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DA 09- 2613

In Reply Refer to:

1800B3-VMM

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Mr. Samuel L. Cilone, Jr.
Fern Creek Traditional High School Alumni Assoc.
6005A Fern Valley Road
Louisville, Kentucky 40228

In re: WXBH-LP, Louisville, Kentucky
Facility ID No. 134599
File No. BMPL-20070306ABT

Dear Mr. Cilone:

On November 23, 2009, the staff released a letter regarding the captioned application ("Application") filed by Brycc House, Inc. ("Brycc"), permittee of Station WXBH-LP, Louisville, Kentucky ("Station"), to modify the Station's construction permit to reflect the terms of a timesharing agreement between Brycc and Fern Creek Traditional High School Alumni Association ("Fern Creek"), licensee of Station WFHS-LP, Louisville, Kentucky.¹ Pursuant to Section 1.113(a) of the Commission's rules ("Rules"),² the Chief, Audio Division, Media Bureau, on his own motion, sets aside the November 23, 2009, Staff Action. This document supersedes that decision.

We have before us a pleading, styled as a "Petition to Deny" ("Petition"), filed on March 22, 2007, on behalf of Fern Creek.³ The Petition asks that we deny the Application and "rescind" Brycc's construction permit for WXBH-LP.⁴ Because the Petition was untimely, it is procedurally defective and will be dismissed. However, even if we were to consider the Petition on its merits, we would deny it for the reasons set forth below.

Background. Brycc and Fern Creek filed mutually exclusive applications for LP Channel 224 on June 15, 2001, which were granted on April 29, 2005, as consecutive time-share licenses.⁵ On January

¹ *Letter to Samuel L. Cilone, Jr.*, DA 09-2470 (MB Nov. 23, 2009) ("November 23, 2009, Staff Action").

² 47 C.F.R. § 1.113(a) (providing the staff with discretion to modify or set aside an action taken under delegated authority within 30 days of public notice of that action).

³ The Petition was filed by Samuel L. Cilone, Jr., a director and Board member of Fern Creek. While Mr. Cilone did not identify his affiliation with Fern Creek in the Objection or state his basis for standing to file, Brycc points out (and Mr. Cilone subsequently concedes in his September 11, 2008, Supplement) Mr. Cilone's affiliation with Fern Creek. Brycc filed an Opposition on July 9, 2007 ("Opposition"), and Fern Creek filed a Supplement on September 11, 2008.

⁴ Petition at 1.

⁵ File Nos. BNPL-20010615ANB (Brycc) and BNPL-20010615AUR (Fern Creek), granted on April 29, 2005. *See Broadcast Actions*, Public Notice, Report No. 45977 (May 4, 2005).

31, 2007, the parties entered into a settlement agreement that set forth a time sharing schedule and provided for shared facilities at Fern Creek's studio. On March 6, 2007, Brycc filed the Application and Fern Creek submitted an application to modify its license to reflect the terms of the settlement agreement.⁶ The Application, which included a proposal to move its transmitter to the coordinates of the shared Fern Creek transmitter site ("Timeshare Site"), was approved by the Commission on March 20, 2007, and Fern Creek's license was reissued reflecting Brycc's new site pursuant to the timesharing schedule. On March 22, 2007, Fern Creek submitted the instant Petition, and subsequently filed a supplement stating that the timeshare and facility sharing agreements had been terminated because Brycc had failed to abide by their terms.⁷

Discussion. Procedural Matter. Brycc argues that Fern Creek's pleading is defective as a "Petition to Deny," and that it should be dismissed.⁸ We agree. Because the Petition was filed two days *after* the Application had been granted, it is untimely and will be dismissed.⁹ However, notwithstanding our dismissal of the Petition as untimely, we will briefly address the merits of Fern Creek's arguments.

Substantive Matters. In the Petition, Fern Creek requests that we "thoroughly review" Brycc's qualifications as an LPFM licensee. It contends that (1) the Timeshare Site is outside the 10 mile radius required under Section 73.853 of the Rules; (2) Brycc's ownership has changed 100% since the original construction permit was issued, in violation of Section 73.865 of the Rules; and (3) Brycc does not qualify to be a LPFM licensee because it is not an educational institution, and that any educational affiliation it once had no longer exists. We reject these arguments for the reasons set forth below.

Fern Creek first argues that the Timeshare Site is located more than 10 miles from Brycc's headquarters (Brycc concedes that the Timeshare site is located 10.48 miles from its headquarters),¹⁰ in violation of the requirements set forth in Section 73.853(a) of the Rules. We disagree. That Rule states that an applicant is deemed local if it is either (a) physically headquartered within 10 miles of the proposed transmitter site (or 20 miles for applicants outside the top 50 urban markets), or (b) has 75 percent of its board residing within 10 miles (or 20 miles for applicants outside the top 50 urban markets).¹¹ Because Louisville is outside the top 50 markets,¹² Brycc's qualifications are analyzed under

⁶ File No. BMPL-20070306ABT (Brycc) and BLL-20060821ADU (Fern Creek).

⁷ Brycc notes that they are no longer co-located and that it had filed a modification application to change its location. File No. BPL-20081201ABG, granted on August 3, 2009. Brycc also stated that it would abide by the timeshare agreement and believed it was still in effect.

⁸ Opposition at 5-7.

⁹ We also note that formal petitions to deny do not lie against minor modification applications, such as this. *See* 47 U.S.C. § 309(c) and 47 C.F.R. § 73.3584; *see also Change of Community*, Report and Order 21 FCC Rcd 14212, 14220 (2006); *see also CMP-Houston KC, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656, 10660 n.31 (2008), citing *Cloud Nine Broadcasting, Inc.*, Letter, 10 FCC Rcd 11555, 11556 (1995).

¹⁰ Petition at 1.

¹¹ 47 C.F.R. §73.853(b)(1). *See Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21923 (2007) ("*LPFM Third R&O*") (modifying the ten-mile requirement to twenty miles for all LPFM applicants proposing facilities in other than the top 50 urban markets, for both the distance from transmitter and residence of board member standards).

the 20-mile standard. Accordingly, we find that the distance between the Timeshare Site and Brycc's headquarters is well within the requirements of Section 73.853(a) of the Rules.¹³ We note that Brycc's authorization has been modified to specify a new site that is also within the parameters of Section 73.853 of the Rules.¹⁴

Next, Fern Creek argues that Brycc's Board of Directors "has changed 100% since the original construction permit was issued,"¹⁵ implying that there was an unauthorized transfer of control in violation of Section 73.865 of the Rules.¹⁶ In support of its argument, it attaches the list of corporate officers and directors filed with the State of Kentucky and the pages from an unidentified FCC application with a listing of officers and directors. However, nothing in the Petition explains the significance of these documents.¹⁷ Brycc responds that the composition of the board changed gradually over time, and that any change that occurred more rapidly than allowed was inadvertent due to the rapid turnover of members.¹⁸

As we have made clear in our LPFM proceeding, a gradual change of a licensee's governing board or membership body is a permissible "insubstantial change," even if the majority of current members joined after the station's authorization was granted.¹⁹ Fern Creek has failed to provide any evidence to refute Brycc's assertion that its board changes occurred gradually. Accordingly, we will not consider this issue further. However, we remind Brycc that, under the revised Rules, if it experiences a sudden change of its governing board's majority (*i.e.*, more than a 50 percent turnover within twelve months), it is required to seek Commission approval by filing an FCC Form 316 ("short form") broadcast application.²⁰

Third, Fern Creek argues that Brycc's status as an educational organization has changed, disqualifying it to hold an LPFM license. Section 73.853(a)(1) of the Rules provides that an LPFM station may only be licensed to a nonprofit educational institution and upon a showing that the proposed station will be used for the advancement of an educational program.²¹ Brycc certified in Section 4 of its

¹² Louisville is the 53rd largest according to Arbitron Radio Market rankings, spring 2009. *See* www.arbitron.com/home/mm001050.asp?inframe.

¹³ Brycc also points out that the Timeshare Site is located within 10 miles of 75 percent of its board members, and is therefore in compliance with Section 73.853(b) of the Rules, as well. Opposition at 7.

¹⁴ *See* File No. BPL-20081201ABG, granted August 3, 2009.

¹⁵ Petition at 1.

¹⁶ *Id.*

¹⁷ *See* Petition, Ex. 3,4 (numbering provided).

¹⁸ *See* Opposition at 13-14.

¹⁹ *See LPFM Third R&O*, 22 FCC Rcd at 21917 (citing *Creation of a Low Power Radio Service*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208, 19248 (2000)).

²⁰ *See LPFM Third R&O*, 22 FCC Rcd at 21918; 47 C.F.R. § 73.865(e).

²¹ 47 C.F.R. §73.853(a)(1).

license application that it was a noncommercial educational institution, attached Articles of Incorporation showing that Brycc was incorporated in the State of Kentucky in 1999 as a noncommercial entity, and included a description of its educational programming. According to Brycc, its articles of incorporation and bylaws establish their noncommercial educational status by stating that Brycc House's purpose is to "promote creative expression, independent learning, community awareness and youth empowerment."²² Fern Creek provides no evidence demonstrating that Brycc's status has changed.²³ Accordingly, we find that Brycc remains qualified to be a LPFM licensee.

Finally, Fern Creek indicates that Brycc has breached the settlement agreement with Fern Creek with respect to the timeshare and facility sharing agreements.²⁴ However, any dispute over the use of Fern Creek's property is a private matter required to be adjudicated in a court that has jurisdiction over the property.²⁵ Accordingly, we will not consider this issue further.

Conclusion. Accordingly, pursuant to Section 1.113(a) of the Commission's rules, IT IS ORDERED that the November 23, 2009, Staff Action in this proceeding, DA 09-2470, IS HEREBY RESCINDED.

In addition, for the reasons set forth above, IT IS ORDERED, that Fern Creek Traditional High School Alumni Association's March 22, 2007, Petition to Deny IS DISMISSED.

Sincerely,

Peter H. Doyle,
Chief, Audio Division
Media Bureau

cc: Fern Creek Traditional High School Alumni Association
Brycc House, Inc.
Alan Korn, Esq.

²² Opposition at 11-12.

²³ See 47 U.S.C. § 309(d)(1); *Clear Channel Communications, Inc., et al.*, Memorandum Opinion and Order, 23 FCC Rcd 1421, 1434, (2008); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986), (Petitions to Deny and Informal Objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

²⁴ Supplement at 1-2.

²⁵ The Commission generally does not interfere with private contractual disputes "that should be solved by negotiation between the parties or in the courts." *Metromedia, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 595 (1988). See also, *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622, 8624 (1992) and *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976).