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Summary

It defies belief that there was no interaction, directly or indirectly, between Mrs. Drischel or her agents, the party who filed a petition for allotment of an FM channel in remote Quanah, Texas, near the Texas Panhandle, and the major group broadcasters or their agents who filed a massive counterproposal (on which they had been working since 1998) piggybacking on the Quanah petition under the protective umbrella of the Commission's "counterproposal rule" precluding the filing of alternative proposals by other interested members of the public.

The major group broadcasters' massive counterproposal seeks to add four high powered FM channels in the largest radio markets in Texas, one in the Dallas-Fort Worth market (ranked 8th in the nation), one in the San Antonio market (ranked 32nd in the nation) and two in the Austin market (ranked 49th in the nation). In each instance, a small community in the market is designated the community of license in order to enlist a 307(b) preference for first local outlets in an manner that offends rational thought. In two instances, the only local outlets of small communities which lie outside of any major radio markets are to be removed. Moreover, the humongous sixteen-step reallocation scheme, if accepted, would foreclose any opportunity for genuine 307(b) debate vis-a-vis channel allotments sought for other small communities which lie outside major markets, such as the subject rulemaking petitions for Benjamin and Mason, Texas.

Other interested members of the public were blindsided by this maneuver. The massive counterproposal could not have been reasonably foreseen from the public notice of the apparent solitary and isolated Quanah petition. The counterproposal does not remotely meet the lawful test that it must be a logical outgrowth of the rulemaking petition and public notice. The Commission's dismissal of the Benjamin and Mason petitions due to conflicts with the counterproposal cannot be sustained under the Administrative Procedure Act and related judicial and agency decisions. If they are, then the "counterproposal rule" itself is subject to challenge based on the duty of the agency to consider the efficacy of its regulations and bring them into reason and consonance with lawful requirements.

initial Quanah allotment proposal with Mr. Crawford's Benjamin and Mason allotment proposals were reasonably foreseeable to meet the "logical outgrowth" test applied by the Court of Appeals to determine whether a rulemaking action was based upon adequate notice and opportunity for public participation, citing Weyerhaeuser Company v. Costle, 590 F.2d 1011 (D.C.Cir. 1978); Owensboro on the Air v. United States, 262 F.2d 702 (D.C.Cir. 1958; also, Pinewood, South Carolina, 5 FCC Rcd 7609 (1990).

3. We shall address these citations in more detail shortly. Suffice it to state here that in the Weyerhaeuser decision, the Court of Appeals struck down a rulemaking decision that followed a "labyrinthine trail" which interested members of the public could not reasonably have discerned from the notice of proposed rulemaking.

4. Quanah, Texas, is located in the northwestern part of the state near the Texas Panhandle. Benjamin, Texas, is located approximately 60 miles south of Quanah. Benjamin is the county seat of Knox County and has no existing local radio station. Down the road about 12 miles, still in the county, is Knox City, for which an unused FM channel has previously been allotted, i.e., channel 297A. There was no apparent connection between the proposed channel 233C3 at Quanah set forth in the Commission's notice of proposed rulemaking, Mr. Crawford's proposed channel 257C2 at Benjamin or the vacant allotment of channel 297A at Knox City.

5. Mason, Texas, is located some 200 miles south of Quanah.

It is the county seat of Mason County. There was no apparent connection between the proposed channel 233C2 at Quanah in the rulemaking notice and Mr. Crawford's proposed channel 249C3 at Mason.

6. The Commission's notice of proposed rulemaking identified Marie Drischel, General Partner, Nationwide Radio Stations, 496 Country Road 308, Big Creek, Mississippi 38914, as the party who filed the petition to commence the proceeding.

7. The petition did not mention, and the FCC public notice did not mention, that for a long time previously, dating as far back as 1998, a counterproposal had been conceived, developed and prepared -- and was going to be filed on the comment date -- by a group of major broadcasters, i.e., First Broadcasting Company, Next Media Licensing, Inc., Rawhide Radio, L.L.C., Capstar TX L.P. and Clear Channel Licenses, Inc., having interests in many hundreds of radio stations including numerous stations in Texas (referred to as the "Joint Parties").

8. All Mr. Crawford or any other members of the public knew from the agency's rulemaking public notice was that Ms. Dreschel proposed to allot and file for a new radio station near the Texas Panhandle in Quanah on the channel that she had specified. The labyrinthine trail leading to the conflicts for which Mr. Crawford's proposals are being dismissed -- of which Mr. Crawford had no reasonable notice in the agency's public action initiating the rulemaking proceeding -- was this:

(a) Step one: The trail begins with a proposal of one

of the Joint Parties, First Broadcasting Company, L.P., to move its existing FM channel 248C2 at Durant, Oklahoma, to a small town named Keller, Texas, which is located well in excess of 100 miles from Quanah, Benjamin and/or Mason. Keller is imbedded in the heart of the Dallas-Fort Worth metropolitan area, the nation's 8th largest radio market, for which an upgrade to a fully powered channel 248C is proposed. Joint Parties' Counterproposal at 5-13.

(b) Step two: In order to do that, a radio station in Archer City, Texas, would have to change from channel 248C1 to channel 230C1. Counterproposal at 13.

(c) Step three: In order for the Archer City station to do that, a radio station in Seymour, Texas would relinquish its authorized upgrade from a Class A channel to channel 230C2 and change to channel 222C2. Counterproposal at 14.

(d) Steps four, five and six: In order for the Seymour station to do that, three authorized, but vacant allotments would be changed, one in Seymour, one in Wellington, Texas, and channel 297A in Knox City. The Joint Parties would use channel 257A for that purpose, hence, the conflict with Mr. Crawford's proposal to use channel 257 at nearby Benjamin. Counterproposal at 15.

(e) While the problem regarding Mr. Crawford's Benjamin proposal has now been identified, no self-respecting labyrinthine trail person could stop at this point until he or she determined that the full Class C Dallas-Fort Worth market allotment to one of the Joint Parties, triggering this potential conflict (step

already mentioned, a radio station in Healdton, Oklahoma, would move and change its community of license to Purcell, Oklahoma. Counterproposal at 16-18.

(i) Step nine brought the labyrinthine trail to the brink of a precipice overlooking a regulatory Grand Canyon. Moving the radio station out of Healdton would leave the community without a local outlet, an FCC no-no.

(j) Not to worry. Apparently labyrinthine trail blazers are an inventive lot. Enter step ten: a radio station in Ardmore, Oklahoma, would give up its license in that larger community and adopt Healdton as its community of license, a highly unusual 307(b) maneuver which the Joint Parties refer to as "the Ardmore/Healdton" proposal. Counterproposal at 18-19.

(k) Step eleven: We must once again return to the Archer City reallocation (step two). In addition to everything we have already referred to, a radio station in Waco, Texas, would downgrade from channel 248C to channel 247C1 and change its community of license to Lakeway, Texas, a small community near Austin, Texas. In the process, the station, owned by Joint Parties' Capstar TX Limited Partnership, would upgrade its commercial location from Waco, the 193rd radio market, to Austin, the 49th radio market. Counterproposal at 19-24.

(l) Step twelve: For the Waco/Lakeway changes to occur, a San Antonio radio station would downgrade from channel 247C to 245C1. Counterproposal at 24.

(m) Step thirteen. A radio station in Georgetown,

Texas, proposes to downgrade from channel 244C1 to 243C2 and change the community of license to Lago Vista, Texas, another small community near Austin, Texas. This would improve the commercial position of the station, owned by the Joint Parties' Clear Channel Broadcast Licenses, Inc., as a second move-in to the Austin radio market. Counterproposal at 24-29.

(n) Step fourteen: For the Waco/Lakeway/Georgetown changes to occur, a radio station in Llano, Texas, would move its transmitter location and change from channel 242A to channel 297A. Counterproposal at 29.

(o) Step fifteen: In order for the Llano reallocation to happen, a radio station in Nolanville, Texas, would change from channel 297A to channel 249A. Counterproposal at 29-30.

(p) And, step sixteen: In order for the Nolanville station's channel change to happen, a radio station in McQueeney, Texas, would change its transmitter site and relocate from McQueeney to Converse, Texas. This was the second precipice overlooking the regulatory grand canyon of an FCC no-no removing the only local outlet for McQueeney, a community located outside any metropolitan area. The choice, here, was a dreadful one that no right-thinking follower of the labyrinthine trail would have anticipated as a legitimate public interest proposal, i.e., removing the only local outlet in favor of awarding -- to one of the Joint Parties who owns the McQueeney station, Rawhide Radio, L.L.C. -- still another high powered FM station in the San Antonio radio market, the nation's 32nd largest. Counterproposal

at 30-35.

9. Ergo, Mr. Crawford's Benjamin and Mason proposals are conflicted. Step six of the counterproposal, validated after one follows the trail through to step sixteen, proposes channel 257 at Knox City in conflict with channel 257 at Benjamin. The unsavory choice of deleting McQueeney's only station in step sixteen co-opts channel 249 at Mason. The existing transmitter site at McQueeney had cleared the Mason proposal (engineering statement filed with the Mason rulemaking petition, copy attached as Exhibit B). Only when the change in step sixteen to move the station into the San Antonio market is considered does the conflict arise.

10. Attached as Exhibit C are maps showing all of the locations involved in the odyssey reflected in steps one through sixteen as well as the locations of Quanah, Benjamin and Mason.

II.

Requirement under the Administrative Procedure Act

11. The Administrative Procedure Act requires the Commission to publish in the Federal Register notice of a proposed rule in order to allow interested persons to file comments reflecting their interests. 5 U.S.C. §553(b)(3). The final rule must be an outgrowth of the proposed rule. Unless persons are sufficiently alerted to know whether their interests are at stake, the public notice is unlawful. National Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986).

12. Weyerhaeuser Company v. Costle, supra, cited in the

Commission's Report and Order dismissing Mr. Crawford's Benjamin petition, struck down a rule issued by the Environmental Protection Agency where the path from the initial proposal to the final rule followed what the court referred to as a "labyrinthine trail" of which interested citizens could not possibly have reasonable notice.

13. Owensboro on the Air v. United States, 262 F.2d 702 (D.C.Cir. 1958), also cited in the Benjamin Report and Order, involved de-intermixture of the Evansville, Indiana, television market, i.e., a proposal to remove all VHF channels and establish an all-UHF market. The rulemaking notice identified one VHF channel to be removed from Evansville, Indiana, but did not identify another VHF channel to be removed from Hatfield, Indiana, which is located in the Evansville market. Map attached as Exhibit D. Under these circumstances, notice of the de-intermixture proposal alerted interested parties regarding the likelihood of a counterproposal to make an alternative use of the Hatfield VHF channel in another television market, i.e., Louisville.

14. Pinewood, South Carolina, 5 FCC Rcd 7609 (1990), also cited in the Benjamin Report and Order, is not remotely comparable either. That case involved three communities, Summerville, Sumerton and Pinewood, all in South Carolina in reasonable proximity to each other. Map attached as Exhibit E. The initial public notice proposed to upgrade an existing Class A FM station to Class C2 status (at Summerville). A

counterproposal sought to block this upgrade by using the channel for a first local service (at Summerton). Another FM channel was available to meet this need while allowing the upgrade at Summerville. The Commission held that a third party could not belatedly seek to use that channel to serve a different local community (at Pinewood).

15. Medford and Grants Pass, Oregon, 45 RR2d 359 (1979), cited in the Pinewood decision at ¶8, involved a proposed rule to establish a third commercial television allotment in Medford by deleting the noncommercial reservation of channel 18 there; instead, another channel (12) was assigned to achieve the third commercial allotment and reserved channel 18 was reallocated to Grants Pass. The Commission held that interested parties were on notice of the essence of the initial proposal, i.e., to provide a third commercial channel at Medford (the merits of a reserved channel at Grants Pass were not in dispute). Medford and Grants Pass are in reasonable proximity to each other. Map attached as Exhibit F.

16. Pensacola, Florida, 62 RR2d 535 (Mass Media Bureau 1987), cited in the Pinewood decision at ¶8, involved the Commission's omnibus allotment of nearly 700 new FM channels with regulatory complexities in dealing with counterproposals and petitions for reconsideration not present here. There, public notice of a petition for reconsideration of a channel change in Pensacola, Florida, but not in Gulf Breeze, Florida, was held to be sufficient notice to a licensee regarding its desire for an

upgrade of its station in Chicksaw, Alabama, all within reasonable proximity of each other. Map attached as Exhibit G.

17. Toccoa, Sugar Hill, and Lawrenceville, Georgia, MM Docket No. 98-162, DA-01-2784 (Mass Media Bureau 2001), involved a rulemaking proposal in which the owner of a station on a full Class C allotment to Toccoa, Georgia, sought to downgrade to a Class C-1 and move the channel to Sugar Hill, Georgia (near the Atlanta area) and then submitted a counterproposal to change the Class C-1 move from Sugar Hill to Lawrenceville, Georgia (also in the Atlanta area only a few miles from Sugar Hill). Noting the unfairness to other parties in the manipulation of the counterproposal rule cutting off opportunities for submission of alternative proposals, the Commission rejected the maneuver in which the petitioner undertook to file a counterproposal to its own proposal; if in truth the petition filed by Ms. Dreschel was influenced directly or indirectly by any of the Joint Parties or their agents, the equivalent has taken place here, only worse, i.e., exacerbated by the concealment of that relationship. The Commission also raised a question of whether the Lawrenceville counterproposal met the test of a "logical outgrowth" of the Sugar Hill proposal; given the proximity of these two communities, both the Atlanta area, this holding manifestly undermines any notion that the massive reallocation structure of the counterproposal here meets the "logical outgrowth" test to strike down Mr. Crawford's Benjamin and Mason petitions.

18. There is no way -- legally or rationally -- that the

Commission's public notice of the Quanah allotment rulemaking proceeding can be deemed to apprise the public of alternative reallocations across the State of Texas and in much of Oklahoma affecting Durant, Oklahoma, Keller, Texas, Archer City, Texas, Seymour, Texas, Wellington, Texas, Knox City, Texas, Lawton, Oklahoma, Elk City, Oklahoma, Healdton, Oklahoma, Ardmore, Oklahoma, Waco, Texas, Lakeway, Texas, San Antonio, Texas, Georgetown, Texas, Llano, Texas, Nolanville, Texas, McQueeney, Texas, Converse, Texas, the nation's sixth largest radio market (Dallas-Fort Worth), the nation's 32nd largest radio market (San Antonio) and the nation's 49th largest radio market (Austin).

III.

Application of the counterproposal rule to deprive the public of the opportunity to participate in the rulemaking process

19. Nor was the massive counterproposal piggybacked on the obscure Quanah rulemaking notice by accident. One can say without rational fear of contradiction that the radio station in Elk City, Oklahoma, near the Texas Panhandle, didn't read the public notice of a proposal to allot channel 233 at Quanah, Texas, just down the road a piece, and say, hey, we would like to have channel 233C3 rather rather than channel 232C3 in Elk City - - notwithstanding their parity in terms of power and coverage -- and commence to prepare a counterproposal in accordance with its rights under the Commission's counterproposal rule and within the tight timetable specified (the Quanah notice of proposed rulemaking was dated August 18, 2000, counterproposals were due two months later, on October 10, 2000).

20. To the contrary, the Joint Parties had contracted with the Elk City station to reimburse it for expenses in making the changes and had been otherwise working on their project to alter the allocations landscape in a wholesale manner in order to create new powerhouse FM stations in the Dallas-Fort Worth, San Antonio and Austin markets -- of which the Elk City channel change conflicting with the Quanah proposal was an integral part -- for years dating back to 1998.² If they filed a petition for rulemaking to accomplish their massive reallocation plan, it would have been subject to study and the filing of responsive alternatives by members of the public affected by the proposal throughout much of Texas and Oklahoma. That is precisely what the law of the land embodied in the Administrative Procedure Act provides for.

21. On the other hand, a petition in the unlikely place of Quanah far removed from any of the markets and a massive counterproposal with no reasonable opportunity for the public to file any alternative public interest proposals would operate to escape the public scrutiny and participation that the law requires. A suspicious mind would believe that the Joint Parties may have had a hand in inspiring the filing of the Quanah petition.³ Whether that is the case or whether the filing of

² Joint Parties' reply to partial opposition to motion to accept supplement, filed December 26, 2001 in MM Docket No. 00-148, at 5.

³ Mr. Crawford, of course, has no way to force Ms. Drischel and the Joint Parties to disclose the true facts and circumstances of the origin of the Quanah petition, e.g.,

the Quannah petition was a wildly fortuitous coincidence, the Joint Parties employed the allotment counterproposal process to serve their private ends and to keep the public from knowing about and enjoying their legal rights to participate in the process. This cannot be allowed to happen. And yet, that is precisely what the Commission's Reports and Orders in the Benjamin and Mason rulemaking proceedings, if unchecked, would allow to happen.

22. The Report and Order in the Benjamin proceeding defends its result on the premise that "the continuous filing of rulemaking proposals without regard to a cut-off date is not conducive to the efficient transaction of Commission business." To be sure, within the bounds established by the Administrative Procedure Act and implementing judicial rulings, the agency is entitled to set cut-off dates and procedures to manage its rulemaking proceedings. That is what the counterproposal rule in Section 1.420(d), which has been around for a long time, does.

23. But the setting and the circumstances of the rulemaking petition and acceptable counterproposals must be such that members of the public have a fair idea of where the rulemaking proceeding is heading. Examples of successful administration of allotment rulemaking proceedings before this agency are the

attorneys, engineers or others who may have been involved and the relationships of such attorneys, engineers or others with any of the Joint Parties or any of their attorneys, engineers or other representatives. But the Commission does. And should, if it has any interest in the integrity of the allotment "counterproposal rule" in Section 1.420(d).

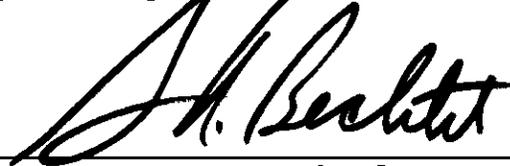
Owensboro, Pinewood, Medford, Pensacola and Toccoa cases cited earlier. In the first four instances, there were circumstances from which such a fair idea was given, i.e., the disposition of VHF channels in the Evansville, Indiana television market in the Commission's de-intermixture proceeding (Owensboro), choices of the use of two FM channels amongst three communities in a limited geographical area of South Carolina (Pinewood), deployment of two television channels in a television market embracing Medford and Grants Pass, Oregon (Medford) and the interaction of the interests of three FM stations within proximity of each other in administration of the nationwide allotment of 700 new FM channels (Pensacola). In Toccoa, the Commission struck down a counterproposal of which the petitioner was itself the originating source and also held that the initial proposal for one community near Atlanta was not fair notice of a counterproposal for another community also near Atlanta.

24. Under federal administrative law, there has to be some nexus, some setting, some clue as to where the rulemaking proposal is heading and some measure of the metes and bounds of what is under prospective consideration. That is not present here. The obscure, remote, singleton allocation rulemaking notice did not subsume any nexus, any setting, any clue as to where the rulemaking proposal was heading or any measure of the metes and bounds of what was under prospective consideration. If anything, the Commission's allocation rulemaking notice was deceptive, hiding and obscuring what lay ahead in the humongous

counterproposal that had been years in the making. There was no hint that a thousand-pound gorilla had been invited to the dance.

25. If under these circumstances, the Quanah rulemaking notice is held to constitute acceptable notice of the Joint Parties' counterproposal, then there is no limit to the ability of this agency to broaden the scope of matters covered within its allocation rulemaking notices. That simply cannot be. The Joint Parties' counterproposal that is a subversion of the agency's counterproposal rule may well destroy it. In another context, the Court of Appeals has held that when the Commission reaches the point of administering a rule or policy that can no longer be sustained as in keeping with its lawful functions, the agency has a duty to reconsider and modify its rule or policy to bring its modus operandi back in lawful bounds. Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993). The principle of that holding should apply with equal force to the error in giving effect to the counterproposal of the Joint Parties under the circumstances extant here.

Respectfully submitted,



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EXHIBIT A

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

RECEIVED

OCT 10 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of)	
)	
Amendment of Section 73.202 (b),)	MM Docket 00-148
Table of Allotments,)	
FM Broadcast Stations.)	RM-9939
(Quanah, Texas))	

To; The Commission
Allocations Branch
Office of Branch Chief

Interest

NationWide Radio Stations (NationWide) was the petitioner that started this process by asking the FCC to place channel 233C3 at Quanah, Texas, as a new local service. NationWide is unclear about the process whereby it gets to file an application, but it is still interested in a channel at Quanah and intends to file an application (or be a part of a group that files an application) for this new station. If NationWide is correct that it is suppose to do a second filing for this station, it respectfully request that this document be accepted as that expression.

Sincerely,

Marie Drischel

Marie Drischel, General Partner
NationWide Radio Stations
496 Country Road 308
Big Creek, Mississippi 38914

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OCT 25 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Quannah, Texas)

)
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)

MM Docket No. 00-148
RM - 9939

To: The Chief, Allocations Branch

REPLY COMMENTS

Now comes NationWide Radio Stations ("NationWide"), before the Commission to comment on the Counterproposal filed by First Broadcasting Company, L.P., and several other companies. The Counterproposal offers Channel 255C3 to Quannah as a new FM radio service to avoid a conflict with their filing. NationWide hereby agrees to have Channel 255C3 allocated to Quannah with no site restriction. NationWide expresses its interest in applying for Channel 255C3 if it is granted and constructing the facility.

On behalf of NationWide, I state that these statements are true and correct to the best of my knowledge and belief.

Respectfully submitted

Marie Drischel
NationWide Radio Stations
Marie Drischel, General Partner
496 County Road 308
Big Creek, MS 38914

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