



Federal Communications Commission
Washington, D.C. 20554

September 27, 2006

DA 06-1924
In Reply Refer to:
1800B3-MFW

Mr. Samuel O'Brien, President
Hoyt Sherman Place Foundation
1501 Woodland Avenue
Des Moines, IA 50309

Mr. Preston Daniels
Employee & Family Resources, Inc.
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505 Fifth Avenue
Des Moines, IA 50309

Mr. Randy Henry
Florida Public Radio, Inc.
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In re: **Hoyt Sherman Place Foundation
NEW (LPFM), Des Moines, IA
Facility ID No. 134908**
Application to Assign Construction Permit
File No. BAPL-20060216AAY

Informal Objection

Gentlemen:

This letter refers to the captioned application of Hoyt Sherman Place Foundation ("Hoyt"), permittee of a new low power FM ("LPFM") station in Des Moines, Iowa, to assign the permit and sell the assets of that facility to Employee & Family Resources, Inc. ("EFR"). On March 6, 2006, Florida Public Radio, Inc. ("FPR") filed an Informal Objection to the assignment application (the "Objection").¹ For the reasons set forth below, we deny FPR's Objection and grant the assignment application.

Discussion. *Permit expiration.* In its Objection, FPR first argues that the Commission cannot grant the subject assignment application because Hoyt's construction permit for the Des Moines LPFM facility has expired. Accordingly, states FPR, there is nothing to assign. In support of this contention, FPR states that the construction permit for the Des Moines facility² was issued on February 27, 2004, and,

¹ The Objection indicates that it was served on the permittee, Hoyt. Hoyt and EFR jointly filed a Response to Informal Objection on April 28, 2006.

² File No. BNPL-20010614AFN.

pursuant to the terms of the permit itself and Section 73.3598(a) of the Commission's Rules,³ expired 18 months after that date, on or about August 27, 2005. FPR acknowledges that the Commission has granted LPFM permittees the opportunity to seek a waiver of the 18-month construction deadline, even if the requirements for "tolling" the permit have not been met,⁴ if the permittee:

demonstrates that it cannot complete construction within the allotted 18 months for reasons beyond its control, that it reasonably expects to be able to complete construction within the additional 18 months that the construction permit would provide, and that the public interest would be served by the extension.⁵

FPR states that "there is no record . . . that Hoyt ever sought a waiver to extend its [construction permit]" and that, even if Hoyt had filed an appropriate waiver request, there is no indication that the failure to construct was for reasons beyond Hoyt's control.⁶

FPR is incorrect. On August 15, 2005, Hoyt filed a request for waiver of Section 73.3598 of the Rules. Hoyt stated that it had acquired all necessary equipment to operate the station but would be unable to complete construction by the expiration date because, between the time it initially toured its proposed studio space and the time it took possession of that property, the owner had stripped the facilities down to the concrete walls, removing all bathrooms, carpeting, soundproofing, etc. Hoyt indicated that it was in the process of reinstalling those items and would be able to complete construction if granted additional time. The waiver request, which Hoyt amended on August 16, 2005, was unopposed. The Bureau staff granted the waiver and established February 27, 2007, three years from the date of the initial permit, as the expiration date of the Des Moines LPFM station's construction permit.⁷ This revised expiration date is reflected in the Commission's CDBS data base.

Waiver of Section 73.865. In its Objection, FPR also argues that Hoyt has failed to justify its request for waiver of Section 73.865 of the Commission's Rules,⁸ which prohibits all but involuntary and *pro forma* transfers and assignments of LPFM stations.

In the *Second Order and Further Notice*, the Commission examined the issue of allowing LPFM permittees and licensees to assign their authorizations, which had been prohibited in the *Report and Order* authorizing and instituting the LPFM service.⁹ The Commission stated that, while it considered the parameters under which LPFM stations may be transferred or assigned, it would delegate to the Media

³ 47 C.F.R. § 73.3598(a).

⁴ *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rule Making, 20 FCC Rcd 6563, 6574 (2005) ("*Second Order and Further Notice*").

⁵ *Id.*

⁶ Objection at 2.

⁷ *Letter to Gregory P. Page, Esq.*, Reference 1800B-IB (MB Sep. 13, 2005).

⁸ 47 C.F.R. § 73.865.

⁹ *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000); *see also* 47 C.F.R. § 73.865 (LPFM authorizations may not be transferred or assigned except in cases of involuntary or *pro forma* transfers or assignments).

Bureau the authority to waive Section 73.865 of the Rules “upon a determination that such waiver will maximize spectrum use for low power FM operations.”¹⁰ The Commission listed several circumstances in which waiver might be appropriate,¹¹ cautioning that the list was not exhaustive but that, “until we have further considered the transferability issue, we do not believe that waiver is appropriate to permit the for-profit sale of an LPFM station to any entity or the transfer of an LPFM station to a non-local entity or entity that owns another LPFM station.”¹²

In the application, Hoyt indicates that it “has determined that the New LPFM [station] should be owned and operated by a compatible local organization rather than by [Hoyt]” and requests waiver of Section 73.865 of the Rules.¹³ The parties claim that the proposed transaction meets all of the conditions set forth in Paragraph 20 of the *Second Order and Further Notice*, because: (1) no payment has been made or will be made in connection with the transaction;¹⁴ (2) the assignment is to a local entity which has its headquarters in Des Moines, within 10 miles of Hoyt’s headquarters; and (3) neither EFR nor its officers or board members have any other media interests and “all are in compliance with all other requirements of an LPFM permittee such as U.S. citizenship.”¹⁵

In its Objection, FPR argues that Hoyt has failed to justify its request for waiver of Section 73.865 of the Rules. Based on the illustrative list set forth in the *Second Order and Further Notice*, FPR argues that there has been no change in Hoyt’s governing board, there is no partnership between the assignor and assignee, and this is not an instance of a licensee’s inability to continue operations, as the transaction involves an unbuilt construction permit and there are no operations to continue. The three factors addressed by the parties in the waiver request are “all well and good,” states FPR, but they are insufficient to support a waiver of Section 73.865 of the Rules.¹⁶

In opposition, Hoyt and EFR argue that Hoyt has, in fact, justified a waiver of Section 73.865. They reference the language in Attachment 4 to the application that Hoyt had determined that the new LPFM station should be “owned and operated by a compatible local organization” rather than by Hoyt. This determination, they state, was:

¹⁰ *Second Order and Further Notice*, 20 FCC Rcd at 6571 ¶ 20.

¹¹ The Commission stated that:

For example, waiver may be appropriate, assuming the public interest would be served, in certain circumstances: a sudden change in the majority of a governing board with no change in the organization’s mission; development of a partnership or cooperative effort between local community groups, one of which is the licensee; and transfer to another local entity upon the inability of the current licensee to continue operations. This is not an exhaustive list of circumstances appropriate for waiver.

Id.

¹² *Id.*

¹³ File No. BAPL-20060216AAY, Attachment 4.

¹⁴ The parties indicate that EFR is paying the expenses related to the filing of the assignment application. *Id.*

¹⁵ *Id.* at 2.

¹⁶ Objection at 5.

Based primarily on the economic demands of construction and operation of the New LPFM [station] which demands could be better met by an organization such as EFR which is larger, has more broad-based community support and, consequently, more resources available to it to provide local programming, information and public service opportunities of the type originally envisioned by Hoyt. Hoyt is a limited-purpose entity with finite resources which its Board has determined must be directed to other priorities. Hoyt believes EFR is better situated to provide the local market with a community-oriented broadcast alternative of the variety and content Hoyt had intended.¹⁷

Hoyt and EFR also state that the application meets the criteria set forth in Paragraph 20 of the *Second Order and Further Notice*.

Hoyt and EFR amended the assignment application on May 8, 2006, to supply additional information bearing on the request for waiver. They indicate that the “Hoyt Sherman Place Foundation” is the organization created to seek and provide funding for Hoyt Sherman Place, a museum and performing arts center built in 1877 by prominent local businessman Hoyt Sherman. When Hoyt originally filed the application, it believed “that operation of the LPFM station could facilitate both public awareness of Hoyt Sherman Place and its event offerings, as well as being an additional tool to augment the fundraising activities of [the Hoyt Sherman Place Foundation].”¹⁸ Subsequently, Hoyt determined that the costs involved in constructing and operating the station would detract from its core responsibilities and “create a drain on its personnel and financial resources.”¹⁹ It therefore agreed to convey the LPFM permit to EFR, “an early supporter of the LPFM concept and of HSPF’s efforts to provide local, community oriented programming.”²⁰

We believe that the statement in the assignment application that Hoyt “has determined that the New LPFM [station] should be owned and operated by a compatible local organization rather than by [Hoyt]” is undocumented and too vague and general to justify a waiver of Section 73.865, even under the flexible standard set forth in the *Second Order and Further Notice*. Nevertheless, the opposition pleading and the May 8, 2006, amendment to the application clearly indicate that Hoyt seeks to assign the Des Moines LPFM permit because it cannot afford to build and operate the station. This ground is sufficient under the *Second Order and Further Notice* to justify waiver of Section 73.865. Additionally, the permit is to be assigned for no consideration, and Hoyt and EFR have demonstrated that EFR is a local entity qualified to hold an LPFM authorization.

Moreover, we have reviewed the assignment application. We find that it otherwise complies with all statutory and regulatory requirements, that EFR is qualified to own and operate the Des Moines LPFM station, and that approval of the application will further the public interest, convenience, and necessity.

¹⁷ Response to Informal Objection at 2.

¹⁸ File No. BAPL-20060216AAY, May 8, 2006 amendment, Exhibit 1.

¹⁹ *Id.*

²⁰ *Id.*

Accordingly, the March 6, 2006, Informal Objection filed by Florida Public Radio, Inc. IS DENIED, Section 73.865 of the Commission's Rules IS WAIVED, and the application (File No. BAPL-20060216AAY) to assign construction permit No. BNPL-20010614AFN from Hoyt Sherman Place Foundation to Employee & Family Resources, Inc. IS GRANTED. The authorization is enclosed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Russell C. Powell, Esq.
G. Thomas Sullivan, Esq.
Gregory P. Page, Esq.