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

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In the Matter of	)	
	)	
Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Shiner, Texas)	)	MM Docket No. 01-105 RM-10104
	)	
Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Batesville, Texas)	)	MM Docket No. 01-130 RM-10147
	)	
Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Tilden, Texas)	)	MM Docket No. 01-153 RM-10169

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2008 **Released: January 18, 2008**

By the Commission:

1. The Commission has before it Applications for Review and Supplements filed by Charles Crawford ("Crawford") directed to the *Report and Order* in MM Docket No. 01-105[1] and the *Report and Order* in MM Docket No. 01-153.[2] Crawford has also filed Comments and a Supplement in MM Docket No. 01-130.[3] Rawhide Radio, LLC has filed an Opposition to each of the Applications for Review. In view of the fact that Crawford also has raised identical arguments in each of these proceedings, we will consider this matter in a single Memorandum Opinion and Order. For the reasons discussed below, we deny the Applications for Review. In addition, we are dismissing the underlying proposal for a Channel 250A allotment at Batesville, Texas, and terminating that proceeding (MM Docket No. 01-130).

I. BACKGROUND

2. At the request of Nation Wide Radio Stations, the *Notice of Proposed Rule Making* in MM Docket No. 00-148 (*"Quanah NPRM"*) proposed the allotment of Channel 233C3 to Quanah, Texas.[4] The date by which comments and counterproposals were due in that proceeding was October 10, 2000. In

[1] *Shiner, Texas,* Report and Order, 19 FCC Rcd 4327 (MB 2004).

[2] *Tilden, Texas,* Report and Order, 19 FCC Rcd 6112 (MB 2004).

[3] *Batesville, Texas,* Notice of Proposed Rule Making, 16 FCC Rcd 12682 (MB 2001). The Media Bureau has referred this matter to the Commission pursuant to 47 C.F.R. § 0.5(c).

[4] *Quanah, Texas,* Notice of Proposed Rule Making, 15 FCC Rcd 15809 (MMB 2000).

response to that *Notice,* five radio station licensees ("Joint Parties") jointly filed a timely Counterproposal which set forth interrelated allotment proposals and channel substitutions involving twenty-two communities in Texas and Oklahoma (the "Quanah Counterproposal").[5] Included in the Quanah Counterproposal were proposals to allot Channel 245C1 to San Antonio, Texas, Channel 249C1 to Converse, Texas, and Channel 232A to Flatonia, Texas.

3. After the comment date in MM Docket No. 00-148, Crawford filed eight Petitions for Rule Making (collectively, the "Crawford Petitions") including the three proposals captioned above. Each of the Crawford Petitions was in conflict with the Quanah Counterproposal, and thus, should have been treated as untimely filed counterproposals in MM Docket No. 00-148.[6] The staff, however, erroneously docketed the Crawford Petitions and released Notices of Proposed Rule Making because the Quanah Counterproposal was tardily entered into the FM database. The staff subsequently identified the allotment conflicts and determined that the Crawford Petitions were untimely. In this instance, the Crawford proposal for Channel 232A at Shiner conflicted with the proposal to allot Channel 232A at Flatonia, his proposal for Channel 250A at Batesville conflicted with the proposal to allot Channel 249C1 at Converse, and his proposal to allot Channel 245C3 at Tilden conflicted with the proposal to allot Channel 245C1 at San Antonio. Earlier, the staff had dismissed two of Crawford's other proposals for new allotments at Mason and Benjamin, Texas. Thereafter, the staff denied Crawford's consolidated Petition for Reconsideration of the dismissals of the Mason and Benjamin proposals.[7] We later denied an Application for Review filed by Crawford of that staff action.[8] In doing so, we rejected the Crawford argument that he did not have "reasonable notice" that the *Quanah NPRM* could potentially elicit the "humongous" twenty-two community Quanah Counterproposal that would technically preclude his proposals for allotments at communities 100 and 320 kilometers from Quanah. We also rejected his argument that he did not have adequate notice as required by Section 553 of the Administrative Procedure Act.[9] Crawford sought judicial review of the denial of the Application for Review.

4. The District of Columbia Court of Appeals for the D.C. Circuit (the "Court") affirmed our dismissal of the Mason and Benjamin proposals.[10] In that decision, the Court likewise rejected Crawford's contentions that he was not given adequate notice that the Joint Parties Counterproposal could preclude his proposals at Benjamin and Mason, and that adequate notice requires that an affected party be able to anticipate the specific preclusive result of an allotment proceeding. The Court noted that the *Quanah NPRM,* as well as our own rules, make it clear that an allotment rulemaking proceeding encompasses mutually exclusive counterproposals and that late-filed conflicting proposals would be dismissed.[11] The Court reasoned that "this put all interested parties on notice that their proposals could be precluded by *any* counterproposal - whether foreseeable or not - that was filed by the comment date in the rulemaking proceeding."[12] The Court also observed that, in addition to the Crawford proposals being precluded by the "logical outgrowth" of the *Quanah NPRM,* our dismissal of those proposals "was merely doing that which [we] announced" we would do.[13] With regard to the Mason proposal, the Court went on

[5] Section 1.420(d) of the Rules requires a counterproposal to be filed by the specified comment date in a rulemaking proceeding. 47 C.F.R. § 1.420(d).

[6] These Petitions for Rule Making were filed between April 18 and May 23, 2001.

[7] *Benjamin and Mason, Texas,* Memorandum Opinion and Order, 18 FCC Rcd 103 (MB 2003).

[8] *Benjamin and Mason, Texas,* Memorandum Opinion and Order, 19 FCC Rcd 470 (2004).

[9] 5 U.S.C. § 553(b)(3).

[10] *Crawford v. FCC,* 417 F. 3d 1289 (D.C. Cir. 2005) ("*Crawford*").

[11] *Id.* at 1296.

[12] *Id.* (emphasis in original).

[13] *Id. citing* 18 FCC Rcd at 104, n. 7, *supra.*

to state that, even if the adequate notice test required an affected party to be able to anticipate a preclusive outcome in a particular allotment proceeding, that test would be satisfied in this proceeding with respect to Mason.[14] As an illustrative example, based on the Commission's minimum distance separation of 147 miles between a Class C3 station and a Class C station, the Court noted that a Class C3 proposal at Quanah could conflict with another Class C3 proposal up to 147 miles from Quanah. In turn, this Class C3 proposal could conflict with another Class C3 proposal as far away as another 147 miles away. As such, the Court stated that the foreseeable radius of conflict arising from even such a simple proposal would be 294 miles from Quanah.

5. In his Applications for Review of the *Reports and Orders* dismissing the Shiner and Tilden Petitions for Rule Making, Crawford raises the identical adequate notice arguments that he raised earlier in the Benjamin and Mason proceedings.[15] The Supplement, filed after the Court's rejection of those arguments in *Crawford v. FCC,* contends that the Court "fashioned a benchmark for measuring" adequate notice of 294 miles from the originally proposed allotment at Quanah.[16] Shiner, Batesville and Tilden, Texas, are located between 367 and 408 miles from Quanah. For this reason, Crawford contends that the Joint Parties' Counterproposal is "not valid" and does not provide a basis to preclude his proposals at Shiner, Batesville and Tilden, Texas.[17]

II. DISCUSSION

6. We deny the Applications for Review. In his Supplements, Crawford ignores the fact that the Court concurred with our determination that the *Quanah NPRM* placed all interested parties on notice that their proposals could be precluded by any counterproposal, "whether foreseeable or not," filed by the comment date. As such, the Court agreed that the dismissal of a late-filed proposal was the logical outgrowth of the *Quanah NPRM* and that the staff was merely doing what we announced that we would do.[18] In order to avoid such preclusion, the Court reiterated our admonishments to interested parties to file their proposals as soon as they are ready to avoid the risk of being precluded.[19] Contrary to Crawford's assertion, the Court did not establish a 294-mile benchmark for determining adequate notice. Rather, it merely used the Mason proposal as an illustrative example of the preclusive impact of the FM minimum separation requirements,[20] to establish that Crawford should have known that one additional

[14] *Id.* at 1296.

[15] On review, Crawford also addressed the merits of the Joint Parties' Counterproposal filed in MM Docket No. 00-148. The Joint Parties' Counterproposal was set forth in a *Public Notice* released August 3, 2001 (Report No. 2500). Reply comments were due 15 days from the date of that *Public Notice.* Crawford's comments are both outside of the scope of this proceeding and grossly untimely. They will not be considered in this proceeding.

[16] Supplement at 1.

[17] Supplement at iii. The remaining three proposals are for allotments at Evant, Harper and Goldthwaite, Texas. These communities are located within 294 miles of Quanah and Crawford has requested dismissal of each of those proposals.

[18] The Court applied a "logical outgrowth" test to determine whether a rulemaking action was based upon adequate notice and opportunity for public participation. *See Weyerhaeuser Company v. Costle,* 590 F. 2d 1011, 1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States,* 262 F. 2d 702 (D.C. Cir. 1958). *See also Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F. 2d 506, 549 (D.C. Cir. 1983) ("whether the 'logical outgrowth' test is satisfied depends , in turn, on whether the affected party 'should have anticipated' the agency's final course in light of the initial notice." *Crawford, supra,* n. 10, at 1295).

[19] *See Conflicts Between Applications and Petitions for Rule Making to Amend the Table of FM Allotments,* Memorandum Opinion and Order, 8 FCC Rcd 4743, 4745 (1993) (noting that the risk of preclusion "could in large part be minimized by filing a counterproposal at the earliest possible time"); *see also Pinewood, South Carolina,* Memorandum Opinion and Order, 5 FCC Rcd 7609 (1990).

[20] *See* 47 C.F.R. § 73.207(b)(1).

Class C3 proposal 147 miles from Quanah could preclude another Class C3 proposal 147 miles from that proposal. Moreover, a counterproposal involving multiple allotment proposals could extend the area of potential preclusion well beyond 294 miles. In view of the potential for the filing of several counterproposals in a single proceeding where each of the counterproposals could specify numerous allotment proposals, we conclude that Crawford's claim of lack of adequate notice with regard to these three rulemaking petitions is without merit.

7. For the same reasons, we are also dismissing the Crawford Petition for Rule Making in MM Docket No. 01-130 which proposes a Channel 250A allotment at Batesville, Texas. We also terminate that proceeding.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, That the aforementioned Applications for Review filed by Charles Crawford ARE DENIED.

9. IT IS FURTHER ORDERED, That the aforementioned Petition for Rule Making filed by Charles Crawford for a Channel 250A at Batesville, Texas (MM Docket No. 01-130) IS HEREBY DISMISSED.

10. IT IS FURTHER ORDERED, That MM Docket No. 01-105, MM Docket No. 01-130, and MM Docket No. 01-153 ARE HEREBY TERMINATED.

11. The Commission need not send a copy of this *Memorandum Opinion and Order* to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A), the Congressional Review Act, because by denying the two Applications for Review and dismissing the third rulemaking petition in this case we are not adopting any new rule which we need to report to the Congress or the Government Accountability Office.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

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Secretary