



**Federal Communications Commission
Washington, D.C. 20554**

November 3, 2011

DA 11-1853

In Reply Refer to:

1800B3-AJR

Released: November 3, 2011

Spanish Peaks Broadcasting, Inc.
c/o Scott Woodworth, Esq.
1875 I Street, N.W.
Washington, DC 20006

In re: **FM Petition for Rule Making**
(Charlo, Montana)

New FM, Charlo, Montana
Facility ID No. 171098
BNPH-20070411ABF

Dear Counsel:

This letter is in response to the Petition for Rule Making (the “Channel 296C Petition”) and the amendment (the “Second Amendment”) to the application for new FM station at Charlo, Montana (the “Application”),¹ that you concurrently filed on July 12, 2011, on behalf of Spanish Peaks Broadcasting, Inc. (“SPB”), winning bidder in Auction 91 for Channel 251C3 at Charlo, Montana. For the reasons set forth below, we dismiss the Channel 296C Petition and the Second Amendment.

Background. Originally, SPB filed a long-form Application for a new FM station in conjunction with its rule making petition to allot Channel 251C3 at Charlo, Montana.² SPB was the winning bidder for this allotment. On May 27, 2011, it filed a minor amendment (the “First Amendment”) to its Application to change the community of license and upgrade the allotment from Channel 251C3 at Charlo to Channel 253C at Woods Bay, Montana. To accommodate this proposed upgrade and reallocation, an *Order to Show Cause* (“OSC”) was requested and issued to Bee Broadcasting, Inc., licensee of Station KBBZ(FM), Kalispell, Montana, as to why its license should not be modified from Channel 253C to Channel 296C.³

Thereafter, SPB concurrently filed the Channel 296C Petition and the Second Amendment to the Application. The Channel 296 Petition proposes an upgrade at Charlo from Channel 251C3 to non-adjacent Channel 296C pursuant to Section 1.420(g)(2).⁴ The Second Amendment seeks to modify the First Amendment to the Application by abandoning the previously proposed change in community of license from Charlo to Woods Bay. Instead, SPB proposes to amend its Application to specify upgraded, non-

¹ See File No. BNPH-20070411ABF.

² See *Charlo, Montana*, Notice of Proposed Rule Making, 22 FCC Rcd 13702 (MB 2007). See also *Charlo, Montana*, Report and Order, 23 FCC Rcd 82 (MB 2008).

³ See Letter to Bee Broadcasting, Inc., Reference 1800B2 (MB Jun. 22, 2011).

⁴ 47 C.F.R. § 1.420(g)(2).

adjacent Channel 296C at Charlo at a different transmitter site in lieu of Channel 251C3.⁵ As a result of the Second Amendment, SPB requests that the staff rescind the *OSC* as moot. SPB contends that Section 1.420(g) of the Rules permits the filing of a hybrid non-adjacent channel upgrade application/rulemaking petition and that the staff should process the Channel 296C Petition and Application, as amended by the Second Amendment, pursuant to these procedures. SPB claims that grant of the Channel 296C Petition and the Second Amendment will serve the public interest because there will be a net gain of 84,136 persons and 19,003 square kilometers in coverage.

Discussion. First, although the Second Amendment was previously accepted for filing, we now recognize that it should be dismissed, pursuant to Section 73.3566, as patently not in accordance with the Commission's Rules.⁶ While Section 73.3573(a)(i) and (ii) provide that a winning auction bidder's long-form application for a new station may include a minor amendment to change the proposed community of license or to upgrade to an adjacent channel, it does not permit an upgrade in channel class on a non-adjacent channel. On the contrary, Section 73.3573(a) provides that all other changes in a station's or a winning bidder's assignment not enumerated in subsections (a)(i) through (iv) are considered as major changes in facilities. Because the Second Amendment proposes to upgrade the Charlo allotment from Channel 251C3 to higher class, non-adjacent Channel 296C, this proposal is a major change and cannot be accomplished as a minor amendment to a long-form application for a new station on Channel 251C3 at Charlo, Montana.⁷

Second, even though SPB's proposed non-adjacent channel upgrade could be considered in a rule making proceeding, the Channel 296C Petition is prematurely filed. Section 1.420(g) of the Commission's Rules provides, in effect, that the Commission may modify the "license or permit of an FM station" to a higher class, non-adjacent channel in a rule making proceeding, provided that certain conditions are met. However, the rule does not provide that an applicant for an FM station, such as a winning auction bidder, may have its proposed assignment upgraded to a non-adjacent channel. Because SPB does not have an authorization for Channel 251C3 at Charlo, we conclude that the Channel 296C Petition was prematurely filed.⁸

Accordingly, the Petition for Rule Making filed on behalf Spanish Peaks Broadcasting on July 12, 2011, and its associated amendment of July 12, 2011, to its construction permit application, File No. BNPH-20070411ABF, ARE DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc : Robert Lewis Thompson, Esq.
(Counsel to Bee Broadcasting, Inc.)

⁵ The Second Amendment was accepted for filing on July 19, 2011.

⁶ 47 C.F.R. § 73.3566.

⁷ See *Media Bureau Offers Examples to Clarify the Treatment of Applications and Rulemaking Petitions Proposing Community of License Changes, Channel Substitutions, and New FM Allotments*, Public Notice, 22 FCC Rcd 6852, Example 5 (MB 2007) (explaining that a proposal to substitute Channel 277C3 for 221A at the same community by a licensed station requires the filing of a rule making petition and is not a minor change).

⁸ See *Santa Margarita and Guadalupe, California*, Report and Order, 2 FCC Rcd 6930, 6931 (MMB 1987) (finding that only a licensee or permittee may use rule making process to upgrade to a higher class channel).