



Federal Communications Commission
Washington, D.C. 20554

July 8, 2005

DA 05-1948
In Reply Refer to:
1800B3-SS

John Crigler, Esq.
Garvey Schubert Barer
1000 Potomac Street, N.W., 5th Floor
Washington, DC 20007

In re: NEW LPFM, Cave Junction, OR
Takilma Community Assoc., Inc.
Facility ID: 134503
File No. BNPL-20010613AAS

Dear Counsel:

This letter refers to the captioned application filed by Takilma Community Association, Inc. ("TCA") for a new low power FM ("LPFM") station at Cave Junction, Oregon.¹ For the reasons set forth below, we dismiss the TCA application as patently defective.

Background/Pleadings. On August 10, 2001, Oregonians for Responsible Conservation Alliance ("ORCA") filed a "Petition to Deny"² the TCA application alleging that TCA's communications director, Mr. Jonathan Klein, and two TCA board members, Mr. Romain Cooper (who was also TCA's President) and Ms. Mary Jo Yonce, engaged in unlawful and unlicensed broadcasting in violation of Section 301 of the Communications Act. Thus, ORCA argues that TCA is not qualified to hold a LPFM authorization pursuant to Section 73.854³ of the Commission's rules.⁴ Included in TCA's response were the admissions that TCA board member Romain Cooper's involvement with unlicensed radio station Takilma Free Radio ("TFR") "was limited to two forums that he was asked to take part in," and that board member Jonathan Klein, Ph.D., "can't deny" that he may have provided "technical advice" to the unlicensed radio station's operation.⁵

On February 25, 2005, Bureau staff sent TCA a letter of inquiry ("LOI") regarding ORCA's allegations and requesting specific details of any involvement by TCA principals in any unlicensed

¹ The other applications in this mutually exclusive group (Group No. 84) Oregonians for Responsible Conservation Alliance (File No. BNPL-20010615ARE) and Cave County Christian Radio, Inc. (File No. BNPL-20010615AUA) were dismissed by Bureau staff on January 18, 2005, and March 22, 2005, respectively.

² We will treat ORCA's filing as an informal objection under 47 C.F.R. § 73.3587.

³ 47 C.F.R. Section § 73.854.

⁴ TCA filed an opposition to ORCA's objection on September 19, 2001. On September 28, 2001, ORCA filed a "Response [to] (Opposition) to Petition to Deny" which we will treat as a "reply," to TCA's opposition.

⁵ See TCA Opposition at 3-4.

broadcast operation.⁶ On April 20, 2005, James Nolan, ORCA's Vice-President submitted a letter requesting that the Commission dismiss its Petition to Deny.⁷

On April 29, 2005, TCA responded to the staff LOI. TCA asserts that although board members Klein and Cooper were not involved in the operation of TFR, Klein in 1995 or 1996 "provided informal technical advice to a member of the community . . . only subsequently [learning] that this person was affiliated with TFR."⁸ Further, TCA admits that Cooper participated in one forum in either 2000 or 2001 and another forum in 2002 which aired on TFR, but Cooper "did not participation [sic] in TFR operations, or the selection of its programming."⁹ In addition, TCA states that it was "unaware that [board member] Ms. Yonce was an announcer for TFR."¹⁰ TCA notes that Yonce's term on the TCA board ended in June 2002 and that Klein and Cooper resigned from TCA's board effective April 12, 2005, without "an acknowledgement of any wrongdoing."¹¹

Discussion. Section 632(a)(1)(B) of the Making Appropriations for the Government of the District of Columbia for Fiscal Year 2001 Act¹² provides that the Commission must "prohibit any applicant from obtaining a low power FM license if the applicant has engaged *in any manner* in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934. . . ."¹³ (emphasis added). Moreover, our records indicate that TCA certified in its FCC Form 318, Section III, Question 8, that neither the applicant nor any party to the application has engaged in any manner, individually or with other persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301.¹⁴ However, TCA subsequently admitted in its opposition that

⁶ Letter to Jonathan Klein, Ph.D., Reference 1800B3-SS (MB Feb. 25, 2005).

⁷ In keeping with clear and longstanding precedent, even where the Commission dismisses a petition to deny, it considers the merits of that petition. *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733, 3739 (1995); *Booth American Company*, 58 F.C.C.2d 553, 554 (1976).

⁸ See TCA's Response to Staff Inquiry (filed April 29, 2005) at 2. See also *Affidavit of Jonathan D. Klein, Ph.D.*, appended as Exhibit 1 to the TCA response.

⁹ See *id.* TCA states that "during the first forum in 2000 or 2001, Mr. Cooper participated in a short interview regarding general conservation issues. On September 1, 2002, Mr. Cooper participated in a second forum lasting one and one-half hours regarding a proposed national monument for forest service lands in southwest Oklahoma." *Id.* See also *affidavit of Romain Cooper*, appended as Exhibit 2 to the TCA response.

¹⁰ *Id.* Yonce used the airname "Ruby Rosemary" when on the air for TFR.

¹¹ *Id.* at 3.

¹² See Pub. L. No. 106-553, 114 Stat. 2762 (2000) ("Appropriations Act"), codified in 47 C.F.R. § 73.807; see also *Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002), *rev'd en banc*, 317 F.3d 239 (D.C. Cir. 2003).

¹³ *Id.* See also *Creation of Low Power Radio Service, Second Report & Order*, 16 FCC Rcd 8026, 8030 (2001) ("*Second Report & Order*") and *Ruggiero v. FCC*, 317 F.3d 239, 241 (D.C. Cir. 2003). In the *Second Report and Order*, the Commission indicated that "an applicant will be found ineligible to hold an LPM license if it has engaged in unlicensed operation regardless of whether the Commission has made a specific finding that the party has engaged in such conduct." *Second Report and Order*, 16 FCC Rcd at 8030.

¹⁴ See File No. BNPL-20010613AAS at Section III, Question 8.

Klein and Cooper were involved with unlicensed, unlawful radio station TFR.¹⁵ Accordingly, TCA appears to have made a false certification in its original application.

Section 73.854 of the Commission's rules, as amended by the *Second Report and Order*, clearly states that no party to an LPFM application may engage in any manner in the unlicensed operation of any station in violation of Section 301 of the Act. We find that the activities of the aforementioned former TCA board members with TFR's unlicensed station fall within the statutory prohibition. Klein gave technical advice; Cooper appeared on TFR programming; and Yonce worked as an announcer at the station. Even though TCA has offered to cure this defect to its application with the resignation of these board members, we find that TCA is ineligible to hold an LPFM license. Neither the Appropriations Act, the *Second Report and Order*, nor Section 73.854 permits LPFM applicants to retain their basic qualifications simply by removing the principals that participated in the unlicensed operation of a radio station.

Accordingly, pursuant to Section 73.854 of the Commission's rules and Section 301 of the Communications Act of 1934, as amended, TCA does not meet the basic qualifications for a new LPFM station authorization. For these reasons, its application (File No. BNPL-20010613AAS) IS DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING, and the ORCA informal objection and all related pleadings ARE DISMISSED as moot.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Takilma Community Association, Inc.
Oregonians for Responsible Conservation Alliance
Cave Country Christian Radio, Inc.

¹⁵ In addition, ORCA's "Reply" contains an exhibit naming another TCA board member, Mary Jo Yonce, as being a broadcaster on pirate radio station TFR. See "Reply" at Exhibit II(D).