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Marilyn Welker, Director
Simply Living
2029 N. High Street, Suite A
P.O. Box 82273
Columbus, OH 43202

Paul G. Madison, Esq.
Kelley Drye & Warren LLP
3050 K Street NW
Washington, DC 20007

In re: WCRS-LP, Groveport and Columbus, Ohio
Facility ID No. 132329
File Nos. BLL-20070618ACJ
BPL-20091204AAA

Petition for Reconsideration

Dear Ms. Welker and Mr. Madison:

We have before us a Petition for Reconsideration ("Petition") filed on June 1, 2010, by Simply Living, licensee of low-power FM ("LPFM") Station WCRS-LP, Columbus, Ohio.[1] Simply Living requests reconsideration of the May 3, 2010, letter reissuing Simply Living's license for WCRS-LP with hours of operation from 3:00 p.m.–8:00 p.m. daily.[2] In the Petition, Simply Living also requests a waiver of the requirement in Section 73.872(c)(2) and (3) of the Commission's Rules (the "Rules")[3] that any modification to a time-share agreement requires the written approval of all parties to the agreement ("Waiver Request"). Finally, it asks that the Commission conduct an arbitration to resolve the disagreements between Bexley and Simply Living regarding the hours of operation for WCRS-LP and WCRX-LP. For the reasons set forth below, we deny the Petition and Waiver Request.

Background. Simply Living and Bexley were two of five mutually exclusive applicants in LPFM Group 72 ("MX Group 72") for Channel 271 (102.1 FM) in the area of Columbus and Groveport, Ohio;[4] the others were Groveport Madison Local Schools ("Groveport"), Capital University ("Capital"), and Community Refugee and Immigration Services, Inc. ("Refugee Services"). All five MX Group 72

[1] We also have before us an Opposition to Petition for Reconsideration ("Opposition") filed on June 11, 2010, by Bexley Public Radio Foundation ("Bexley"), licensee of LPFM Station WCRX-LP, Columbus, Ohio.

[2] *Simply Living,* Letter, 25 FCC Rcd 4686 (MB 2010) ("*Staff Decision"*).

[3] 47 C.F.R. §73.872(c)(2), (3).

[4] *Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications Filed in Windows I, II, and III*, Public Notice, 18 FCC Rcd 18048 (MB Aug. 28, 2003).

applicants entered into, and filed with the Commission, a Time-Share Agreement where each applicant would receive authority to operate during a specified portion of each broadcast day.[5] The Commission approved the Time-Share Agreement. While four of the five applicants received construction permits, only Bexley and Simply Living constructed and were granted covering licenses.[6]

In May 2008, Refugee Services and Groveport filed applications to assign their construction permits and, thus their operating hours, to Simply Living.[7] At the request of the applicants, the staff dismissed the applications on August 12, 2008.[8] Notwithstanding such dismissal, the staff reissued Simply Living's license to include the operating hours allocated to Refugee Services and Groveport under the Time-Share Agreement.[9] However, the *Staff Decision* found this reissuance to be "in contravention of [the Commission's] own Rules,"[10] and stated that "an agency's failure to follow its own regulations is fatal to the deviant action."[11] It also indicated that "each party to the Time-Share Agreement is bound by their operating hours and may only amend or modify those hours by a written agreement executed by all parties and submitted to the Commission."[12] Therefore, the *Staff Decision* declared the reissuance *void ab initio*, and reissued Simply Living's license with the original operating hours.[13]

The Petition consists of a Waiver Request and a request for arbitration. In the Waiver Request, Simply Living argues that the Commission should waive the requirement that any modification to a time-share agreement requires written approval of all parties to the agreement.[14] It maintains that the Time-Share Agreement is obsolete because three of the five interested parties do not currently operate

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[5] The hours are allocated under the Time-Share Agreement as follows: During the weekdays (Monday through Friday), Groveport from 6:00 a.m. to 9:00 a.m.; Capital from 9:00 a.m. to 11:00 a.m.; Bexley from 11:00 a.m. to 1:00 p.m.; Capital from 1:00 p.m. to 3:00 p.m.; Simply Living from 3:00 p.m. to 8:00 p.m.; Refugee Services from 8:00 p.m. to 1:00 a.m.; Capital from 1:00 a.m. to 6:00 a.m. On weekends (Saturday and Sunday), Groveport from 6:00 a.m. to 9:00 a.m.; Capital from 9:00 a.m. to 3:00 p.m.; Simply Living from 3:00 p.m. to 8:00 p.m.; Refugee Services from 8:00 p.m. to 1:00 a.m.; Capital from 1:00 a.m. to 6:00 a.m.

