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

September 4, 2013

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In re: Lovcom, Inc.
KOWY(FM), Dayton, Wyoming
Facility ID No. 189506
File No. BNPH-20110603ABR

**Petition for Reconsideration**

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed on March 29, 2012, by White Park Broadcasting, Inc. ("White Park"), licensee of Station KROW(FM), Cody, Wyoming ("KROW"). In the Petition, White Park seeks reconsideration of the March 2, 2012, Media Bureau ("Bureau") staff decision[1] granting the referenced application of Lovcom, Inc. ("Lovcom"), for a new FM station at Dayton, Wyoming ("2011 Application"). For the reasons set forth below, we deny the Petition, deny White Park's request for a declaratory ruling, and modify the license of KROW to specify operation on Channel 266C2

**Background.** In May 2011, Lovcom submitted the winning bid in FM Auction 91 for an FM allotment on Channel 267A to serve Ten Sleep, Wyoming.[2] Lovcom filed the 2011 Application on June 3, 2011, proposing to change the new station's community of license from Ten Sleep to Dayton, Wyoming, as Dayton's first local service. Lovcom also proposed a one-step upgrade to operate on Channel 266C3 instead of Channel 267A. To accommodate the upgrade, Lovcom proposed the substation of Channel 233C2 for Channel 266C2 at Cody, Wyoming, which would require White Park to

[1] *Lovcom, Inc.,* Letter, Ref. No. 1800B3-DB/TSN (MB Mar. 2, 2012) ("*Staff Decision*").

[2] *See Auction of FM Broadcast Construction Permits Closes*, Public Notice, 26 FCC Rcd 7541, 7557 (2011) (Attachment A, Permit # MM-FM866-A).

switch KROW to the new channel.[3] Pursuant to Commission policy, Lovcom pledged to reimburse White Park for the reasonable costs associated with changing KROW's channel.[4]

On June 10, 2011, the staff issued an Order to Show Cause ("OSC") to White Park, directing it to show why the channel of KROW's construction permit[5] should not be changed from Channel 266C2 to Channel233C2 in order to accommodate Lovcom's proposal.[6] On July 11, 2011, White Park filed a Response to Order to Show Cause and a separate Informal Objection. The staff denied the Informal Objection and granted the 2011 Application on March 2, 2012.[7] The *Staff Decision* further ordered Lovcom to reimburse White Park for its reasonable and prudent costs in changing from Channel 266C2 to Channel 233C2.[8] On March 28, 2012, Lovcom filed an application ("2012 Application") proposing a change of channel to Channel 272C3 instead of Channel 266C3.[9]

On March 29, 2012, White Park filed the Petition. White Park argues that Lovcom's proposal to switch to Channel 272C3 constitutes a change in circumstances since the issuance of the *Staff Decision* and warrants revision of its Ordering Clauses.[10] White Park notes that the channel change proposed in the 2012 Application eliminates the need for White Park to change KROW's channel.[11] White Park also states that Lovcom, by not originally proposing Channel 272C3, "put [White Park] through an unnecessary process in which it expended time and money in dealing with Lovcom's request."[12] White Park requests that the staff "confirm that White Park . . . is entitled to request reimbursement for legal and engineering costs White Park has incurred in responding to the [OSC] and [the 2011 Application]."[13] White Park concludes by asking that the staff modify the ordering provisions in the *Staff Decision* and furnish a declaratory order regarding Lovcom's obligations to White Park.[14]

**Discussion.** Reconsideration is warranted only if the petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that

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[3] *See* 47 C.F.R. § 73.3573(g); *see also Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14219 (2006).

[4] *See Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159, 163 (1967) (requiring that, whenever an existing station is ordered to change frequency to accommodate another station, the benefiting station must reimburse the affected station for its reasonable and prudent expenses, and establishing guidelines for determining reimbursement) ("*Circleville*").

[5] *See* File No. BMPH-20070828AAV, granted March 23, 2009. A covering license application was filed on February 12, 2010, and granted on August 17, 2011. *See* File No. BLH-20100212ABI.

[6] *White Park Broadcasting, Inc.*, Order to Show Cause (MB Jun. 10, 2011).

[7] *See Staff Decision*.

[8] *Id.* at 6.

[9] *See* File No. BPH-20120327AKR. The staff granted the 2012 Application on April 30, 2012. Lovcom filed a covering license application on May 2, 2012, and the staff granted it on May 21, 2012. *See* File No. BLH-20120502ABH. On May 7, 2012, Lovcom, filed another modification application proposing to change the Station's channel to Channel 272C0. *See* File No. BPH-20120507ABU. The staff granted this application on June 15, 2012.

[10] Petition at 1.

[11] *Id.* at 2.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 3.

otherwise warrant reconsideration of the prior action.[15] Because Lovcom submitted the 2012 Application after the *Staff Decision*, we find that White Park has met this requirement.

Commission policy provides for reimbursement of legal and engineering expenses incurred in the channel change negotiation process and for filing or responding to pleadings reasonably related to a necessary channel change.[16] This reimbursement obligation is based on the premise that the party requesting the change – having benefited from that change – should provide compensation to the affected station.[17] However, where the required change is not effectuated, *Circleville* is inapplicable and no reimbursement is warranted.[18] White Park never effectuated the channel change requested by Lovcom in the 2011 Application and ordered by the *Staff Decision*. This negates any obligation Lovcom had to pay White Park's expenses with respect to the potential channel change. We are not aware of any instance where we have ordered reimbursement of legal fees where the proposed channel change did not occur and White Park has not provided any precedent in support of its position. We thus find no basis for granting White Park's request for reimbursement.[19] Finally, we deny Lovcom's request for a declaratory ruling because there is no uncertainty regarding reimbursement obligations when involuntary channel changes are not effected. However, because White Park's channel change is no longer necessary, we will, *sua sponte*, modify the KROW license to re-specify operation on Channel 266C2. This action moots White Park's obligation to submit a minor change application.

**Conclusion/Actions.** Accordingly, IT IS ORDERED, that the March 29, 2012, Petition for Reconsideration filed by White Park Broadcasting IS DENIED and its associated request for a declaratory ruling IS DENIED.

IT IS FURTHER ORDERED, that KROW license, File No. BLH-20100212ABI, IS MODIFIED to specify operation on Channel 266C2.

Sincerely,

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[15] *See* 47 C.F.R. § 1.106.

[16] *See Harold A. Jahke*, Memorandum Opinion and Order, 74 FCC 2d 265, 274 (1979); *Perryton Radio, Inc., and Radio Dalhart*, Letter, 28 FCC Rcd 3234, 3238 (MB 2013) ("*Radio Dalhart*").

[17] *See Circleville*, 8 FCC 2d at 163 ("reimbursement should come from the party *benefiting* from change" (emphasis added)), *citing Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations (Jackson, Lima, Kenton, and Bellefontaine, Ohio)*, Report and Order, 3 FCC 2d 598, 605 (1966). *See also Radio Dalhart*, 28 FCC Rcd at 3227 (ordering reimbursement of legal fees by party requesting channel change where change to alternate channel still provided a benefit to that party).

[18] *See Cumberland, Kentucky, Weber City, Glade Spring and Marion, Virginia*, Notice of Proposed Rulemaking and Order to Show Cause, 20 FCC Rcd 18039, 18039 n.2 (MB 2005) (reimbursement requirements of *Circleville* not applicable where station ordered to change channel did not effectuate change). Had White Park carried out the ordered channel change, it would have been entitled to reimbursement in accordance with the Ordering Clause in the *Staff Decision*.

[19] White Park suggests that Lovcom "manipulated the application system" and could have requested to operate on Channel 272C3 initially. Petition at 2. However, it has not shown that Lovcom's request to operate on Channel 266C2 was an abuse of process. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, Notice of Proposed Rulemaking, 2 FCC Rcd 5563 ¶ 2 (1987) ("We believe that 'abuse of process' may be characterized as any action designed or intended to manipulate or take improper advantage of a Commission process, procedure or rule in order to achieve a result which that process, procedure or rule was not designed or intended to achieve; or to subvert the underlying purpose of that process, procedure or rule.").

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