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In Reply Refer to:

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In re: **KPVO(FM), Fountain Green, Utah**
Facility ID No. 190393
File No. BPH-20150821ABK

KWSA(FM), Price, Utah
Facility ID No. 15528
File No. BPH-20150902ADY

Minor Change in Licensed Facility

Dear Counsel:

We have before us the above-referenced modification application filed on August 21, 2015, by Valleydale Broadcasting, LLC (Valleydale) (KPVO Modification Application), seeking to upgrade Station KPVO(FM), Fountain Green, Utah (KPVO), to Class C1, with increased ERP and a new antenna site, and related pleadings.¹ The KPVO Modification Application, as amended, also requests an involuntary channel change for Station KWSA(FM), Price, Utah (KWSA), from Channel 261A to Channel 280A. We also have the above-referenced modification application filed on September 2, 2015, by KWSA licensee AJB Holdings, LLC (AJB) (KWSA Modification Application), seeking to upgrade KWSA to Class C3, with a directional antenna, increased ERP, and new antenna site. The KPVO and KWSA Modification Applications are mutually exclusive.

Background. On April 19, 2012, Valleydale submitted a construction permit application requesting, *inter alia*, the substitution of Channel 224A for Channel 261A at Price, Utah.² On August 24, 2012, the Bureau granted the 2012 KPVO CP Application and modified the KWSA license accordingly, ordering AJB to submit a minor modification application implementing this change within 30 days.³ On September 24, 2012, AJB filled out a minor change application in the Media Bureau's Consolidated Database System (CDBS); however, this application was not accepted for filing due to AJB's failure to pay the requisite

¹ On October 30, 2015, AJB filed an informal objection to the KPVO Modification Application (Informal Objection). On November 12, 2015, Valleydale filed an opposition to the Informal Objection (Opposition).

² FCC File No. BNPB-20120419AAS (2012 KPVO CP Application). On May 9, 2012, the Audio Division, Media Bureau (Bureau) issued an order to show cause why the license for KWSA should not be modified to specify operation on Channel 224A. *AJB Holdings, LLC*, Order to Show Cause, Ref. No. 1800B3-DEB (MB May 9, 2012).

³ *AJB Holdings, LLC*, Letter Decision, Ref. No. 1800B3-DEB (MB Aug. 24, 2012) (*KWSA Modification Order*); *Broadcast Actions*, Public Notice, Report No. 47812 (MB Aug. 29, 2012) (2012 KPVO Construction Permit). The 2012 KPVO Construction Permit expired August 24, 2015.

application filing fee.⁴ On August 12, 2015, with twelve days remaining until the 2012 KPVO Construction Permit expired, Valleydale applied to modify the 2012 KPVO Construction Permit, downgrading it to a Class A facility at its existing tower location.⁵ This modification application was granted on August 20, 2015,⁶ and Valleydale filed a license to cover the 2012 KPVO Construction Permit the same day.⁷

Also on August 20, 2015, AJB filed a modification application to stay on Channel 261A, explaining that, because of the grant of the KPVO Downgrade Application, KPVO and KWSA were now fully spaced and there was no need to move KWSA to Channel 224A.⁸ On August 21, 2015, Valleydale filed the KPVO Modification Application, again seeking an upgrade for KPVO and involuntary channel change for KWSA (first requesting Channel 224A and then amending to request Channel 280A). The Bureau granted the KWSA Channel Reinstatement Application on August 24, 2015,⁹ and AJB filed a license to cover the KWSA Channel Reinstatement Application on September 2, 2015.¹⁰ Also on September 2, 2015, AJB filed the KWSA Modification Application. On September 18, 2015, the Bureau granted the KWSA Reinstatement License Application.¹¹ On September 30, 2015, the Bureau issued an order to show cause why the license for KWSA should not be modified to specify operation on Channel 280A in lieu of Channel 261A.¹² On October 30, 2015, AJB filed the Informal Objection and a response to the *2015 Order to Show Cause* (Response).

Pleadings. In its Informal Objection and Response, AJB argues that the KPVO Modification Application is procedurally defective. First, AJB contends that the KPVO Modification Application violates Condition #2 of the KPVO License (Condition #2), which requires 12 months of continuous operation following grant. According to AJB, any application seeking “operations different from the licensed facility” violates this condition.¹³ AJB further argues that the KPVO Modification Application is unacceptable because it was filed before the KPVO License Application was granted and is therefore “inconsistent and conflicting” with the KPVO License Application.¹⁴ AJB also contends that the proposed channel substitution for KWSA is not allowable as a minor change under Section 73.3573(a)(1)(iii) of the Rules.¹⁵ Finally, AJB complains that the KPVO Modification Application conflicts with the later-filed KWSA Modification Application.

