

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 00-148
FM Broadcast Stations.)	RM-9939
(Quanah, Archer City, Converse, Flatonia,)	RM-10198
Georgetown, Ingram, Keller, Knox City,)	
Lakeway, Lago Vista, Llano, McQueeney,)	
Nolanville, San Antonio, Seymour, Waco and)	
Wellington, Texas, and Ardmore, Durant,)	
Elk City, Healdton, Lawton and Purcell,)	
Oklahoma.)		

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 2004

Released: April 27, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Partial Reconsideration and Request for Expedited Action filed by Rawhide Radio, LLC, Capstar TX Limited Partnership, and Clear Channel Broadcasting Licenses, Inc. (“Joint Petitioners”) directed to the *Report and Order* in this proceeding.¹ Texas Grace Communications, Charles Crawford filed Oppositions and Comments. Fritz Broadcasting Co., Inc. and M&M Broadcasters, Ltd. filed a Joint Opposition. The Joint Petitioners filed a Reply to Oppositions and related pleadings in response to Comments filed by Charles Crawford. For the reasons discussed below, we deny the Petition for Reconsideration and Request for Expedited Action.

Background

2. At the request of Nation Wide Radio Stations, the *Notice* in this proceeding proposed the allotment of Channel 233C3 to Quanah, Texas.² In response to the *Notice*, the Joint Petitioners filed a Counterproposal involving twenty-two communities in Texas and Oklahoma. In one aspect of this Counterproposal, the Joint Petitioners proposed the substitution of Channel 248C for Channel 248C2 at Durant, Oklahoma, reallocation of Channel 248C to Keller, Texas, and modification of the Station KLAJ license to specify operation on Channel 248C at Keller, Texas. In order to accommodate this allotment, the Joint Petitioners proposed three channel substitutions. Included among those substitutions was the substitution of Channel 230C1 for Channel 248C1 at Archer City, Texas, and the modification of the Station KRZB license to specify operation on Channel 230C1. On the basis of our own engineering review, Joint Reply Comments filed by Fritz Broadcasting Co., Inc. and M&M Broadcasters, Ltd., and Reply Comments filed by Maurice Salsa, the proposed transmitter site (33-36-58 and 98-51-42) for the Channel 230C1 allotment at Archer City is short-spaced to an application filed by AM & FM

¹ *Quanah, Texas et al.* 18 FCC Rcd 9495 (MB 2003).

² Nation Wide Radio Stations withdrew its expression of interest in this allotment, and in accordance with Section 1.420(j) of the Rules, this proposal was dismissed in the *Report and Order*.

Broadcasters, LLC, licensee of Station KICM, Channel 229C2, Krum, Texas, to upgrade to Channel 229C1 (File No. BMPH-20000725AAZ).

3. Counterproposals that are in conflict with a previously filed application can be considered if the counterproposal is amended to remove the conflict within 15 days from the date the counterproposal appears on public notice.³ To this end, the Joint Petitioners and AM & FM Broadcasters submitted Reply Comments addressing this issue. Under the agreement between these parties, the parties recognized the pending Station KICM application and AM & FM Broadcasters agreed to file an application to downgrade Station KICM back to Channel 229C2 in the event the application is granted and the channel changes proposed in this proceeding are allotted. Pursuant to the agreement, the Joint Petitioners would “compensate” AM & FM Broadcasters for the downgrade of Station KICM.

