

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

APR 12 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 05-243
Table of Allotments)	RM- 11363
FM Broadcast Stations)	RM- 11364
(Meeteetse, Wyoming))	RM- 11365

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

REPLY COMMENTS

Millcreek Broadcasting, LLC; Simmons SLC-LS, LLC; 3 Point Media - Coalville, LLC; and College Creek Broadcasting LLC (together, the "Joint Parties"), submit their Reply Comments in the above captioned proceeding to correct an error in the March 28, 2007 Public Notice,¹ and to address the elicitation of other interest in the nonadjacent upgrade and downgrade proposals discussed in the same Public Notice. In support hereof, the Joint Parties state as follows:

1. On February 10, 2006, the Joint Parties amended their Counterproposal to allot Channel 283A at Ashton, Idaho (instead of Channel 259A) for the new station permit issued to College Creek Broadcasting, Inc. ("College Creek") (one of the Joint Parties). This amendment was necessary to give College Creek more site flexibility and has the added benefit of eliminating the conflict between the Joint Parties' Counterproposal and the proposed allotment of Channel 259C at Meeteetse, Wyoming. This amendment was not reflected in text of the March

¹ There were three Counterproposals filed in this proceeding. The Joint Parties filed one of these Counterproposals, which was released on Public Notice on March 28, 2007 (Report No. 2808) and assigned rule making number RM-11363. The other two Counterproposals were released on Public Notice on March 28, 2007 (Report No. 2809) (RM-11364) and April 2, 2007 (Report No. 2811) (RM-11365).

28, 2007 Public Notice but was recognized in the section that elicited other expressions of interest.

2. The same March 28, 2007 Public Notice states that interested parties may file competing expressions of interest for Channel 245C2 at Vernal, Utah, and Channel 283A at Ashton, Idaho. However, KLCY-FM, Vernal, Utah, is now licensed to operate on Channel 288C2 and thus the Joint Parties' proposal for this station is not a non-adjacent upgrade.² Rather, it is an equivalent nonadjacent channel change, for which no competing expressions of interest are permitted.

3. In regard to the Ashton nonadjacent downgrade proposal, the Bureau has, for the first time, without any prior notice, any explanation, or any basis, overturned approximately twenty years of policy and case law that has permitted nonadjacent downgrades without subjecting such a downgrade proposal to competing expressions of interest. *See, e.g., Opal and Reliance, Wyoming, et al.*, 20 FCC Rcd 12994 (2005) (granted nonadjacent downgrade from 265C2 to 261A at Price, Utah without considering or soliciting competing expressions of interest); *Dinosaur and Rangely, Colorado, et al.*, 19 FCC Rcd 10327 (2004) (granted nonadjacent downgrade from 259C1 to 250C2 at Green River, Wyoming without considering or soliciting competing expressions of interest); *Crowell, Texas, et al.*, 19 FCC Rcd 5347 (2004) (granted nonadjacent downgrade from 253C to 2295C1 at Elk City, Oklahoma without considering or soliciting competing expressions of interest); *Bethel Springs, Tennessee, et al.*, 17 FCC Rcd 14472 (2002) (granted nonadjacent downgrade from 267C3 to 247A at Tiptonville, Tennessee without considering or soliciting competing expressions of interest); *Eldorado, Texas,*

² See BLH-20051018ACV. **KLCY-FM held a permit to operate on Channel 288C2 when the Joint Parties filed their Counterproposal. The Joint Parties disclosed this in their Counterproposal and indicated that Channel 245C2 could also be substituted for Channel 288C2 at the site in KLCY-FM's construction permit (BPH-20010306ABN). See Counterproposal at p. 11**

et al., 15 FCC Rcd 9179 (2000) (granted nonadjacent downgrade from 250C2 to 296A at Bceville, Texas without considering or soliciting competing expressions of interest); *Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13459 (1998) (granted nonadjacent downgrade from 265C3 to 291A at Sulphur, Oklahoma without considering or soliciting competing expressions of interest). This is arbitrary and capricious and violates the Administrative Procedures Act (APA). The Bureau's decision to apply a new policy in this case was not merely prospective (*i.e.*, it only applied to future cases), but it was also retroactive because the Joint Parties' did not have the benefit of knowing this new policy existed before it filed its Counterproposal. While the Bureau may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must *make* an affirmative finding on the record that the retroactive application of such a rule is appropriate.³ It made no finding whatsoever regarding retroactive application in this case, and so its action is invalid.

4. In addition, the Bureau's arbitrary decision is contrary to *Ashbacker* and its progeny.⁴ This line of case law stands for the proposition that nonadjacent proposals are subject to competing expressions of interest where the party petitioning for the proposal is obtaining a benefit (*i.e.* an upgrade). The Commission has never held that *Ashbacker* applies to nonadjacent equivalent channel changes or nonadjacent downgrades because the parties making these proposals are not realizing a benefit. Rather, their facilities remain the same or cover less area. In fact, an exhaustive case law search by undersigned counsel reveals that, for the past twenty years, the Commission has granted proposals for nonadjacent downgrades and equivalent channel changes without once considering (or even soliciting for) competing expressions of interest. On the other hand, the Commission has consistently considered and granted competing

³ *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C.Cir. 1986)

⁴ *Ashbacker v. U.S.*, 326 US 327 (1945).

expressions of interest for nonadjacent upgrade proposals because these licensees receive the benefit of greater facilities.⁵

5. Nevertheless, even if the Commission accepts competing expressions of interest in Channel 283A at Ashton, the Joint Parties' Counterproposal can still be granted because there is at least one alternate channel available at Ashton.⁶ Further, as discussed above, the Joint Parties originally proposed to allot Channel 259A at Ashton (in lieu of the current Channel 243C2 allotment). The Joint Parties amended this proposal to Channel 283A in order to obtain greater site flexibility. This amendment also eliminated the conflict with the proposed Channel 259C allotment at Meeteetse. However, Channel 259A is still available at Ashton and, if necessary, College Creek is willing to use this channel for its new Ashton station. If this channel is used at Ashton, the Joint Parties Counterproposal would remain in conflict with the proposed Channel 259C allotment at Meeteetse. However, as the Joint Parties originally proposed, there are equivalent substitute channels (Channels 292C, 288C, 267C, and 265C), which can be allotted to Meeteetse to resolve the conflict

6. Finally, as part of their Counterproposal, the Joint Parties also requested that the Commission issue an Order to Show Cause to Citicasters Licenses, L.P. ("Citicasters"), the licensee of Stations KOSY-FM, Spanish Fork, Utah, and KXRV(FM), Centerville, Utah to show why these stations' channels should not be changed at their current site. These channel changes will permit the implementation of the public interest benefits of the Joint Parties'

⁵ If the Commission nevertheless decides to create a new policy of accepting competing expressions of interest for nonadjacent channel downgrades, it must require that any party that files such an expression of interest also file a Form 301 and pay the associated application fee. This will ensure that only *bona fide* proponents file expressions of interest. See, e.g., *Revision of Procedures Governing Amendments to FM Table & Allotments and Changes & Community & License in the Radio Broadcast Services*, 21 FCC Rcd 14212, ¶18 (2006) (Commission require proponents for new allotments to simultaneously pay the associated filing fee to encourage only *bonafde* filings).

⁶ As demonstrated in the attached channel studies, Channels 239A, 249A, and 290A are also available at Ashton. See Attachment 1.

Counterproposal and the Joint Parties encourage the Commission to expeditiously issue an Order to Show Cause to Citicasters. The Joint Parties reiterate that they will reimburse Citicasters for its reasonable expenses in changing channels in accordance with *Circleville, Ohio*, 8 FCC 2d 149 (1967).

WHEREFORE, for the foregoing reasons, the Commission should take notice of the error in the March 28, 2007 Public Notice, it should expeditiously issue an Order to Show Cause as requested in the Joint Parties' Counterproposal, and it should rescind its notice requesting competing expressions of interest for Channel 283A at Ashton, Idaho.

Respectfully submitted,

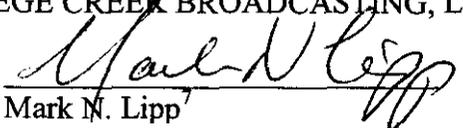
MILLCREEK BROADCASTING, LLC

SIMMONS SLC-LS, LLC

3 POINT MEDIA -- COALVILLE, LLC

COLLEGE CREEK BROADCASTING, LLC

By:


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202-719-7503

Their Counsel

April 12, 2007

⁷ Please note the change in address for counsel for the purpose of service

ATTACHMENT 1

Class A Channel Availability
Ashton, Idaho

REFERENCE
44 06 36.2 N.
111 30 50.2 W.

CLASS = A
Current Spacings

DISPLAY DATES
DATA 04-05-07
SEARCH 04-11-07

----- Channel 239 - 95.7 MHz -----

Call	Channel	Location		Azi	Dist	FCC	Margin
KZJH	LIC 237C	Jackson	WY	139.5	94.63	95.0	-0.37
KID-FM	LIC 241C	Idaho Falls	ID	234.0	114.87	95.0	19.87
KFMR.C	CP -Z 239C1	Marbleton	WY	153.6	220.82	200.0	20.82
RDEL	DEL 239C1	Marbleton	WY	153.6	220.82	200.0	20.82
KBJX	LIC 292C1	Shelley	ID	205.4	69.74	22.0	47.74
KMBR	LIC 238C	Butte	MT	341.3	223.22	165.0	58.22

Class A Channel Availability
Ashton, Idaho

REFERENCE
44 07 41.9 N.
111 25 19.0 W.

CLASS = A
Current Spacings

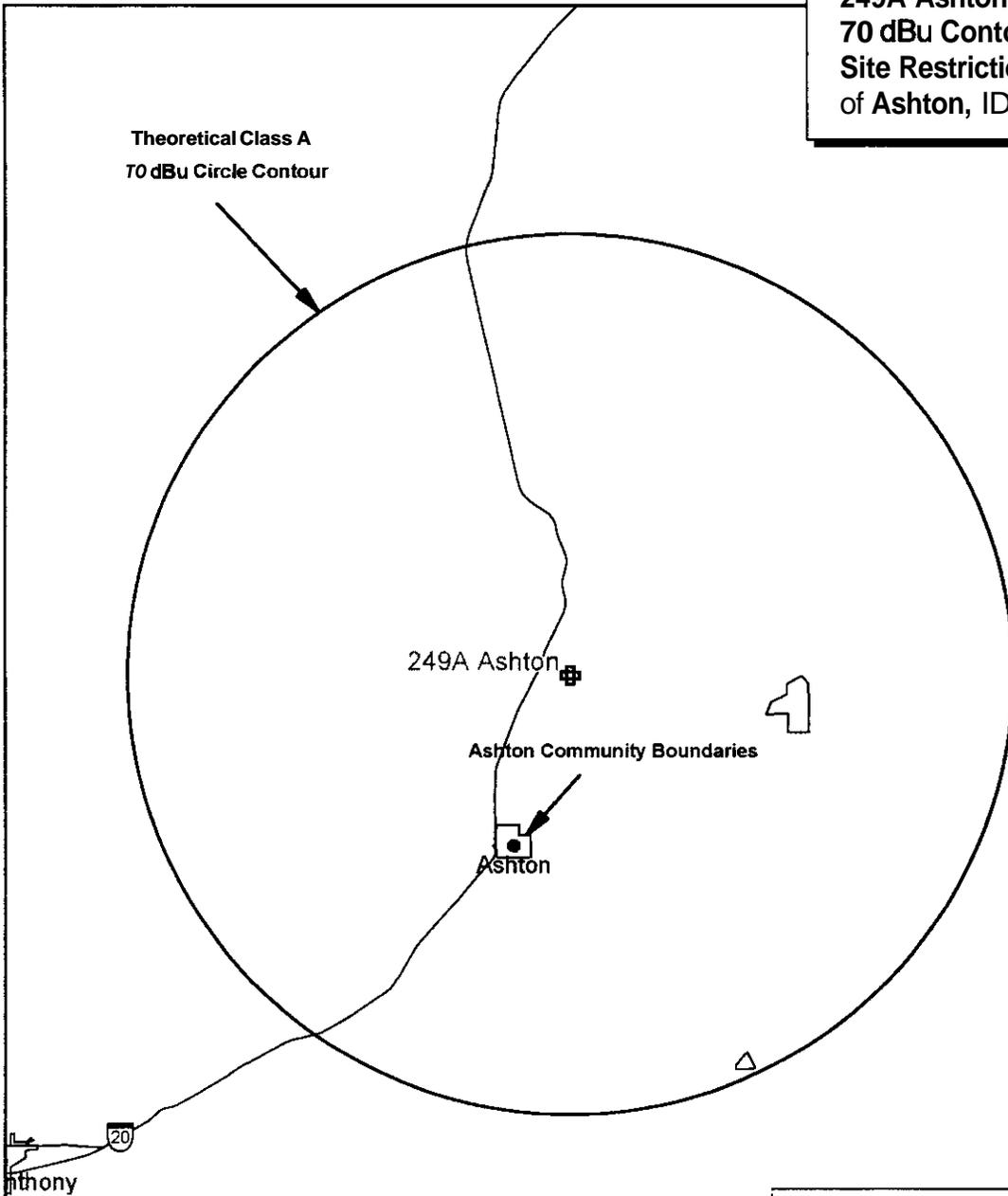
DISPLAY DATES
DATA 04-05-07
SEARCH 04-11-07

----- Channel 249 - 97.7 MHz -----

Call	Channel	Location		Azi	Dist	FCC	Margin
KGTM	LIC 251C1	Rexburg	ID	209.9	74.97	75.0	-0.03
KTAG	LIC 250C	Cody	WY	76.5	185.57	165.0	20.57
KLCE	LIC 247C	Blackfoot	ID	235.4	121.71	95.0	26.71
KOZB	LIC 248C1	Livingston	MT	11.6	173.57	133.0	40.57
KOZB .C	CP 248C1	Livingston	MT	14.1	177.18	133.0	44.18

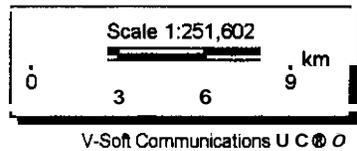
**249A Ashton, ID
70 dBu Contour Map
Site Restriction 7 km NE
of Ashton, ID**

Theoretical Class A
70 dBu Circle Contour



249A Ashton

Latitude: 44-07-42 N
Longitude: 111-25-19 W
ERP: 6.00 kW
HAAT: 100.0 m
Channel: 249 A
Frequency: 97.7 MHz
AMSL Height: 1831.69 m
Elevation: 1699.69 m
Horiz. Pattern: Omni
Vert. Pattern: No
Prop. Model: None



Class A Channel Availability
Ashton, Idaho

REFERENCE
44 07 41.9 N.
111 25 19.0 W.

CLASS = A
Current Spacings

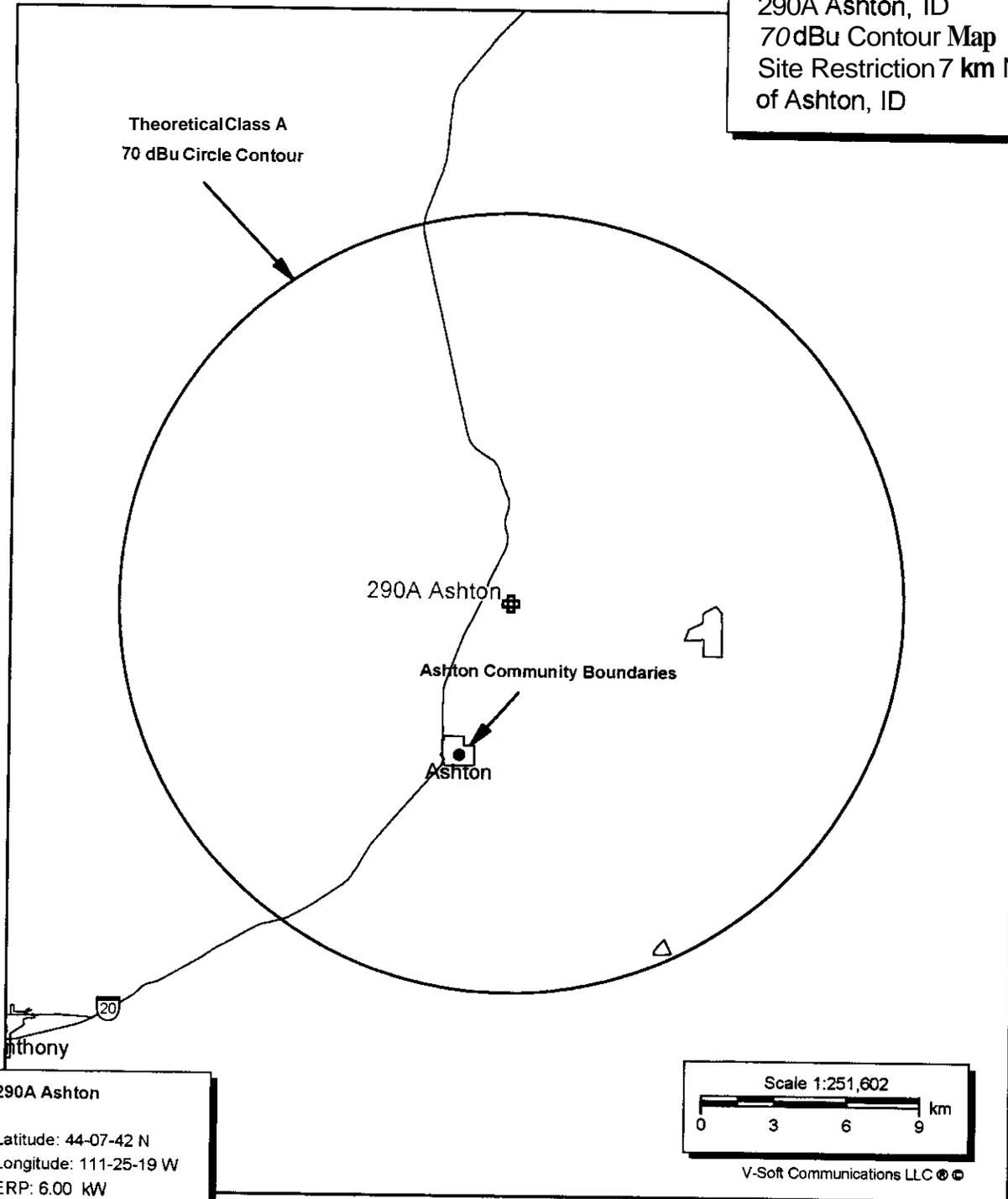
DISPLAY DATES
DATA 04-05-07
SEARCH 04-11-07

----- Channel 290 - 105.9 MHz -----

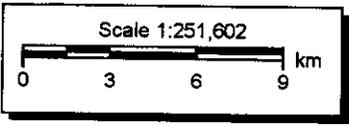
Call	Channel	Location		Azi	Dist	FCC	Margin
RDEL	DEL 290C1	Thayne	WY	170.3	150.51	200.0	-49.49
RDEL	DEL 290C1	Thayne	WY	178.3	150.51	200.0	-49.49
RDEL	DEL 290C3	Thayne	WY	167.9	116.25	142.0	-25.75
KTYN.C	CP 290C3	Thayne	WY	167.9	116.25	142.0	-25.75
KBJX	LIC 292C1	Shelley	ID	209.9	74.97	75.0	-0.03
KTHK	LIC-D 288C1	Idaho Falls	ID	208.7	98.28	75.0	23.28

290A Ashton, ID
70dBu Contour Map
Site Restriction 7 km NE
of Ashton, ID

Theoretical Class A
70 dBu Circle Contour



290A Ashton
Latitude: 44-07-42 N
Longitude: 111-25-19 W
ERP: 6.00 kW
HAAT: 100.0 m
Channel: 290 A
Frequency: 105.9 MHz
AMSL Height: 1831.69 m
Elevation: 1699.69 m
Horiz. Pattern: Omni
Vert. Pattern: No
Prop Model: None



V-Soft Communications LLC ©

CERTIFICATE OF SERVICE

I, Elbert Ortiz, in the law firm of Wiley Rein LLP, do hereby certify that I have on this 12th day of April, 2007, unless otherwise noted, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **“Reply Comments”** to the following:

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* HAND DELIVERED



Elbert Ortiz