

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

In the Matter of)	
)	
WTL COMMUNICATIONS, INC.)	File No. BNPL-20010615BDF
)	Facility ID No. 135682
)	
ROGUE VALLEY CHRISTIAN RADIO, INC.)	File No. BNPL-20010615AZN
)	Facility ID No. 135644
)	
SAINT ANNE DE BEAUPRE EDUCATIONAL RADIO ASSOCIATION)	File No. BNPL-20010614AGR
)	Facility ID No. 134988
)	
Applications for a Construction Permit for a New LPFM Station at Grants Pass, Oregon)	

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 2008

Released: February 8, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it the captioned, mutually exclusive applications of WTL Communications, Inc. (“WTL”), Rogue Valley Christian Radio, Inc. (“RVCR”), and Saint Anne de Beaupre Educational Radio Association (“Beaupre”), each seeking a construction permit for a new station in the Low Power FM (“LPFM”) Broadcast Service at Grants Pass, Oregon. In accordance with our procedures,¹ the staff 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 specifying the applications’ tentative selectee status.² WTL was designated as the tentative selectee for the subject authorization. RVCR filed a Petition to Deny WTL’s application on April 12, 2004 (the “Petition”). WTL filed an Opposition on May 3, 2004, to which RVCR replied on May 17, 2004. An Informal Objection (“Objection”) to the RVCR application was filed by WTL on May 4 and 7, 2004.³ No parties filed a petition to deny or informal objection to the captioned Beaupre application. For the following reasons, we grant the Petition, in part, grant the Objection in part, grant the WTL application and dismiss those of RVCR and Beaupre.

¹ 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, FCC 07-204 (rel. Dec. 11, 2007) (“*Third Report and Order*”).

² See *Closed Groups of Pending Low Power FM Mutually Exclusive Applications Accepted for Filing*, Public Notice, 19 FCC Rcd 4624 (2004).

³ WTL supplemented its Informal Objection on January 10, 2006 (collectively, the “Objection”).

II. DISCUSSION

2. *RVCR Petition to Deny*. We have evaluated the merits of the RVCR Petition and the responsive pleadings received and conclude that WTL is not entitled to the comparative point that it claimed for “established community presence.” Accordingly, as explained below, we will disallow that point and reevaluate the applications on a comparative basis.

3. RVCR argues in its Petition that WTL does not qualify as a local nonprofit educational institution or organization. RVCR asserts that, because WTL did not include its headquarters’ address in its originally-filed application, as required by the Instructions for FCC Form 318,⁴ WTL has failed to establish that it is entitled to a point in the comparative point analysis for having an established community presence.⁵ In its Opposition, WTL acknowledges that “the documentation provided by WTL in its application was apparently not sufficient to fully substantiate the necessary criteria.”⁶ WTL argues, however, that its subsequently filed “evidence” establishes that, at the time of filing and continuing, it was a non-profit corporation with educational goals, with physical headquarters within 10 miles of its proposed transmitter site.⁷ In its Reply, RVCR argues that WTL did not demonstrate in its application as originally filed that it was entitled to a point for established community presence, and its attempt at *ex post facto* justification must be rejected because, pursuant to Section 73.871(b) of the Commission’s Rules (the “Rules”),⁸ it cannot upgrade its comparative status after the cut-off date for its proposal.

4. In the *LPFM Report and Order*, the Commission stated that an applicant claiming a point for established community presence must provide supporting documentation as an exhibit to its application:

Applicants claiming points for established community presence will be required to certify in their applications that they meet the [criteria established for claiming the point]. The application form will identify appropriate documentation that must be made available for the point claimed. Applicants will be required to submit this information at the time of filing and it will be available in our public reference room. . . . This information also will enable applicants to verify that competing applicants qualify for the points they claim.⁹

As observed by RVCR, the Form 318 instructions, Page 8 (Section III, Question 1: Established Community Presence) state that:

Applicants claiming a point for this criterion also must submit evidence of their qualifications as an exhibit to their application forms. This evidence must demonstrate the date of commencement of the applicant's existence and the location(s) of the applicant's headquarters, campus or governing board members' residences . . . during the two years prior to the application

⁴ See Instructions to FCC Form 318, Section III, Question 1 at 8.

⁵ See RVCR Petition at 1.

⁶ See WTL Opposition at 3. WTL advises that it mistakenly included only its post office box mailing address, rather than its headquarters’ street address, in its captioned application.

⁷ See *id.* at Exhibits A and B.

⁸ See RVCR Reply, at 1-2; see also 47 C.F.R. § 73.871(b) (“Amendments that would improve the comparative position of new and major change applications will not be accepted after the close of the pertinent filing window.”).

⁹ *LPFM Report and Order*, 15 FCC Rcd at 2261 ¶ 142.

filing. . . . The location of an applicant's headquarters, campus, or governing board members' residences may be demonstrated by the affidavit of a person or persons with personal knowledge thereof.¹⁰

Although WTL provided evidence of its incorporation in its originally-filed application, it did not specify the location of its headquarters or the residence addresses of its governing board members in that application, or the duration of such local presence. We cannot accept WTL's May 3, 2004 filing as a basis for awarding a point for "established community presence" because to do so would improve its comparative position from that established in the original application, in contravention of Section 73.871(b).¹¹ Accordingly, we find that WTL is not entitled to the claimed point for established community presence.¹² We will, however, accept WTL's May 3, 2004 filing as an amendment to its application for informational purposes only.

5. *WTL Informal Objection.* In its application, RVCR stated that it "is a nonstock, nonprofit corporation organized under the laws of the State of Oregon in 2001."¹³ RVCR claimed a point for established community presence because, although it was not incorporated until 2001, "at least 75 percent of the Corporation's directors have established local presence" because "four, *i.e.*, 80 percent, of the five directors of the Corporation . . . have resided within 10 miles of the proposed antenna site of the proposed LPFM station continuously for the past two years."¹⁴ WTL argues in its Objection that: (1) RVCR failed to provide its Articles of Incorporation, the status of its incorporation on the application filing date, or the exact date of its incorporation, and thus, failed to demonstrate that it was a nonprofit legal entity; (2) even if the Commission concludes that RVCR was properly incorporated at the time of filing, RVCR improperly claimed a comparative point for established community presence;¹⁵ and (3) RVCR appears to be controlled by a central organization and will not truly be serving the local community. In its January 10, 2006, Supplement to the Objection, WTL argues that RVCR's claim that it incorporated in Oregon in

¹⁰ FCC Form 318 Instructions at 8 (Section III, Question 1: Established Community Presence).

¹¹ 47 C.F.R. § 73.871(b). Broadcast applicants traditionally have not been permitted to strengthen their comparative positions beyond that established by the applicable cut-off date, regardless of whether the amendment was voluntary or involuntary. *See, e.g., Women's Broadcasting Coalition*, FCC 85-667, 59 RR 2d 730 (1986) (site change amendment necessitated by FAA rejection of original site would be accepted, but coverage credit for number of persons served would be limited to the number of persons served by the original proposal); *Rose Broadcasting Company*, Memorandum Opinion and Order, 68 FCC2d 1242 (1978) (amendment accepted to replace deceased applicant principal, but applicant could not rely on amendment to improve its comparative position).

¹² We will not dismiss WTL's application for its failure to specify the location of its headquarters or the residence addresses of its governing board members. This omission is not a defect that ordinarily would cause dismissal of an application, but would rather have required a corrective amendment prior to grant. *See, e.g., Superior Broadcasting Of California*, Decision, 94 FCC 2d 904 (1983) (light comparative demerit for failure to report information already on public file with FCC); *Post-Newsweek Stations, Florida, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 92 (1974) (supplemental filings falling within certain parameters were properly accepted and considered by the Bureau). Nothing in the *LPFM Report and Order* or the Rules requires the dismissal of WTL's application based on this omission.

¹³ RVCR application, Exhibit 2.

¹⁴ *Id.* at Exhibit 7. RVCR President Donna Griffith identifies the four directors as Darla Day, Geraldine Wytcherly, Bill McFeeters, and Glenn Chinn.

¹⁵ WTL notes that the Instructions for FCC Form 318 indicate that the applicant must have a community presence for at least two years prior to the date of the application. WTL states that RVCR claims the point, even though it had not been incorporated for two years prior to filing, because "at least 75 percent of its directors have lived within 10 miles of the proposed antenna site during the past two years."

2001 is false. It provides a page from the website of the Office of the Oregon Secretary of State indicating that the corporation was not registered with the State and did not file its Articles until May 3, 2004. RVCR did not respond to either WTL's Objection or the January 2006 Supplement.

6. Pursuant to the applicable Rules and procedures, an applicant for an LPFM station must certify its eligibility to own and operate such station at the time it files its application.¹⁶ Section 73.853 of the Rules states that an LPFM station may be licensed to a noncommercial educational ("NCE") organization for the advancement of an educational program. The *LPFM Report and Order* states that the establishment of LPFM as a noncommercial service requires that licensees comply with the eligibility requirements of Section 397(6) of the Communications Act of 1934, as amended (the "Act").¹⁷ As relevant to this discussion, Section 397(6) of the Act defines a "noncommercial educational broadcast station" as a station which "(A) . . . is owned and operated by a public agency or nonprofit private foundation, corporation, or association. . . ."¹⁸ Because individuals are not eligible to own and operate LPFM stations,¹⁹ the certification requires that the applicant be a noncommercial educational institution, corporation, or entity that is recognized under state law.²⁰ Thus, an LPFM applicant must be incorporated, registered, or otherwise organized as a nonprofit entity under state law.²¹

7. The record establishes that RVCR was not incorporated as of June 15, 2001, the date on which it filed its captioned application. Specifically, evidence submitted by WTL shows that RVCR was not incorporated until May 3, 2004 and that it still has not completed all the requirements for nonprofit groups conducting charitable activities in the State of Oregon.²² We note that incorporation is not always necessary.²³ However, in this case, RVCR made no showing that it is an unincorporated entity. Rather, RVCR appears to rely solely on its 2001 incorporation to demonstrate compliance with Section 73.853, but, as discussed above, it was not incorporated when it filed its application, as required by the Rule. Accordingly, pursuant to Sections 73.853 of the Rules, as well as Section 397(6) of the Act, and the explanation provided in the *LPFM Report and Order*, RVCR did not meet the basic qualifications for a new LPFM station authorization at the time of filing. Thus, we find that the RVCR application must be dismissed as having been inadvertently accepted for filing.²⁴

¹⁶ See Instructions for FCC Form 318, Section II, Question 2. See also FCC Form 318, Section II, Question 2.

¹⁷ *LPFM Report and Order*, 15 FCC Rcd at 2215.

¹⁸ 47 U.S.C. § 397(6).

¹⁹ *LPFM Report and Order*, 15 FCC Rcd 2205 at ¶ 20, n. 40. See also Instructions to FCC Form 318, Section II, Question 2(b).

²⁰ *Id.* at paras. 18, 19. See also 47 U.S.C. § 397(6)(A).

²¹ The Commission restricted the initial LPFM filing windows to "local" applicants. 47 C.F.R. § 73.853(b). See also, *LPFM Report and Order*, 15 FCC Rcd at 2215.

²² WTL Supplement to Objection at Attachments. See also http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.login Registry No. 217199-92 and http://www.doj.state.or.us/cgi-gin/charigroup_db_results.pl.

²³ As stated *supra* at para. 6, an LPFM applicant may be registered or otherwise recognized as a nonprofit educational entity under state law.

²⁴ Because, as discussed below, the RVCR application will be dismissed because the applicant was not in existence at the time that its application was filed, we need not address WTL's claim that RVCR misrepresented in its application the year in which it was incorporated.

8. *LPFM Selection Process.* Before applying the LPFM mutually exclusive selection procedure preference to determine the number of merit points to be awarded to each applicant, we first ascertain the basic eligibility of the applicants. In order to further our diversity goals and foster local, community-based service, we do not allow any broadcaster or other media entity subject to our ownership rules to control or to hold an attributable ownership interest in an LPFM station or enter broadcast-related operating agreements with an LPFM licensee.²⁵ Additionally, to foster the local nature of LPFM service, we have limited eligibility to local entities during the first two years that LPFM licenses are available.²⁶ Based on the record before us, we conclude that WTL and Beaupre are each qualified to hold an LPFM authorization.

9. Mutually exclusive LPFM applications filed by qualified applicants are subject to the comparative selection procedures set forth in Section 73.872 of the Rules.²⁷ This procedure awards a maximum of three points based on three criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which LPFM spectrum has been allocated, with the applicant with the highest points awarded named the tentative selectee:²⁸

- Each applicant that certified that it has had an *established community presence of at least two years' duration* is awarded one point. An applicant is deemed to have an established community presence if, for a period of at least two years prior to application, the *applicant* has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna.
- An applicant that has *pledged to operate at least 12 hours per day* is awarded one point.
- An applicant that has *pledged to originate locally at least eight hours of programming per day* is awarded one point. For purposes of this criterion, local origination is defined as the production of programming within 10 miles of the reference coordinates of the proposed transmitting antenna.²⁹

10. Under this LPFM comparative selection process, the applicants here are awarded the following points:

- *Established Community Presence.* WTL is not entitled to a point because, as discussed above, it failed to submit the required documentation supporting its certification that, for a period of at least two years prior to the filing date of its application, it has existed as an educational institution or organization and has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna. Beaupre is not entitled to a point because it has not so certified.³⁰

²⁵ See 47 C.F.R. § 73.860.

²⁶ See 47 C.F.R. § 73.853(b). The *Third Report and Order* amends this rule section. Pursuant to the amended 47 C.F.R. § 73.853(b), "[o]nly local applicants will be permitted to submit applications." The amended rule takes effect on March 17, 2008.

²⁷ 47 C.F.R. § 73.872.

²⁸ *Id.*

²⁹ See *id.*

³⁰ See the captioned Beaupre application at Section III, Question 1(a); see also Exhibit 7.

- *Proposed Operating Hours.* WTL and Beupre are each entitled to one point because they each have pledged to operate at least 12 hours per day.³¹
- *Local Program Origination.* WTL is entitled to a point because it has pledged to originate at least eight hours of local programming per day.³² Beupre is not entitled to a point because it has not so pledged.³³

Total Points. Accordingly, WTL is entitled to two points, and Beupre is entitled to one point. Thus, WTL is the prevailing tentative selectee in LPFM Mutually Exclusive Group No. 81. We conclude that grant of WTL's application would serve the public interest, convenience and necessity.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the April 12, 2004, Petition to Deny the application of WTL Communications, Inc. (File No. BNPL-20010615BDF) filed by Rogue Valley Christian Radio, Inc. IS HEREBY GRANTED to the extent indicated above, and IS DENIED in all other respects.

12. IT IS FURTHER ORDERED that the Informal Objection, as supplemented on January 11, 2006, to the application of Rogue Valley Christian Radio, Inc. (File No. BNPL-20010615AZN) filed by WTL Communications, Inc. IS HEREBY GRANTED to the extent indicated above, and IS DENIED in all other respects.

13. IT IS FURTHER ORDERED that the applications of Rogue Valley Christian Radio, Inc. and of Saint Anne de Beupre Educational Radio Association (File No. BNPL-20010614AGR) ARE DISMISSED.

14. IT IS FURTHER ORDERED that the application of WTL Communications, Inc. IS GRANTED.

15. IT IS FURTHER ORDERED that copies of this *Memorandum Opinion and Order* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WTL Communications, Inc., P.O. Box 1199, Merlin, Oregon 97532, and to its counsel Dan J. Alpert, Esq., 2120 North 21st Street, Suite 400, Arlington, Virginia 22201; to Rogue Valley Christian Radio, Inc., 363 Squaw Mountain Road, Selma, Oregon 97358, and to its counsel, Donald E. Martin, Esq., P.O. Box 8433, Falls Church, Virginia 22041; and to St. Anne de Beupre Educational Radio Association, 774 NE Wharton Drive, Grants Pass, Oregon 97526.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ See captioned WTL application at Question 2; see also captioned Beupre application at Question 2.

³² See captioned WTL application at Question 3.

³³ See captioned Beupre application at Question 3.