

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

MAILED

OCT 17 2006

In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Boonville and Wheatland, Missouri))
)
)
)

FCC Mail room

MB Docket No. 06-88
RM-11254

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: October 11, 2006

Released: October 13, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: (1) a *Notice of Proposed Rule Making*¹ issued at the request of Bittersweet Broadcasting, Inc., formerly Big Country of Missouri, Inc, licensee of Station KWJK-FM, Boonville, Missouri (“Petitioner”); (2) supporting comments filed by the Petitioner; (3) comments filed by World Radio Link, Inc. (“WRL”); and (4) reply comments filed by the Petitioner. For the reasons discussed below, we will grant the rulemaking petition.

2. **Background.** In response to the Petitioner’s rulemaking petition (the “Boonville Petition”),² the *NPRM* proposed the upgrade of its Station KWJK-FM, Boonville, Missouri, from Channel 226A to Channel 226C3 in accordance with Section 1.420(g)(3) of the Commission’s rules.³ To accommodate this upgrade, the *NPRM* proposed the substitution of Channel 272A for vacant but applied for Channel 226A at Wheatland, Missouri, at the reference site proposed by the Petitioner, which is located 5.4 kilometers northwest of Wheatland.⁴ The Channel 272A site proposed by the Petitioner is fully spaced and meets the Commission’s technical requirements. The *NPRM*, however, noted that if WRL’s proposed transmitter site for a Channel 226A construction permit were used as the reference coordinates for Channel 272A at Wheatland, Channel 272A would not be fully spaced to Station KJPW-FM, Channel 272A, Waynesville, Missouri. Because WRL’s application was filed after the Boonville Petition, the *NPRM* solicited comment on our tentative conclusion that WRL’s application is not entitled to cut off protection vis-à-vis the Boonville Petition and that WRL must amend to specify a Channel

¹ *Boonville and Wheatland, MO*, Notice of Proposed Rule Making, 21 FCC Rcd 6420 (MB 2006) (“*NPRM*”).

² The Boonville Petition, which was filed on August 28, 2001, was originally dismissed but was reinstated after the grant of a petition for reconsideration. See *NPRM*, 21 FCC Rcd at 6421.

³ This rule permits upgrades of FM stations on mutually exclusive co-channels or adjacent channels without affording other interested parties an opportunity to file competing expressions of interest in the upgraded channel.

⁴ At the time that the Petitioner filed its rulemaking petition, the Channel 226A Wheatland allotment was vacant. However, WRL became the successful auction bidder for Channel 226A at Wheatland in Auction No. 62 and has an application for a construction permit (File No. BNPH-20060309ABD) pending.

272A facility at a rule-compliant site.⁵ Additionally, the *NPRM* stated that WRL may seek to demonstrate the public interest benefits, if any, of the transmitter site specified in its application and whether they outweigh the public interest benefits of the Petitioner's proposed upgrade.

3. The Petitioner filed supporting comments, reiterating its continuing interest to file an application for Channel 226C3 at Boonville and to construct the facilities upon grant of the application. Noting that WRL's application for Channel 226A at Wheatland was filed more than four years after the Boonville Petition, the Petitioner agrees that, under well established Commission precedent,⁶ WRL must be required to modify its application to specify a fully spaced Channel 272A site. In further support of this position, the Petitioner states that WRL filed its application as a result of its participation in Auction No. 62 and was on notice that "[b]idders are also responsible for reviewing all pending rulemaking petitions and open proceedings that might affect the FM allotment(s) on which they plan to bid."⁷ As a result, the Petitioner argues that any application that WRL filed as a result of its participation in Auction No. 62 is subject to the outcome of this open rulemaking proceeding.

4. In its comments, WRL states that it is familiar with the due diligence obligations of auction bidders but contends that it should not be required to amend its application for Wheatland to specify Channel 272A because it has suffered considerable engineering and legal expenses in prosecuting its application for Channel 226A. WRL points out that it has incurred additional expense because it was in the final stages of negotiating a lease agreement with a tower owner and that this transmitter site is not suitable for broadcasting on Channel 272A. WRL also asserts that, if the Commission was seriously considering amending the FM Table of Allotments, it should have done so before the auction.

5. In its reply comments, the Petitioner contends that WRL's comments are late filed and should not be considered. In support of this position, the Petitioner notes that the comment deadline set forth in the *NPRM* was July 31, 2006, and the record in this proceeding indicates that the comments were received by U.S. mail at the Commission on August 7, 2006. Although WRL apparently sent a copy of its comments as an attachment to an e-mail message to the Commission's Secretary Office on July 31, 2006, the Petitioner contends that such communication does not constitute a proper filing and should be disregarded. However, in the event that WRL's comments are considered, the Petitioner contends that they are without merit because WRL acknowledges its due diligence obligation, should have known of the pendency of the Boonville Petition, and should not now be allowed to stand in the way of the fair and efficient use of the spectrum to avoid inconvenience to WRL.

6. **Discussion.** As a threshold matter, we agree with the Petitioner that WRL's comments are late filed and should not be considered. WRL's comments were received at the Commission on August 7, 2006, and the comment deadline was July 31, 2006. Moreover, WRL has not given a reason for its late filing or requested a waiver of the filing deadline. Although WRL attempted to e-mail a copy of its comments to the Commission's Secretary office, e-mail is not one of the acceptable ways of filing

⁵ The Boonville Petition also requested the reclassification of Stations KMXV(FM), Channel 227C, and KCKC(FM) (formerly KSRC(FM)), Channel 271C, both Kansas City, Missouri, to specify operation as Class C0 facilities because each operates below the minimum Class C facilities of 100 kW ERP and 451 meters HAAT. These stations were reclassified as C0 stations prior to the release of the *NPRM* in this proceeding. See *Various Locations*, Report and Order, 21 FCC Rcd 2231 (MB 2006).

⁶ See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report and Order, 7 FCC Rcd 4917 (1992) ("*Conflicts*").

⁷ *Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005*, 20 FCC Rcd 10492, 10500 (2005).

comments in FM allotment rulemaking proceedings.⁸

7. However, even if WRL's comments were considered, they do not provide sufficient legal or public interest arguments for changing our tentative conclusion that WRL must modify its application to specify Channel 272A at a rule-compliant site. On the contrary, WRL's application is not entitled to cut-off protection vis-à-vis the Boonville Petition because it was filed after the Boonville Petition.⁹ Further, the inconvenience and expenses incurred by WRL are not sufficient reasons for refraining from substituting channels at Wheatland because, by its own admission, WRL was aware of the due diligence obligation of auction bidders and should have known of the pendency of the Boonville Petition. Finally, there is nothing in the record of this proceeding to show that the public interest benefits from WRL's transmitter site for Channel 226A at Wheatland outweigh the public interest benefits in upgrading Station KWJK-FM to Channel 226C3.¹⁰ Indeed, this upgrade will result in a gain of service to a population of 35,465 persons within an area of 2,287 square kilometers. Although there would be a loss of area of 3.4 square kilometers, the loss area is unpopulated.

8. We will, therefore, substitute Channel 226C3 for Channel 226A at Boonville.¹¹ To accommodate this upgrade, we will substitute Channel 272A for vacant but applied for Channel 226A at Wheatland, Missouri, and require that WRL amend its application to specify operation on Channel 272A at a rule-compliant site.¹²

9. Accordingly, pursuant to the authority contained in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b), and 0.283, IT IS ORDERED, That effective November 27, 2006, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, as follows:

<u>Community</u>	<u>Channel No.</u>
Boonville, Missouri	226C3, 257C2
Wheatland, Missouri	272A

10. IT IS FURTHER ORDERED, That, pursuant to Section 316 of the Communications Act of 1934, as amended, the license for Station KWJK-FM, Channel 226A, Boonville, Missouri, IS MODIFIED to specify operation on Channel 226C3 at Boonville, Missouri, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

⁸ See, e.g., 47 C.F.R. § 1.401(b) (electronic submissions of rulemaking petitions not permitted in broadcast allotment proceedings). We also note that the attachment to the e-mail, apparently containing WRL's comments, was not received at the Commission on July 31, 2006.

⁹ See *Conflicts*, 20 FCC Rcd 4917 (1992).

¹⁰ See *Andalusia, AL*, Report and Order, 49 Fed. Reg. 32201, published August 13, 1984 (granting a rulemaking petition for a new FM allotment or upgrade serves the public interest more than protecting an applicant's preference for a specific transmitter site).

¹¹ The reference coordinates for Channel 226C3 at Boonville, MO 38-51-17 NL and 92-38-17 WL.

¹² The reference coordinates for Channel 272A at Wheatland, MO, are 37-58-44 NL and 93-26-49 WL.

- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing

11. IT IS FURTHER ORDERED, That the rulemaking petition (RM-11254) filed by Bittersweet Broadcasting, Inc., IS GRANTED.

12. IT IS FURTHER ORDERED, That World Radio Link, Inc., amend its application (File No. BNPB-20060309ABD) for Channel 226A, Boonville, Missouri, to specify Channel 272A at a rule-compliant site.

13. IT IS FURTHER ORDERED, That the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following applicant and its principal/contact representative:

World Radio Link, Inc.
P.O. Box 5429
Twin Falls, ID 83303-5429
(Applicant for Channel 226A,
Wheatland, MO)

Clark Parrish
39 Canyon View Road
Jerome, ID 83338
(Principal and Contact
Representative, World Radio
Link)

14. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and 3(l), Bittersweet Broadcasting, Inc. is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the upgrade for Station KWJK-FM at the time its Form 301 application is submitted.

15. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau