



Federal Communications Commission
Washington, D.C. 20554

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DA 06-1925
In Reply Refer To:
1800B3-JWR

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In re: **(NEW), Low Power FM, Columbus, OH**
Facility ID No. 132332
File No. BNPL-20010122AFS
Application for Construction Permit

Petition to Deny & Informal Objection

Gentlemen:

We have before us the above-referenced January 22, 2001, application filed by M&M Community Development, Inc., Columbus Branch ("M&M") for a construction permit to build a new low power FM ("LPMF") station in Columbus, Ohio. Also before us are the Bruce H. Klemesrud and Sarah Marie Klemesrud Foundation ("Klemesrud") September 18, 2001, Petition to Deny ("Klemesrud Petition") and the June 10, 2003, National Lawyers Guild Center on Democratic Communications ("NLG") Informal Objection ("NLG Objection"), both directed to the subject application, as well as related responsive pleadings.¹ For the reasons set forth below, the NLG Objection is granted to the extent indicated, the subject application is dismissed, and the Klemesrud Petition and Motion to Strike and the M&M Motion for Leave are dismissed as moot.

¹ M&M filed an opposition to the NLG Objection on October 3, 2005, and an Opposition to the Klemesrud Petition on December 31, 2001. Also on file is the Klemesrud January 11, 2002, "Motion to Strike Opposition to Petition to Deny" (the "Motion to Strike"); M&M filed an Opposition to the Motion to Strike on January 24, 2002, to which Klemesrud filed a Reply on March 12, 2002. Additionally, M&M filed a "Motion for Leave to File Surreply" (the "Motion for Leave") and accompanying "Surreply" on April 12, 2002.

In its Objection, NLG states, among other things, that the M&M application violates section 73.853(b) of the Commission's Rules (the "Rules").² Specifically, NLG states that the subject application is defective because M&M's proposed transmitter site is more than 10 miles from M&M's headquarters and more than 10 miles from the residences of 75% of its board members (the "10 Mile Rule").³

Section 73.853(b) of the Rules ("Licensing Requirements and Service") provides, in pertinent part, that:

(b) only local applicants will be permitted to submit applications [for low power FM stations] for a period of two years from the date that LP100 and LP10 stations, respectively, are first made available for application. For the purposes of this paragraph, an applicant will be deemed local if it can certify that:

(1) the applicant, its local chapter or branch is physically headquartered or has a campus within 16.1 km (10 miles) of the proposed site for the transmitting antenna; or

(2) it has 75% of its board members residing within 16.1 km (10 miles) of the proposed site for the transmitting antenna.

In its Opposition to the NLG Objection, M&M concedes that the location of its proposed transmitter site was more than 10 miles from its headquarters, and that the subject application therefore did not comply with 73.853(b) at the time the application was filed.⁴ In explanation, M&M states that, prior to the relevant filing window, M&M's consulting engineer had located an initial site that complied with both the LPFM spacing requirements and the 10-Mile Rule. M&M states that when the Commission implemented the spacing provisions affording protection to third adjacent channels,⁵ the initial site became no longer suitable, and the engineer located an alternate site. The M&M application specified

² 47 C.F. R. § 73.853(b).

³ NLG attaches printouts from a service entitled "Geocode.com" indicating that M&M's headquarters at 32 Brunson Avenue, Columbus, Ohio, is 13.82 miles from the proposed transmitter site. It also indicates that M&M principals Kimberly Lee Minor and Marc Minor, who reside at the Brunson Avenue address, live more than 10 miles from the transmitter site, and that M&M principal Greg Dukes, whose address is 5394 Meadow Court, Columbus, Ohio, resides 16.1 miles from the proposed transmitter site. M&M does not take issue with those distances.

⁴ In Section II, Item 4(a) of FCC Form 318 ("Application For Construction Permit For A Low Power FM Broadcast Station") M&M originally certified that it was "community based" in that it is physically headquartered or has a campus within 10 miles of its proposed transmitter site and that 75% of its board members resided within 10 miles of the proposed transmitter site. It affirmed that certification in amendments filed on November 20 and December 18, 2001. However, in an amendment filed on April 16, 2002, prior to NLG's Objection, M&M admitted that it could not certify that that it is physically headquartered or has a campus within 10 miles of its proposed transmitter site and that 75% of its board members resided within 10 miles of the proposed transmitter site. It therefore stated that it no longer wished to claim a comparative point for "Established Community Presence." M&M requested a waiver of the basic eligibility requirement contained in Section 73.853(b), arguing that: (1) its headquarters and the residence of its sole director were 11 miles from the proposed transmitter site; (2) the applicant is based in Columbus, its director is a long-time Columbus resident, and its programming will serve Columbus; and (3) its non-compliance was inadvertent.

⁵ See *Creation of Low Power Radio Service, Second Report & Order*, 16 FCC Rcd 8026 (2001).

that new site. While the new site complied with the new spacing provisions, M&M states that the engineer, by “inadvertent oversight,” failed to recalculate the distances of the new site to determine if it complied with the 10 Mile Rule, which it did not. As a consequence, the subject application, as filed, certified M&M was “community based,” thereby complying with 73.853(b), when, in fact, it did not so comply.

M&M argues that, notwithstanding this oversight, its application should not be considered defective. It points out that the Commission adopted the local residency requirement and the 10-Mile Rule in an effort to establish LPFM as a community-based, local broadcast service. M&M argues that (1) each of its principals reside, at most, 16.5 miles from its proposed transmitter site; (2) its principals all live in Columbus, Ohio, the proposed community of license; (3) M&M’s headquarters are located in Columbus; and (4) its proposed transmitter site is located in downtown Columbus. These “key factors,” states M&M, mitigate the “slight variance” from the requirements of the Rules, especially given M&M’s good faith efforts to comply with the third-adjacent-channel transmitter site restrictions.⁶

The Commission adopted and intended the 100-Watt LPFM service to be a truly community-based broadcast service. It stated that, given the small coverage areas of LPFM stations, and the intention that the particular needs and interests of these small areas be served, local familiarity is more significant than for stations serving larger populations.⁷ The Commission attempted to facilitate this “local familiarity” by requiring that, for LPFM filing windows opened within two years after the opening of the first LPFM filing window:

[a]ll LPFM applicants must be based within 10 miles of the station they seek to operate. This means that the applicant must be able to certify that it or its local chapter or branch is physically headquartered, has a campus, or has 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna. We chose the 10-mile distance as proportionate to most stations’ likely effective reach. We are concerned that a larger distance, in many areas of the country, could lead to ownership outside the bounds of the stations real community and the people they will actually serve.⁸

The Commission did not, however, indicate that it would deviate from or be willing to waive the 10-mile distance requirement in circumstances in which the principals and headquarters are, as claimed here, within the proposed community of license but more than 10 miles from the transmitter site.

We disagree with M&M’s description of the defects in its proposal as a “slight variance” from the requirements of Section 73.853(b). M&M’s proposal met none of the provisions of the rule, and locations in excess of three and six miles beyond the geographic parameters specified in the rule are not minor deviations. Moreover, we believe it inappropriate to countermand the Commission’s statement that LPFM applicants be headquartered or have 75 percent of its principals residing within the station’s “likely

⁶ M&M Opposition to Informal Objection at 3.

⁷ See *Creation of a Low Power Radio Service, Report & Order*, 15 FCC Rcd 2205, 2219 (2000) (“*Report and Order*”). In recognition of the small areas served by LPFM stations, the Commission also exempted LPFM stations from the requirement that a minimum field strength of 70 dBμ (3.16 mV/m) be provided over the entire principal community to be served. See 47 C.F.R. §§ 73.315, 73.801. Columbus has a geographic land area of 225.9 square miles. See <http://www.columbusinfobase.org/areas/cityof.asp>

⁸ *Report and Order*, 15 FCC Rcd at 2219.

effective reach,” and we will not rule that a headquarters office located or principals residing anywhere in the proposed community of license, irrespective of the distance from the transmitter location, will satisfy the requirement that an LPFM applicant be “community based.”⁹

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.¹⁰ Although M&M did not file its request for waiver of Section 73.853(b) until nearly fifteen months after it filed the subject application, we have afforded the waiver request the "hard look" called for under *WAIT Radio*.¹¹ We find that the facts and circumstances presented are not sufficient to demonstrate that waiver, rather than strict application, of Section 73.853(b) would further the public interest.¹² Accordingly, M&M’s request for waiver of this rule IS DENIED.

Based on the above discussion, we find that the subject application does not comply with Section 73.853(b) and was therefore inadvertently accepted for filing. Accordingly, the NLG Objection IS GRANTED to the extent indicated herein, and the M&M application (File No. BNPL-20010122AFS) IS HEREBY DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING.¹³ Additionally, the Klemesrud Petition to Deny and “Motion to Strike Opposition to Petition to Deny” and the M&M “Motion for Leave to File Surreply” ARE DISMISSED AS MOOT.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁹ Neither will we entertain waiver requests based on a showing that the headquarters location or principals’ residences are within the proposed station’s predicted coverage area utilizing either the standard prediction methodology of 47 C.F.R. § 73.313 or alternative prediction methodologies. The “10-mile Rule” is, as the Commission indicated, a “simple, straightforward requirement” for ensuring that LPFM applicants are based in the local community. *Report and Order*, 15 FCC Rcd at 2220.

¹⁰ *Columbia Communications Corp. v. FCC*, 832 F.2d 139, 192 (D.C. Cir. 1987) (quoting *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968 (*per curiam*)).

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹² *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900-01 (D.C. Cir. 2004).

¹³ Because the dismissal of the M&M application is premised on its eligibility to be an LPFM licensee under Section 73.853(b), we need not address the remainder of NLG’s allegations or those of Klemesrud.