established by an *Order* adopted on January 25, 1994, *i.e., prior* to the imposition of the freeze. Accordingly, that filing window was "suspended for the period of the freeze." Petitioner has provided no reasonable alternative interpretation of the plain wording of the *Public Notice*. Apparently, it believes that a plausible alternative meaning is that previously established filing windows were to remain as ordered -- a meaning squarely at odds with the wording and entire thrust of the *Public Notice*. The claims that petitioner did not subjectively understand the *Public Notice*, or that another practitioner was confused by it, or that unidentified Commission staff members had allegedly given conflicting opinions regarding the freeze are of no decisional significance. The *Public Notice* was clear with regard to the status of filing windows that had been ordered, but which had not yet opened. Petitioner's confusion, as well as that of the other practitioner, were of their own making and do not afford a basis for reconsideration.[10] Furthermore, the Commission speaks through its official documents and records and petitioner could not have relied on staff opinions in any case.[11]

6. Nor do we find that petitioner is in any way prejudiced by the freezing of the original filing window and establishment of a new window. It had no right to expect that it would have to face only those applicants that filed during the frozen original filing window. Other potential applicants, who correctly understood the *Public Notice* and were thereby deterred from filing, understandably would not have expressed their interest during the freeze period. Rather, were we to accept petitioner's arguments, reconsider the freeze and subsequently established filing window, and dismiss applications filed during that latter window, it is just such parties who would be prejudiced and who would suffer harm as a consequence of following the procedures established by the Commission.

7. We find that the original filing window in this matter was effectively suspended. Similarly, there was no infirmity with regard to the *Order* establishing the subsequent Athens filing window. Therefore, we will deny Ringer's Petition for Reconsideration.

8. Accordingly, IT IS ORDERED, that David W. Ringer's Petition for Reconsideration IS DENIED. IT IS FURTHER ORDERED, that Ringer's Motion for Stay IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[8] *See Human Resources Management, Inc. v. Weaver,* 442 F. Supp. 241, 247 (D.C.D.C. 1977).

[9] *Webster's Third New International Dictionary,* 1986 edition, defines "suspend" as "2a: to cause (as an action, process, practice, use) to cease for a time: stop temporarily."

[10] *Cf. Bradwin Corp.,* 61 FCC 2d 357 (1976). (Commission would not accept a late-filed document, where it was filed late as the result of the licensee's confusion over whether the Commission would be open and able to receive pleadings on a West Virginia state holiday, because any confusion was of licensee's own making.)

[11] *Cf. Musical Heights, Inc.,* 41 RR 2d 743 (1977). (Staff discussions do not serve as a "firm ground" upon which to base a petition for reconsideration); *220 Television, Inc.,* 81 FCC 2d 575 (1980)(Facts are to be ascertained from official Commission records and parties may not rely upon inquiries to the staff.)