



Federal Communications Commission
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DA 07-1928

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In Reply Refer to: 1800B3-LAS

Mr. Brian Hamilton
Wisconsin Academy
N2355 Duborg Road
Columbus, WI 53925

In re: Wisconsin Academy
Columbus, Wisconsin
Facility ID No. 132511
File No. BNPL-20010122AND

**Application for New LPFM Station
Petition for Reconsideration**

Dear Mr. Hamilton:

We have before us a Petition for Reconsideration ("Petition") filed October 8, 2003, by Wisconsin Academy. Wisconsin Academy seeks reconsideration of the September 3, 2003, action of the Audio Division, Media Bureau dismissing the above-captioned application of Wisconsin Academy ("Application") for a new Low Power FM ("LPFM") station in Columbus, Wisconsin, as unacceptable for filing.¹ For the reasons set forth below, we deny the Petition.

Background. Wisconsin Academy participated in the first round of the LPFM filing windows. Those filing windows permitted only local applicants to apply for new LPFM stations and specifically limited each non-governmental applicant to a single application filing.² As noted in the *LPFM Window Notice*, this filing limitation was based on Section 73.855(b)(1) of the Commission's Rules (the "Rules"), which prohibits any party except government, public safety and transportation organizations from holding an attributable interest in more than one LPFM station.³ The *LPFM Window Notice* further stated that a second application filed by an applicant in the window would be treated as a conflicting application subject to dismissal under Section 73.3518 of the Rules.⁴

To demonstrate its compliance with this particular restriction, Section II Item 5(a) of FCC Form 318, the LPFM Application form, requires each applicant to certify that, "no party to this application has an attributable interest in any other low power FM broadcast station." Wisconsin Academy responded "No" to Item 5(a) and submitted an exhibit. In its exhibit, Wisconsin Academy acknowledged that three of the seven listed directors, Wendell Springer, Meredith Burrington, and Merlyn Bass, "each has an

¹ *Letter to Donald E. Martin, Esq.*, Ref. No. 1800B3-AED (MB Sept. 3, 2003) ("*Letter Decision*").

² *Low Power FM Filing Window*, Public Notice, 15 FCC Rcd 24817 (MMB 2000) ("*LPFM Window Notice*").

³ 47 C.F.R. § 73.855(b)(1) (For a period of two years from the date that the LPFM stations are first made available for application, a party may hold an attributable interest in no more than one LPFM station).

⁴ 47 C.F.R. § 73.3518. *See also* 47 C.F.R. § 73.801 (making Section 73.3518 applicable to LPFM stations).

interest in other applications for LPFM stations.” Wisconsin Academy further stated that, should any of the other LPFM applications be granted, the affected director “will recuse himself from participating in activities related to the governance and operation of this applicant’s LPFM station.”

Staff analysis confirmed that three of the parties to the Application were also parties to multiple applications filed during the LPFM filing window. Because three of the Wisconsin Academy directors were listed as parties on more than one LPFM application, the *Letter Decision* determined that, at the time of filing, the Application was not acceptable.⁵ The *Letter Decision* found the recusal language did not cure the “one application” filing limitation and dismissed the Application in accordance with the procedures stated in the *LPFM Window Notice*.

Discussion. 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.⁶ In its Petition, Wisconsin Academy claims that the *Letter Decision* was in error because it ignored a relevant exception to the attribution rules that had been adopted in the *LPFM Report and Order*.⁷

We disagree. Wisconsin Academy relies on an exemption that applies in two very limited factual contexts, neither of which is applicable here. Regarding the first context, the *LPFM Report and Order* states that the exception will apply where “certain officers and directors of the parent of an LPFM applicant or licensee . . . hold otherwise attributable interests in a broadcast licensee or other media entity subject to our ownership rules without making the LPFM applicant ineligible.”⁸ A party’s otherwise attributable interests in an existing media entity will be exempted provided two conditions are met: (1) the duties and responsibilities of the officer or director are wholly unrelated to the LPFM station, and (2) the officer or director recuses himself or herself from consideration of any matters affecting the LPFM station. Second, the Commission extended the exemption in the LPFM context “to officers and directors of the LPFM applicant or licensee itself, if that entity is a multifaceted organization, such as a university,” and the two conditions are met: (1) the duties and responsibilities of the officer and director are wholly unrelated to the LPFM station, and (2) the officer and director recuses himself or herself from consideration of any matters affecting the LPFM station.⁹ Here again, provided the two conditions are met, a party’s otherwise attributable interests in an existing media entity will not be attributed to the LPFM applicant.

The Wisconsin Academy situation is factually distinguishable from that contemplated by the discussion in the *LPFM Report and Order*. The exception was patterned after a commercial attribution rule exception,¹⁰ and was aimed at exempting certain existing attributable media interests held by certain officers and directors that would otherwise violate the cross- and multiple-ownership bans, so to “avoid

⁵ *Letter Decision* at 1.

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

⁷ *Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2224-25 (2000) (“*LPFM Report and Order*”).

⁸ *Id.* at 2224-25 (emphasis added).

⁹ *Id.* (emphasis added).

¹⁰ *Id.* See 47 C.F.R. § 73.3555 Note 2(h).

making ineligible entities that will serve the purposes of this service well.”¹¹ Wisconsin Academy’s attempt to use this attribution exemption for conflicting application filing purposes is misplaced. Wisconsin Academy further ignores the Commission’s explicit monition that “these exceptions are narrow in scope.”¹²

Section 73.3518 of the Rules is designed to prevent the filing of multiple applications, “not all of which can be granted.”¹³ Here, Wisconsin Academy submitted conflicting LPFM applications. For example, an application for a new LPFM station in Rice Lake, Wisconsin, filed on January 18, 2001, by Meadow Creek Christian Radio Corporation, also listed Wisconsin Academy director Wendell Springer as a party.¹⁴ Thus, when Wisconsin Academy filed its Application on January 22, 2001, the staff properly concluded that the application could not be accepted because Mr. Springer was listed as a party to both applications, in violation of Section 73.855(b)(1) of the Rules.¹⁵ The Application violated the LPFM filing requirements as articulated in the *LPFM Window Notice* and was appropriately dismissed. Because Wisconsin Academy has failed to show material error in the dismissal of its LPFM Application, its Petition will be denied.¹⁶

Conclusion/Actions. For the above stated reasons, the Petition for Reconsideration filed by Wisconsin Academy is DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Donald Martin, Esq., Counsel for Wisconsin Academy

¹¹ *LPFM Report and Order*, 15 FCC Rcd at 2225. By way of example, the *LPFM Report and Order* states that, if a director of a “full power broadcaster were to act as an officer of the LPFM [station], the director would be attributed with both stations and would violate the [cross-ownership] ban.” *Id.* at 2224.

¹² *Id.* at 2225.

¹³ *Open Media Corporation*, 8 FCC Rcd 4070, 4073 (1993) (citing *Valley Broadcasting Co.* 58 RR 2d 945, 948 (1985)). Section 73.3518 of the Rules forbids the simultaneous prosecution of two applications both of which cannot be granted because they are inconsistent on their face or in the context of other rules.

¹⁴ File No. BNPL-20010118AAJ. The Rice Lake, Wisconsin LPFM construction permit application was granted on December 10, 2001, and the license application (File No. BLL-20030609AAV) was granted on June 30, 2003.

¹⁵ Additionally, an LPFM application for Milton, Wisconsin, filed by Woodland Educational Radio on January 22, 2001, also listed Wisconsin Academy director Meredith Burrington as a party (File No. BNP-20010122ADM). An LPFM application for Neenah, Wisconsin, filed by Fox Valley Adventist Broadcasting, Inc. on January 22, 2001, also listed Wisconsin Academy director Merlyn Bass as a party (File No. BNPL-20010122AAAG).

¹⁶ See *Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004).