4. In response to that submission, we issued a *Request for Supplemental Information*.⁴ The *Request* found that the agreement was, in effect, a withdrawal of an expression of interest within the ambit of Section 1.420(j) of the rules which limits reimbursement to actual expenses. Accordingly, the Joint Petitioners were requested to submit the underlying agreement in order to determine compliance with Section 1.420(j) of the rules. The Joint Petitioners did not submit any agreement. Instead, the Joint Petitioners, as well as AM & FM Broadcasters, contended that Section 1.420(j) of the Rules applies only to a dismissal, modification or withdrawal of an expression of interest and not to an agreement to file a subsequent application to downgrade an allotment. We disagreed. The pending Station KICM application was an expression of interest and an impediment to the channel allotments proposed by the Joint Petitioners. Pursuant to an agreement in this proceeding, AM & FM Broadcasters has agreed to remove this impediment and forego Class C1 facilities as set forth in its application.⁵ In the *Report and Order*, we stated that the agreement by AM & FM Broadcasters in exchange for compensation was tantamount to a withdrawal of this expression of interest. In view of this noncompliance with Section 1.420(j) of the rules, the Joint Petitioners Counterproposal could not be favorably entertained in the context of this proceeding.

5. The fact that the Station KICM application has now been granted did not warrant favorable action on the Counterproposal or alter our determination with respect to the applicability of Section 1.420(j) of the Rules. The application was pending during this proceeding. With regard to the Station KICM Class C1 construction permit, the fact that AM & FM Broadcasters has agreed to file an application to downgrade its allotment back to Class C2 only after Channel 230C1 is allotted to Archer City is also fatal to the Joint Petitioners Counterproposal. We would, in fact, be allotting a short-spaced allotment at Archer City contingent upon AM & FM Broadcasters filing an application after the *Report and Order*, the application being granted and the Station KICM Class C2 facilities being licensed. It is our policy not to consider such a contingent proposal based upon an action outside of this proceeding.⁶

6. At that juncture, we stated that the appropriate procedure would be for the Joint Petitioners and AM & FM Broadcasters to file a Petition for Rule Making proposing the channel substitution at Archer City along with the downgrade of the Station KICM Class C1 allotment. This would be consistent with the procedure used in the cases cited by the Joint Petitioners in their Response to Request for

³ See Note to Section 73.208 of the Rules; see also *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 (1993).

⁴ 17 FCC Rcd 994 (MMB 2002) (the “*Request*”).

⁵ An application on file by the comment date in a rulemaking proceeding is an “expression of interest” functionally equivalent to a counterproposal. See *Detroit, Texas, et al.*, 13 FCC Rcd 15591 (MMB 1998).

⁶ See *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615 (MMB 1988), *recon.* 3 FCC Rcd 6626 (MMB 1988); see also *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (MMB 1996).

Supplemental Information.⁷ The *Report and Order* also rejected a contingent application procedure under Section 73.3517(e) of the rules suggested by the Joint Petitioners as a means of implementing a Class C2 downgrade for Station KICM and a Channel 230C1 allotment at Archer City. Section 73.3517(e) permits the simultaneous acceptance of contingent applications. This is not the procedure proposed by the Joint Parties and AM & FM Broadcasters. In this instance, the procedure would require a separate *Report and Order* allotting a short-spaced allotment at Archer City contingent upon the promise of AM & FM Broadcasters to subsequently file and implement an application that would bring the respective allotments into compliance with our separation requirements.

7. The *Report and Order* dismissed the entire Joint Petitioners Counterproposal. As discussed above, we could not make the requested Channel 230C1 substitution at Archer City because it would be short-spaced to the Channel 229C1 application at Krum, Texas. The Archer City substitution would have required the substitution of Channel 232C2 for Channel 231C2 at Lawton, Oklahoma. In turn, the Lawton substitution would have required the substitution of Channel 233C3 for Channel 232C3 at Elk City, Oklahoma. The proposed Channel 233C3 substitution at Elk City conflicted with the originally proposed Channel 233C3 allotment at Quanah, Texas. No other proposal in the Joint Petitioners Counterproposal conflicted with the underlying Quanah proposal set forth in the *Notice*.

8. The initial proposal set forth in the Joint Petitioners Counterproposal proposed the substitution of Channel 248C for Channel 248C2 at Durant, Oklahoma, reallocation of Channel 248C to Keller, Texas, and modification of the Station KLAJ license to specify operation on Channel 248C at Keller. This proposal could not be implemented because it required the substitution of Channel 230C1 for Channel 248C1 at Archer City. Similarly, the Keller proposal would have also required channel substitutions at Healdton, Oklahoma, and Waco, Texas. To accommodate these proposals, the Joint Petitioners proposed a series of channel substitutions involving 12 communities in Texas and Oklahoma. A counterproposal must conflict with the proposal set forth in the *Notice*.⁸ In this instance, none of these proposals conflicted with the underlying Channel 233C3 proposed allotment at Quanah. As such, we would not bifurcate the Counterproposal or otherwise consider any of these proposals in the context of the *Report and Order* in this proceeding.⁹

Alternative Proposals

9. In the event that its Counterproposal could not be favorably entertained, the Joint Petitioners advanced two alternative proposals.¹⁰ The first was a proposal to reallocate Channel 248C to Keller, Texas, and modify the Station KLAJ license to specify operation on Channel 248C at Keller. Except for the necessary changes in channel at Waco and Marlin, Texas, this proposal was the same as advanced in the Counterproposal. For the same reasons discussed above, we would not consider this alternative. A Channel 248C allotment at Keller requires the same substitution at Archer City. The second alternative only proposes the substitution of Channel 247C1 for Channel 248C at Waco, Texas, reallocation of Channel 247C1 to Lakeway, Texas, and modification of the Station KWTX license to specify operation on Channel 247C1 at Lakeway. The Joint Petitioners also proposed related channel substitutions

⁷ *Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13458 (MMB 1998); *Farmersville, Texas, et al.*, 12 FCC Rcd 4099 (MMB 1997).

⁸ See *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931, n. 5 (1990).

⁹ See also *Broken Arrow and Bixby, Oklahoma, Coffeyville, Kansas*, 3 FCC Rcd 6507 (MMB 1988).

¹⁰ In *Winslow, Camp Verde, Mayer and Sun City West, Arizona*, 16 FCC Rcd 9551 (MMB 2001), we announced our policy that we would no longer consider alternative proposals in the context of either a single petition for rule making or counterproposal. In this instance, the Joint Petitioners Counterproposal was filed before the announcement of this new policy.

necessary to accommodate this reallocation. However, none of these proposed channel substitutions conflicted with the underlying Channel 233C3 allotment at Quanah, Texas, proposed in the *Notice*. As such, we would not consider this proposal in the context of this proceeding.

10. In support of its Petition for Partial Reconsideration, the Joint Petitioners did not dispute our determination that we could not make a required Channel 231C1 at Archer City due to the Station KICM application and the resulting Channel 229C1 allotment at Krum. Instead, the Joint Petitioners argue that we erred in dismissing the entire Counterproposal. Specifically, the Joint Petitioners contend that we should have considered the portion of its Counterproposal which was not defective and not in conflict with the Quanah proposal as a “separate” proposal. For this reason, the Joint Petitioners request that we now issue a *Notice of Proposed Rule Making nunc pro tunc* to the time its Counterproposal was originally filed.

11. We deny the Petition for Partial Reconsideration. As discussed above, the Counterproposal was and continues to be defective due to Channel 229C1 at Krum, Texas. The Joint Petitioners combined a defective allotment proposal with an allotment proposal not in conflict with the underlying Quanah proposal into a single Counterproposal. It was not “facially acceptable” as suggested by the Joint Petitioners. In this proceeding, the Joint Petitioners pursued this entire Counterproposal through the *Report and Order*. During the course of this proceeding, it was not incumbent upon the staff to determine which portion of the Counterproposal could be considered in a separate *Notice of Proposed Rule Making* or, on its own motion, bifurcate the Counterproposal.

12. In its Petition for Partial Reconsideration, the Joint Petitioners refer to earlier proceedings in which a counterproposal not in conflict with the original proposal was considered in the context of a separate proceeding. These cases do not support the relief requested by the Joint Petitioners or suggest that we should now process a portion of the Joint Petitioners Counterproposal on a *nunc pro tunc* basis in a new proceeding. Unlike the Joint Petitioners defective counterproposal in this proceeding, the counterproposals in those cases involved proposals in technical compliance with our rules. We did not have to determine which portion of the counterproposal was technically acceptable and if the counterproponent wished to pursue a portion of its counterproposal. In *Noblesville, Indianapolis and Fishers, Indiana*, we did not consider an otherwise technically acceptable counterproposal in a proceeding in which the counterproponent modified the original proposal to create a mutual exclusivity.¹¹ Instead, this nonconflicting proposal was considered in a separate proceeding. In *Saratoga, Green River, Big Piney and La Barge, Wyoming*, we inadvertently accepted a counterproposal into a rulemaking proceeding even though it was untimely with respect to a conflicting proposal in an earlier proceeding.¹² Therefore, we dismissed the subsequent proposal and terminated the proceeding. Since the ultimate resolution of the earlier proceeding did not preclude that proposal, we treated the proposal as a new petition for rule making and initiated a new proceeding. In *Alva, Bartlesville and Ponca City, Oklahoma, and Deerfield, Missouri*, we merely proposed in a new proceeding a technically acceptable proposal for Deerfield, Missouri, which had been filed as a nonconflicting counterproposal in an earlier proceeding.¹³ We also followed this procedure in *Kingston, Tennessee*,¹⁴ and *Oakdale and Campti, Louisiana*.¹⁵

13. We will not, on a *nunc pro tunc* basis, issue a Notice of Proposed Rule Making setting forth a portion of the Joint Petitioners Counterproposal. The Joint Petitioners request this relief in order that

¹¹ *Noblesville, Indianapolis and Fishers, Indiana*, 18 FCC Rcd 11039 (MB 2003).

¹² *Saratoga, Green River, Big Piney and La Barge, Wyoming*, 15 FCC Rcd 10358 (MMB 2000).

¹³ *Alva, Bartlesville and Ponca City, Oklahoma, and Deerfield, Missouri*, 11 FCC Rcd 20915 (MMB 1996).

¹⁴ *Kingston, Tennessee*, 2 FCC Rcd 3589 (MMB 1987).

¹⁵ *Oakdale and Campti, Louisiana*, 7 FCC Rcd 1033 (MMB 1992).

proposals contained in the Counterproposal not be precluded by eight conflicting petitions for rule making that we accepted after the comment date in this proceeding. We recognize that we did not promptly enter the Counterproposal into the FM data base. As a consequence, we inadvertently accepted eight untimely rulemaking petitions in conflict with proposals in the Counterproposal. We have addressed this matter and have dismissed all eight petitions. These dismissals are now on appeal. In the event the appeals are denied, there would be no impediment that would preclude the Joint Petitioners from filing a petition for rule making setting forth the technically acceptable allotment proposals originally contained in the Counterproposal as well as any related allotment proposals.¹⁶ If the dismissals are reversed, we note that the Joint Petitioners filed comments in response to the respective *Notices of Proposed Rule Making*. In each instance, the Joint Petitioners referenced their conflicting proposal already on file and expressed a continuing interest in that proposal. To the extent a Joint Petitioner's conflicting proposal is technically acceptable, it will be considered in connection with that particular proceeding.

14. Accordingly, IT ORDERED, That the aforementioned Petition for Partial Reconsideration and Request for Expedited Action filed by Rawhide Radio, LLC, Capstar TX Limited Partnership and Clear Channel Broadcasting Licenses, Inc. IS DENIED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

¹⁶ In its Petition for Reconsideration, the Joint Petitioners refer to the "unconscionable length of time" between the issuance of the *Notice of Proposed Rule Making* and the *Report and Order*. In addition to the fact that the Joint Petitioners filed a complex Counterproposal involving twenty-two communities, we note that during this two and one half year period, we received fifty-six pleadings. Included among those pleadings was a "Withdrawal of Interest" and a "Reinstatement of Interest," both filed by the Joint Petitioners.