[6] Capital's application was dismissed by the Commission in 2006 without receiving a construction permit (File No. BNPL-20010122AKC). The hours allocated to Capital remain unused. Groveport's and Refugee Services' construction permits were ultimately cancelled and their call signs deleted on August 7, 2008. *See Broadcast Actions*, Report No. 46798, Public Notice, Aug. 12, 2008.

[7] File Nos. BAPL-20080512AEQ (Refugee Services) and BAPL-20080512AET (Groveport).

[8] *Broadcast Actions,* Report No. 46798, Public Notice, Aug. 12, 2008.

[9] File No. BLL-20070618ACJ (reissued Aug. 7, 2008). Simply Living originally broadcast every day from 3 p.m. to 8 p.m. After the Reissuance, it acquired Groveport's hours of 6 a.m. to 9 a.m. and Refugee Services' hours from 8 p.m. to 1 a.m. Simply Living's operating hours thus became 6 a.m. to 9 a.m. and 3 p.m. to 1 a.m. daily.

[10] "Section 73.872(c)(2) of the Rules states that, where a station is authorized pursuant to a time-sharing agreement, a change of the regular schedule set forth therein 'will be permitted only where a written agreement signed by each time-sharing permittee or licensee… is filed with the Commission….'" *Staff Decision* at 2. This Rule is also reflected in the Time-Share Agreement. *Id. See also* 47 C.F.R. § 73.872(c)(2).

[11] *Staff Decision* at 4 (citing Florida Institute of Technology v. FCC, 952 F.2d 549, 553 (D.C. Cir. 1992) ("*Florida Institute*"), *quoting* Way of Life Television Network, Inc. v. FCC, 593 F.2d 1356, 1359 (D.C. Cir. 1979)).

[12] *Staff Decision* at 3 (citing Time-Share Agreement para. 11).

[13] File No. BPL-20091204AAA. The *Staff Decision* also granted Simply Living's minor modification application to increase the height of its antenna.

[14] Petition at 1. *See* 47 C.F.R. § 73.872(c)(2), (3).

stations,[15] and a waiver will allow the Commission to help Simply Living and Bexley reach a new time-share agreement.[16] Simply Living argues that issuing a waiver will "ensure fair and equitable treatment of all [Time Share] licensees," and serve the public interest by preventing "publicly owned spectrum [from going] needlessly unused."[17]

Simply Living then requests that, after granting the Waiver Request, the Commission conduct an arbitration to allocate air time between Simply Living and Bexley because it maintains that the parties are unable to reach an agreement themselves.[18] Simply Living notes that no precedent exists for this proposal, but suggests that we "order [Simply Living] and [Bexley] to submit requests for broadcast hours for which they seek to be licensed, together with a statement which . . . might include . . . the station's current and proposed programming, noting in particular programs that are locally produced or serve the public interest."[19]

In its Opposition, Bexley argues that the Commission should not override the Time-Share Agreement, but Bexley and Simply Living should instead reach an agreement themselves.[20] Bexley maintains that unused airtime alone is not an adequate basis for reconsideration or waiver of Section 73.872(c)(2) of the Rules.[21] Additionally, Bexley argues that a waiver is not appropriate because no circumstances have changed, "grant of a waiver would undermine the policy of Section 73.872(c)(2) and (3),"[22] and there are "no unique or unusual circumstances" that call for a waiver.[23] Finally, Bexley argues that this case does not warrant arbitration and that Bexley and Simply Living should act according to the *Staff Decision*.[24]

Discussion. Reconsideration is warranted only if the Petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.[25] Simply Living does not claim that the *Staff Decision* contained errors of fact or law, and it does not present new facts or changed circumstances. Rather, it asks that we waive the provisions of Section 73.872(c)(2) and (3) of the Rules[26] in this case so

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[15] *Id.* at 6.

