



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

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In Reply Refer To:

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

License Reissuance
Request for Minor Change

Dear Counsel:

We have before us two letters¹ filed by Bexley Public Radio Foundation (“Bexley”), licensee of low-power FM (“LPFM”) Station WCRX-LP, Columbus, Ohio, and party to a time-sharing agreement (“Time Share Agreement”) with Simply Living, licensee of LPFM Station WCRS-LP, Columbus, Ohio. Bexley objects to the Commission’s August 7, 2008, reissuance of Simply Living’s license (“Reissuance”)² which modified Simply Living’s hours of operation.³ Also before us is the captioned modification application filed by Simply Living, which is uncontested. For the reasons set forth below,

¹ See Letter from John Anderson of Anderson Devoss and Johnson Broadcast Consulting Group, to James D. Bradshaw, Engineer, Audio Division, Media Bureau (Nov. 13, 2009) (“First Bexley Letter”) and Letter from Paul G. Madison, Esq., Kelley Drye & Warren, LLP to James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau (Nov. 23, 2009) (“Second Bexley Letter”).

² File No. BLL-20070618ACJ.

³ Simply Living submitted responses on November 16, 2009 (“First Simply Living Letter”) and December 7, 2009 (“Second Simply Living Letter”). Letter from Jane Haskins of Haskins Law, LLC, to James D. Bradshaw, Engineer, Audio Division, Media Bureau (Nov. 16, 2009) and Letter from Jane Haskins of Haskins Law, LLC, to James D. Bradshaw, Engineer, Audio Division, Media Bureau (Dec. 7, 2009). Both Simply Living and Bexley discuss at length their problems in reaching a mutually-agreeable operating schedule and payments for shared equipment. We decline to comment or rule on these matters, as it is the responsibility of the parties to the time-share agreement to negotiate changes in the operating schedule. See 47 C.F.R. § 73.872(c)(2).

we declare the Reissuance *void ab initio*, we reissue Simply Living's license⁴ with the original operating hours and grant Simply Living's minor modification application.⁵

Background. Between May 30, 2000, and June 5, 2000, the Commission opened a filing window for LPFM new station applicants.⁶ There were five mutually exclusive applicants in group 72 ("MX Group 72") for Channel 271 (102.1 FM) in the area of Columbus and Groveport, Ohio:⁷ Groveport Madison Local Schools ("Groveport"), Capital University ("Capital"), Community Refugee and Immigration Services, Inc. ("Refugee Services"), Simply Living, and Bexley. All five MX Group 72 applicants entered into, and filed with the Commission, the Time Share Agreement.⁸ While four of the five applicants received construction permits, only Bexley and Simply Living constructed and were granted covering licenses.⁹ In May 2008, Refugee Services and Groveport filed applications to assign their construction permits and, therefore, operating hours, to Simply Living.¹⁰ At the request of the applicants, the Commission dismissed the applications.¹¹ Notwithstanding such dismissal, the Commission reissued Simply Living's license to include the operating hours allocated to Refugee Services and Groveport under the Time Share Agreement.¹²

Bexley argues that the Reissuance violated both Sections 73.872(c)(2) and (3) of the Commission Rules ("Rules") and the Time Share Agreement because Simply Living failed to obtain the written consent of each party to the Time Share Agreement before modifying its operating hours.¹³ Accordingly, Bexley asks that the Commission "restore the *status quo*" by informing Simply Living that its operating

⁴ File No. BLL-20070618ACJ.

⁵ File No. BPL-20091204AAA.

⁶ *Low Power FM Filing Window Instructions*, Public Notice, 15 FCC Rcd 9201 (May 26, 2000).

⁷ *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 (Aug. 28, 2003).

⁸ 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.

⁹ 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.

¹⁰ File Nos. BAPL-20080512AEQ (Refugee Services) and BAPL-20080512AET (Groveport).

¹¹ *Broadcast Actions*, Report No. 46798, Public Notice, Aug. 12, 2008. Groveport's and Refugee Services' construction permits expired in October 2008.

¹² 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.

¹³ See 47 C.F.R. § 73.872(c) and Time Share Agreement, paras. 11 and 15. Specifically, Paragraph 11 states that the Time Share Agreement "may be amended or modified by the Applicants only by written instrument executed by all of the Applicants and submitted to the Commission." Paragraph 15 states that "No party may assign its interest under this Agreement, without the prior written consent of the other Parties...."

hours are as stated in the Time Share Agreement and that any modification to such operating hours requires written consent of the parties to the Time Share Agreement and Commission approval.¹⁴

Simply Living argues on procedural and substantive grounds that the Reissuance should stand. On procedural grounds, it claims that the First Bexley Letter should be dismissed as an untimely petition for reconsideration.¹⁵ Substantively, it argues that the Reissuance was in accordance with the Rules because (1) the Commission has ultimate authority in licensing matters, and therefore can override time-share agreements; (2) Bexley and Simply Living have been unable to amend the Time Share Agreement, so the Commission is obligated to intercede to ensure the spectrum is used; and (3) it would harm Simply Living's viability as a station to revert to its previous operating schedule after one year of operation with expanded operating hours.

Discussion. As an initial matter, we address Simply Living's procedural challenge. It claims that the First Bexley Letter is a petition for reconsideration, and as such, is unreviewable because it was filed on November 13, 2009, more than thirty days after the August 7, 2008, public notice of the Reissuance.¹⁶ We treat the First Bexley Letter and Second Bexley Letter as informal requests for Commission action, pursuant to Section 1.41 of the Rules,¹⁷ which does not limit the time period within which such requests must be filed.¹⁸ We therefore are not persuaded by Simply Living's argument that we should deny the First Bexley Letter as an untimely petition for reconsideration. Accordingly, we will address the merits of both the First Bexley Letter and the Second Bexley Letter.

Turning now to the merits, 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..."¹⁹ Section 11 of the Time Share Agreement underscores this requirement.²⁰ Thus, under both Section 73.872(c)(2) and the Time Share Agreement, 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.²¹ Despite Simply Living's failure to obtain Bexley's or any other party's consent to use Groveport and Refugee Services' hours, the Commission modified the terms of Simply Living's license in contravention of its own Rules. It is a

¹⁴ 47 C.F.R. §§ 73.872(c)(2) and (3). First Bexley Letter at page 4; Second Bexley Letter at 7. Bexley also contends that Simply Living should have given notice of its plans to acquire Refugee Services and Groveport's hours. As discussed above, Simply Living needed Bexley's consent to change the operating schedule set forth in the Time Share Agreement. See 47 C.F.R. § 73.872(c).

¹⁵ First Simply Living Letter at 2-3. See 47 U.S.C. § 405(a) and 47 C.F.R. § 1.429(d) (petitions for reconsideration must be filed within 30 days of public notice of Commission action).

¹⁶ See 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d).

¹⁷ 47 C.F.R. § 1.41.

¹⁸ *Nevada Cogeneration Associates*, Order, 24 FCC Rcd 5501, 5502 (WTB 2009), citing *Pacific Gas and Electric Company*, Memorandum Opinion and Order, 18 FCC Rcd 22761, 22763 (2003).

¹⁹ 47 C.F.R. § 73.872(c)(2).

²⁰ Time Share Agreement para. 11.

²¹ *Id.*

well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.²² Thus, we declare the Reissuance *void ab initio* and reissue Simply Living's license to reflect the operating hours originally allocated in the Time Share Agreement.²³

Given this ruling, Simply Living's remaining arguments can be easily dismissed. First, Simply Living argues that an amalgam of Rules²⁴ and statutes,²⁵ when read together, "strongly indicate" the Commission's intent to retain the authority to override agreements made in the time-share context.²⁶ This argument takes the provisions out of context. The Commission did not intend to override its own rules by granting the Reissuance. Simply Living next argues that a number of Audio Division staff counseled it to file the assignment applications in coordination with Refugee Services and Groveport. However, longstanding Commission precedent has established that parties relying on such informal discussions do so at their own risk.²⁷ Third, Simply Living argues that the Commission is obligated to intercede to ensure spectrum is used. We disagree. This case essentially involves a contractual dispute, and the Commission generally does not interfere with private contractual disputes.²⁸ This case is no exception. Lastly, Simply Living argues that after one year of operation with expanded hours, it would harm its viability as a station to revert to its previous operating schedule. We interpret this argument as a request for waiver of Sections 73.872(c)(2) and (3) of the Rules based on detrimental reliance.²⁹ The Commission has authority to issue waivers if it determines that grant of the waiver would not undermine the policies set forth by the rule.³⁰ Here, a waiver would undermine the reason for the Rule,³¹ which is to ensure fair and equitable treatment of all time-share licensees and permittees.

Conclusion. For the reasons discussed above, we reissue Simply Living's license to reflect the operating hours as set forth in the Time Share Agreement. In addition, we find that it is in the public

²² *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).

²³ The Time Share Agreement provides for Simply Living to operate between 3 p.m. to 8 p.m. daily.

²⁴ Section 73.870(f) of the Rules simply provides an orderly process to allocate spectrum by requiring new applicants to file during a filing window. (47 C.F.R. § 73.870(f)). Section 73.872(d) of the Rules describes a process by which the spectrum will be awarded if mutually exclusive applicants cannot agree to share time. (47 C.F.R. § 73.872(d)).

²⁵ 47 U.S.C. §§ 307 and 316 (granting the Commission authority to issue and modify station licenses).

²⁶ Second Simply Living Letter at 2.

²⁷ *Applications of Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705 (1991), citing *Texas Media Group, Inc.*, 5 FCC Rcd 2851, 2852 (1990), *aff'd sub nom. Malkan FM Associates v. FCC*, No. 90-1281, slip op. at 12 (D.C. Cir. Jun. 14, 1991).

²⁸ *See Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622, 8624 (1992) (citing *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR 2d 773, 778 (1976)); *See also Metromedia, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 595 (1988).

²⁹ 47 C.F.R. §§ 73.872(c)(2) and (3). The Florida Institute of Technology made, and the court rejected, a similar argument in *Florida Institute*. *See Florida Institute*, 952 F.2d at 553 (arguing that the Commission's failure to follow its own regulations engendered enough detrimental reliance to oblige the Commission to waive its Rules).

³⁰ 47 C.F.R. §§ 0.201, 0.283 and § 1.3. *See also WAIT Radio v. FCC*, 418 F.2d 1153, 1156-57 (D.C. Cir. 1969).

³¹ Sections 73.872(c)(2) and (3) require that each party to a time-share agreement agree to any amendment in the operating hours. 47 C.F.R. § 73.872(c)(2).

interest, convenience and necessity to grant Simply Living's request for a minor modification to its license to increase the height of its antenna.

Accordingly, IT IS ORDERED that Simply Living's license (File No. BLL-20070618ACJ) is REISSUED to reflect the hours of operation stipulated in Article II, paragraph 6 of the Time Share Agreement (3:00 p.m. to 8:00 p.m. daily).

IT IS FURTHER ORDERED that Simply Living's application for minor modification (File No. BPL-20091204AAA) is GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: H. Scott McKenzie, Groveport Madison Local School District
Angela K. Plummer, Community Refugee & Immigration Services
Steve Koch, Capital University