

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1031

CHARLES CRAWFORD,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE O'SULLIVAN
ANDREA LIMMER
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, DC 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

AUSTIN SCHLICK
DEPUTY GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

STANLEY R. SCHEINER
ATTORNEY

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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GLOSSARY

APA	Administrative Procedure Act
NPRM	Notice of Proposed Rulemaking
Joint Parties	The proponents of the October 10, 2000 Counterstatement filed in Quanah proceeding: Capstar, Clear Channel, First Broadcasting, Next Media and Rawhide Radio
Bureau	Media Bureau, Audio Division, Federal Communications Commission

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

In order to allow proposed allotments for FM broadcast stations that conflict with one another to be resolved in a fixed and reasonably short time frame, the FCC applies a “cut-off” rule that governs the filing of such proposals. Under the rule at issue in this case, 47 C.F.R. § 1.420(d), when a party files a rulemaking proposal to amend the FM Table of Allotments, a public notice is issued, and all proposals in conflict with that initial proposal, or with any conflicting proposal that might be filed, must be filed within an initial 30-day comment period. An additional period is afforded for reply comments, but new proposals may not be submitted after the 30-day cut-off deadline.

In this case a Public Notice was issued reflecting a proposed allotment in Quanah, Texas. The cut-off for initial comments and counterproposals was October 10, 2000. A comprehensive conflicting counterproposal by the Joint Parties (the “Counterproposal”) was filed at the cut-off deadline, but the Commission did not notify the public of the Counterproposal until August 2001. In May 2001, Mr. Crawford filed two proposals for stations at Benjamin and Mason, Texas, located 60 and 200 miles from Quanah, respectively. After determining that they conflicted with and were precluded by the Counterproposal, the Commission dismissed the Benjamin and Mason proposals.

The question presented is whether the Commission’s dismissal of the Benjamin and Mason proposals satisfied the provisions of the notice requirements of the Administrative Procedure Act (“APA”) governing rulemaking proceedings, 5 U.S.C. § 533 *et seq.*

STATUTES AND REGULATIONS

The pertinent statutes and regulations are contained in a Statutory Appendix to Mr. Crawford’s Brief.

COUNTERSTATEMENT

Section 307(b) of the Communications Act of 1934, 47 U.S.C. § 307(b), directs the FCC to “make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”

In 1962 the Commission adopted a Table of Allotments to aid in the assignment of FM radio broadcasting stations. *Revision of FM Broadcast Rules, First Report and Order*, 40 FCC 662, 676, ¶ 37. The Table, currently codified at 47 C.F.R. § 73.202(b), sets forth the FM radio channels allotted to each state by community. The Table also specifies the “class” of each

allotted channel, based on permissible power output and antenna height,¹ which determines each station's service area. Because of interference concerns, the location, frequency and class assigned to a given station depend on the location, frequency and class of nearby stations. Channel spacing and minimum distance separation requirements are set forth at 47 C.F.R. § 73.207.

Changes to the Table of Allotments are made through rulemaking proceedings initiated by the FCC or by the filing of a petition for rulemaking by an interested member of the public. See 47 C.F.R. § 1.420. The Table determines the universe of channels for which applications may be made.

The “Daisy Chain” Problem and the Need For Cut-Off Procedures

This case involves the procedural structure the Commission has established to address potential conflicts between conflicting (*i.e.*, “mutually exclusive”) petitions to amend the Table and assignment applications. In *Ashbacker v. FCC*, 326 U.S. 327 (1945), the Supreme Court held that all valid conflicting applications must receive a comparative hearing. This principle “created some very practical and difficult administrative problems.” *Ranger v. FCC*, 294 F.2d 240, 243 (D.C. Cir. 1961). This Court explained in *Ranger* one sort of difficulty that may arise, known as the “daisy chain” problem:

Particularly is this so in view of what is described in this litigation as a chain reaction. Let us assume three towns, A, B and C, fifty miles apart in a straight geographical line. Application for a broadcast station at A is made. Grant of that application would preclude a station at B on the same or an adjacent channel; it would not affect the possibility of a station at C. Before the application for A has been acted upon, an applicant files for a license at B and asks for a comparative hearing with A. A grant in B would preclude a station at C. Therefore potential

¹ See 47 C.F.R. § 73.210-73.211. Stations are classified as Class A, B1, B, C3, C2, C1, C0 and C in ascending order of signal contour.

applicants for C must file in the A-B case in order to protect their rights. Theoretically this reaction could go on indefinitely and could eventually involve every potential broadcast-station situs in the United States.

Id. See also *KittyHawk Broadcasting Corp., et al.*, 7 FCC 2d 153 (1967), *recon denied*, 10 FCC 2d 160, *appeal dismissed sub nom. Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968).

In order to ameliorate this concern, in 1959 the Commission instituted a new cut-off rule, substantially identical to the rule at issue here, pursuant to which counterproposals filed in response to an original application are protected against any applications conflicting with theirs which had not been filed by the cut-off deadline. In *Ranger*, this Court upheld the new rule. *Id.* at 244. In so doing, the Court held that the rule had been motivated by considerations of administrative efficiency and finality, and stated that, “Some such rule was necessary to meet the problems created by the *Ashbacker* doctrine, and the manner of coping with the difficulty lies within the discretion of the Commission, so long as its solution is reasonable.” *Id.*

The Quanah Proceeding

On July 13, 2000, NationWide Radio Stations filed a petition for rulemaking, proposing the allotment of a new class C3 channel at Quanah, Texas.² The proposal attached the requisite allotment study,³ contained an averment by NationWide’s general partner, Marie Drischel, that the petition was filed in good faith and stated that if the channel were allotted as proposed, NationWide would timely file an application for permission to construct a new FM facility for Hardeman County.⁴

² See Petition for Rulemaking (J.A. 8).

³ Petition, Exhibit I (J.A. 10). This requirement arises from the Commission’s precedents. See, e.g., *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, 7 FCC Rcd 4834 (1992) at ¶ 11 and n.9.

⁴ Petition, p. 2 (J.A. 9).

On August 18, 2000, the Bureau issued a Notice of Proposed Rulemaking (“NPRM”) announcing four proposals for rulemaking in separate cities (the Quanah proposal and three unrelated proposals), and setting October 10, 2000 as the comment deadline and October 25, 2000 as the reply comment deadline.⁵ The NPRM stated that each petitioner had committed to apply for its requested channel, if allotted, and that “each proposal warrants consideration because it complies with our technical requirements and would serve the public interest.”⁶ Parties were directed to an Appendix for procedures governing permitted filings; there the Notice stated, under the heading “Cut-Off Protection,” (a) that Counterproposals would be considered only if advanced in initial comments, and not if advanced in reply comments (referencing Rule 1.420(d)); and (b) that petitions for rulemaking which conflicted with the other proposals made in the proceeding would be considered “as long as they are filed before the date for filing initial comments herein [*i.e.*, October 10, 2000]. If they are filed later than that, they will not be considered in connection with the decision in this docket.”⁷

On October 10, 2000, the comment deadline, the Joint Parties filed their counterproposal.⁸ In a preliminary statement, they indicated that their counterproposal conflicted with the initial Quanah proposal, but proposed to allot a different channel to Quanah in order to resolve the conflict.⁹ On that same day, in accordance with the rules, NationWide (the original

⁵ Quanah NPRM (J.A. 11).

⁶ NPRM, ¶ 1 (J.A. 11).

⁷ NPRM, Appendix (J.A. 16).

⁸ Counterproposal (J.A. 19).

⁹ Counterproposal at (ii) (J.A. 26).

petitioner) filed comments confirming its interest in the channel specified in its petition and its intention to file an application if the proposed allotment were granted.¹⁰

On October 25, 2000, NationWide filed reply comments in which it expressed its agreement to the channel substitution proposed by the Joint Parties, and in which it confirmed its interest in applying for that channel, if allotted.¹¹

On August 3, 2001, after an unexplained nine-month delay, the Commission issued a Public Notice in the Quanah docket advising of the Counterproposal, and directing interested parties to file reply comments addressing the Counterproposal within 15 days. Following the issuance of the Notice, many interested parties, including Mr. Crawford, engaged in extensive litigation concerning whether the Joint Parties' proposal had been procedurally defective on the date filed, and related questions.

On December 21, 2001, NationWide filed a Withdrawal of Expression of Interest.¹² NationWide explained that when filing its petition, it had not intended to become involved in "such a complex proceeding with so many larger interests at stake." It explained further, "NationWide's interest is simply in applying for a new radio station to serve Quanah and this area of northern Texas. In recent months there have been numerous petitions filed for communities in the Quanah area.... NationWide expects to have ample opportunity to apply for one of these new allotments." Its general partner went on to state, under penalty of perjury, that "neither NationWide nor its principals have been paid or promised any money or other consideration in exchange for the withdrawal of its expression of interest, and that there are no

¹⁰ Statement of Interest (J.A. 18).

¹¹ Reply Comments of NationWide (J.A. 68).

¹² (J.A. 88).

agreements regarding its withdrawal.”¹³ Corresponding certificates were filed by representatives of the Joint Parties on January 16, 2002.¹⁴

The Bureau ultimately issued an order dismissing both the original Quanah proposal, as had been requested by the petitioner, and the Joint Parties’ counterproposal. The Joint Parties filed a petition for reconsideration. This petition was denied. However, that result is not yet final.¹⁵

Application of the Cut-Off Rule To Mr. Crawford’s Proposals

Mr. Crawford filed petitions proposing new FM allotments in Benjamin and Mason, Texas on May 18 and May 25, 2001, respectively – after the deadline for responding to NationWide’s Quanah proposal, but before the Commission released its Public Notice seeking comment on the Joint Parties’ Counterproposal. *See* Order under Review, ¶ 2. Due to the staff’s delay in entering the Counterproposal into the agency’s database, the Commission was initially unaware that the Benjamin and Mason proposals already had been precluded by the Counterproposal, and erroneously docketed both of Mr. Crawford’s proposals and released public notices of proposed rulemakings.¹⁶

¹³ Withdrawal, p. 2 (J.A. 89).

¹⁴ Certifications of No Consideration (J.A. 97).

¹⁵ The outcome of the Quanah proceeding, depending on the result and when the result becomes final, may bear on Mr. Crawford’s interest in and standing to prosecute this appeal *See, e.g., 21st Century Joint Telesis v. FCC*, 318 F.3d 192 (D.C. Cir. 2003), in which the Court explained that, “Although standing is determined ‘at the time [an] action commences,’ *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 191, (2000), the court is not relieved from evaluating mootness ‘through all stages’ of the litigation in order to ensure there remains a live controversy.” (*quoting Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990)). (additional citations omitted). If, as a result of the dismissal becoming final, Mr. Crawford is able to file his proposals, his case might well become moot.

¹⁶ *See* NPRM in Docket Nos. 01-131; 01-133, June 22, 2001 (J.A. 77; 82); Order, ¶ 2 (J.A. 1).

On June 14, 2002, the Bureau issued orders terminating both proceedings, on the basis that the Benjamin and Mason proposals had been precluded by the Counterproposal.¹⁷ It rejected Mr. Crawford's argument that he lacked notice of the Counterproposal.¹⁸ In response to an argument that the counterproposal had been defective when filed, the Bureau said, "Any purported deficiency will be considered in the context of [the Quanah proceeding]. In the event the Joint Parties' Counterproposal is ultimately dismissed... Charles Crawford may then file his proposal."¹⁹

On July 8, 2002, Mr. Crawford filed a petition for reconsideration of the two orders dismissing his rulemaking petitions.²⁰ As here, he relied primarily on the argument that the Quanah notice had been inadequate, in that he could not possibly be expected to follow the "labyrinthine trail" that would have enabled him to envision the wide-ranging counterproposal and its preclusive effects. Mr. Crawford also argued that there must have been some collusion between the original proponent of the Quanah petition and the Joint Parties, intended to deprive potentially interested parties of the ability to offer alternatives to the Counterproposal. On August 19, 2002, the Joint Parties filed an opposition. In addition to arguing the notice point, the Joint parties explained that they had been working on their proposal for two years, had been

¹⁷ See *Report and Order*, Dkt. No. 01-131 (J.A. 106); *Report and Order*, Dkt. No. 01-133 (J.A. 103).

¹⁸ See *R&O* in Dkt. 01-131 at ¶ 3 and n.2 (J.A. 106-107); see also *R&O* in Dkt. 01-133 at ¶ 4 (J.A. 104).

¹⁹ (J.A. 107). As noted at note 15, *supra*, at present the dismissal of the Joint Parties' counterproposal is not final.

²⁰ Petition for Reconsideration (J.A. 108).

watching the database carefully for potentially conflicting proposals, and had filed their proposal when they saw the Quanah notice out of a fear of being precluded if they waited.²¹

The Bureau issued its order affirming the dismissals on January 17, 2003.²² Rejecting the argument that the nature of the Joint Parties' Counterproposal precluded adequate notice, the Bureau pointed out that, "Even a counterproposal involving a single community near the community set forth in a Notice" could have had substantial preclusive effect.²³ The Bureau also rejected the collusion argument as having no basis in the record.²⁴

Mr. Crawford filed his Application for Review on February 4, 2003.²⁵ The Commission issued its Order under review on January 8, 2004. It rejected Mr. Crawford's notice argument, stating, "Allotment cut-off procedures and the need for these procedures are clear and well-established."²⁶ The Order pointed out that parties frequently file large proposals involving multiple communities and channels in response to proposals that are much smaller in scope, because they "recognize that a single rulemaking can have a substantial preclusionary impact over a broad geographic area." The Order also found that Mr. Crawford's claim was "not well-taken" in the context of his allotment proposals, which were "only 100 and 320 kilometers distant from Quanah." In a footnote, the Order stated that its FM allotment procedures met the

²¹ Opposition to Petition for Reconsideration, ¶ 5 (J.A. 147; 150).

²² *Memorandum Opinion and Order* ("Bureau Order") (J.A. 4).

²³ Bureau Order at ¶ 7 (J.A. 6).

²⁴ Bureau Order at ¶ 9 (J.A. 6-7).

²⁵ (J.A. 152).

²⁶ Order, ¶ 4 (citations omitted) (J.A. 2).

“logical outgrowth” test.²⁷ Finally, the Commission agreed with the Bureau that nothing in the record supported Mr. Crawford’s allegation of collusive conduct between NationWide and the Joint Parties.²⁸ This appeal followed.

SUMMARY OF ARGUMENT

Mr. Crawford’s principal challenge is that he did not receive adequate notice from the Commission’s Quanah Public Notice that the Counterproposal might be filed, and might preclude his Benjamin and Mason proposals. The need for cut-off procedures is well-established, and both this Court and the Commission have repeatedly explained why parties cannot be given the ability to counter each proposal. Parties are specifically on notice of the possibility that preclusion might result from a proposal they have not seen, and parties are thus constrained to file any allotment proposal they may be working on as soon as possible, in order to avoid that risk. Parties may choose to “time” their submissions on the basis of NPRMs and/or other filings, but they do so at the known risk of being precluded.

Mr. Crawford is incorrect when he argues that the Commission erred by supposedly requiring him to foresee the actual Counterproposal filed by the Joint Parties and anticipate the actual conflicts with his two subsequent proposals. His proposals could easily have been precluded by a far simpler proposal that would have required no such stretch of imagination. Even if there were some limit to the degree of foresight that could be required of potential rulemaking proponents, that limit would not be exceeded when the party’s contemplated

²⁷ Order, n.8 (citations omitted) (J.A. 6). The logical outgrowth test states that parties to a rulemaking need not receive specific notice of, and prior opportunity to comment on, each issue decided in the proceeding, so long as the issues “logically arise” from the topics stated in the notice.

²⁸ Order, ¶ 4 (J.A. 2).

allotment(s) are within sufficient geographic proximity to the site listed in the notice such that the party could reasonably be expected to anticipate the possibility that *some* counterproposal might preclude its own. Benjamin and Mason are close enough to Quanah for Mr. Crawford to have anticipated that another proposal might be filed and have preclusive effect on his two proposals.

Mr. Crawford seems to contend that the Commission's delay in placing the Counterproposal into its public database has caused or contributed to the dismissals of which he complains. Under Rule 1.420(d), however, his Benjamin and Mason proposals were precluded on October 10, 2000, when the time for filing counterproposals to NationWide's Quanah proposal expired and the Joint Parties' Counterproposal had been timely submitted. The Commission's mistaken docketing of Mr. Crawford's proposals did not confer upon Mr. Crawford any rights he did not otherwise have.

Finally, the Commission's decision not to investigate the "collusion theory" was a proper exercise of discretion and fully in accordance with this Court's discussion in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*en banc*).

STANDARD OF REVIEW

The Commission's order in this case must be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Judicial review under this standard is highly deferential; the Court may not substitute its judgment for that of the agency. *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388 (D.C. Cir. 1995).

ARGUMENT

In *Florida Inst. Of Technology v. FCC*, 952 F.2d 549 (D.C. Cir. 1992), this Court upheld the Commission's enforcement of cut-off rules in a setting indistinguishable from the present

case. In so doing, the Court rejected both of Mr. Crawford's main arguments. Dismissal of the petition is similarly appropriate here.

In the Context of the Regulatory Scheme, Adequate Notice Was Provided

Mr. Crawford's principal challenge is that the application of Rule 1.1420(d) in this case failed to provide adequate notice required by Section 553 of the APA. *See, e.g.*, Brief, pp. 1-2, 13, 14. However, all parties were advised, and had adequate notice, that their proposals could be precluded by any counterproposal filed by the deadline that was mutually exclusive with the Quanah proposal, and that was also mutually exclusive with their own.

1. In asserting legal error arising out of an unsatisfied notice expectation, Mr. Crawford ignores the panoply of rights afforded to him and other interested parties in the rulemaking structure for amending the FM Table of Allotments. First, parties may file initial proposals to amend the Table. All parties must receive notice of such original proposals, and have an opportunity to comment on them. Parties also have the right to file counterproposals within the initial comment period. All parties then have the right to file comments with respect to those counterproposals. All timely proponents then have the right to be considered on an equal footing in the proceeding, on the basis of criteria spelled out in the Commission's cases.²⁹ However, as explained in this Court's *Ranger* decision, parties may not file conflicting proposals outside the

²⁹ *See, e.g., Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, Report and Order*, 7 FCC Rcd 4917 (1992); *Memorandum Opinion and Order*, 8 FCC Rcd 4743 (1993), deciding that in view of the "significant increase in the number of FM stations and the accompanying congestion of the FM band," and "the time and effort required by FM applicants to secure new transmitter sites," *Id.*, 7 FCC Rcd at ¶ 9, it would apply similar cut-off protections to assignment applications as against conflicting rulemaking petitions, notwithstanding that its substantive policy would continue to favor rulemaking allotments for new service over assignment applications when considering timely-filed mutually exclusive applications and proposals. *Id.*, 8 FCC Rcd at ¶ 12).

cut-off deadline for receiving initial comments. That rule is necessary in order to solve the “daisy chain” problem, and the Rule at issue in this case represents a “reasonable” solution to that problem, well within the Commission’s discretion. *See Ranger, supra*, 294 F.2d at 244.

This constraint on parties’ ability to file proposals provides an incentive for interested parties to file any allotment proposals they may have as soon as possible. In fact, the Commission has noted that parties are well-advised to do so. In the proceeding just cited, one commenter had raised a concern that “under the new rule, a counterproposal filed before the counterproposal deadline in an FM allotment proceeding could be rendered unacceptable because a conflicting FM application was filed earlier.” However, the Commission considered that this “problem” would actually have the fortuitous effect of discouraging parties from filing near the end of an initial comment period, as Mr. Crawford complains occurred in this case:

While parties may desire to file on the last day of a comment period to minimize the possibility that other counterproposals may be filed, or for other tactical reasons, they do so at a risk that an application could be filed earlier. This risk could in large part be minimized by filing a counterproposal at the earliest possible time, rather than waiting for the comment period to expire. Indeed, rulemaking petitioners could protect themselves by filing their proposals as initial petitions for rule making in lieu of waiting for a proceeding in which to file them as counterproposals. We see no public interest reason to alter the rule adopted simply to preserve potential tactical ploys by petitioners.

Id., 8 FCC Rcd at ¶ 13.

