

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. 01-131
FM Broadcast Stations.)	RM-10148
(Benjamin, Texas))	
)	
(Mason, Texas))	MM Docket No. 01-133 [✓]
)	RM-10143
)	RM-10150
)	

MEMORANDUM OPINION AND ORDER
(Proceedings Terminated)

Adopted: January 15, 2003

Released: January 17, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Reconsideration filed by Charles Crawford directed to the *Report and Order* in two separate proceedings.¹ Maurice Salsa filed a pleading titled "Support for Petition for Reconsideration." Rawhide Radio, LLC filed an Opposition to Petition for Reconsideration and Charles Crawford filed a Reply to Opposition. In view of the fact that Charles Crawford filed a single Petition for Reconsideration raising identical arguments against each *Report and Order*, we will consider this matter in a single *Memorandum Opinion and Order*. For the reasons discussed below, we deny the Petition for Reconsideration.

Background

2. At the request of Nationwide Radio Stations,² the *Norice of Proposed Rule Making* in MM Docket No. 00-148 proposed the allotment of 233C3 to Quanah, Texas.³ In response to that Notice, First Broadcasting Company, LP, Next Media Licensing, Inc., Rawhide Radio, LLC, Capstar TX Limited Partnership and Clear Channel Broadcasting Licenses, Inc. ("Joint Parties") jointly filed a Counterproposal setting forth interrelated allotment proposals and channel substitutions involving 22 communities in Texas and Oklahoma. Included in that Counterproposal was the proposed substitution of Channel 257A for vacant Channel 297A at Knox City, Texas, and a reallocation of Channel 249C1 from McQueeney to Converse, Texas. The Counterproposal was timely filed on the October 10, 2000, comment date in MM Docket No. 00-148.

MM Docket No. 01-133

3. On May 25, 2001, Charles Crawford filed a Petition for Rule Making proposing the allotment of Channel 249C3 to Mason, Texas, as a sixth local FM service. This proposal was short-spaced to the proposed reallocation of Channel 249C3 to Converse, Texas, as set forth in the Joint Parties

¹ *Benjamin, Texas*, 17 FCC Rcd 10994 (MM Bur. 2002); *Mason, Texas*, 17 FCC Rcd 11038 (MM Bur. 2002).

² *Quanah, Texas*, 15 FCC Rcd 15809 (MM Bur. 2000).

Counterproposal in MM Docket No. 00-148. In view of the fact that we did not promptly enter the Counterproposal into the Commission data base, we did not identify this short-spacing and inadvertently issued a *Notice of Proposed Rule Making* in MM Docket 01-133 proposing the allotment of Channel 249C3 to Mason, Texas. The *Report and Order* dismissed the proposed Channel 249C3 allotment at Mason due to the short-spacing with the proposed Channel 249C1 reallocation to Converse. As part of a timely filed Counterproposal in MM Docket No. 00-148, a Channel 249C1 allotment at Converse was entitled to protection from competing proposals filed after the October 10, 2000, comment date in MM Docket No. 00-148. For this reason, the Charles Crawford proposal for a Channel 249C3 was untimely with respect to the earlier filed Channel 249C1 reallocation proposal at Converse and therefore dismissed.

MM Docket No. 01-131

4. On May 18, 2001, Charles Crawford filed a Petition for Rule Making proposing the allotment of Channel 257C2 to Benjamin, Texas. This proposal was short-spaced to the proposed Channel 257A allotment at Knox City, Texas, as set forth by the Joint Parties Counterproposal in MM Docket No. 00-148. Since the counterproposal was not entered into the Commission data base, we again did not identify the short-spacing and issued a *Notice of Proposed Rule Making* in MM Docket 01-131 proposing the allotment of Channel 257C2 to Benjamin, Texas. As did the *Report and Order* in MM Docket No. 01-133, the *Report and Order* in MM Docket No. 01-131 dismissed the proposed Channel 257C2 allotment at Benjamin. As part of a timely filed Counterproposal in MM Docket No. 00-148, the Channel 257A proposal at Knox City was likewise entitled to protection from competing proposals filed after the October 10, 2000, comment date in MM Docket No. 00-148. The Charles Crawford proposal for a Channel 257C2 allotment at Benjamin was untimely with respect to the earlier filed Channel 257A proposal at Knox City and therefore dismissed.

5. In support of his Petition for Reconsideration, Charles Crawford contends that he could not have "reasonably foreseen" that a Counterproposal filed in response to a *Notice* proposing the allotment of Channel 233C3 to Quannah, Texas, would elicit a Counterproposal involving 22 communities and preclude his proposal for Channel 257C2 at Benjamin located 60 miles from Quannah, and his proposal for Channel 249C3 at Mason located 200 miles from Quannah. As such, this is a "labyrinthine trail" that does meet the "logical outgrowth" test for adequate notice and opportunity for public participation.

6. We deny the Petition for Reconsideration. Consistent with the notice provisions of the Administrative Procedure Act, possible allotments at Converse and Knox City were within the scope of the *Notice* in MM Docket No. 00-148, and the Charles Crawford proposals for Mason and Benjamin, Texas, were properly dismissed.³ The *Notice* in MM Docket No. 00-148 specifically elicited timely counterproposals involving other communities and even announced the possibility of allotting alternate channels to any community in that proceeding. The fact that the Joint Parties Counterproposal included proposals at Converse and Knox City which caused the exclusion of the subsequent Charles Crawford proposals as untimely conflicting proposals was merely doing what which we announced that we could do. As such, this procedure meets 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.⁴

7. In this instance, Charles Crawford contends that the "humongous" nature of the Counterproposal involving 22 communities precludes adequate notice to public. We disagree. As stated above, a notice of proposed rule making specifically alerts interested parties of the possible filing of a

³ 5 U.S.C. § 553

⁴ *Weyerhaeuser Company v. Costle*, 570 F.2d 1011, 1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958).

counterproposal involving new communities and the possibly of allotting alternate channels. Any counterproposal can have a significant preclusive effect. Even a counterproposal involving a single community near the community set forth in a *Norice* potentially involves the alternate allotment of one of 79 other non-reserved FM channels. The *Norice* invited counterproposals and alerted interested parties of this possibility. Depending upon the class of stations proposed, the potential preclusion can involve a significant geographical area.⁷ Similarly, interested parties are on notice that an FM allotment proceeding can involve a significant number of interrelated communities resulting in substantial preclusion.⁸ In view of the above, interested parties are on notice that a counterproposal can involve a substantial preclusion based upon a significant number of channels, a large geographical area and/or a significant number of communities. The notice provision of the Administrative Procedure Act does not require a separate *Norice* for every allotment under consideration in a docket and permits the establishment of cut-off procedures.⁹ The untimeliness of the Charles Crawford proposals now requires that he await the outcome of MM Docket No. 00-148.

8. Charles Crawford relies on three Court decisions to support his view that we did not afford adequate notice in these proceedings. However, these cases are distinguishable. In *Owensboro on the Air v. United States*⁸, the Commission proposed removing all VHF channels from Evansville, Indiana. The *Norice* identified the one VHF channel to be removed from Evansville. The *Report and Order* removed a VHF channel from Hatfield, which was located in the Evansville market but not identified in the *Norice*. The Court determined that there was sufficient notice to alert interested parties even though the VHF channel at Hatfield was not identified in the *Notice* and Hatfield is located 21 miles from Evansville. In *Weyerhaeuser Company v. Costle*, the Court determined that there was not adequate notice because the agency based its decision upon data and calculations submitted after the record closed which did not afford opportunity for public comment.⁹ In contrast, the *Norice* in this proceeding specifically alerted parties of the potential filing of counterproposals and afforded interested parties the opportunity to submit their own counterproposal or comment on any submitted counterproposal. The challenged *Norice* in *National Black Media Coalition v. FCC*¹⁰ proposed adoption of a minority preference with respect to AM applications on foreign clear channels. Instead, the ultimate *Report and Order* did not adopt a minority preference. The Court determined that since the *Report and Order* did the opposite of what was originally proposed, there was not adequate notice to the public. Thus, this case is inapposite.

9. Charles Crawford also speculates that the Joint Parties may have been involved in the filing of the original filing of the Nationwide Radio Stations Petition for Rule Making proposing the allotment of Channel 233C3 to Quannah. The Joint Parties deny any involvement in the filing of that Petition for Rule Making. In the absence of any documentation to support the Charles Crawford speculation, there is no basis for further inquiry in the context of this proceeding.

⁷ See Section 73.207(b) of the Commission's Rules. For instance, Section 73.207(b) requires a minimum separation between two Class C allotments of 290 kilometers.

⁶ See e.g. *Cross Plains, Texas, et al.*, 15 FCC Rcd 5506 (MM Bur. 2000) (a counterproposal involving 36 communities); *Ardmore, Alabama, et al.*, 17 FCC Rcd 18101 (MM Bur. 2002) (a petition for rule making involving 19 communities); *Farmersville, Texas, et al.*, 12 FCC Rcd 12056 (MM Bur. 1997) (a counterproposal involving 15 communities).

⁷ See *Implementation of BC Docket No 80-90 to Increase the Availability of FM Broadcast Assignments*, 62 RR 2d 535 (1987).

⁸ 262 F.2d 702 (D.C. Cir. 1958).

⁹ 590 F.2d 1011 (D.C. Cir. 1978).

¹⁰ 791 F.2d 1016 (2d Cir. 1986).

10. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Charles Crawford **IS DENIED**.

11. IT IS FURTHER ORDERED, That MM Docket No. 01-131 and MM Docket No.01-133 ARE HEREBY TERMINATED.

12. For further information concerning these proceedings, contact Robert Hayne, Media Bureau, (202)418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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Media Bureau