[16] *Id.* at 5.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 7.

[20] Opposition at 5. Bexley also suggests that the Petition may not have been timely filed because it was unable to ascertain the Petition's filing date. *Id.* at 10. This supposition is incorrect. Simply Living's June 1, 2010, Petition is timely filed *vis-à-vis* the May 3, 2010, *Staff Decision*. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[21] 47 C.F.R § 73.872(c)(2). *See also* Opposition at 6.

[22] *Id.* at 11. Bexley argues that grant of a waiver would allow Simply Living to avoid its current obligations under the Time-Share Agreement, and "would be unfair to Bexley, who also wishes to use the unused broadcast time." *Id.*

[23] *Id.*

[24] *Id.* Additionally, throughout the Opposition, Bexley discusses its difficulties in reaching an agreement with Simply Living.

[25] *See* 47 C.F.R. § 1.106.

[26] 47 C.F.R. § 73.872(c)(2), (3).

that it may alter the Time-Share Agreement without the approval of all parties involved, and then asks the Commission to arbitrate to create a schedule that divides air time between Simply Living and Bexley.

The Commission may grant a waiver for good cause shown.[27] A waiver is appropriate if (1) special circumstances warrant a deviation from the general rule, and (2) such deviation would better serve the public interest than would strict adherence to the rule.[28] Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.[29] Additionally, "the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis."[30]

We decline Simply Living's waiver request for several reasons. The Commission has created "powerful incentive[s]"[31] to encourage voluntary cooperation between time-share licensees. These include conditioning the opportunity to convert non-renewable involuntary successive license term authorizations into renewable authorizations and, as here, to apportion vacant air time among surviving time-share licensees. Thus, the Commission has clearly left with the affected parties the decision as to whether to use an arbitrator or mediator. In this regard, nothing in the rules prevents time-share licensees from agreeing to consensual dispute resolution procedures, and the Audio Division is prepared to give effect promptly to any agreement reached under these procedures that otherwise complies with the Commission's Rules. We find that a waiver of this rule is not warranted merely because Simply Living and Bexley cannot agree on the apportionment of airtime. As the Commission noted in the similar context of involuntary time-sharing arrangements, to accommodate those licensees who fail to reach universal voluntary agreements "would be rewarding such applicants' unwillingness or inability to reach such agreements."[32] We conclude that adherence to the rule best serves the public interest by safeguarding the rule's goal to promote cooperation among time-share licensees. We note that this continuing stalemate will likely ensure that neither Simply Living nor Bexley will acquire additional airtime. During the next LPFM window, new applicants, but neither of the current time-share licensees, will have the opportunity to apply for the vacant airtime.[33]

Commission arbitration is unlikely to result in the prompt resolution of this dispute. A Commission decision apportioning vacant airtime would itself be subject to administrative and judicial challenge. Finally, we note that this dispute does not involve any complex factual, technical or legal issues, the sort of circumstances in which an arbitrator could simplify the scope of the disagreement, reduce legal and engineering burdens on all parties, and facilitate an expeditious outcome. The use of significant Commission resources to resolve this simple one-issue dispute, therefore, is unwarranted.

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[27] *See* 47 C.F.R. § 1.3. *See also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990).

[28] *Id.* at 1166.

[29] *WAIT Radio*, 418 F.2d at 1157.

[30] *In the Matter of 2000 Biennial Review,* 2010 WL 2780733, (CPD July 13, 2010) (citing *WAIT Radio*, 418 F.2d at 1157).

[31] *See Creation of a Low Power Service*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21925 (2006).

[32] *Id*. at 21926.

[33] *See id.,* 22 FCC Rcd at 21927.

Ordering Clauses. For the reasons set forth above, IT IS ORDERED that the Petition for Reconsideration filed by Simply Living on June 1, 2010, is DENIED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau