



**Federal Communications Commission  
Washington, D.C. 20554**

October 27, 2010

**DA 10-2064**

*In Reply Refer To:*

1800B3-MM

Released: October 27, 2010

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In re: Mt. Zion Education Association,  
(New) LPFM, Baraboo, Wisconsin  
Facility ID No. 132405

File No. BNPL-20010122AIY

In re: Heart to Heart Educational  
Association, (New) LPFM, Beaver Dam,  
Wisconsin  
Facility ID No. 132230

File No. BNPL-20010122AFA

**Applications for Construction Permits**

**Informal Objections**

Dear Counsel:

We have before us the captioned applications for construction permits for new low-power FM (“LPFM”) stations in Baraboo, Wisconsin, and Beaver Dam, Wisconsin (collectively, “Applications”) filed by Mt. Zion Education Association and Heart to Heart Educational Association, respectively (“Applicants”). Also before us are (1) two informal objections<sup>1</sup> and a “Memorandum in Support of Informal Objection to Listed LPFM Applications” (“Memorandum in Support”) filed by National Lawyers Guild Center on Democratic Communications, The Microradio Implementation Project, and the United Church of Christ (collectively, “Lawyers Guild”),<sup>2</sup> (2) a “Joint Opposition to Informal Objections”

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<sup>1</sup> Each captioned application is a technically unrelated singleton application against which the same objection was raised. For citation purposes, we refer to each objection as “Heart to Heart Objection” and “Mt. Zion Objection” (collectively, “Objections”).

<sup>2</sup> Filed Oct. 1, 2001.

(“Joint Opposition”) filed by Applicants;<sup>3</sup> and (3) a Consolidated Opposition filed on behalf of national cable programming network Eternal Word Television Network, Inc. (“EWTN”).<sup>4</sup> For the reasons stated below, we deny the Objections and grant the Applications.

**Background.** Applicants filed in the January 2001 LPFM filing window.<sup>5</sup> On October 1, 2001, Lawyers Guild filed its Objections, asserting that EWTN and/or Starboard Broadcasting, Inc. (“Starboard”)<sup>6</sup> conspired to file twenty-three LPFM applications, including the Applications.<sup>7</sup> In support of this claim, Lawyers Guild asserts that the Applicants are sham organizations that serve as a front for the real parties in interest, EWTN and/or Starboard. Accordingly, Lawyers Guild maintains that Applicants allegedly function as local chapters of EWTN and/or Starboard, and have violated Section 73.858 of the Commission’s Rules (“Rules”) because they are not separately incorporated with a local presence and mission.<sup>8</sup> Lawyers Guild also claims that Applicants have violated the LPFM multiple-ownership Rules because EWTN and Starboard own translators in the area.<sup>9</sup> Next, Lawyers Guild avers that Applicants misrepresented their true identity to the Commission, a violation of Section 1.17 of the Rules.<sup>10</sup> Finally, Lawyers Guild maintains that Applicants’ proposed retransmission of EWTN’s network programming violates Section 73.879 of the Rules.<sup>11</sup>

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<sup>3</sup> Lawyers Guild filed a responsive pleading titled: “Objector’s Response to Joint Opposition to Informal Objection” on January 26, 2002 (“Objector’s Response”).

<sup>4</sup> Filed Jan. 11, 2002. Lawyers Guild filed a “Response to ‘Consolidated Opposition to Informal Objections’ of Eternal Word Television Network” (“Response to Consolidated Opposition”) on March 28, 2002. Despite Lawyers Guild’s claim that EWTN lacks standing, we consider EWTN’s pleading in order to develop a complete record. See, e.g., *Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations (Dalhart and Perryton, Texas)*, Report and Order, 22 FCC Rcd 4201 n.2 (2007) (accepting filings after pleading cycle’s end for purposes of establishing a complete record).

<sup>5</sup> See *Low Power FM Filing Window*, Public Notice, DA 00-2831, rel. Dec. 15, 2000 (announcing filing window); see also *Notice of Acceptance of Low Power FM Broadcast Applications and Notification of Petition to Deny Deadline*, Public Notice, Report No. LPFM-S-2, rel. Aug. 16, 2001 (listing applications accepted for filing).

<sup>6</sup> Joint Opposition at Exhibit 2.

<sup>7</sup> Eighteen of the remaining applications were dismissed at Applicants’ request or pursuant to comparative procedures. The remaining three were disposed as follows: Sacred Heart Educational Association’s application, File Number BNPL-20010122AGI, was granted November 10, 2005 (*Broadcast Actions*, Public Notice, Report No. 46112, Nov. 16, 2005); Father Solanus Casey’s application, File Number BNPL-20010122AHA, was dismissed upon filing of a “Notice of Apparent Intent to Withdraw LPFM Application” by Peter Franck on April 5, 2002 (*Broadcast Actions*, Public Notice, Report No. 45848, Oct. 26, 2004); and St. John Vianney Education Association’s application, File Number BNPL-20010122AHQ, was dismissed at the request of Donald Schmidt (*Broadcast Actions*, Public Notice, Report No. 45427, Feb. 21, 2003).

<sup>8</sup> 47 C.F.R. § 73.858(b). The provision states that the “ownership and other interests in LPFM station permittees and licensees will be attributed to their holders” unless “the local chapter is separately incorporated and has a distinct local presence and mission.”

<sup>9</sup> Heart to Heart Objection at 4; Mt. Zion Objection at 4; Objector’s Response at 4; 47 C.F.R. § 73.855 (prohibiting an LPFM station-owner from holding an attributable interest in two or more LPFM stations).

<sup>10</sup> 47 C.F.R. § 1.17.

<sup>11</sup> 47 C.F.R. § 73.879. The Rule states, “An LPFM licensee may not retransmit, either terrestrially or via satellite, the signal of a full-power radio broadcast station.”

In response, Applicants claim to be wholly independent of EWTN and state that it played no part in the application process,<sup>12</sup> but that Starboard, a nonprofit corporation dedicated to dissemination of the Roman Catholic Church's teachings, recruited the Applicants and handled the bulk of the administrative and technical aspects of the filing process, free of charge.<sup>13</sup> Applicants further state that they are not-for-profit unincorporated associations pursuant to Wisconsin law with a physical headquarters within 10 miles of the proposed transmitting antenna site.<sup>14</sup> Finally, Applicants claim that their proposed use of EWTN's satellite-delivered network programming complies with the Commission's rules and, specifically, is not barred by Section 73.879.<sup>15</sup>

**Discussion.** Pursuant to the Communications Act of 1934, as amended, ("Act") informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(a) of the Act.<sup>16</sup> Lawyers Guild has failed to meet this burden.

Lawyers Guild claims that EWTN and Starboard are undisclosed real parties in interest to the Applications.<sup>17</sup> As evidence, it points to the fact that Starboard recruited the Applicants and prepared and filed the Applications.<sup>18</sup> It notes that all 23 applications to which Lawyers Guild objected used the same engineer<sup>19</sup> and the same exhibits;<sup>20</sup> the organizations were created within a few days of the filing deadline and filed on the same day,<sup>21</sup> and, most notably, they all planned to use EWTN programming.<sup>22</sup> As further evidence, Lawyers Guild submits an affidavit from Ms. Orion Gray, a staff member of objector Microradio Implementation Project, who states that Applicants, via telephone, revealed to her that a fellow church member recruited them to support Catholic radio, and that they had limited knowledge of

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<sup>12</sup> Joint Opposition at 2.

<sup>13</sup> *Id.* at Exhibit 2.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> 47 C.F.R. § 73.879. Joint Opposition at 3-4.

<sup>16</sup> 47 U.S.C. § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), rehearing denied (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>17</sup> Memorandum in Support at 3-4 and Objector's Response at 2 and 4, respectively. Lawyers Guild also mentions that the Catholic Church "quite possibly" is an undisclosed party in interest to the Heart to Heart Application. However, it offers no evidence to support this claim, so we decline to consider it. Objector's Response at 4.

<sup>18</sup> Joint Opposition at 2.

<sup>19</sup> Heart to Heart Objection at 4; Mt. Zion Objection at 4.

<sup>20</sup> Memorandum in Support at 3.

<sup>21</sup> Heart to Heart Objection at 4; Mt. Zion Objection at 5. Additionally, the Objector's Response asks that we take "Judicial Notice" of the fact that Starboard was formed two months before the applications were due (Objector's Response at 2). Because Starboard's organizational status has no bearing on the outcome of this proceeding, we will not consider this issue further.

<sup>22</sup> Memorandum in Support at 4.

their responsibilities as potential licensees.<sup>23</sup> We disregard Gray's statement because the Commission has found accounts of conversations with third parties to be inadmissible hearsay.<sup>24</sup> On the other hand, we accept the Applicants' declarations that they are not associated with a national organization<sup>25</sup> and EWTN's statement that it "is not now nor has it ever been affiliated with, either by contract, ownership interest, debt instrument or otherwise, any of the Applicants...nor has it ever been the real party in interest to any of the Applications."<sup>26</sup> We also accept Starboard's declaration that it "does not intend to underwrite construction or operating costs for these stations, and does not anticipate any remuneration for its efforts...None of the LPFM groups is directly or indirectly affiliated or associated with [Starboard]. [Starboard] holds no ownership interest in any of the groups. [Starboard]'s role is, and will remain, consultative."<sup>27</sup>

In a real-party-in-interest inquiry, the focus is whether a third person has an undisclosed ownership interest in an application or will be in a position to actually or potentially control the applicant.<sup>28</sup> In deciding whether a substantial and material question of fact has been raised regarding either part of this test, we must consider the totality of evidence presented, including both Lawyers Guild's evidence and that of EWTN, Starboard, and the Applicants.<sup>29</sup> Contrary to Lawyers Guild's assertions, there is no substantial and material question of fact concerning whether EWTN or Starboard will be in a position, actually or potentially, to control operation of Applicants' stations. Without the Gray affidavit, Lawyers Guild's only supporting evidence is that all the filings were similar and coincided

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<sup>23</sup> Memorandum in Support, Affidavit of Orion Gray.

<sup>24</sup> See, e.g., *Living Proof, Inc. Big Pine, California*, Letter, 24 FCC Rcd 2382, 2385, n.29 (MB 2009) (declining to credit hearsay statements of third party). The weight to be accorded to a hearsay statement depends on its truthfulness, reasonableness, and credibility (*Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980)). However, we find that we need not address whether to afford this hearsay any weight because Applicants have rebutted the claims raised in the statement (*See Anabelle Savage, Chapter 7 Trustee, Universal Broadcasting, Inc., Assignor, and Jireh Media, Inc., Assignee*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 3665, n.47 (MB 2010) (declining to address whether to accord any weight to a hearsay statement because applicants rebutted the claim)).

<sup>25</sup> Joint Opposition at 2. We decline Lawyers Guild's request that we dismiss the Applicants' declarations because they were not sworn (Objector's Response at 3). The Applicants' declarations, filed in response to the informal objections, are not required by law, rule or other regulation to be supported by an affidavit or an unsworn declaration, as provided in Section 1.16 of the Rules (47 C.F.R. § 1.16). While Section 73.3584(b) of the Rules requires allegations of fact or denials thereof in oppositions to petitions to deny to be supported by affidavit of a person or persons with personal knowledge thereof, there is no such legal or regulatory requirement for responses to informal objections (*See* 47 C.F.R. §§ 73.3584(b) and 73.3587 (discussing informal objections)).

<sup>26</sup> Consolidated Opposition at 4.

<sup>27</sup> See Joint Opposition at Exhibit 2 (Declaration of David Vacharesse, President of Starboard).

<sup>28</sup> See *Georgia Public Telecommunication Commission*, 7 FCC Rcd 7996, 7998 (1992) ("Georgia Public") citing *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1998); *KOWL, Inc., South Lake Tahoe, Calif.*, Memorandum Opinion and Order, 49 FCC 2d 962 (1974) (same, citing *Creek County Broadcasting Co.*, 31 FCC 2d 462, 22 RR 2d 891 (1971) and *Sumiton Broadcasting Co.*, 15 FCC 2d 400, 14 RR 2d 1000 (1968)).

<sup>29</sup> See *Michael McDermott d/b/a McDermott Communications Co.*, Memorandum Opinion and Order, 11 FCC Rcd 5750, 5750 (1996).

in time. We find this claim both conclusory and unpersuasive.<sup>30</sup> Such a coincidence is not enough evidence to demonstrate that EWTN will be in a position to exercise actual or potential control over the Applicants' stations.<sup>31</sup> Lawyers Guild's evidence that Starboard coordinated the filing of the Applications is similarly flawed, as acting as a free-of-charge recruiter and consultant does not confer the type of actual or potential control that is required in party-in-interest cases.<sup>32</sup> We thus conclude that Lawyers Guild's allegations do not support its claim of a scheme by EWTN and/or Starboard to create sham organizations. We accordingly find no reason to look further into the real-party-in-interest issue. For the same reasons, we reject as unsubstantiated, Lawyers Guild's claim that Applicants are local chapters of EWTN or Starboard, or that Applicants violated the LPFM multiple-ownership rules.<sup>33</sup>

Lawyers Guild next claims that Applicants misrepresented their identities to the Commission.<sup>34</sup> In order to sustain their claim of misrepresentation, Lawyers Guild has the burden to establish, *prima facie*, both a false statement or certification by the Applicants and intent to deceive the Commission.<sup>35</sup> Lawyers Guild fails to meet either element of this standard. As evidence, Lawyers Guild offers the same allegations it advanced to support its unpersuasive real party in interest theory.<sup>36</sup> Those allegations fail to prove that either Applicant deceived, or intended to deceive, the Commission, by misrepresenting its identity or involvement with EWTN and/or Starboard. Each Applicant certified<sup>37</sup> that it is a not-for-profit unincorporated association under Wisconsin law as of January 17, 2001.<sup>38</sup> Moreover, both EWTN and

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<sup>30</sup> See *Gencom, Inc. v. FCC*, 832 F.2d 171 n.11 (D.C. Cir. 1987) (“*Gencom*”) (finding that allegations of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits...are not sufficient to establish a *prima facie* case that an application is inconsistent with the public interest).

<sup>31</sup> See *M2M Enterprises, Inc.*, Order and Order on Reconsideration, DA 10-1467, ¶ 4 (WTB rel. Aug. 9, 2010) (denying undisclosed real party in interest allegation based, in part, on applicant's use of the same license consultant).

<sup>32</sup> *Id.* (denying undisclosed real-party-in-interest claim for lack of evidence of actual or potential control over the applicants' stations); *Georgia Public*, 7 FCC Rcd at 7998 (same).

<sup>33</sup> 47 C.F.R. § 73.855. In rejecting Lawyers Guild's misrepresentation claim, we also do not reach its claims that the Applicants must respond to “local needs” or provide “programming to fill those needs.” (Heart to Heart Objection at 4; Mt. Zion Objection at 4). Regardless, we note that there is no Rule requiring LPFM licensees to provide programming responsive to community issues. See *In the Matter of Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2270-72 (2000) (locally-originated programming is a preference, not a requirement).

<sup>34</sup> Memorandum in Support at 3.

<sup>35</sup> *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983). *Scott and Davis Enterprises*, Decision, 88 FCC 2d 1090, 1099 (Rev. Bd. 1982) (“Longstanding Commission precedent has held that misrepresentation and lack of candor charges are very grave matters....The duty to come forward with a *prima facie* showing of deception is particularly strong where a misrepresentation issue is sought.” (citation omitted)).

<sup>36</sup> E.g., the organizations (1) were filed by the same engineer (Heart to Heart Objection at 4; Mt. Zion Objection at 4); (2) had the same “cookie cutter” exhibits (Memorandum in Support at 3); (3) had the same programming plan (Memorandum in Support at 4); (4) were created within a few days of the filing deadline and (5) were filed on the same day (Heart to Heart Objection at 4; Mt. Zion Objection at 5).

<sup>37</sup> See File Nos. BNPL-20010122AIY and BNPL-20010122AFA.

<sup>38</sup> Wis. Stat. § 193.001 *et. seq.* (2009). The Commission has recognized that such organizations are acceptable under the Rules. See *M&M Community Development, Inc.*, Letter, 21 FCC Rcd 7983, 7984 (MB 2006).

Starboard deny participating in a scheme to serve as a surrogate for EWTN or Starboard.<sup>39</sup> Therefore, we reject Lawyers Guild's unsubstantiated misrepresentation claim.<sup>40</sup>

Finally, we reject Lawyers Guild's assertion that the Applicants plan to illegally retransmit the signals of EWTN's<sup>41</sup> and Starboard's full-power stations.<sup>42</sup> The Applicants plan to use EWTN's satellite-delivered network programming, an LPFM programming arrangement which the Commission has approved in the past.<sup>43</sup>

**Conclusion.** Based on the record before us, we conclude that Mt. Zion Education Association and Heart to Heart Educational Association are each qualified to hold LPFM authorizations and that grant of the Applications would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that the informal objections filed by the National Lawyers Guild Center on Democratic Communications, The Microradio Implementation Project, and the United Church of Christ ARE DENIED.

IT IS FURTHER ORDERED that the applications of Mt. Zion Education Association (File No. BNPL-20010122AIY) and Heart to Heart Educational Association (File No. BNPL-20010122AFA) ARE GRANTED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Peter Franck, Esq.  
Alan Korn, Esq.  
Howard J. Barr, Esq.  
Mr. Lyle Evans

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<sup>39</sup> See Joint Opposition, Exhibits 1 and 2. Lawyers Guild claims that Starboard essentially forged the signatures of the parties to the Applications (Memorandum in Support at 3) and that Applicants' inexperience and alleged lack of interest in radio broadcasting support its contention that the Applications are shams and should be denied (Response to Consolidated Opposition at 3). These claims are mere speculation, not indicia of a conspiracy. Far from considering inexperience as a ground for denying an application, the Commission historically has expressed interest in having newcomers enter into broadcasting. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

<sup>40</sup> See *Gencom*, 832 F.2d 171 n.11.

<sup>41</sup> Memorandum in Support at 4.

<sup>42</sup> Objector's Response at 4. 47 C.F.R. § 73.879.

<sup>43</sup> See, e.g., BNPL-20010122AGI (granted Nov. 10, 2005). This application, filed by Sacred Heart Educational Association, was one of the 23 LPFM applications to which Lawyers Guild objected. It planned the same broadcast schedule as the Applicants.