

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 00-148
Table of Allotments,)	RM-9939
FM Broadcast Stations.)	RM-10198
(Quanah, Archer City, Converse, Flatonia,)	
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
(Proceeding Terminated)

Adopted: May 5, 2011

Released: May 6, 2011

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by Rawhide Radio, LLC, Capstar TX Limited Partnership, Clear Channel Broadcasting Licenses, Inc. and CCB Texas Licenses, L.P. (“Joint Petitioners”) of the *Memorandum Opinion and Order* in this proceeding.¹ Charles Crawford (“Crawford”) filed an Opposition to Application for Review, and a Supplement and a Second Supplement to Opposition to Application for Review. J&J Fritz Media, Ltd. and M&M Broadcasters, Ltd. (“J&J/M&M”) filed an untimely Opposition to Application for Review.² The Joint Petitioners filed a Reply to Oppositions and related pleadings in response to the Supplement filed by Crawford. For the reasons discussed below, we deny the Application for Review.

II. BACKGROUND

2. At the request of Nation Wide Radio Stations, the *Notice of Proposed Rule Making* in this proceeding proposed the allotment of Channel 233C3 to Quanah, Texas.³ In response to the *Notice*, the Joint Petitioners filed a Counterproposal (the “Counterproposal”) involving twenty-two communities in Texas and Oklahoma. In addition, Joint Petitioners asked the staff to consider severing the Counterproposal into two alternatives if some portion of the primary Counterproposal were determined to

¹ *Quanah, Texas, et al.*, Memorandum Opinion and Order, 19 FCC Rcd 7159 (MB 2004) (“*Quanah MO&O*”).

² J&J/M&M filed a Motion for Extension of Time to file an Opposition to Application for Review. The Joint Petitioners opposed these Motions. J&J/M&M has failed to show good cause for its late filing. We deny the Motion and dismiss the Opposition. See 47 C.F.R. § 1.46(a).

³ *Quanah, Texas*, Notice of Proposed Rule Making, 15 FCC Rcd 15809 (MMB 2000) (“*Quanah Notice*”). 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 *Quanah, Texas*, Report and Order, 18 FCC Rcd 9495 (MB 2003) (“*Quanah Report and Order*”).

be defective.⁴ In the *Quanah Report & Order*, the Media Bureau (the “Bureau”) determined that the Counterproposal could not be considered in the context of this proceeding because the proposed transmitter site for the Channel 230C1 allotment at Archer City was short-spaced to the then pending application of AM & FM Broadcasters, LLC (“AM & FM”), licensee of Station KICM, Channel 229C2, Krum, Texas, to upgrade to Channel 229C1 (the “KICM Application”).

3. The Bureau also dismissed each of the two alternative proposals advanced by the Joint Petitioners because neither proposal complied with the Commission’s Rules and procedures.⁵ The first alternative proposal included the proposed Channel 230C1 substitution at Archer City that was short-spaced to the KICM Application. Thus, the Bureau rejected the first alternative proposal on the same basis as it rejected the primary Counterproposal. The Bureau also rejected the second alternative because none of the proposed channel substitutions in the second alternative conflicted with the underlying Channel 233C3 allotment at Quanah, Texas, as proposed in the *Quanah Notice*. In these circumstances, the Bureau found that it could not bifurcate the counterproposal or otherwise consider this second alternative proposal in the context of this proceeding, as requested by the Joint Petitioners, and dismissed the entire Counterproposal, including both alternatives.⁶ In doing so, the Bureau noted that for a proposal to be considered in a proceeding, it must be in conflict with the underlying proposal.

4. The Joint Petitioners filed a Petition for Partial Reconsideration. They contended that the Bureau should have either considered the portion of the Counterproposal that was not defective and not in conflict with the initial Quanah proposal as a counterproposal in this rule making proceeding or considered the second alternative as a “separate” proposal in a new rule making. In the *Quanah MO&O*, the Bureau rejected these arguments and denied the Petition for Partial Reconsideration.⁷ It found that the Counterproposal was facially unacceptable and could not be processed *nunc pro tunc* given that it remained defective with respect to the Channel 229C1 authorization at Krum, Texas. The Bureau rejected the second alternative because it was not in conflict with the underlying Quanah proposal and stated that “. . . 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.”⁸ The Bureau also concluded that the cases cited by the Joint Petitioners did not support the requested relief of issuing a Notice of Proposed Rule Making on a *nunc pro tunc* basis because unlike the Counterproposal “the counterproposals in those cases involved proposals in technical compliance with our rules.”⁹ Finally, the Bureau acknowledged that it had inadvertently accepted eight untimely rule making petitions in conflict with the second alternative but explained that it had remedied these errors by subsequently dismissing each of the conflicting petitions.¹⁰

⁴ Counterproposal at 36. (“The Joint Petitioners urge the Commission to adopt the above proposal in its entirety. . . . However, in the unlikely event that the Commission finds a defect in the proposal, it can be severed into two proposals, either of which can be granted independently.”). Approval of the entire Counterproposal would have provided first local service to five communities: Keller, Texas; Purcell, Oklahoma; Lakeway, Texas; Lago Vista, Texas; and Converse, Texas. The first “KLAK Alternative” proposed first local service to the communities of Keller and Purcell; the second “KVCQ Alternative” proposed first local service to the communities of Lakeway, Lago Vista, and Converse.

⁵ *Quanah Report and Order*, 18 FCC Rcd at 9497.

⁶ *Id.*

⁷ *Quanah MO&O*, 19 FCC Rcd at 7162, ¶ 11.

⁸ *Id.*

⁹ *Id.* at 7162, ¶ 12.

¹⁰ *Id.* at 7163, ¶ 13.

5. In their Application for Review, the Joint Petitioners abandon their previous claim that the second alternative satisfied the mutual exclusivity requirement. They reiterate, however, their argument that the Bureau erred in dismissing the entire Counterproposal and that, consistent with precedent, it should have initiated a new proceeding proposing the channel substitutions set forth in the second alternative. In support of this position, the Joint Petitioners argue that (1) the second alternative was clearly identified and set forth as an independent proposal; (2) the Bureau had an obligation to consider the second alternative because it was “a technically acceptable proposal;”¹¹ (3) the Bureau’s basis for distinguishing the cited cases is incorrect because in two of the cases, alternative proposals that had been submitted along with a defective counterproposal were made the subject of Notices of Proposed Rule Making;¹² and (4) refiling the second alternative is not an adequate remedy even though the Commission dismissed the conflicting proposals because of the lengthy appeal process in those cases and the grant of an additional application that is short-spaced to one aspect of the second alternative.¹³

III. DISCUSSION

6. We deny the Application for Review. As an initial matter, we note that the Joint Petitioners filed their Counterproposal at a time when the Bureau entertained alternative proposals in FM allotment proceedings. Approximately seven months later, the Bureau ended this processing policy and announced that “. . . we will no longer entertain optional or alternative proposals presented in either an initial petition for rule making or in a counterproposal.”¹⁴ The Bureau noted that: (1) there is no provision in our Rules requiring the consideration of such proposals; (2) based upon its prior experience, this policy required the staff to speculate on the proposal actually preferred by the proponent; and (3) processing alternative proposals and related appeals were administratively burdensome. However, this filing restriction is not applicable to the Counterproposal.¹⁵ Thus, the issue before us is whether the Bureau should have bifurcated the second alternative proposal and issued a separate Notice of Proposed Rule Making.¹⁶ For the reasons set forth below, we find that the Joint Petitioners’ claim that the second alternative constitutes “a technically acceptable proposal”¹⁷ is untenable and, therefore, affirm the Bureau’s decision not to issue a Notice of Proposed Rule Making for the second alternative.

7. On the date that the Counterproposal was filed, the second alternative proposal contained two technical defects that prevented its consideration as either a rule making petition or a counterproposal. First, the proposed downgrade and reallocation of Station KHFI(FM) from Georgetown, Texas, to Channel 243C2 at Lago Vista, Texas, was short-spaced when filed to an earlier, cut-off proposal to allot Channel 243A at Evant, Texas.¹⁸ In an attempt to resolve this conflict, the Counterproposal noted that the

¹¹ Joint Petitioners’ Application for Review at 5.

¹² See *Milford, Utah*, Report and Order, 19 FCC Rcd 10335 (MB 2004); and *Kingston, Tennessee*, Report and Order, 2 FCC Rcd 3589 (MMB 1987).

¹³ See File No. BPH-20010102AAO.

¹⁴ *Winslow, Camp Verde, Mayer, and Sun City West, Arizona*, Memorandum Opinion and Order, 16 FCC Rcd 9551, 9555, ¶ 9 (MMB 2001) (“*Winslow*”).

¹⁵ The elimination of the policy became effective upon publication of the *Winslow* case in the Federal Register on May 30, 2001. See 66 FR 29237 (May 30, 2001). The Joint Petitioners filed their Counterproposal on October 10, 2000.

