

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 01-115
Table of Allotments,)	RM-10129
FM Broadcast Stations)	RM-10325
(Au Gres, Alpena, Beaverton,)	
Frankfort, Cheboygan and)	
Standish, Michigan))	

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

OPPOSITION TO MOTION TO STRIKE

WATZ Radio, Inc. ("WATZ"), licensee of FM Broadcast Station WATZ-FM, Channel 257C2 (99.3 MHz), Alpena, Michigan, by its attorney, hereby respectfully submits its Opposition to the "Motion to Strike" filed by Fort Bend Broadcasting Company ("Fort Bend"). Fort Bend's motion is utterly without merit, and, in fact, represents an attempt to place unauthorized further reply comments before the Commission. Therefore, it must be denied.

1. In this case, the Commission issued a "Corrected Public Notice", setting the final date for Reply Comments to Fort Bend's "Counterproposal" at November 7, 2001. Both WATZ and Northern Radio, Inc. timely complied with the November 7, 2001 due date.

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2. Our research indicates that, in rulemaking proceedings, procedures in Commission rulemaking proceedings are determined by the date of the "corrected public notice" in proceedings where such is issued. **Amendment of Commission Rules Regarding Multiple Address Systems (WT Docket No. 97-81)**, 15 FCC Rcd 11956, nn. 88, 287, 288, 289 (January 19, 2000); **Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules (WT Docket No. 94-148 and CC Docket No. 93-2)**, 15 FCC Rcd 3129, n. 242 (February 14, 2000); and **Amendment of Parts 2 and 25 of the Commission's Rules (ET Docket No. 98-206)**, 66 FR 10601, 22 CR 981, n. 534 (December 8, 2000).

3. Fort Bend cites cases that have no applicability to a rulemaking proceeding. In **Florida Institute of Technology v. FCC**, 952 F.2d 549 (D. C. Cir. 1992), the facts were that an applicant for a broadcast construction permit was placed on an "A" cut-off list, no competing applications were filed in response thereto, and then, sometime later, rather than being placed on a "B" cut-off list, the applicant was erroneously placed on a second "A" cut-off list. The second "A" list was not a correction to the first; rather, the applicant was listed in error on the second "A" list; the Commission correctly dismissed an application which was filed based on the second "A" list.

In *State of Oregon Acting by and through the State Board of Education*, 8 FCC Rcd 3558, a similar circumstance to *Florida Institute of Technology* took place, except in the *State of Oregon* situation, the Commission actually issued a public notice rescinding the erroneous cut-off list; the Commission correctly dismissed an application filed in response to the erroneous cut-off list. *Crystal Broadcast Partners*, 11 FCC Rcd 4860 (1996), involved a late-filed "Petition to Deny", where one of the excuses for the late filing was that the "Broadcast Actions" public notice, which had listed the correct file number, correct call sign and correct assignor and assignee names, stated "Rapid City, Wyoming" rather than "Rapid City, South Dakota". The Commission ruled in that situation that the original public notice would stand.

4. In the instant rulemaking case, however, the Commission issued a "Corrected Public Notice" on October 23, 2001¹. The October 23 Public Notice was not issued "erroneously"; rather, the Commission purposely issued it. Parties such as WATZ and Northern Radio were certainly

¹There is a substantial and material question as to whether the October 5, 2001 "Public Notice" was ever properly released in its entirety. The undersigned, who had been checking the Commission's website daily for the release of a public notice announcing the acceptance of the Fort Bend counterproposal, never saw it until the "corrected" version was released on October 23, 2001. As it turned out, the Commission issued a correction to another counterproposal on the same public notice, released October 9, 2001. Thus, substantial confusion took place in this matter; and fundamental fairness requires that all interested parties such as WATZ and Northern Radio have a full and fair opportunity to respond.

entitled to rely on the October 23 notice for the setting of the Reply due date.

5. Furthermore, the Commission's rules are not to be for the convenience of any one party, such as Fort Bend, at the expense of other interested parties, such as WATZ and Northern Radio. A parallel rule is the one established by **Crosthwait v. FCC**, 584 F.2d 550, 555 (D. C. Cir. 1978), that an applicant has no vested interest in the disqualification of a competing applicant. By analogy, Fort Bend has no vested interest in the striking of the WATZ and Northern Radio comments, particularly since they were both timely filed. Furthermore, since the Fort Bend proposal involves the forced move of WATZ-FM, Alpena, Michigan to another frequency, WATZ, pursuant to Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. §316(a), has a statutory right to be heard.² Therefore, on Section 316(a) grounds, the Commission cannot strike WATZ's Comments.

6. Finally, Fort Bend's "Motion to Strike" appears to be as much about the submission of unauthorized further reply comments as it is about trying to get the Commission to disregard the showings of WATZ and Northern Radio.

²Section 316(a) provides in pertinent part: "No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification"

Indeed, Fort Bend demonstrates why its Counterproposal should be dismissed as patently defective. On page 5 of the "Motion to Strike", Fort Bend indicates that, upon receipt of the WATZ and Northern Radio comments, for the first time it became aware that Fort Bend's proposed use of Channel 257C1 at Frankfort will violate Section 73.315 of the Commission's Rules pertaining to line-of-sight city-grade coverage of the community of license. WATZ is constrained to point out the following statement of law which appeared in the recently released **FM Table of Allotments, Bethel Springs, Tennessee, et al (MM Docket No. 99-196)**, DA 01-2682, 16 FCC Rcd -, at ¶6 (November 16, 2001):

Since the Commission will not require a station to change its transmitter site to accommodate a rulemaking proposal and since counterproposals must be "technically correct" and "substantially complete" at the time they are filed, Option II cannot be considered. See e.g., Fort Bragg, California, 6 FCC Rcd 5817 (1991); Princeton, et al., Massachusetts, 8 FCC Rcd 19 (1992); and Sanford and Robbins, North Carolina, 12 FCC Rcd 1(1997). See also, Claremore, Oklahoma, et al., 2 FCC Rcd 5921 (1987); and Hazelhurst, et al. Mississippi, 9 FCC Rcd 6439 (1994), recon. den., 11 FCC Rcd 2353 (1996).

7. In essence, Fort Bend now concedes that its "Counterproposal" was not "technically correct" and "substantially complete" at the time it was filed. The only legally correct thing for the Commission to do, therefore, is to strike the Fort Bend "Counterproposal",

and to grant the Au Gres rulemaking proposal as originally filed³.

WHEREFORE, WATZ Radio, Inc. urges that the December 4, 2001 "Motion to Strike" filed by Fort Bend Broadcasting Company **BE DENIED**, and that the July 13, 2001 "Counterproposal" filed by Fort Bend Broadcasting Company **BE STRICKEN AS TECHNICALLY INCORRECT**.

Respectfully submitted,

WATZ RADIO, INC.

By 

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December 12, 2001

³The "Motion to Strike" addresses, but does not deny, WATZ's contention that the real party in interest behind the Au Gres rulemaking proposal is Roy Henderson, the 100% shareholder in Fort Bend.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Opposition to Motion to Strike" was served by first-class United States mail, postage prepaid, on this 12th day of December, 2001 upon each of the following:

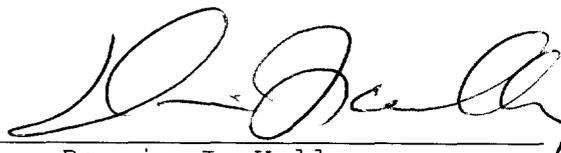
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