On the merits, AJB contends that Valleydale has not shown any public interest benefits to justify the proposed channel substitution.¹⁶ AJB also argues that an involuntary channel change has a “rulemaking aspect” under Section 1.87(b) of the Rules, thus requiring the Bureau to compare the KWSA Modification

⁴ FCC File No. BPH-20120924AIU (2012 KWSA Modification Application).

⁵ FCC File No. BMPH-20150812AAW (KPVO Downgrade Application). Valleydale had previously filed two modifications to the 2012 KPVO Construction Permit. See FCC File Nos. BMPH-20130212AAT and BMPH-20140716AEM.

⁶ *Broadcast Actions*, Public Notice, Report No. 48560 (MB Aug. 25, 2015).

⁷ FCC File No. BLH-20150820CNF (KPVO License Application). The KPVO License Application was granted August 28, 2015 (KPVO License). *Broadcast Actions*, Public Notice, Report No. 48566 (MB Sept. 2, 2015).

⁸ FCC File No. BPH-20150820CNC (KWSA Channel Reinstatement Application).

⁹ See *Broadcast Actions*, Public Notice, Report No. 48562 (MB Aug. 27, 2015).

¹⁰ FCC File No. BLH-20150902ADW (KWSA Reinstatement License Application).

¹¹ See *Broadcast Actions*, Public Notice, Report No. 48576 (MB Sept. 23, 2015).

¹² *AJB Holdings, LLC*, Order to Show Cause, Ref. No. 1800B3-AED (MB September 30, 2015) (*2015 Order to Show Cause*).

¹³ Informal Objection at 2.

¹⁴ *Id.* at 3 (citing 47 CFR § 73.3518).

¹⁵ Response at 2; 47 CFR § 73.3573(a)(1)(iii).

¹⁶ Response at 3-6.

Application to the KPVO Modification Application as a counter-proposal.¹⁷ AJB further states that Channel 280 is currently occupied by Station KUDE(FM), Nephi, Utah (KUDE), with no “timely prospect” to complete a channel change that was ordered in 2004.¹⁸ AJB also urges the Commission not to “countenance” Valleydale’s multiple amendments by granting the KPVO Modification Application.¹⁹ Finally, AJB claims that Valleydale should not be given another “bite at the apple” of involuntary channel substitution, having “failed to fulfill its obligations to KWSA for reimbursement of its expenses under *Circleville*” by refusing to pay the 2012 KWSA Modification Application filing fee.²⁰

In its Opposition, Valleydale contends that AJB never complied with the *KWSA Modification Order*, thus forcing it “to file an application for lower class facilities (not dependent on the Station KWSA channel change) in order to avoid having its permit cancelled and its auction payment forfeited.”²¹ Regarding its multiple amendments, Valleydale explains that, at the time that it filed the KPVO Modification Application, it could not have known about the KWSA Channel Reinstatement Application, which was filed the previous day. Similarly, Valleydale states that it amended to change the requested channel from Channel 224A to Channel 280A because of a “coordinated application [filed August 20, 2015] which had the effect of eliminating Ch. 224A as an available alternate channel for Station KWSA.”²² Regarding compliance with Condition #2 of its current license, Valleydale states that: (1) it “constructed Station KPVO with permanent facilities and it remains on the air”; (2) the mere fact that “Valleydale seeks a permit to improve its facilities is not inconsistent with remaining on the air with its current licensed facilities”; and (3) in any case, if the KPVO Modification Application were granted, Valleydale would have three years to build. Therefore—if necessary to comply with Condition #2—it could delay construction of the modified facilities until after the first year of the current authorization.²³

Regarding the claim that the KPVO Modification Application is inconsistent or in conflict with the KPVO License Application, Valleydale states that there is no case law or administrative reason preventing the Bureau from licensing a granted construction permit at the same time that it processes a modification application for a new construction permit from the same applicant for the same facilities.²⁴ Valleydale asserts that there are “hundreds, perhaps more than a thousand” instances where such overlapping applications have been routinely processed.²⁵ Valleydale points out that AJB itself filed similarly “inconsistent” applications when it filed the KWSA Reinstatement License Application and KWSA Modification Application on the same day.²⁶ Furthermore, Valleydale contends that as a prior-filed application, there is no reason for the KPVO Modification Application to “accommodate” the later-filed KWSA Application. Finally, Valleydale reiterates its willingness, under *Circleville*, to reimburse AJB for its expenses involved in the proposed channel change.²⁷

¹⁷ *Id.* at 7; 47 CFR § 1.87(b).

