



Federal Communications Commission
Washington, D.C. 20554

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DA 06-1480

In Reply Refer to:

1800B3-JP

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M&M Community Development, Inc.
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Dayton, OH 45415

National Lawyers Guild Center
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1840 Woolsey Street
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In re: M&M Community Development, Inc.,
Dayton Branch
(NEW) Low Power FM, Englewood, OH
Facility ID: 132271
File No. BNPL-20010122AGM

Dear Sir or Madam:

We have before us the above-referenced application filed by M&M Community Development, Inc., Dayton Branch ("M&M Dayton") for a construction permit to build a new low power FM ("LPFM") station in Englewood, Ohio. The Commission dismissed this application on July 18, 2005, as inadvertently accepted for filing.¹ M&M Dayton filed a timely Petition for Reconsideration on August 22, 2005. Also on file are the June 10, 2003, Informal Objection filed by the National Lawyers Guild Center on Democratic Communications ("NLG"), M&M Dayton's Opposition to Informal Objection filed on February 6, 2006, and NLG's Opposition to Petition for Reconsideration filed on March 1, 2006. For the reasons set forth below, the Petition for Reconsideration is granted, the application is reinstated and the Informal Objection and Opposition to Petition for Reconsideration are denied. Furthermore, M&M Dayton's application for a construction permit is granted.

DISCUSSION

M&M Dayton Petition for Reconsideration. The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.² M&M Dayton's petition alleges that the dismissal of the original application was in error because M&M Dayton was in fact a legally recognized entity in Ohio at the time of its application.

¹ *Letter to Alan Korn, Esq. and Howard M. Weiss, Esq.*, Reference 1800B3-JWR (MB Jul. 18, 2005). M&M Dayton filed its original application on January 22, 2001. On September 24, 2001, Christian Community FM ("CCF") filed an informal objection to the application. M&M Dayton filed an opposition to CCF's objection on December 31, 2001, to which CCF replied on March 14, 2002. CCF subsequently withdrew its objection to M&M Dayton's application on February 23, 2004.

² 47 C.F.R. § 1.106. See also *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

According to the Commission's rules and procedures, an LPFM applicant must certify its eligibility to own and operate such station at the time it files its application.³ This certification requires that the applicant be a non-profit educational institution, corporation or entity recognized under state law.⁴ The instruction to FCC Form 318, Section II, Question 2, Subsection 2(b) regarding non-profit educational organizations states that "[a]pplicants must be prepared to furnish supporting documentation for their statement upon request by the Commission staff." Such documentation may, for example, include a letter signed by a local attorney licensed to practice in the state where the applicant proposes to operate, the citation and text of a state statute permitting unincorporated entities, or any other official documentation showing applicant's existence as a separate legal entity.

The Commission dismissed M&M Dayton's original application because M&M Dayton was not incorporated at the time of its application. Although M&M Dayton indicated in its application that it was a not-for-profit corporation, it did not submit further evidence regarding its legal status recognized under state law. On reconsideration, M&M Dayton asserts that it was an unincorporated association recognized under Ohio state law at the time it filed its application. In support of its position, M&M Dayton submits a letter from an attorney licensed in Ohio stating that unincorporated associations are authorized by Ohio state law and that an unincorporated association is any non-profit organization that is not incorporated. M&M Dayton also references Ohio Revised Code § 1745.01.⁵ Additionally, M&M Dayton provides evidence that it "has had an active presence" in Dayton since 1995, as represented in its original application.⁶

NLG Opposition to Petition for Reconsideration. In its opposition to M&M Dayton's Petition for Reconsideration, NLG first states that M&M Dayton failed to submit any admissible evidence showing M&M Dayton's existence as a legally recognized unincorporated association at the time of application filing.⁷ As noted above, however, an applicant is required to furnish documentation only upon request. We conclude that M&M Dayton has shown it was an unincorporated association recognized under Ohio state law at the time of its application and that it was engaged in non-profit activities in Dayton since 1995, well before it filed the subject application. We believe these to be sufficient indices that M&M Dayton was a non-profit educational entity recognized under Ohio law for purposes of filing an LPFM application.

³ See Instructions for FCC Form 318, Section II, Question 2. See also FCC Form 318, Section II, Question 2.

⁴ *Id.* at paragraphs 18 and 19. See also Section 397(6)(A) of the Communications Act of 1934, as amended (the "Act"). 47 U.S.C. § 397(6)(A).

⁵ See Petition for Reconsideration, Exhibits 2 and 3. See also *Miazga v. Int'l Union of Operating Engineers*, 196 N.E.2d 324, 327 (Ohio Ct. App. 1964) ("Proper interpretation of the statute shows that it was the legislative intent in adopting the act to make unincorporated associations legal entities for all purposes of law."); Ohio Revised Code §§ 1745.02 to 1745.04.

⁶ Petition for Reconsideration, Exhibit 3 indicating that M&M Dayton has been active in youth mentoring in the Dayton area since 1995.

⁷ NLG notes that it was not served with a copy of M&M Dayton's Petition for Reconsideration. We find the failure to serve by M&M Dayton does not prejudice NLG since both its Opposition to Petition for Reconsideration and its Informal Objection will be considered. See *In re Josephine Broadcasting*, 5 FCC Rcd 3162, 3163 (1990).

NLG asserts that granting M&M Dayton an LPFM license would violate the ownership limits of Section 73.855 of the Commission's Rules⁸ (the "Rules") because M&M Dayton's parent organization, M&M Community Development, Inc. ("M&M CD"), has an interest in two other LPFM stations. While M&M Dayton's original application stated that M&M CD held a 52 percent voting and equity interest in M&M Dayton, subsequent amendments to the application have corrected this information. M&M Dayton states that as a non-profit, non-stock entity it does not have any voting or equity interests, and that, in reality, M&M CD has no ownership, equity, or voting interest in M&M Dayton. M&M Dayton characterizes its amendments as a "correction," not a report of a major change in ownership structure under Section 73.871(a) of the Rules.⁹ We accept M&M Dayton's amendments as a correction of an error under Sections 1.65 and 73.871(c)(4) of the Rules.¹⁰ M&M CD could have no equity or voting rights in M&M Dayton because the latter entity is an unincorporated association. Moreover, we note that when M&M Dayton eventually incorporated on December 12, 2001, as a non-profit, non-stock corporation, M&M CD did not have any listed equity or voting rights in M&M Dayton.

NLG contends M&M Dayton does not qualify for the attribution exception contained in Section 73.858(b) of the Rules¹¹ and, therefore, that the interests of M&M Community Development, Inc. be attributed to M&M Dayton. Section 73.858(b) of the Rules states that "[a] local chapter of a national or other large organization shall not have the attributable interests of the national organization attributed to it provided that the local chapter is separately incorporated and has a distinct local presence and mission." NLG claims that M&M Dayton cannot qualify for the exemption because it was not incorporated, much less separately incorporated, when the application was filed. Under the Rules, LPFM applicants may be unincorporated entities or organizations.¹² The *LPFM Report and Order*¹³ states that the establishment of LPFM as a noncommercial service requires that LPFM licensees comply with the eligibility requirements of Section 397(6) of the Act, which defines a "noncommercial educational broadcast station" as a station which "(A) ... is owned and operated by a public agency or a non-profit private foundation, corporation, or association..."¹⁴ The record establishes that M&M Dayton was organized separately from any national entity and had a distinct local presence and mission at the time it filed the Englewood LPFM application; it later incorporated and maintained that local presence and mission. Accordingly, we find that it is eligible for the exemption contained in Section 73.358(b) of the Rules.

Next, NLG alleges that the Commission should not reconsider that dismissal of M&M Dayton's application because the application fails to identify the citizenship, percentage of votes, and percentage of assets of all purported members. M&M Dayton's November 20, 2001, amendment to its application lists the following four officers: Stan Tompkins, Larry Brown, Brenda Reeves, and Jamita Tompkins. In its

⁸ 47 C.F.R. § 73.855.

⁹ 47 C.F.R. § 73.871(a).

¹⁰ 47 C.F.R §§ 1.65, 73.871(c)(4).

¹¹ 47 C.F.R. § 73.858(b).

¹² See 47 C.F.R. § 73.853. See also Instructions for FCC Form 318, Section II, Question 2 and FCC Form 318, Section II, Question 2 ("Organizational NCE applicants are private, non-profit entities such as non-profit foundations, corporations or associations. Individuals cannot qualify as organizational applicants.")

¹³ *Creation of a Low Power Radio Service, Report and Order*, 15 FCC Rcd 2205, 2213 (2005) ("*LPFM Report and Order*").

¹⁴ 47 U.S.C. § 397(6). See *Blue Lake Academy, Inc.*, 20 FCC Rcd 12060 (MB 2005).

original application dated January 22, 2001, M&M Dayton identified the citizenship and percentage interests of Stan Tompkins and Larry Brown. However, it did not indicate the citizenship of its listed director and officers in the November 20, 2001, amendment. Failure to report the citizenship of an applicant's principals is a defect requiring amendment, not dismissal of an application.¹⁵ M&M Dayton's February 6, 2006, Opposition to Informal Objection lists the members of its Board of Trustees as Andrew Davis, Diana Feldhaus, David Mattingly, and Patricia Moran and identifies each as a citizen of the United States.¹⁶ Accordingly, we conclude that dismissal is unwarranted in these circumstances.

The February 27, 2006, amendment reflects a complete change in ownership and control of M&M Dayton from its original application. M&M Dayton states that the change in board members was not sudden or substantial, but rather occurred gradually during the pendency of its application. Normally such change in the ownership of an LPFM applicant would be considered a major change impermissible outside of a filing window.¹⁷ However, the Media Bureau will waive Section 73.871 of the Rules¹⁸ upon a finding that the public interest would be served and no change in the organization's mission has occurred. Particularly in light of the substantial time that the application has been pending, we find that waiver of the requirements of Section 73.871 of the Rules in this case would serve the public interest.

Finally, NLG alleges that M&M Dayton lacks the character qualifications necessary to receive an LPFM license based on the above allegations and alleged misrepresentations regarding M&M Dayton's incorporation status. M&M Dayton responds that there is no evidence of deliberate misrepresentation or lack of candor. NLG has presented no probative evidence to support its allegations regarding M&M Dayton's fitness to be a Commission licensee. NLG's arguments regarding the allegedly fatal defects in M&M Dayton's proposal here have been considered and rejected above. With respect to NLG's misrepresentation allegation, it is true that M&M Dayton presented information in its original application – concerning, *inter alia*, its corporate status and ownership – that was inaccurate. Nevertheless, an essential element of misrepresentation is an intent to deceive the Commission.¹⁹ NLG has presented no evidence that M&M Dayton submitted the erroneous information with such an intent. Accordingly, although it is clear that M&M Dayton has made numerous filing errors, NLG has not established a substantial or material question of fact to warrant further inquiry into M&M Dayton's basic qualifications to hold a Commission authorization.

NLG Informal Objection. As a result of our reinstatement of the application, we must consider the NLG informal objection. Most of the allegations contained in this filing were addressed in the discussion of NLG's Opposition to the Petition for Reconsideration above.

¹⁵ See *Atlantic City Community Broadcasting*, 3 FCC Rcd 5595, 5598 (MMB 1988) and *Ecola Broadcasting Co.*, 5 FCC Rcd 2556, 2557 (MMB 1990).

¹⁶ See Opposition to Informal Objection at 5. M&M Dayton further amended its application on June 23, 2006, to reflect that each board member holds a 25% voting interest in the organization.

¹⁷ 47 C.F.R. § 871(c)(3).

¹⁸ 47 C.F.R. § 73.871. See *Center for Community Arts, Inc.*, 20 FCC Rcd 11164, 11165 (2005) (waiving 47 C.F.R. § 73.871 with respect to changes in a majority of an LPFM applicant's board of directors). See also *Creation of Low Power Radio Service, Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6763, 6772 (2005).

¹⁹ See *San Francisco Unified School District*, 19 FCC Rcd 13326, 13335 (2004) and *Liberty Productions, LP*, 16 FCC Rcd 12061, 12079-80 (2001) (substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation or otherwise raise a question as to an applicant's basic qualifications).

The NLG Informal Objection also argues that the application is defective because M&M CD, M&M Dayton's alleged "parent" organization, did not exist as a legal entity at the time of application. The Section 397(6)(A)²⁰ eligibility requirement applies only to the applicant, M&M Dayton, not to an affiliated national organization, such as M&M CD. As discussed above, M&M Dayton has established its existence as a legal entity separate and distinct from M&M CD at the time its application was filed. Accordingly, the legal status of M&M CD has no bearing on the acceptability of the M&M Dayton application.

CONCLUSIONS/ACTIONS

Accordingly, IT IS ORDERED that, the M&M Dayton Petition for Reconsideration IS GRANTED, its application is HEREBY REINSTATED and NLG's Informal Objection is DENIED. Additionally, we have evaluated M&M Dayton's proposal and we find both that it complies with all pertinent statutory and regulatory requirements and that the public interest, convenience, and necessity will be served by its grant. IT IS FURTHER ORDERED that, the application of M&M Community Development, Inc., Dayton Branch for a new Low Power FM radio station at Englewood, Ohio (File No. BNPL-20010122AGM) is GRANTED. The authorization is enclosed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Howard M. Weiss, Esquire
Alan Korn, Esquire
Christian Community Broadcasters

²⁰ 47 U.S.C. § 397(6)(A).