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In Reply Refer To:

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Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P.O. Box 41177
Washington, DC 20018

In re: Martin Bayou Management Corporation
NEW(FM), Mexico Beach, Florida
Facility ID No. 174534

File No. BNPED-20071022BQK

Help Save the Apalachicola River Group, Inc.
NEW(FM), Port St. Joe, Florida
Facility ID No. 173830

File No. BNPED-20071018AQD

Petition for Reconsideration

Dear Mr. Kelly:

We have before us the June 2, 2011, "Petition for Reconsideration" ("Petition") of Martin Bayou Management Corporation ("MBMC"), asking the Commission to reconsider its actions of May 3, 2011, regarding the referenced applications of Help Save the Apalachicola River Group, Inc. ("HSARG") and MBMC for new noncommercial educational ("NCE") FM radio stations at Port St. Joe and Mexico Beach, Florida, respectively.¹ For the reasons set forth below, we deny the Petition pursuant to Section 1.106(p) of the Commission's Rules (the "Rules").²

Background. MBMC and HSARG each applied to construct a new NCE FM station during a filing window for such applications in October 2007.³ On June 18, 2008, the Media Bureau ("Bureau") issued a public notice identifying the MBMC and HSARG Applications as mutually exclusive ("MX")

¹ On June 14, 2011, HSARG filed an "Opposition to Petition for Reconsideration" ("Opposition") and on June 24, 2011, MBMC filed a "Reply to Opposition to Petition for Reconsideration" ("Reply"). HSARG filed a July 8, 2011, "Opposition to Reply" which we disregard and dismiss on procedural grounds. *See infra*.

² 47 C.F.R. § 1.106(p).

³ File Nos. BNPED-20071022BQK and BNPED-20071018AQD (respectively, "MBMC Application" and "HSARG Application").

and grouping them into NCE MX Group 328 with eight other applications.⁴ Pursuant to established procedures,⁵ the Commission determined that both the MBMC and HSARG Applications, along with three others, were entitled to a fair distribution preference under Section 307(b) of the Communications Act of 1934,⁶ as amended.⁷ The Commission then subjected the five remaining applicants to a point hearing analysis and identified a three-way tie between MBMC, HSARG, and Gulf Coast Community College (“GCC”).⁸ After proceeding through tie-breakers,⁹ the Commission declared both HSARG and MBMC to be the tentative selectees for Group 328 on a time-sharing basis.¹⁰ The Commission accepted for filing the MBMC and HSARG Applications and established a deadline by which to file petitions to deny them.¹¹

MBMC filed a Petition to Deny the HSARG Application on July 28, 2010. In its Petition, MBMC argued that HSARG had more applications for new NCE FM stations than were considered by the Commission when conducting the second tie-breaker.¹² MBMC claimed that it should have thus prevailed in the point determination, and sought dismissal or denial of that HSARG Application.¹³ HSARG filed an Opposition to Petition to Deny on August 10, 2010, responding that its later-filed applications were not “pending” at the time it filed the HSARG Application and therefore did not count for the purposes of the second tie-breaker.¹⁴ HSARG also asserted that MBMC failed to adequately document its claims that it was entitled to points under the established local applicant and diversity of

⁴ See *Media Bureau Identifies Groups of Mutually Exclusive Applications*, Public Notice, 23 FCC Rcd 9508, Attachment A (MB 2008).

⁵ See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), *recon. granted in part*, 16 FCC Rcd 5074 (2001), *rev'd in part on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

⁶ See 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 C.F.R. § 73.7002(a).

⁷ *Comparative Consideration of 52 Group of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Education FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8812-13 (2010) (“52 Groups Comparative Order”).

⁸ *Id.* at 8813.

⁹ The first tie-breaker criterion the Commission considers for NCE-FM applicants is the number of radio station authorizations attributable to each applicant; the applicant with the fewest authorizations prevails. GCC certified that it had 14 attributable interests; HSARG and MBMC certified that they each had no attributable interests. Accordingly, GCC was eliminated, and HSARG and MBMC proceeded to the second criterion: the number of pending radio applications attributable to each applicant. HSARG and MBMC certified that each had one radio application pending. Thus both applicants proceeded to the tiebreaker of last resort, which is mandatory time sharing. See *52 Groups Comparative Order*, 25 FCC Rcd at 8813.

¹⁰ *Id.*

¹¹ *Id.* at 8841. The GCC application was dismissed on August 9, 2010. See *Broadcast Actions*, Public Notice, Report No. 47298 (Aug. 12, 2010).

¹² See n. 9 *supra*.

¹³ See *Comparative Consideration of 37 Group of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Education FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 7008, 7038 (2011) (“37 Groups Comparative Order”).

¹⁴ *Id.*

ownership criteria.¹⁵ MBMC filed a Reply to Opposition to Petition to Deny on August 20, 2010, restating its previous arguments and also arguing that HSARG's Opposition was procedurally defective and should have been dismissed.¹⁶

The Commission addressed these pleadings in the *37 Groups Comparative Order*. First, the Commission found that while HSARG could have raised its objections to the MBMC Application in its own Petition to Deny rather than in its Opposition to MBMC's Petition to Deny, the Opposition met the requirements of an informal objection under Section 73.3587 of the Rules.¹⁷ Accordingly, the Commission declined to dismiss the Opposition and instead treated the portion that addressed the MBMC Application as an informal objection.¹⁸ Second, the Commission agreed with HSARG that MBMC's documentation to support its diversity claim was insufficient and that it thus erred in awarding points to MBMC for that criterion. Third, the Commission recognized that the correction of its error altered the point hearing analysis in favor of HSARG and declared it the sole tentative selectee for NCE MX Group 328.¹⁹ Accordingly, the Commission granted the HSARG Application and dismissed the MBMC Application.²⁰

MBMC filed the subject Petition on June 2, 2011, in which it concedes that it did not submit the appropriate documentation for its diversity of ownership claim.²¹ However, MBMC seeks reconsideration of other aspects of the *37 Groups Comparative Order*. MBMC asserts that HSARG's established local applicant documentation was insufficient and that the Commission erred in awarding it points under that criterion.²² Also, MBMC argues that the Commission afforded disparate treatment to the HSARG and MBMC Applications in violation of *Melody Music, Inc. v. FCC*²³ by reviewing "on its own motion" MBMC's diversity documentation while not treating HSARG's established local applicant documentation with the same scrutiny.²⁴ In its Opposition, HSARG argues that its documentation was in fact sufficient.²⁵ In its Reply, MBMC's restates the arguments in the Petition²⁶ and also seeks dismissal of the Opposition due to a procedural defect,²⁷ namely, that it is allegedly not signed and verified as required by Section 1.52 of the Rules.²⁸

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* See also 47 C.F.R. § 73.3587.

¹⁸ In light of the procedural validity of the arguments attacking the MBMC Application and their ultimate success on the merits, the Commission deemed as moot and refused to consider both MBMC's Petition to Deny and the portion of HSARG's Opposition to Petition to Deny specifically addressing MBMC's Petition to Deny. *37 Groups Comparative Order*, 26 FCC Rcd at 7038-39.

¹⁹ *37 Groups Comparative Order*, 26 FCC Rcd at 7038-39.

²⁰ *Id.* at 7060.

²¹ Petition at 3.

²² *Id.*

²³ 345 F.2d 730 (D.C. Cir. 1965).

²⁴ Petition at 3.

²⁵ Opposition at 1-2.

²⁶ Reply at 3-4.

²⁷ *Id.* at 2.

²⁸ 47 C.F.R. § 1.52.

Discussion. *Petition for Reconsideration.* 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.²⁹ Furthermore, the Bureau has the authority to dismiss or deny petitions for reconsideration of actions of the full Commission when the arguments plainly do not warrant consideration by the full Commission.³⁰

Procedural Issues. As an initial matter, we dismiss HSARG's July 8, 2011, Opposition to Reply. Section 1.45 of the Rules allows for the filing of a petition, any oppositions, and a singular reply by the petitioner.³¹ Any unauthorized pleadings are subject to dismissal without consideration.³² Accordingly, we dismiss HSARG's Opposition to Reply without consideration.

Additionally, MBMC argues that HSARG's Opposition is procedurally defective and must be stricken or disregarded.³³ MBMC asserts that the Opposition was signed by "Diane C. Brown, Representative" and that it is defective because she is "not an attorney."³⁴ MBMC seeks dismissal of the Opposition on these grounds, citing Section 1.52 of the Rules³⁵ and *Tama Radio Licenses of Tampa Florida, Inc.*³⁶ In relevant part, Section 1.52 states that "[t]he original of all petitions, motions, pleadings, briefs and other documents filed by any party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. *A party who is not represented by an attorney shall sign and verify the document and state his address.*"³⁷ The Commission's data base indicates that Diane C. Brown is an officer of the corporation (Secretary) and the Application Certifier and that HSARG is not represented by counsel. Ms. Brown signed and verified the Opposition.³⁸ Thus, HSARG did not violate Section 1.52 of the Commission Rules and there is no reason to strike or otherwise disregard the Opposition.

Substantive Issues. MBMC argues that HSARG "did not attach any proof to its application that it was an established local applicant."³⁹ MBMC notes that its application included a topographic map showing the calculation of the distance between its headquarters the community reference coordinates to

²⁹ See 47 C.F.R. § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

³⁰ See 47 C.F.R. § 1.106(p). See also *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1606-07 (2011).

³¹ See 47 C.F.R. § 1.45.

³² See, e.g., *Lee. G. Petro, Esq.*, Letter, 25 FCC Rcd 4486, 4488 (MB 2010) (dismissing pleadings not authorized by 47 C.F.R. § 1.45).

³³ Reply to Opposition at 2.

³⁴ *Id.*

³⁵ 47 CFR § 1.52.

³⁶ 25 FCC Rcd 7588 (2010), *aff'd sub nom. Cherry v. FCC*, 641 F.3d 494 (D.C. Cir. 2011) (dismissing application that did not comply with 47 CFR § 1.115).

³⁷ 47 CFR § 1.52 (emphasis added). See, e.g., *RJM Communications*, Letter, 21 FCC Rcd 7980, 7981 (MB 2006) ("Section 1.52 of the Rules requires documents submitted to the Commission to be signed by an attorney or a party. A party's signature verifies that such party has read the document; that to the best of his or her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.").

³⁸ See Opposition at 2-3. "Diane C. Brown, Representative" signed the Opposition and stated her address.

³⁹ Petition at 3.

support its claim to established local applicant points⁴⁰ and that HSARG only provided a document from the Florida Department of State listing the addresses of the HSARG principal place of business and the addresses of the corporation's officers.⁴¹ MBMC suggests, without citing to any case, rule, statute, or Commission decision, that there must be something "on the face of the application" that demonstrates the qualifications for established local applicant points, and that HSARG has failed to meet this standard.⁴²

MBMC's arguments are misguided. MBMC cites⁴³ to that portion of the Form 340 Instructions that provides that "[e]xamples of acceptable documentation [to support a claim to established local applicant points] include corporate material from the secretary of state, lists of names, addresses, and length of residence of board members, copies of governing documents requiring a 75% local governing board . . . etc."⁴⁴ As MBMC itself acknowledges, HSARG provided in support of its application a document from the Florida Department of State with the necessary geographic information. HSARG also provided its by-laws, which state that the corporation "shall be headquartered and at least 75% of its board members shall reside within 25 miles of the reference coordinates of the community to be served by a noncommercial radio station for which the Corporation files a construction permit application."⁴⁵ Nothing further is required to document HSARG's eligibility for established local applicant points, and we reject MBMC's argument.

MBMC then argues that the Commission violated *Melody Music* by allegedly "review[ing] on its own motion the lack of documentation in the MBMC application" while not engaging in a similar review of the "lack of documentation" in the HSARG Application.⁴⁶ While we agree with MBMC that *Melody Music* requires us to afford similar treatment to similarly situated applicants, we disagree with the premise that MBMC and HSARG are similarly situated. According to the Form 340 Instructions, an applicant claiming diversity of ownership points must have "governing documents [requiring] that such diversity be maintained" and must submit to the Commission copies of the documentation.⁴⁷ MBMC concedes that it failed to do this.⁴⁸ HSARG, on the other hand, submitted all of the necessary documentation, and none of it was defective. As the parties before us are not similarly situated, there was no violation of *Melody Music* and we reject this argument. Finally, we reject the factual premise of MBMC's disparate treatment claim, namely that the Commission reviewed the MBMC diversity documentation "on its own motion."

⁴⁰ Reply to Opposition at 3.

⁴¹ Petition at 3 and Exhibit A.

⁴² Petition at 3; Reply to Opposition at 3.

⁴³ Petition at 3; Reply to Opposition at 3.

⁴⁴ FCC, Instructions for FCC 340 Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station, p. 9, <http://transition.fcc.gov/Forms/Form340/340.pdf> (retrieved Oct. 6, 2011) ("Form 340 Instructions").

⁴⁵ See HSARG Application, Attachment 2.

⁴⁶ Petition at 3. In support of this argument, MBMC cites "*Telephone & Data Systems, Inc. v. FCC*, 195 F.3d 655, 658 (D.C. Cir. 1994)." This citation is problematic for several reasons. First, the volume, reporter, and page numbers cited do not correspond to *Telephone & Data Systems, Inc. v. FCC*, but to *Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999). The correct citation for the named case is *Telephone & Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994). However, neither case is germane to the issues raised in the Petition or contains the quotation that Petitioner included with the citation. Accordingly, this part of the Petition will be disregarded.

⁴⁷ See Form 340 Instructions at p. 9.

⁴⁸ Petition at 3 ("In reviewing our application, it turns out to be correct—MBMC did not submit the corporate resolution regarding 'diversity,' which we regret.").

To the contrary, HSARG first raised this issue in its Opposition to MBMC's Petition to Deny.⁴⁹ The Commission concluded that the issue was properly raised and, therefore, appropriately addressed in this application proceeding. Accordingly, MBMC's *Melody Music* argument is meritless.

Conclusion/Actions. Accordingly, for the reasons set forth above, IT IS ORDERED, pursuant to 73 C.F.R. § 1.45, that the Opposition to Reply to Opposition to Petition for Reconsideration filed by Help Save the Apalachicola River Group, Inc. on July 8, 2011, is DISMISSED.

Additionally, the arguments in the Petition plainly do not warrant consideration by the full Commission. Therefore, IT IS FURTHER ORDERED, pursuant to authority contained in 47 C.F.R. § 1.106(p), that the Petition for Reconsideration filed by Martin Bayou Management Corporation on June 2, 2011, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Martin Bayou Management Corporation
Help Save the Apalachicola River Group, Inc.

⁴⁹ See 37 Groups Comparative Order, 26 FCC Rcd at 7038.