If parties file their proposals as soon as possible, as they have an incentive to do, they still face some risk of preclusion, but the risk arises, not from a lack of notice, but from the possibility that their own proposal may not be ready and filed in time to avoid foreclosure by an earlier, inconsistent proposal. This is a risk inherent in the Commission’s first-filed approach, which this Court has upheld as a practical necessity. *See Ranger, supra*.

Indeed, this Court recognized in *Florida Inst. Of Technology v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992) that the cut-off rule provides an incentive to file proposals as soon as possible in order to “attract all competitive applications ... within a fixed and reasonably short time frame,” so that proceedings may be expeditiously concluded. Thus, Rule 1.420(d) deprives parties like Mr. Crawford only of the option they would otherwise have to delay the submission of their proposals, without risk of being precluded. The Rule effectively requires parties to submit their proposals at the earliest possible opportunity, or wait at their peril. As Mr. Crawford does not really contest, advance notice and the ability to counter (as opposed to comment on) all mutually exclusive proposals is simply not possible without confronting the daisy chain problem, and thereby destroying the effective functioning of the rulemaking process.³⁰

It is important to note that the cut-off protection afforded to timely filers, while certainly not insignificant, neither guarantees them a station license nor insulates them from subsequent competition from parties similarly situated to Mr. Crawford. No party is precluded from filing an application based on the results reached in the rulemaking proceeding, and, as with proposals, the Commission’s substantive standards for deciding between mutually exclusive applications are unaffected. For example, the very Quannah proponent in this proceeding withdrew its rulemaking proposal, in part on the basis that it fully expected as a result of recent allotments to be able to apply for a newly-allotted station license, as it had originally desired.³¹

³⁰ In this case, Mr. Crawford’s proposals were filed fully seven months after the cut-off deadline, so it is not apparent that the lack of specific notice of the Counterproposal could have affected his timing. Given the incentive built into the structure, both implicit and explicit, to file quickly, one would instead assume that Mr. Crawford filed as soon as he was ready. It is likely that even immediate notice of the Counterproposal, and permission to file a counter to it, would not have enabled him to meet the cut-off deadline, because he simply was not ready.

³¹ Withdrawal of Expression of Interest, p. 2 (J.A. 89).

2. The *Florida* case, where this Court upheld the Commission’s denial of a request to waive a substantially identical cut-off rule, forecloses Mr. Crawford’s notice argument.³² Although *Florida* arose in the context of applications for NCE FM broadcasting stations as opposed to rulemaking allotment proposals, the same cut-off rule and the same purported lack of notice of which Mr. Crawford complains were at issue.³³ After explaining the purposes underpinning the cut-off rule, the Court observed that it had upheld strict enforcement of the Commission’s “hard-nosed” rules, as long as parties had “explicit notice of all applicable requirements.” *Id.* at 550, quoting *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). The Court noted that, “the cut-off rules for NCE FM stations are quite straightforward,” *id.*, and explained that the “*KittyHawk* doctrine” was the Commission’s answer to the “daisy chain” problem, which if not addressed would make “any attempt to establish cut-off dates ... nugatory.” *Id.* at 550, quoting, *supra*, 7 FCC Rcd at 155.

As the Court found in *Ranger*, the cut-off rule is reasonable, and as the Court said in *Florida*, its application is “straightforward.” Parties subject to the Rule were adequately alerted

³² Nothing precluded Mr. Crawford from seeking a waiver in this case. *See Florida, supra* at 554, stating that timely applicants have no “vested right” to be protected from such equitable relief. (citation omitted). However, as discussed further *infra*, there is no indication that such a request would have fared better than the Institute’s request. *See Florida, supra* at 554, rejecting the notion that the mistaken docketing in that case provided any grounds for requiring that a waiver be granted.

³³ It may be that the “foresight” that would have been required of the Institute to imagine the specific Palm Bay counterproposal that precluded it differed from the foresight that would have been necessary for Mr. Crawford to imagine the Counterproposal, but such differences are immaterial, since the Court in *Florida* recognized that the same notice at issue here, alerting parties that their proposal would be precluded by any application that conflicted with it, was adequate.

that they could be precluded by any conflicting proposal, the exact contours of which they would lack advance notice, that conflicted with the Quanah proposal and with their own.

3. The Commission stated in a footnote to its Order that the Rule met the “logical outgrowth” test as applied in several cases.³⁴ These cases involve some of the same considerations present here, in that they reject the suggestion that “perfect” notice of all positions advanced by a party must be afforded, and instead strike an appropriate balance between “pure notice” principles and interests of administrative finality. But in this case, the question is not whether parties could fairly anticipate from the proposal set forth in the original rulemaking notice the exact counterproposals that ultimately were considered. Here, as in *Florida*, there was instead explicit notice that any counterproposal, of any description so long as it was “mutually exclusive” with both the Quanah proposal and any proposal a party might wish to advance, would be given preclusive effect. Given this stated requirement, parties were fully on notice of the need to file proposals as soon as possible, and of the risk that waiting would entail.

4. The Brief argues that it would be unreasonable to expect parties like Mr. Crawford, when reading the Quanah public notice, to anticipate the actual Counterproposal. But neither the Rule nor the notice purported to confine parties’ duty to such an expectation. Even if the rule were bounded by principles of foreseeability, there would be adequate notice in this case.

There is simply no basis for the notion that adequate notice should require that a party be able to envision the exact contours of a preclusive counterproposal. Surely, the relevant analysis would involve the geographic proximity of the original proposal listed in the notice to a party’s contemplated allotments, not whether a party could envision specific conflicting proposals.

³⁴ Order at n.8, citing *Weyerhauser 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).

Benjamin and Mason are located 60 and 200 miles from Quanah, respectively.³⁵ Given the spacing requirements set forth in Rule 73.207, 47 C.F.R. § 207, applicable to the C class stations he ultimately proposed, Mr. Crawford could expect that, depending on the characteristics of a potential counterproposal, a single proposed allotment located in any of the many cities in the area surrounding Quanah (or, in the case of Benjamin, apparently another proposal in Quanah itself) could preclude his planned proposals.

The Brief argues that Mason is “too far distant” from Quanah for a conflict to arise between proposed allotments in both cities. Brief, p. 17. But parties were on notice that they faced a risk of preclusion, not limited merely to another “Quanah proposal,” but to another proposal in conflict with the Quanah proposal. This could easily have been a proposal for a proposed allotment between the two cities.³⁶ Thus, the Bureau pointed out that, “Even a counterproposal involving a single community near the community set forth in a Notice” could have had substantial preclusive effect.³⁷ Even if there are relevant limits to reasonable foreseeability in this context, it would not be unreasonable to expect, and to require, Mr.

³⁵ See, e.g., Bureau Order at ¶ 5. Mr. Crawford says that Mason is 192 miles from Quanah. The difference is not material.

³⁶ See, e.g., July 8, 2002 Petition for Reconsideration, map at Exhibit C (J.A. 130); see also table in Rule 73.207, which denotes a wide range of distance separation requirements, ranging up to 180 miles, depending on channel separation and the strength of the conflicting station. The map shows numerous metropolitan markets, including Dallas, Fort Worth and Abilene, as well as many smaller cities, in the general area between Quanah and Mason (approximately 192 miles apart, according to Mr. Crawford). It is our understanding that any application for a transmitter site, application for a major modification to an existing transmitter site, as well as any proposed rulemaking allotment that was mutually exclusive with the Quanah proposal might have been included in the Quanah docket as a conflicting proposal and been given preclusive effect. It was hardly unreasonable to expect that some such filing might have come into conflict with Mr. Crawford’s Mason proposal. Mr. Crawford has used a misleading analysis that fails to even examine the pertinent considerations that would be used in a reasonable foreseeability analysis.

³⁷ Bureau Order at ¶ 7 (J.A. 6).

Crawford to file his proposals during the initial comment period ending October 10, 2000, rather than waiting.

The Delay in Processing and Mistaken Docketing Are Immaterial

In *Florida, supra*, the Commission made a processing error similar to the error that occurred here. Although Palm Bay's counterproposal had been filed in the Central Florida docket, the Commission mistakenly issued a new Palm Bay notice, purporting to give interested parties the right to file counterproposals to Palm Bay's within a new cut-off period. The Institute filed its application within that period. The Commission's staff, realizing its mistake, returned the Institute's application as untimely, explaining that under *KittyHawk*, the Institute's proposal had to be filed before the cut-off date specified in the Central Florida notice. *Id.* at 551.

The Court affirmed that result. It rejected the notion that the erroneous notice had created for the Institute "rights it would not otherwise enjoy," since "[i]t is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action." *Id.* at 553, quoting *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (additional citations omitted). See also *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 202 (D.C. Cir. 2003): "21st Century may not 'turn a clerical error into a windfall of 'rights it would not otherwise enjoy.'" quoting *State of Oregon v. FCC*, 102 F.3d 583, 586 (D.C. Cir. 1996) and *Florida, supra*.

The delay in entering the Counterproposal into the database and the subsequent mistaken docketing of Mr. Crawford's proposals are similarly irrelevant. Mr. Crawford's proposals were precluded on October 10, 2000 when the Counterproposal was filed; his "lack of notice that he had been precluded" did not create any significant reliance expectation. At most, Mr. Crawford

was misled into thinking he could file his proposals when he subsequently thought of them, whereas they had long since been precluded.

The Commission Permissibly Declined to Conduct an Investigation

In two short sections of his Brief, Mr. Crawford complains that the Order is “contaminated” by the Commission’s acceptance of the “counterproposal scheme.” Brief, p. 22. The Brief suggests further at p. 11 that the Joint Parties must have filed their allotment request as a counterproposal rather than as an initial proposal to avoid the opportunity for others like Mr. Crawford to offer counters to it. The Brief also suggests that there must have been “some communication” between the Joint Parties and the Quanaah petitioner. Brief, p. 12.

The Brief contains not a single citation to authority from this Court or anywhere else suggesting that the Commission was obliged to conduct an investigation into these speculative assertions. In fact, this Court made clear in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (*en banc*), that the method by which the Commission resolves factual uncertainties “is, as we have often said, up to the Commission.” (citation omitted). See also Brief, p. 22 (acknowledging that the FCC’s decision to not make further inquiry was “the agency’s prerogative”).

Here the Commission’s rules provided a significant degree of protection against the “scheme” alleged by Mr. Crawford. Parties withdrawing interest from the allotment they initially proposed must file a detailed certification. See Rule 1.420(d)(j), 47 C.F.R. § 1.420(d)(j). As explained earlier, NationWide filed such a certification. Not only did it conform to the requirements of the regulation, but it also explained that the original petition had been filed with

the aim of providing service to this area of northern Texas.³⁸ Corresponding certificates were filed by the Joint Parties on January 16, 2002.³⁹

The Joint Parties also explained, in response to Mr. Crawford's allegations, the circumstances that had led to the filing of their counterproposal. They said they had been planning their proposal for two years, had seen the Quanah proposal, which did conflict with a small part of their proposal, were worried about the risk of preclusion, and so, although they were not completely prepared, filed in the Quanah docket.⁴⁰ This averment is inconsistent with Mr. Crawford's unsupported charge that the Quanah proposal was somehow engineered by the Joint Parties so as to shield their proposal from competing proposals.

Here, not only was the Commission correct in finding that nothing in the record supported Mr. Crawford's "conspiracy theory," but to give that theory credence in this case would have required an assumption that NationWide and the Joint Parties had submitted false sworn affidavits and attested pleadings. Declining to pursue the matter further was undoubtedly within the Commission's discretion.

³⁸ December 20, 2001 Withdrawal of Interest, p. 2 (J.A. 89).

³⁹ (J.A. 97).

⁴⁰ Opposition to Petition for Reconsideration, at ¶ 5 (J.A. 150).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

JOHN A. ROGOVIN
GENERAL COUNSEL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

AUSTIN SCHLICK
DEPUTY GENERAL COUNSEL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

CATHERINE O'SULLIVAN
ANDREA LIMMER
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20530

STANLEY R. SCHEINER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

June 21, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES CRAWFORD,)	
)	
PETITIONER,)	
)	
V.)	
)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED)	No. 04-1031
STATES OF AMERICA,)	
)	
RESPONDENTS.)	
)	
)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 6099 words.

STANLEY R. SCHEINER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

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