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

In the Matter of	)	
	)	
CASA DE ORACION GETSEMANI	)	File No. BNPL-20000605AFI
	)	File No. BLL-20090518AAH
Application for a Construction Permit for a New LPFM Station at Providence, Rhode Island	)	Facility ID No. 124214
	)	
EPHESE FRENCH SDA CHURCH	)	File No. BNPL-20000606AAV
	)	Facility ID No. 124196
Application for a Construction Permit for a New LPFM Station at Providence, Rhode Island	)	
	)	
ZION BIBLE INSTITUTE	)	File No. BNPL-20000601ADH
	)	Facility ID No. 123967
Application for a Construction Permit for a New LPFM Station at Barrington, Rhode Island	)	
	)	
BROWN STUDENT RADIO	)	File No. BNPL-20000605AGI
	)	Facility ID No. 124263
Application for a Construction Permit for a New LPFM Station at Providence, Rhode Island	)	
	)	
PROVIDENCE COMMUNITY RADIO	)	File No. BNPL-20000605AJO
	)	Facility ID No. 124478
Application for a Construction Permit for a New LPFM Station at Providence, Rhode Island	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 2011 **Released: June 27, 2011**

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (the "Bureau"), pursuant to delegated authority,[1] has before it an April 14, 2008, Petition for Reconsideration (the "Petition") submitted by Brown Student Radio ("BSR") seeking reconsideration of a Commission decision issued on March 14, 2008.[2] In the *MO&O,* the Commission granted the captioned time-share applications (the "Time-Share Applications") of Casa de Oracion Getsemani ("Casa"), Ephese French SDA Church ("Ephese"), and Zion Bible Institute ("Zion") for a new low power FM ("LPFM") station in the Providence, Rhode Island, area, and dismissed BSR's and Providence Community Radio's ("PCR") mutually-exclusive applications for an LPFM station at

[1] *See* 47 C.F.R. §§ 0.283 and 1.106(a), (p).

[2] *See Casa de Oracion Getsemani, Ephese SDA French Church, et. al.,* Memorandum Opinion and Order, 23 FCC Rcd 4118 (2008) (the "*MO&O*"). The five captioned applications comprise this LPFM mutually-exclusive group.

Providence. The Bureau also has before it: (1) BSR's May 22, 2009, Informal Objection to a covering license application filed by Casa ("Casa License Application");[3] and (2) BSR's May 26, 2009, Petition for Reconsideration of the Bureau's grant of the Casa License Application (collectively, the "License Petition").[4] For the reasons discussed below, we deny both the Petition and the License Petition.

II. BACKGROUND

2. The applications of Casa, Ephese, Zion, BSR, and PCR were determined by the Bureau to be mutually exclusive. In accordance with our procedures,[5] the Bureau tallied the comparative point totals claimed by each applicant and listed those point totals in a Public Notice accepting the applications for filing, establishing a petition to deny period, and designated Zion, Casa, Ephese, BSR and PCR as tentative selectees.[6] BSR filed separate petitions to deny the PCR, Casa, and Ephese applications on March 30, 2005. On April 25, 2005, Casa, Ephese and Zion amended their respective applications to report that they had entered into a voluntary time-share agreement pursuant to Section 73.872 of the Commission's Rules (the "Rules").[7] BSR then filed an "Objection to Share-Time Agreement and Point Aggregation" of Casa, Ephese, and Zion on May 9, 2005, and a "Supplement" to its Objection to the time-share agreement on October 11, 2007, in which it argued that Zion had contracted to sell its campus and move the entire institution to a location more than 10 miles away from the proposed community of license; it also argued that Zion's point for "established community presence" should be disallowed and that Zion was therefore ineligible to participate in the time-share agreement. In the *MO&O*, the Commission denied the BSR petitions to deny the Casa and Ephese applications and the BSR Objection to the time-share agreement. In addition, the Commission granted the Casa, Ephese and Zion voluntary time-share agreement in conjunction with the grant of their applications and dismissed the applications of PCR and BSR.[8]

3. In its Petition, BSR reiterates its arguments that Zion should not be credited with a point for "established community presence" because Zion "contracted to sell its campus and move the entire institution to a location more than 10 miles away from its proposed community . . . ."[9] BSR also claims that the time-share agreement among Casa, Ephese, and Zion is invalid as a result of Zion's loss of the "established community presence" point. It argues that Section 73.872(c)[10] limits time-sharing to

[3] File No. BLL-20090518AAH.

[4] *See Broadcast Actions,* Public Notice, Report No. 46992 (rel. May 26, 2009).

[5] *See Creation of a Low Power Radio Service,* Report and Order, 15 FCC Rcd 2205 (2000) ("*LPFM Report and Order*"); *recon. generally denied,* Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208 (2000); *regulation modification granted by* Second Report and Order, 16 FCC Rcd 8026 (2001); Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007) ("*Third Report and Order*").

[6] *See Broadcast Applications,* Public Notice, Report No. 25930 (rel. Feb. 28, 2005).

[7] 47 C.F.R. § 73.872.

[8] Because we concluded that PCR was not among those applicants with equal high-point totals, it was not eligible to participate in a time-share agreement with the three selectees, Casa, Ephese and Zion. *See MO&O*, 23 FCC Rcd at 4132 (2008); *see also* 47 C.F.R. § 73.73.872(c).

[9] Petition at 6.

[10] 47 C.F.R. § 73.872(c), which states that "[i]f mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency . . . ." If not all of the tied applicants in a mutually exclusive group participate in a time-share proposal, the time-share proponents' points will be aggregated to determine the tentative selectees.

applicants with the same and highest point total, and therefore, that the change in Zion's comparative status is fatal to the time-share agreement.[11] BSR states that, because Casa, Ephese, and Zion elected to rely on the time-share agreement, the failure of that agreement should result in the forfeiture of their points, and BSR, with three points, should be declared the sole prevailing applicant.[12] Finally, BSR reiterates its argument, also previously rejected by the Commission, that Zion was required to apprise the Commission of its relocation efforts pursuant to Section 1.65 of the Rules and failed to do so.[13]

4. On March 4, 2010, and in response to a staff request for additional information,[14] Zion states that "[o]n July 1, 2008, the College's primary campus was relocated to Haverhill, [Massachusetts]" but that it "continue[s] to own and offer limited courses at the Barrington, Rhode Island campus. So, in fact, we currently have two campuses, though we are endeavoring to sell the campus in Rhode Island."[15] In its Comments, BSR reiterates its argument that "relocation was at least intended, if not well under way, before the Commission issued its [March 14, 2008] decision selecting Zion's application for grant" and that Zion was obligated to report this "relocation development," pursuant to Section 1.65 of the Rules.[16]

5. On July 3, 2008, Zion requested cancellation of its granted construction permit.[17] The Casa License Application was filed on May 18, 2009, and granted by the staff two days later.[18] Two days after that, on May 22, 2009, BSR filed an untimely Informal Objection to the Casa License Application. On May 26, 2009, BSR requested that the Commission treat the May 22, 2009, Informal Objection as a petition for reconsideration.

III. DISCUSSION

6. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the

[11] Petition at 7.

[12] BSR also argues that an issue remains whether Ephese and Casa, which it claims are "pure churches," are qualified to hold an LPFM authorization. However, BSR states that it will not re-argue this issue here, intends to preserve its right to re-argue this matter "in the event of a future judicial appeal." Petition at n.2.

[13] *Id.* at 4.

[14] *Letter to Dr. Charles Crabtree, President, Zion Bible College,* Ref. 1800B3 (MB Jan. 15, 2010).

[15] *See Letter from Dr. Charles T. Crabtree, President, Zion Bible College,* filed Mar. 4, 2010. Zion states that although its Barrington, Rhode Island, campus is up for sale, it continues to own and offer limited courses at that location. BSR filed comments ("Comments") to Zion's response on March 15, 2010.

[16] 47 C.F.R. § 1.65; *see* Comments at 1, 2. Section 1.65 of the Rules requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission of any substantial change that may be of decisional significance to that application. For purposes of Section 1.65, an application is considered "pending" before the Commission from the time it is accepted for filing until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court. 47 C.F.R. § 1.65(a). Here, Zion's obligation continued until its permit was cancelled by the staff (at Zion's request) on July 3, 2008, and that cancellation became a final action.

[17] *See Letter to Marlene H. Dortch, Secretary of the FCC*, filed by Zion Bible Institute on Jul. 3, 2008. The staff cancelled Zion's permit on July 3, 2008. *See Broadcast Actions,* Public Notice, Report No. 46774 (rel. Jul. 9, 2008).

[18] *See* n.4, *supra*.

petitioner's last opportunity to present such matters.[19] A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.[20] Additionally, under newly promulgated Section 1.106(p)(2) and (3) of the Rules,[21] the staff may dismiss or deny a reconsideration petition on the basis that it "plainly does not warrant consideration by the full Commission."[22]

7. BSR has failed to demonstrate that reconsideration is warranted of the grant of either the Time-Share Applications or the Casa License Application. Moreover, the arguments and material presented by BSR either have been rejected previously by the Commission or fail to identify any error or omission in the *MO&O*. Accordingly, the Petition plainly does not warrant consideration by the full Commission.

8. *The Petition.* Under Section 73.872(b)(1) of the Rules, an applicant qualifies for an "established community presence" point if the "applicant . . . , for a period of at least two years prior to application, . . . [has] had a campus . . . within 10 miles of the coordinates of the proposed transmitting antenna."[23] There is no question that Zion qualified for the established community presence comparative point when it filed the captioned application, *i.e.,* it was local and established in the community for two years prior to filing. Citing Section 73.872(c) of the Rules, however, BSR argues that the voluntary time-share agreement among Casa, Zion, and Ephese should have been disallowed because Zion was not entitled to its point for established community presence and therefore was not eligible to participate in the agreement. Specifically, BSR argues that the award of a preference in our licensing process to an entity that will not maintain its preferred status by virtue of "its own publically declared intent to abandon its local campus," makes the local presence priority legally invalid as applied to this case.[24] BSR compares the situation here to that in *Bechtel v. FCC*[25] in which the Court of Appeals found that the Commission's "integration credit policy," which began as a comparative application preference, was rendered meaningless because the Commission had no mechanism to ensure that the applicant maintained the criterion for which the preference was awarded.[26]

9. We agree with BSR that an LPFM applicant/permittee/licensee must maintain the "local" attributes that are the foundation for both an applicant's eligibility to apply for an LPFM authorization and – provided that the applicant has been in existence for two years – the

[19] *See* 47 C.F.R. § 1.106(c), (d); *see also WWIZ, Inc.,* Memorandum Opinion and Order, 37 FCC 685, 686 (1964) ("*WWIZ*"), *aff'd sub. nom. Lorain Journal Co. v. FCC,* 351 F.2d 824 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 967 (1966).

[20] *See WWIZ,* 37 FCC at 686.

[21] 47 C.F.R. § 1.106(p)(2) and (3). These provisions became effective on June 1, 2011. *See* Commission's Rules of Practice, Procedure, and Organization, 76 Fed. Reg. 24383, 24383 (May 2, 2011).

[22] *See Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Reorganization,* Report and Order, 26 FCC Rcd 1594, 1606 ¶ 28 (2011).

[23] 47 C.F.R. § 73.872(b)(1).

[24] Petition at 9.

[25] *See Bechtel v. FCC,* 10 F.3d 875 (D.C. Cir. 1993) ("*Bechtel*") (concept of "integration," which gave additional credit to prospective owners who proposed to be involved in a station's day-to-day management, struck down as arbitrary and capricious).

[26] Petition at 9-10.

"established community presence" point.[27] In 2007, the Commission fully ensured that only local entities would hold LPFM licenses when it amended the rules to make permanent the "local" requirement.[28] In adopting the "local applicant" eligibility requirement, the Commission specifically opined that:

> [W]e do not believe that our preference for local applicants here raises the concerns voiced by the court in *Bechtel* . . . . [A] primary concern underlying the court's decision was that there was no obligation for a successful applicant in the commercial broadcast service to adhere to its integration proposal, and there was no evidence indicating the extent to which licensees had done so in the past. In contrast, LPFM licenses will not be transferable, so we can be assured that a local entity that is awarded the license will continue to operate the station.[29]

Here, Zion acknowledges that on July 1, 2008, the college's primary campus was relocated to Haverhill, Massachusetts, after its permit had been granted, but states that it continued to own and offer limited courses at its Barrington, Rhode Island campus.[30] Zion's maintenance of the Barrington campus meets both the definition of "local" in Section 73.853(b)(1) and the requirement for an "established community presence" point in Section 73.872(b)(1) because Zion maintains a campus within 10 miles of the coordinates of the proposed antenna site.

10. In the *MO&O,* the Commission found that BSR's newspaper article submissions as evidence of Zion's impending move could not provide a basis for disallowing Zion's comparative point for established community presence.[31] Here, as evidence of Zion's move, BSR for the first time submits the following: (1) a November 15, 2007, press release from the mayor of Haverhill, Massachusetts, announcing Zion's planned future relocation to Haverhill;[32] (2) an announcement found on Zion's own website of its plan to relocate as of September 2008;[33] and (3) the minutes from a January 7, 2008, Barrington, Rhode Island, town council meeting announcing an initiative to develop "the former Zion site in Barrington."[34] We find that these additional facts are not probative on the issue of whether Zion

[27] *See* 47 C.F.R. §§ 73.872(b) and 73.853(b) (setting forth comparative "established community presence" standard and "local" eligibility requirement respectively. *See also LPFM Report and Order,* 15 FCC Rcd at 2219 ¶ 33 (2000).

[28] *See Third Report and Order,* 22 FCC Rcd at 21922 ¶ 23 (2007).

[29] *See LPFM Report and Order,* 15 FCC Rcd at 2220 ¶ 36 (2000). We note that LPFM licenses may now be transferred or assigned to another local entity, but not for three years from the date of issue. *See* 47 C.F.R. § 73.865(c).

[30] BSR's counsel states that he visited Zion's Barrington, Rhode Island, campus on August 19, 2008; he states that "[t]here is no question that Zion had packed up and moved for good." *See* Comments at 2. In light of Zion's statement that it is still offering classes in Barrington, BSR counsel's summer recess visit is not probative of whether or not Zion had abandoned the campus.

[31] *See MO&O*, 23 FCC Rcd at 4130 (citing *American Mobile Radio Corporation*, Memorandum Opinion and Order, 16 FCC Rcd, 21431, 21436 (2001) ("[T]he Commission has consistently held that newspaper and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements in a petition to deny.")).

[32] *See* Petition at 7 and at Exhibit A. Haverhill, Massachusetts, is approximately 72.5 miles away from Zion's proposed transmitter site.

[33] *See id.* and at Exhibit B.

[34] *See id.* and at Exhibit C.

continued to maintain a local campus at Barrington; at most, these additional facts run to the issue of whether Zion should have lost its established community presence point when it engaged in relocation activities, an argument already found to be without merit.

11. For these reasons, Zion was properly awarded an established community presence point, and therefore, was eligible to enter into the voluntary time-share agreement with Casa and Ephese.[35] Also, for these reasons, Zion's Haverhill relocation activities and plans were not matters of decisional significance requiring disclosure pursuant to Section 1.65 of the Rules. Moreover, pursuant to Section 73.872(c)(3) of the Rules,[36] the remaining two parties to the agreement, Casa and Ephese, may apportion between themselves the air time previously allotted in the agreement to Zion, which has voluntarily surrendered its permit.

12. *The License Petition*. Procedural Issue. BSR argues that the Casa License Application was granted by the staff only two days after it was filed. Consequently, BSR argues that pursuant to Section 1.106(b)(2) of the Rules, it has made an adequate showing as to why it was not able to participate in the earlier stages of the proceeding and, thus, its Informal Objection should be considered as a Petition for Reconsideration.[37] We agree. Section 73.3587 of the Rules requires that an informal objection to a broadcast application be filed prior to action on the application and, thus, the Informal Objection ordinarily would be subject to dismissal without consideration.[38] The Commission, however, has historically accorded standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action "effectively precludes participation during the initial consideration of an application."[39]

13. Substantive Issue. BSR argues that the Commission should rescind the grant of the Casa License Application for the reasons set forth in the Petition.[40] We have found that the Commission properly awarded construction permits to Casa, Ephese, and Zion pursuant to their time-share agreement. Accordingly, we also find that the License Petition is without merit.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed on April 14, 2008, by Brown Student Radio, IS DENIED.

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[35] We note that, even without Zion as a member of the voluntary time-share agreement, the aggregated points of time-sharers Casa and Ephese still exceed those of BSR. *See* 47 C.F.R. § 73.872(c).

[36] 47 C.F.R. § 73.872(c)(3).

[37] *See* 47 C.F.R. § 1.106(b)(2); *see also* License Petition at 2.

[38] *See* 47 C.F.R. § 73.3587 ("Before FCC action on any application for an instrument of authorization, any person may file informal objections to the grant.").

[39] *See, e.g., Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854 (1997) (standing awarded to file petition for reconsideration without pre-grant objection when application granted five days after Public Notice of its acceptance); *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816 (1989) (standing to file petition for reconsideration without pre-grant objection when application granted four days after Public Notice of its acceptance).

[40] License Petition at 2.

15. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed on May 26, 2009, by Brown Student Radio IS GRANTED to the extent indicated and IS DENIED in all other respects, and the Informal Objection filed on May 22, 2009, by Brown Student Radio IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau