



Federal Communications Commission  
Washington, D.C. 20554

October 31, 2007

**DA 07-4475**

*In Reply Refer to:*

1800B3-MFW/JP

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Caribbean Festival Association, Inc.  
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In re: Caribbean Festival Association, Inc.  
(New) LPFM, St. Petersburg, FL  
Facility ID No. 134194  
File No. BNPL-20010615AXI

**Petition for Reconsideration**

Dear Applicant and Counsel:

We have before us a Petition for Reconsideration (the "Petition") filed by Caribbean Festival Association, Inc. ("Carifesta") seeking reconsideration of an August 6, 2004, staff action<sup>1</sup> dismissing Carifesta's above-referenced application (the "Application") for a new low power FM ("LPFM") station in St. Petersburg, Florida.<sup>2</sup> For the reasons set forth below, the Petition is denied.

**Background.** On June 15, 2001, Carifesta filed the Application. In response to Section II, Item 3.a. of its FCC Form 318 Application (Parties to the Application), Carifesta listed six officers and directors. Carifesta listed the citizenship of two of these parties to its application as "AM," signifying American citizenship, denoting the other four parties as "JA," signifying Jamaican citizenship.<sup>3</sup> Cox filed

<sup>1</sup> *Letter to Tamara Felton Dudley, Esq.*, Reference 1800B3-SLS (MB Aug. 6, 2004) ("Staff Decision").

<sup>2</sup> On September 23, 2004, Cox Radio, Inc., ("Cox"), licensee of station WSUN-FM, Holiday, Florida, by counsel, filed an Opposition to the Petition for Reconsideration (the "Opposition"), to which Carifesta filed a Reply on October 5, 2004.

<sup>3</sup> Specifically, the Application listed Carifesta's principals as follows:

Delores Glenn	AM	Director
Donald Jackson	JA	President
Michelle Jackson	JA	Director
Nanette Watson	JA	Director
Teresa Riggs	AM	Director
Trevor Davis	JA	Vice-president

The Application did not provide the address for any of Carifesta's principals, as required by the instructions to FCC (footnote continued)

a Petition to Deny the Application, arguing that the proposal appeared to violate Section 310 of the Communications Act of 1934, as amended (the “Act”).<sup>4</sup> In conjunction with its Opposition to the Petition to Deny, Carifesta amended its application. It observed in its Opposition that the Board as amended was comprised of four American Citizens and two Jamaican citizens, one of whom has pledged to recuse himself from all issues voted on by the Board. This, it claimed, results in 80 percent American ownership in Carifesta.<sup>5</sup>

The staff concluded that the amendment would not satisfy Section 310 of the Act and dismissed the Carifesta application. The Staff Decision observed that Section 310(b) prohibits the grant of a broadcast license to any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives . . .”<sup>6</sup> and stated that the fact that the Jamaican citizens are legal permanent residents of the United States did not qualify them to own or control a radio station under Section 310 of the Act. Citing *BBC License Subsidiary L.P.*,<sup>7</sup> the staff noted that compliance with Section 310 is determined by means of a two-prong analysis, which considers both voting interests and ownership interests. The Staff Decision held that recusal of one Board member from voting on matters pertaining to the proposed LPFM station met only the voting-interest criterion for compliance with Section 310 and did not change that Board member’s ownership interest in Carifesta. The Staff Decision concluded that, even after the application was amended, the Board was still comprised of 33 percent Jamaican ownership, in violation of Section 310 of the Act. Carifesta filed a timely Petition for Reconsideration of the Staff Decision on September 7, 2004.

**Discussion.** The Commission will consider a petition for reconsideration only 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 petitioner’s last opportunity to present such matters.<sup>8</sup> In its Petition,

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Form 318, and it provided no response to the columns in Item 3.a. regarding “Percentage of Votes” or “Percentage of Total Assets.” See Application, Section II, Item 3.a.

<sup>4</sup> Section 310(b)(3) of the Act prohibits grant of a broadcast license to any corporation of which more than one-fifth of the capital stock is owned of record *or* voted by aliens or their representatives . . . .” 47 U.S.C. § 310(b)(3) (emphasis added).

<sup>5</sup> The amended Application disclosed the following ownership structure:

Delores Glenn	US	Director	20% Voting Interest
Donald Jackson	JA	President	20% Voting Interest
Michelle Jackson	US	Director	20% Voting Interest
Nanette Watson	US	Director	20% Voting Interest
Teresa Riggs	US	Director	20% Voting Interest
Trevor Davis	JA	Director	0% Voting Interest

Carifesta explained that it had erroneously listed Nanette Watson as a Jamaican citizen in its initial application, when in fact she was an American citizen, and that Michelle Jackson had become an American citizen after the application was filed. See Application, 2004 Amendment, Exhibit 1.

<sup>6</sup> *Staff Ruling* at 2, citing 47 U.S.C. § 310(b).

<sup>7</sup> *BBC License Subsidiary L.P.*, Memorandum Opinion and Order, 10 FCC Rcd 10968 (19945).

<sup>8</sup> 47 C.F.R § 1.106, and *WWIZ, Inc.*, Memorandum Opinion and Order, 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).

Carifesta argues that the staff is “simply wrong on the law.” It states that it is a registered Florida non-profit corporation and has no capital stock. Carifesta contends that, although ownership and voting interests are considered independently, “unless there is an investment in return for an expectance to share in the profits through voting or non-voting stock or a limited partner’s membership, there is no investor and there is no ownership under either prong.”<sup>9</sup> No board member, according to Carifesta, has an “equity interest” in a non-profit, non-stock corporation, and the only measurement of a cognizable interest in a noncommercial entity for Section 310(b) purposes is the board member’s vote measured against the total number of board members. In this case, with five Board members and one voting alien, only 20 percent of Carifesta’s voting interests are held by aliens. Carifesta asserts that the Commission should ignore the presence of Mr. Davis on its governing Board because, due to his agreement “to recuse himself from any matters affecting the LPFM station,”<sup>10</sup> he will have no voting interest.<sup>11</sup> Thus, Carifesta maintains that its ownership structure complies with Section 310(b)(3) of the Act.<sup>12</sup>

We disagree. While the Commission has broad authority to craft its attribution rules to promote ownership policies, including rules to implement LPFM multiple and cross-ownership restrictions, it lacks authority to exclude positional interests for the purpose of applying the statutorily mandated alien ownership provisions.<sup>13</sup> Thus, Carifesta’s reliance on Section 73.858(a) of the Rules is misplaced. That rule, by its terms, merely provides a mechanism to permit an LPFM applicant or licensee to insulate certain positional interests for the purpose of satisfying LPFM ownership restrictions.<sup>14</sup>

Second, this approach is consistent with prior Commission policy. The Commission anticipated this very issue when it instituted the LPFM service. In light of questions regarding the application of statutory foreign ownership requirements to LPFM applicants and licensees, the Commission stated that:

We recognize that many entities that will hold LPFM licenses will be non-stock corporations or other non-stock entities, and that non-stock entities do not have “owners” in the traditional sense. As the Commission has explained, the specific citizenship requirements of Section 310(b) reflect a deliberate judgment on the part of Congress to

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<sup>9</sup> Petition at 2.

<sup>10</sup> Petition at 1.

<sup>11</sup> Carifesta states that the recusal of Mr. Davis, is expressly contemplated by Section 73.358 of the Rules, *see* 47 C.F.R. § 73.858(a).

<sup>12</sup> *Id.* at 2-3. Carifesta acknowledges that “officerships can be cognizable but do not affect ownership percentages.”

<sup>13</sup> *See, e.g., Wilner & Scheiner*, Memorandum Opinion and Order, 103 FCC 2d 511 (1985), *recon. granted in part*, 1 FCC Rcd 12 (1986) (“We have no power to accord a statutory ‘exemption’ to a person holding a positional interest otherwise subject to the scope of Section 310(b) because he or she agrees as a matter of private contract not to exercise the powers inherent in that position.”), quoted in Cox Opposition at 8-9. Carifesta states that *Wilner & Scheiner* should be discounted because it discusses the law in 1985, “before these restrictions were liberalized through both statutory amendment and rule making.” Although Carifesta is correct to the extent that licensee corporations are no longer forbidden to have alien officers and directors, *see Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission’s Rules to Implement Section 403(k) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 13072 (1996), it cites no authority overturning the holding that a licensee or applicant cannot avoid a Section 310 violation simply by having an alien voluntarily recuse himself or herself from voting on the broadcast affairs of the applicant.

<sup>14</sup> 47 C.F.R. § 73.858(a).

prevent undue foreign influence in broadcasting. Thus, for purposes of determining whether a non-stock LPFM applicant or licensee complies with the statutory foreign ownership requirements, we will first consider the citizenship of those individuals who have the ability, comparable to that of a traditional owner, to influence or control the licensee. In making these determinations we will be guided by Commission precedent.<sup>15</sup>

The Commission has long treated directors of non-stock, non-profit corporations as principals “because they hold comparable relationships of personal interest and responsibility.”<sup>16</sup> As observed by the staff, Commission precedent holds that entities must demonstrate compliance with Section 310(b) of the Act on both voting and “ownership” grounds such that a principal’s agreement to recuse himself or herself from matters relating to the station will not be sufficient to demonstrate compliance with Section 310(b) of the Act if that principal’s ownership interest exceeds the statutory limit. Because Carifesta’s Petition fails to show a material error or omission in the original decision and did not raise additional facts unknown or not existing until after Carifesta’s last opportunity to present such matters it will be denied.<sup>17</sup>

**Conclusion/Actions.** For the above stated reasons, the Carifesta’s Petition for Reconsideration IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Michael Couzens, Esq.

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<sup>15</sup> *Creation of Low Power Radio Service*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208, 19244 (2000).

<sup>16</sup> *Triad Television Corp.*, 25 FCC 2d 848, 1021 (1958); *Loyola University*, 14 RR 1017 (1956).

<sup>17</sup> *See Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004).