¹⁶ Based on our independent reexamination of the record, we agree with the Joint Petitioners that they specifically defined the second alternative, provided supporting technical information, and asserted that the second alternative could “be granted on its own merits.” Counterproposal at 38, ¶ 66.

¹⁷ Joint Petitioners’ Application for Review at 5.

¹⁸ The required spacing between co-channel Class A and C2 stations is 166 kilometers whereas the actual distance between the proposed Channel 243C2 at Lago Vista, Texas and the proposed allotment of Channel 243A at Evant,

(continued....)

proponent of Channel 243A at Evant was simultaneously withdrawing its expression of interest in that proposed allotment. The Counterproposal and the Evant withdrawal of interest were both filed on October 10, 2000.¹⁹ However, it is well established that “[i]n allocation proceedings, both counterproposals and initial rule making proposals are deemed defective if they are in conflict with, or contingent upon, a cut-off proposal . . . in another proceeding.”²⁰ Because of this short-spacing, the second alternative proposal was contingent upon the Commission’s approval of the withdrawal of the Evant proposal, which did not become effective until August 20, 2001.²¹ As a result, the second alternative proposal was filed approximately nine months before it was “technically acceptable” as either a rule making petition or as a counterproposal.²²

8. Second, the Counterproposal contained a proposed reallocation and downgrade of Station KWTX(FM) to Channel 247C1 at Lakeway, Texas, which proposed an unsuitable transmitter site. As noted by staff in a *Request for Supplemental Information*,²³ “it appears that the proposed transmitter site is, in fact, located in the Colorado River or at the very edge of the river. In either case, it would appear the proposed transmitter site is neither suitable nor available.”²⁴ Crawford submitted engineering exhibits seeking to corroborate the staff’s view about the proximity of the site to the water, and stating that the proposed site is in a Critical Water Quality Zone for which a special use permit for a broadcast tower would not likely be granted.²⁵ While not addressing the suitability of the proposed site in response to the *Request*, the Joint Petitioners acknowledged a two- or three-second mistake in the reference coordinates that they intended to use for Channel 247C1 at Lakeway.²⁶ They argued, however, that this minor error is not a defect in their Counterproposal because a site change amendment of this magnitude is allowed under Section 73.1692(c)(1).²⁷ Alternatively, the Joint Petitioners contended that even if the discrepancy in the

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Texas, is approximately 117 kilometers. See Joint Petitioners’ Counterproposal, Engineering Statement at Exhibit E, Figure 46. See also 47 C.F.R. § 73.207(b), Table A (minimum distance separation requirements).

¹⁹ Counterproposal at 25, ¶ 44.

²⁰ *Amboy, California*, Report and Order, 19 FCC Rcd 12404, 12408, ¶ 9 (MB 2004) (dismissing a counterproposal because of a conflict with a previously filed, cut-off allotment proposal in another proceeding); and *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, Memorandum Opinion and Order, 21 FCC Rcd 2254, 2256 (MMB 2006) (affirming dismissal of counterproposal filed on March 19, 2001, because it was contingent upon approval of request to dismiss an earlier filed, conflicting counterproposal, which did not become effective until July 3, 2001). See also *Pinewood, South Carolina*, Memorandum Opinion and Order, 5 FCC Rcd 7609, 7609-10 (1990) (dismissing a rule making petition in conflict with a cut-off channel suggestion in an earlier proceeding); and *Benjamin and Mason, Texas*, Memorandum Opinion and Order, 19 FCC Rcd 470 (2004), *affirmed*, *Crawford v. FCC*, 417 F.3d at 1295-96.

²¹ *Burnet, Texas*, Report and Order, 16 FCC Rcd 13281 n.2 (MB 2001).

²² See, e.g., *Broken Arrow, Oklahoma, et al.*, Report and Order, 3 FCC Rcd 6507, 6507 n.2 (MMB 1988) (counterproposals must be technically correct and substantially complete when filed); *Springdale, Arkansas, et al.*, Report and Order, 4 FCC Rcd 674, 677 n.7 (MMB 1989) (“*Springdale, Arkansas*”) (same); *Detroit, Texas, et al.*, Report and Order, 13 FCC Rcd 15591, 15593 (MMB 1998) (“*Detroit, Texas*”) (same).

²³ *Quanah, Texas*, Request for Supplemental Information, 16 FCC Rcd 17081, 17081 (MMB 2001) (“*Request*”).

²⁴ *Id.*

²⁵ See Crawford’s Response to Request for Supplemental Information, filed November 13, 2001, at 2-3 and Attachment C, Letter from Carl McClendon, City of Austin Planner, to Elgin FM Limited Partnership, November 8, 2001 (“City of Austin Letter”).

²⁶ Joint Petitioners’ Response to Request for Supplemental Information, filed November 13, 2001, at 2.

²⁷ 47 C.F.R. § 73.1692(c)(1) (allowing FM stations to correct geographic coordinates without prior Commission approval where the change is three seconds in latitude or longitude, “provided there is no physical change in location and no other licensed parameters are changed”).

coordinates for the Lakeway allotment constituted a defect, the Commission may, pursuant to *Boalsburg, Pennsylvania*,²⁸ accept a late-filed curative amendment, especially where its acceptance would not require the denial of any other proposal in the proceeding.²⁹

9. We disagree. In FM allotment proceedings, the Commission requires “the reasonable expectation that a useable site is available complying with the minimum spacing requirements.”³⁰ “Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable.”³¹ The failure to specify a useable site is a defect that can lead to dismissal or denial of a rule making proposal.³² After reexamining the record in this proceeding, we believe that Crawford has rebutted the presumption of feasibility or suitability of the site specified by the Joint Petitioners for Channel 247C1 at Lakeway. Regardless of whether the site is located in or merely near the Colorado River, its location in a Critical Water Quality Control Zone is not in dispute. Crawford has submitted uncontested evidence from a local zoning official that “a site plan for a tower located at [the Joint Petitioners’ proposed coordinates] would most likely not meet the requirements for approval.”³³ Furthermore, to the extent that the Joint Petitioners argue that a two- or three-second discrepancy in the reference coordinates for this allotment is a minor error that can be corrected under Section 73.1692(c)(1), we disagree. This rule is intended to permit licensed FM stations to correct the geographic coordinates of their towers when they discover, for example, that incorrect reference coordinates were previously submitted, provided that the change is no more than three seconds in latitude or longitude and that there is no physical change.³⁴ This rule does not apply to reference coordinates in FM allotment proceedings or to physical changes in sites. The Joint Petitioners have provided no authority for their interpretation of the rule, and we conclude that their expansive reading is without merit.

10. The second alternative proposal’s conflict with the pending Evant, Texas, proposal and the unsuitability of the specified Lakeway site are each, independently, fatal defects. The Commission has held that counterproposals are subject to dismissal if they are not technically correct and substantially

²⁸ *Boalsburg, Pennsylvania*, Memorandum Opinion and Order, 7 FCC Rcd 7653, 7654 n.7 (MMB 1992), *app. for rev. dismissed*, 10 FCC Rcd 12264 (MMB 1995) (permitting a counterproponent to submit a late filed reimbursement pledge to cure defect in counterproposal because of lack of prejudice to other parties to the proceeding) (“*Boalsburg, Pennsylvania*”); *cf. Detroit, Texas*, 13 FCC Rcd at 15592 (not accepting a late-filed cure of a counterproposal because it would have prejudiced a mutually exclusive proposal in the proceeding).

²⁹ Crawford responded that *Boalsburg, Pennsylvania*, is inapposite because acceptance of the late-filed amendment in this case would prejudice other conflicting proposals, such as his rule making petitions filed in the Shiner, Benjamin, Mason, and Junction, Texas, proceedings. See Crawford’s Partial Opposition to Motion to Accept Supplement, filed December 11, 2001, at 7. In their reply, the Joint Petitioners argued that these rule making petitions would not be prejudiced because those filings were not timely filed in the Quanah proceeding and, therefore, are not mutually exclusive proposals under FM allotment procedures.

³⁰ *San Clemente, California*, Memorandum Opinion and Order, 3 FCC Rcd 6728 (1988), *appeal dismissed sub nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989).

³¹ *Crestview and Westbay, Florida*, Report and Order, 7 FCC Rcd 3059 (MMB 1992).

³² See, e.g., *Clewiston, Fort Myers Villas, et al., Florida*, Report and Order, 10 FCC Rcd 6548 (1995) (rejecting an allotment reference site on an island due to its “environmentally sensitive” nature which made the location unusable and noting that [w]e have consistently rejected any proposed reference sites that fall within bodies of water”).

³³ See City of Austin Letter.

³⁴ *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules*, Notice of Proposed Rule Making, 15 FCC Rcd 21649, 21667-68, ¶¶ 34-36 (2000). See also *Technical Streamlining*, Notice of Proposed Rule Making, 13 FCC Rcd 14849, 14872-73, ¶¶ 51-52 (1998).

complete when filed.³⁵ The rationale for this policy is “to afford all parties an opportunity to fully respond in reply comments.”³⁶ Pursuant to this policy, we have dismissed counterproposals for technical or legal deficiencies. As noted above, however, the Bureau has variously and inconsistently permitted curative amendments in certain circumstances.³⁷ To the extent curative amendments have been allowed, we find this practice inconsistent with our announced policy regarding technically defective and/or incomplete FM allotment proposals and counterproposals. Even if the divergent lines of Bureau decisions could be harmonized, we are not bound by them,³⁸ and we reject those Bureau actions accepting curative amendments in the allotment context. The public interest is better served by no longer entertaining curative amendments, particularly because the FM allotment filing rules permit the submission of multi-faceted mutually contingent proposals.³⁹ As this case clearly shows, a more lax policy can create confusion and uncertainty for interested parties, impose enormous processing burdens on the Bureau, and cause delay for all. Moreover, a strict acceptability policy will encourage petitioners and counterproponents to be more careful and accurate, which in turn serves the original purpose of affording all parties an opportunity to respond fully to counterproposals. Therefore, we find that the Bureau did not err by failing to issue a Notice of Proposed Rule Making on the second alternative proposal because, as filed, it contained two defects on the date it was filed and because a curative amendment should not be entertained.

11. Finally, we reject the Joint Petitioners’ argument that their Counterproposal received disparate treatment from prior cases because the Bureau did not issue a Notice of Proposed Rule Making. The cases relied on by the Joint Petitioners are inapposite because they involved proposals that were technically acceptable at filing.⁴⁰ In contrast, the second alternative proposal here included two fatal technical defects. Accordingly, we find that the Joint Petitioners’ second alternative proposal was not disparately treated by the Bureau’s decision not to issue a new Notice of Proposed Rule Making.

³⁵ The Commission has expressed this policy in several cases. See, e.g., *Caldwell, College Station, and Gause, Texas*, Memorandum Opinion and Order, 15 FCC Rcd 20641, 20642, ¶ 4 (2000); *Lincoln, Osage Beach, Steelville, and Warsaw, Missouri*, Memorandum Opinion and Order, 17 FCC Rcd 6119, 6123, ¶ 13 (2002); *Conflicts between Applications and Petitions to Amend the FM Table of Allotments*, Memorandum Opinion and Order, 8 FCC Rcd 4743, 4744 (1993) (footnote omitted); and *Amendment of Sections 1.420 and 73.3584 Concerning Abuses of the Commission’s Processes*, Report and Order, 5 FCC Rcd 3910, 3919 n.41 (1990) (establishing a strict policy of enforcing Section 1.52 verification requirements).

³⁶ *Springdale, Arkansas*, 4 FCC Rcd at 677 n.7; and *Eldorado and Lawton, Oklahoma*, Report and Order, 5 FCC Rcd 6737 (MMB 1990).

³⁷ Compare *Detroit, Texas*, 13 FCC Rcd at 15592, ¶ 6 (rejecting late-filed curative amendment to counterproposal), and *Eldorado, and Lawton, Oklahoma*, Report and Order, 5 FCC Rcd at 6737 (rejecting counterproposal that was not substantially complete when filed), with *Boalsburg, Pennsylvania*, 7 FCC Rcd at 7654 n.7 (permitting the submission of a late filed reimbursement pledge), and *Canton, Farmington, Elmwood, and Perkin, Illinois*, Report and Order, 3 FCC Rcd 5824, 5825 (MMB 1980) (accepting verification affidavit).

³⁸ See *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008) (recognizing “our well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions.”); *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990) (Commission not bound by staff actions).

³⁹ The Commission has imposed a similar strict acceptability requirement for contingent application filings. See 47 C.F.R. § 73.3517(e) (requiring the dismissal of all contingently related applications based on the dismissal of any related application).

⁴⁰ See *Milford, Utah*, 19 FCC Rcd at 10335; and *Kingston, Tennessee*, 2 FCC Rcd at 3589.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, that the aforementioned Application for Review filed by Rawhide Radio, LLC, Capstar TX Limited Partnership, Clear Channel Broadcasting Licenses, Inc., and CCB Texas Licenses, L.P. IS DENIED.

13. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary