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

In the Matter of

Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 05-112
FM Broadcast Stations.	)	RM-11185
(Fredericksburg, Converse, Flatonia,	)	RM-11374
Georgetown, Ingram, Lakeway, Lago Vista, Llano,	)	
McQueen, Nolanville, San Antonio,	)	
and Waco, Texas)	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 05-151
Table of Allotments,	)	RM-11222
FM Broadcast Stations.	)	RM-11258
(Llano, Junction, and Goldthwaite, Texas)	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2014 **Released: July 24, 2014**

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration ("Petition") filed August 10, 2007, by Rawhide Radio, LLC, Clear Channel Broadcasting Licenses, Inc., CCB Texas Licenses, LP, and Capstar TX Limited Partnership (collectively, "Joint Parties"). The Petition seeks review of the *Report and Order* in this proceeding,[1] which denied a Counterproposal filed by the Joint Parties for a "daisy chain" of FM allotments involving eleven communities and granted a mutually exclusive Counterproposal ("Munbilla Counterproposal") filed by Munbilla Broadcasting Properties, Ltd. ("Munbilla Broadcasting") for a new FM allotment at Goldthwaite, Texas.[2] For the reasons discussed below, we deny the Petition.

I. BACKGROUND

2. Almost five years before this proceeding began, the Joint Parties proposed a similar "daisy chain" in the *Quanah* proceeding.[3] The events in that proceeding form the primary basis for the Joint Parties' arguments in the current proceeding involving many of the same communities. In *Quanah*, the Commission dismissed the Joint Parties' proposal because of a technical defect. The Commission also

[1] *Fredericksburg, Converse, Flatonia, et al., Texas,* Report and Order, 22 FCC Rcd 10883 (MB 2007) ("*Fredericksburg R&O*").

[2] Oppositions to Petition for Reconsideration were filed by Charles Crawford and Katherine Pyeatt on August 27, 2007, Radio Ranch, Ltd. ("Radio Ranch") on November 13, 2007, and Munbilla Broadcasting on November 13, 2007. The Joint Parties filed a Reply to Oppositions on November 23, 2007.

[3] *See Quanah, Texas, et al.,* Report and Order, 18 FCC Rcd 9495 (MB 2003), *recon. denied,* Memorandum Opinion and Order, 26 FCC Rcd 7159 (2004) ("*Quanah Reconsideration Decision*"), *rev. denied,* Memorandum Opinion and Order, 26 FCC Rcd 7159 (2011) ("*Quanah Review Decision*") (collectively, "*Quanah*")

rejected the Joint Parties' request to "bifurcate" their proposal and issue a separate Notice of Proposed Rule Making on the portion that was not defective.

3. While the Joint Parties Application for Review was pending in the *Quanah* proceeding, they refiled their proposal in the current proceeding. Specifically, this proceeding began with the issuance of two unrelated *Notices of Proposed Rule Making.* First, at the request of Katherine Pyeatt, the *Notice of Proposed Rule Making* in MB Docket No. 05-112 proposed the allotment of Channel 256C3 to Fredericksburg, Texas.[4] Second, at the request of Linda Crawford, the *Notice of Proposed Rule Making* in MB Docket No. 05-151 proposed the allotment of Channel 297A to Llano, Texas.[5] In response to the *Llano NPRM,* Munbilla Broadcasting filed the Munbilla Counterproposal proposing the allotment of Channel 297A to Goldthwaite, Texas. This Counterproposal is mutually exclusive with the *Llano NPRM* because Channel 297A at Goldthwaite conflicts with Channel 297A at Llano under the Commission's minimum distance separation rule.[6] In response to the *Fredericksburg NPRM,* the Joint Parties modified and resubmitted their prior proposal as a Counterproposal. Among these proposed allotments were the substitution of Channel 256A for then vacant Channel 243A at Ingram, Texas, and the substitution of Channel 297A for 242A at Llano, Texas, for Rawhide Radio LLC's Station KQBT(FM). Because these proposed allotments were timely with respect to the *Llano NPRM* and the Munbilla Counterproposal, we consolidated these dockets.[7]

4. The *Fredericksburg R&O* granted the Munbilla Counterproposal, allotting Channel 297A to Goldthwaite, Texas, as a first local service. It also denied the Joint Parties Counterproposal because the proposed substitution of Channel 297A at Llano was short-spaced to the Station KOOV(FM) (formerly KHLB) construction permit at Burnet, Texas.[8] The KVOO(FM) Application was filed and granted prior to the filing of the Joint Parties Counterproposal in this proceeding. The *Fredericksburg R&O* specifically noted that the Station KOOV(FM) construction permit is conditioned on the outcome of MM Docket 00-148 and, except for the outcome of that proceeding, was entitled to cut-off protection from all subsequently filed rule making proposals and applications.

5. In their Petition, the Joint Parties argue that the staff erred by (1) not affording their Counterproposal cut-off protection dating back to the dismissal of their proposal in the *Quanah* proceeding; (2) making inconsistent statements in the *Quanah Reconsideration Order* and the *Fredericksburg R&O* about the refilling of their proposal; (3) processing the KOOV(FM) Application and relying on the effective but non-final dismissal of the Joint Parties Counterproposal in *Quanah*; and (4) not considering an engineering solution proposing alternate coordinates for the Channel 297A proposal at Llano that would remove the conflict with Station KOOV(FM). Accordingly, the Joint Parties believe that their Counterproposal should be reinstated and considered on the merits.

II. DISCUSSION

6. Section 1.429 of the Commission's Rules sets forth the limited provisions under which the Commission will reconsider an action in a rule making proceeding.[9] Reconsideration is warranted only if

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[4] *Fredericksburg, Texas,* Notice of Proposed Rule Making, 20 FCC Rcd 6009 (MB 2005) ("*Fredericksburg NPRM"*).

[5] *Llano and Junction, Texas,* Notice of Proposed Rule Making, 20 FCC Rcd 6318 (MB 2005) ("*Llano NPRM*").

[6] *See* 47 C.F.R. § 73.207(b).

[7] *See Fredericksburg R&O,* 22 FCC Rcd at 10883-84.

[8] *See* File No. BPH-20030902ADU (the "KOOV(FM) Application").

[9] *See* 47 C.F.R. § 1.429.

the petitioner cites error of fact or law or has presented facts or circumstances that otherwise warrant Commission review of its prior action.[10] The Joint Parties have not met this standard.

7. *Cut-off Protection/Inconsistency.* We find that no error was committed in the *Fredericksburg R&O* by requiring the Joint Parties Counterproposal to protect the previously filed KOOV(FM) Application at Burnett, Texas. It is well established that counterproposals must protect the transmitter sites of previously filed and cut-off applications.[11] In this case, the Joint Parties Counterproposal, which proposes, *inter alia,* the Channel 297A substitution at Llano, was filed on May 9, 2005. By way of contrast, the KOOV(FM) Application was filed on September 2, 2003. The staff granted the unopposed KOOV(FM) Application on June 29, 2004,[12] subject to the outcome of the *Quanah* proceeding.[13] Because Channel 297A at Llano conflicted with the transmitter site specified in the previously filed and cut-off KOOV(FM) Application, the Joint Parties Counterproposal was technically defective at time of filing and properly dismissed. We also find that, contrary to the assertion by the Joint Parties, the Counterproposals filed in MB Docket No. 05-112 and MM Docket No. 00-148 are not the "same." The dismissal of the Joint Parties Counterproposal in MB Docket 00-148 became final in 2011 when no party sought reconsideration or judicial review of the *Quanah Review Decision.*[14] Finality in that proceeding extinguished Joint Parties' cut-off rights based on the initial Counterproposal filing. The refiling of the dismissed *Quanah* Counterproposal in this proceeding does not revive that dismissed proposal or create cut-off rights with regard to proposals in the present proceeding. We find Joint Parties' reliance on a single sentence in the *Quanah Reconsideration Decision* to establish unprecedented non-rule based cut-off protection to be misplaced. The permission to refile their Counterproposal without prejudice provided for therein[15] related only to the erroneously accepted rule making petitions, not to other technically acceptable proposals such as the KOOV(FM) Application. While the language used in the *Quanah Reconsideration Decision* was admittedly inartful, it is beyond dispute that the staff lacks even the color of authority to suspend on an *ad hoc* basis filing rules which establish the rights of thousands of filings each year. Accordingly, we reject as meritless Joint Parties' contention that the *Fredericksburg R&O* was inconsistent with the *Quanah Reconsideration Decision*.

8. *Processing Policy.* Joint Parties also object to the processing of the KOOV(FM) Application, claiming it was error for the staff to rely on the effective but non-final dismissal of the Joint Parties Counterproposal in MB Docket 00-148. We disagree. Contrary to their claim,[16] the application was not processed under the *Auburn* policy which allows for the consideration of a rule making proposal contingent on an effective but non-final rule making.[17] In 2000, three years before *Auburn,* the

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[10] *See Eagle Broadcasting Co. v. FCC,* 514 F.2d 852 (D.C. Cir. 1975).

[11] *See* 47 C.F.R. § 73.208(a)(1); *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments,* Report and Order, 7 FCC Rcd 4917 (1992), *recon. denied in part ,* Memorandum Opinion and Order, 8 FCC Rcd 4743 (1993).

[12] Broadcast Actions, Report No. 45768 (rel. July 1, 2004).

[13] On May 6, 2011, the Commission denied the Joint Parties Counterproposal in the *Quanah* proceeding, which made grant of the KOOV(FM) Application final.

[14] *Quanah Review Decision,* 26 FCC Rcd at 7159.

[15] *See Quanah Reconsideration Decision,* 19 FCC Rcd at 7163 ("In the event the appeals [of the erroneously accepted rule makings] are denied, there would be no impediment that would preclude the proposals originally contained in the Counterproposal as well as any related allotment proposals").

[16] Petition for Reconsideration at 6.

[17] *See Auburn, Alabama, et al.,* Memorandum Opinion and Order, 18 FCC Rcd 10333, 10340-41 (MB 2003) ("*Auburn*").

Commission explicitly recognized that it was proper to process an application contingent on an effective but non-final rule making following the 1996 elimination of the rule which automatically stayed the effectiveness of a rule making order upon the filing of a petition for reconsideration.[18] *Auburn*, which also explicitly relied on the elimination of the automatic stay provision, merely extended the *Chester* policy to permit the consideration of rule making proposals contingent on effective but non-final rule makings. We also reject as meritless Joint Parties claim that the Commission should apply 2000 processing standards to its 2005 proposal.[19] Unless an application qualifies under an explicit grandfathering provision, the Commission applies the law in effect at the time of action, not at filing.[20] Finally we reject the contention that the processing of the KOOV(FM) Application was unfair because the Joint Parties Counterproposal is "technically acceptable."[21] This argument is difficult to apprehend. The dismissal was based on the fact that the Counterproposal was defective *at the time of filing*.[22] Joint Parties also contradict their technical acceptability assertion by acknowledging that a change in the reference for coordinates in Llano Channel 297A allotment is necessary to perfect their proposal.[23]

9. *Engineering Solution.* In their Petition, the Joint Parties suggest an engineering solution by modifying the reference coordinates for their Channel 297A substitution at Llano. We cannot accept this modification of the Joint Parties Counterproposal because it is late. A counterproposal must be technically correct at the time it is filed.[24] Moreover, acceptance of this engineering solution would violate our processing policy of no longer accepting curative amendments for counterproposals.[25] Accordingly, we will not accept the engineering solution.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Rawhide Radio, LLC, Clear Channel Broadcasting Licenses, Inc., CCB Texas Licenses, LP, and Capstar TX Limited Partnership, IS DENIED.

11. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, and (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[18] *See Chester, CA, et al.,* Memorandum Opinion and Order, 16 FCC Rcd 4009 (2000) (para. 6). *See also Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders,* Report nd Order, 11 FCC Rcd 9501) (1996) (deleting rule that automatically stayed allotment proceedings upon the filing of a petition for reconsideration).

[19] Petition for Reconsideration at 6.

[20] *See BVM Helping Hands,* Memorandum Opinion and Order, FCC 14-81 (rel. June 13, 2014), at para 4.

[21] Petition for Reconsideration at 6.

[22] *See supra* at paragraph 7.

[23] Petition for Reconsideration at 7.

[24] *See Broken Arrow and Bixby, Oklahoma,* Report and Order, 3 FCC Rcd 6507 (MMB 1988).

[25] *See Quanah Review Decision,* 26 FCC Rcd at 7164.