¹⁸ Response at 8 (citing *Dinosaur and Rangely, Colorado, et al*, Report and Order, 19 FCC Rcd 10327 (MB 2004) (*Dinosaur and Rangely*)).

¹⁹ *Id.* at 9.

²⁰ *Id.* at 9-11 (citing *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967)).

²¹ Opposition at 1-2.

²² *Id.* at 2 (apparently referring to FCC File No. BMPH 20150820CNJ, filed by Alex Media, Inc., licensee of Station KPUT(FM), Mona, Utah).

²³ *Id.* at 2-3.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 4-5 (offering to provide citations upon request).

²⁶ See FCC File Nos. BLH-20150902ADW, BPH-20150902ADY.

²⁷ Opposition at 5 (adding that “if the Bureau disagrees with that position and believes that AJB is correct and that Valleydale should pay AJB in advance based on its anticipated expenses, then Valleydale will comply.”).

Discussion. AJB fails to raise any substantial or material question of fact why the KPVO Modification Application should not be granted. We discuss each issue raised by AJB separately below.

Condition #2. Condition #2 requires “continuous operation of the licensed facility for the twelve month period following grant. The failure of the facility to operate will result in the rescission of this grant . . . unless the licensee rebuts the presumption that the authorized facilities were temporarily constructed.” In this case, Valleydale states that KPVO currently continues to operate with its authorized facilities, so there is no “failure to operate” and thus no need to rebut the presumption. AJB does not cite any cases supporting its interpretation that the mere filing of a modification application violates the condition and renders the modification application unacceptable when filed, and we agree with Valleydale that simply filing such an application does not violate Condition #2. The fact that Valleydale merely seeks a permit to improve its facilities in the future is not inconsistent with it remaining on the air with its currently licensed facilities for at least the first twelve month period following the grant of the license. A construction permit provides three years to complete construction, so Valleydale could still operate at its licensed facilities for one year following its initial authorization before commencing licensed operation from the modified facilities. Finally, if Valleydale desires to license the modified facilities and cease operation from the currently licensed facilities before the one year is over (on August 28, 2016), Condition #2 provides the option of rebutting the presumption that the current KPVO facilities were temporarily constructed.

“Inconsistent and conflicting” applications. We also agree with Valleydale that Section 73.3518 of the Rules does not prevent an applicant from filing an application for a license to cover an existing permit at the same time that it seeks permission to modify those facilities in the future, and that such concurrently pending applications are routinely processed.²⁸ The cases AJB cites in support of its argument are inapposite, as they concern situations where it was impossible to grant both applications in question.²⁹ With concurrently pending license and modification applications, as here, it is possible to grant one or both applications without violating any Commission rule.

Eligibility to file as a minor change application. Section 73.3573(a)(1)(iii) of the Rules, which permits a change to a same-class first-, second-, or third-adjacent channel to be processed as a minor change, does not apply to the KPVO Modification Application, because the proposed channel substitution for KWSA is authorized under another rule section, Section 73.3573(a)(1)(iv), which permits involuntary channel substitutions to be processed as minor changes.³⁰

First come/first served processing. Regarding AJB’s argument that the KWSA Modification Application constitutes a *de facto* “counter-proposal” to the KPVO Modification Application, we find that neither Section 1.87 nor 73.3573(f)(1) of the Rules requires a comparative analysis of the KPVO and KWSA Modification Applications. Rather, the KWSA Modification Application is in fact a later-filed minor change application that is processed on a “first come/first served” basis under Section 73.3573(f)(1) of the Rules.³¹ Under Section 73.3573(f)(1), any applications received after the filing of a lead application will be grouped according to filing date, and placed in a queue behind the lead applicant. Since the KWSA Modification Application conflicts with the KPVO Modification Application, and the KPVO Modification Application was filed first, the KWSA Modification Application is in queue behind the KPVO Modification Application. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable (and if the queue member is reached and found

²⁸ See 47 CFR § 73.3518 (“While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.”).

²⁹ See *WSTV, Inc.*, Memorandum Opinion, 17 FCC 530, 531 (1953) (requiring an applicant to select one of two applications that were not both grantable without violating the multiple ownership rules); *Big Wyoming Broadcasting Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 3493 (1987) (dismissing later-filed application when two applications were not both grantable without violating the multiple ownership rules).

³⁰ 47 CFR § 73.3573(a)(1)(iii),(iv).

³¹ 47 CFR § 73.3573(f)(1) (Section 73.3573(f)(1)).

acceptable).³² In this case, we have determined that the lead applicant is acceptable and the lead application grantable. Therefore, upon grant of the KPVO Modification Application, the queue dissolves, and the KWSA Modification Application will be dismissed.

Public interest. Section 316(a) of the Communications Act of 1934, as amended, permits us to modify a license if such action is in the public interest.³³ We have consistently held that disruption of service does not outweigh the public interest benefit of providing service to an additional population, as here.³⁴ Therefore, in the *2015 Order to Show Cause*, we properly found that the upgraded and expanded service proposed by Valleydale serves the public interest.³⁵

Multiple amendments. AJB cites to no precedent for its contention that multiple amendments are a cause for denying a minor modification application, and we note that such amendments are commonplace and liberally permitted under Section 73.3522(c)(2) of the Rules.³⁶

Availability of new channel. AJB objects that any move to Channel 280 would be obstructed by Station KUDE's current operation on that channel despite a 2004 Commission order modifying KUDE's license to specify Channel 256C in lieu of Channel 280C at Nephi, Utah.³⁷ On December 20, 2010, the licensee of KUDE filed the required modification application³⁸; however, the resulting KUDE Construction Permit was tolled in 2014 because yet another channel substitution, upon which the KUDE Construction Permit was conditioned, had not yet occurred.³⁹ On June 14, 2016, the licensee of KUDE filed a minor modification application applying for a downgrade so that it could begin operation on Channel 256A without waiting for another channel substitution.⁴⁰ This minor modification application was granted on July 15, 2016.⁴¹ The resulting construction permit will expire on July 15, 2019, and thus will run more or less concurrently with the KWSA construction permit required by this letter. For these reasons, we do not believe that the KUDE channel substitution will present an obstacle to Valleydale's proposed channel change.

Moreover, we remind AJB that in channel substitution situations, "the affected station has at best an 'implied STA' to remain on its old frequency until it is ready for operation on its new frequency."⁴² Under our FM non-reserved band technical rules, stations operating with STAs—express or implied—are entitled to no protection from operating stations, construction permits, pending applications or subsequently filed applications.⁴³ Therefore, an implied STA is subject to summary cancellation if such action is necessary to accommodate the operation of any FM station pursuant to its authorization.⁴⁴ Furthermore, although

³² *Id.*

³³ 47 U.S.C. § 316(a).

³⁴ *See, e.g., Castle Rock Colorado, et al.*, Report and Order, 7 FCC Rcd 7668, 7669 (1992).

³⁵ *See 2015 Order to Show Cause* at 2.

³⁶ 47 CFR § 73.3522(c)(2).

³⁷ Response at 8.

³⁸ FCC File No. BPH-20101220ABB, granted on February 28, 2011. *Broadcast Actions*, Public Notice, Report No. 47436 (MB March 4, 2011) (KUDE Construction Permit).

³⁹ *See* KUDE Construction Permit, Special Operating Condition #5.

⁴⁰ FCC File No. BMPH-20160614AAJ (modifying the KUDE Construction Permit to downgrade and specify a new site), Attachment 30 at 1.

⁴¹ *See Broadcast Actions*, Public Notice, Report No. 48780 (MB July 20, 2016).

⁴² *Brian M. Madden, Esq.*, Letter, 25 FCC Rcd 4765, 4767 (MB 2010) (*Liberman*) (quoting *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 n.55 (1999))

⁴³ *Liberman*, 25 FCC Rcd at 4767 (citing 47 CFR §§ 73.207, 73.213 and 73.215).

⁴⁴ *Id.* at 4768 (citing *Corona de Tucson, Sierra Vista, Tanque Verde and Vail, AZ, and Animas, Lordsburg and Virden, NM*, Memorandum Opinion and Order, 23 FCC Rcd 4792, 4796 (MB 2008)).

construction permits involving channel substitutions often contain a special operating condition that prohibits operation on the new channel until the incumbent has vacated, we have in the past deleted such conditions when necessary to allow the commencement of operations on the new channel when the incumbent has been grossly tardy in implementing required facility modifications.⁴⁵ Finally, we note that modification applicants are governed by the principle that “implicit in the filing of any facility application is that the applicant stands ‘ready, willing, and able’ to construct and operate as proposed.”⁴⁶

Failure to comply with a Commission order. We hereby admonish AJB for its failure to comply with the *KWSA Modification Order*.⁴⁷ Non-hearing actions taken pursuant to delegated authority, including the *KWSA Modification Order*, are effective upon release, unless otherwise ordered by the designated authority.⁴⁸ The *KWSA Modification Order* required AJB to file a modification application specifying operation on Channel 224A within 30 days from the effective date of that *Order*. It appears that although AJB initiated an application in CDBS, the filing fee was not paid, and the application was accordingly not accepted for filing. This failure to comply with a Commission order is not excused by AJB’s explanation that it expected Valleydale to pay the filing fee. Our well established case law on this point—as well as the plain meaning of the word “reimbursement”⁴⁹—establishes that AJB was entitled only to payment of expenditures *already incurred*, as AJB, a longtime broadcaster with experienced counsel, should be well aware.⁵⁰

Reimbursement requirement. Under *Circleville* and subsequent cases, determination of what constitutes legitimate and prudent expenses for reimbursement is left to the expeditious good faith negotiation of the parties, subject to Commission adjudication if the parties are unable to reach agreement or to enter into binding arbitration.⁵¹ In this case, Valleydale has committed to reimburse AJB for any reasonable and prudent expenses incurred in the proposed channel change.⁵² Therefore, following the policy set out in *Circleville*, we will grant the Application and require Valleydale to enter into negotiations to reimburse AJB for the reasonable and prudent expenses incurred in implementing the proposed channel changes.

Conclusion/Actions. Accordingly, IT IS ORDERED that the minor change application filed on August 21, 2015, by Valley Broadcasting, LLC (File No. BPH-20150821ABK) IS GRANTED.

IT IS FURTHER ORDERED that the minor change application filed on September 2, 2015, by AJB Holdings, LLC (File No. BPH-20150902ADY) IS DISMISSED.

IT IS FURTHER ORDERED that the license for Station KWSA(FM), Price, Utah (File No. BLH-20150902ADW) is modified to specify operation on Channel 280A, subject to the following conditions:

- (a) Within 30 days of the effective date of this Letter, AJB shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facilities;

⁴⁵ *Id.* at 4768.

⁴⁶ *Id.* at 4768 (citing *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003)).

⁴⁷ Given the passage of time and our action taken herein to modify the KWSA license, we are admonishing AJB for its violation rather than pursuing alternative enforcement action.

⁴⁸ 47 CFR § 1.102(b)(1).

⁴⁹ Merriam-Webster Dictionary, “simple definition of ‘reimburse,’” <http://www.merriam-webster.com/dictionary/reimburse> (last visited July 10, 2016) (“to pay someone an amount of money equal to an amount that person *has spent*”) (emphasis added).

⁵⁰ See *Circleville, Ohio*, Second Report and Order, 8 FCC 2d 159 (1967); *Peter Wayne Lechman*, Memorandum Opinion and Order, 8 FCC Rcd 3058, 3058 (MMB 1993) (*Lechman*).

⁵¹ See, e.g., *Lechman*, 8 FCC Rcd at 3058.

⁵² See, e.g., KPVO Modification Application, Exh. 30; Opposition at 5.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 CFR § 73.1620; and

(c) Nothing contained herein shall be construed to authorize changes in transmitter location or to avoid the necessity of filing environmental assessments pursuant to 47 CFR § 1.1307.

IT IS FURTHER ORDERED that Valleydale Broadcasting, LLC shall reimburse AJB Holdings, LLC for its reasonable and prudent costs associated with the channel changes ordered herein.

IT IS FURTHER ORDERED that AJB HOLDINGS, LLC IS ADMONISHED for its failure to file a modification application specifying operation on Channel 224A, as directed by the *KWSA Modification Order*.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau