

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
LPFM MX Group 198)
Center for Emerging Media, Inc.)
Application for a Construction Permit for a New) File No. BNPL-20131112BMA
LPFM Station at Baltimore, Maryland,) Facility ID No. 194219
Loyola University Maryland)
Application for a Construction Permit for a New) File No. BNPL-20131115ANS
LPFM Station at Baltimore, Maryland,) Facility ID No. 196835
The Benedictine Society of Baltimore City)
Application for a Construction Permit for a New) File No. BNPL-20131114ADS
LPFM Station at Baltimore, Maryland,) Facility ID No. 192734
The United Workers Association)
Application for a Construction Permit for a New) File No. BNPL-20131114BEV
LPFM Station at Baltimore, Maryland,) Facility ID No. 196682
Johns Hopkins University)
Application for a Construction Permit for a New) File No. BNPL-20131115ANR
LPFM Station at East Baltimore, Maryland) Facility ID No. 196810

ORDER ON RECONSIDERATION

Adopted: December 17, 2015

Released: December 17, 2015

By the Chief, Media Bureau:

1. We have before us a Petition for Reconsideration (Second Petition) filed by Loyola University Maryland (Loyola), seeking reconsideration of a Commission Memorandum Opinion and Order (Order) to the extent that it denied in part the Petition to Deny filed by Loyola (First Petition).¹ For the reasons set forth below, we dismiss the Second Petition pursuant to Sections 1.106(a) and 1.106(p) of the FCC rules (Rules).²

I. Background

2. As discussed in the Order, the captioned mutually-exclusive (MX) applications of Loyola, Center for Emerging Media, Inc. (CEM), The Benedictine Society of Baltimore City (BSB), The

1 LPFM MX Group 198, Memorandum Opinion and Order, 30 FCC Rcd 10540 (2015) (Order).

2 47 CFR §§ 1.106(a), 1.106(p).

United Workers Association (UWA), and Johns Hopkins University (JHU) (Loyola Application, CEM Application, BSB Application, UWA Application, and JHU Application, respectively) were filed during the 2013 LPFM filing window and identified by the Media Bureau (Bureau) as LPFM MX Group 198.³ On September 5, 2014, the Commission issued a Public Notice in which it conducted a point-system analysis of this group and determined that the applications of CEM, BSB, UWA, JHU, and St. Joseph's were each entitled to a total of five comparative points pursuant to Section 73.872(b) of the Rules,⁴ while the applications of Loyola and RFC were each entitled to four points.⁵ The *September Public Notice* thus identified the applications of CEM, BSB, UWA, JHU, and St. Joseph's as tentative selectees of LPFM Group 198 on a time-share basis; began a 30-day period for filing petitions to deny those applications; and began 90-day periods in which all MX applicants could file amendments to resolve their mutual exclusivities or those named as tentative selectees could file point-aggregation time-share agreements.

3. Loyola timely filed the First Petition in which it argued that the Commission erred in: 1) not awarding the Loyola Application a point under the diversity of ownership criterion; and 2) awarding the JHU Application a point under that criterion. Subsequently, BSB, St. Joseph's, and JHU amended their respective applications to file a points-aggregation time-share agreement (First Agreement).⁶

4. In the *Order*, the Commission granted the First Petition to the extent that it argued that the JHU Application should not have been a tentative selectee.⁷ However, the *Order* affirmed the determination in the *September Public Notice* that Loyola was not entitled to a comparative point because one of its board members holds attributable interests in two other broadcast stations.⁸ The Commission again stated that although Section 73.858(a) provided an attribution exception to the Commission's LPFM ownership and cross-ownership limits, the clear wording of that rule did not provide an exception to the attribution rules for the purposes of comparative points under Section 73.872(b).⁹ The *Order* further rejected Loyola's arguments that it lacked notice of this distinction and its contrary interpretations of Section 73.858(a) and the Instructions for FCC Form 318 (Instructions). The Commission found that

³ See *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period; CDBS Is Now Accepting Form 318 Amendments*, Public Notice, 28 FCC Rcd 16713 (MB 2013). LPFM MX Group 198 also consisted of applications filed by St. Joseph's, Sykesville, Roman Catholic Congregation, Inc. (St. Joseph's), and Radiant Foundation Corporation (RFC). See File Nos. BNPL-20131115AIE (St. Joseph's Application) and BNPL-20131113BTK (RFC Application).

⁴ 47 CFR § 73.872(b).

⁵ *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window; Announces a 30-Day Petition to Deny Period and a 90-Day Period to File Voluntary Time-Share Proposals and Major Change Amendments*, Public Notice, 29 FCC Rcd 10847 (2014) (*September Public Notice*). The Loyola Application, CEM Application, the BSB Application, the UWA Application, and the JHU Application each received a point under each of the following four criteria: 1) established community presence of at least two years; 2) commitment to originate local programming; 3) commitment to maintain a main studio; and 4) commitment to originate local programming and to maintain a main studio. The CEM Application, the BSB Application, the UWA Application, and the JHU Application also each received a point under the diversity of ownership (new entrant) criterion. The Loyola Application was not awarded a point under this final criterion. See *id.* at 10850, n.22.

⁶ On April 30, 2015, the Bureau dismissed the RFC Application. See *Broadcast Actions*, Public Notice, Report No. 48482 (MB May 5, 2015). This resulted in the St. Joseph's Application being granted as a singleton. See *Broadcast Actions*, Public Notice, Report No. 48512 (MB June 17, 2015).

⁷ *Order*, 30 FCC Rcd at 15043, paras. 7-8.

⁸ *Id.* at 15042-42, paras. 5-6.

⁹ *Id.*

such a reading contradicted the text of the Rule and would undermine the Commission's goal of promoting diversity of ownership.¹⁰

5. The *Order* also concluded that the First Agreement was no longer valid because the St. Joseph's Application had been granted and the JHU Application was no longer a tentative selectee.¹¹ Accordingly, the *Order* identified the CEM Application, the BSB Application, and the UWA Application as the new tentative selectees of LPFM MX Group 198 and afforded these applicants a 90-day period in which to file a new time-share agreement.¹² The *Order*, however, took no final action on any of the applications in LPFM MX Group 198.¹³

6. In the Second Petition, Loyola again contends that the Commission erred in denying it the comparative point under the diversity of ownership criterion.¹⁴ It first argues that “[a]pplicants in the current LPFM window were not given explicit notice that a recusal would be ineffective for the diversity of ownership point due to lack of any formal distinction made by the Commission and the plain text of the Instructions.”¹⁵ Loyola further states that “as a processing rule, Loyola was entitled to explicit notice of all application requirements, including that its recusal would not be effective for the purposes of the diversity of ownership point criterion.”¹⁶ Loyola also argues, for the first time, that notwithstanding its attributable interest, it should receive a diversity ownership point because “it is not a subsidiary of a parent organization that is an active player in the broadcast marketing” but rather is “a university trying to obtain its first broadcast station for educational purposes. The attributable interest at issue here . . . is *de minimis*.”¹⁷

II. Discussion

7. Section 1.106(a) of the Rules generally prohibits petitions for reconsideration of interlocutory orders.¹⁸ The *Order* is an interlocutory order because it did not take any final action on any application in LPFM MX Group 198.¹⁹ Consequently, the *Order* is not subject to reconsideration at this stage, and we will dismiss the Second Petition.²⁰

¹⁰ *Id.* at 10543, para. 6.

¹¹ *Id.* at 15044, para. 10.

¹² *Id.*

¹³ *Id.* at 15044, para. 11.

¹⁴ BSB filed an Opposition to the Second Petition on October 29, 2015.

¹⁵ Second Petition at 3.

¹⁶ *Id.* at 2-3, citing *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (*Salzer*), and *Synergy Project Inc.*, Letter Order, 29 FCC Rcd 9601 (MB 2014) (*Synergy*).

¹⁷ Second Petition at 5.

¹⁸ See 47 CFR § 1.106(a).

¹⁹ See *Jet Fuel Broadcasting*, Memorandum Opinion and Order, 29 FCC Rcd 2471, para. 2 (2014) (“An interlocutory action by definition is non-final, one that neither denies nor dismisses an application nor terminates an applicant's right to participate in the proceeding. For an agency action to be ‘final,’ first, the action must mark the ‘consummation’ of the agency's decision making process, and not be merely of a tentative or interlocutory nature; and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.”) See also *Order*, 30 FCC Rcd at 10544, para. 10 (ordering clauses did not grant or dismiss any application).

²⁰ See *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations Filed in the February 2010 Window*, 30 FCC Rcd 5135, 5147, para. 33 (2015) (dismissing petition for reconsideration filed against interlocutory order).

8. Additionally, Section 1.106(p) of the Rules permits the Bureau to dismiss or deny petitions for reconsideration “that plainly do not warrant consideration by the Commission.”²¹ Section 1.106(p)(3) specifies that a petition for reconsideration that relies on “arguments that have been fully considered and rejected by the Commission within the same proceeding” does not warrant consideration.²² In the *Order*, the Commission considered and rejected Loyola’s argument that it lacked notice that its recusal pledge would not be effective for the purposes of a diversity of ownership point, stating that “Section 73.858(a) expressly provides for attribution exception only to the Commission’s ownership limits . . . and cross-ownership applicant eligibility restrictions, and does not provide that the Commission will disregard an applicant’s attributable interests for other purposes.”²³ The Commission further rejected “Loyola’s strained reading of the Instructions.”²⁴ Accordingly, as a separate and independent basis for dismissing the Second Petition, we find that it relies on arguments already considered and rejected by the Commission, and does not present any new facts or changed circumstances.²⁵

9. Finally, Section 1.106(p)(2) provides for summary dismissal of “arguments that could have been presented previously to the Commission or its staff but were not.”²⁶ Loyola argues for the first time in the Second Petition that *Salzer* and *Synergy* require the Commission to award its application a point for diversity of ownership, and that granting the Loyola Application would further the goal of promoting diversity of ownership. These arguments could have been presented in the First Petition, but were not, and the Second Petition can thus be dismissed to the extent it relies on these new arguments.²⁷

10. The 90-day period for the remaining tentative selectees in LPFM MX Group 198 to reach

²¹ 47 CFR § 1.106(p). See *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, para. 27 (2011).

²² 47 CFR § 1.106(p)(3).

²³ Order, 30 FCC Rcd at 10542, para. 5.

²⁴ *Id.* at 10543, para. 6.

²⁵ See *Anniston Seventh Day Adventist Church*, Memorandum Opinion and Order, 30 FCC Rcd 6057 (MB 2015) (dismissing petition for reconsideration pursuant to Sections 1.106(p)(3) and 1.106(b)(3) of the Rules where it did not present new facts or changed circumstances, but merely raised the same arguments rejected by the Commission).

²⁶ See 47 CFR § 1.106(p)(2); see also *Royce International Broadcasting Co.*, Memorandum Opinion and Order, 26 FCC Rcd 9249, para. 2 (MB 2011) (The Commission’s “[r]ules and precedent clearly provide that [the agency] will not consider petitions for reconsideration which rely on facts or theories that could have been presented earlier in the proceeding.”).

²⁷ Additionally, were we to consider these arguments, we would reject them. The Court of Appeals for the D.C. Circuit has held that “*Salzer's* ‘full and explicit notice’ phrasing . . . must be appraised in the context of the highly confusing situation that case presented.” *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (emphasis added). See also *Salzer*, 778 F.2d at 875 (holding that applicants did not receive adequate notice of filing requirements where the Commission was vague about timing and forms for new information submissions). *Synergy* addressed whether a dismissed application with a pending application for review and an application for a new LPFM construction permit were inconsistent applications, and determined that neither the Rules nor the Instructions gave guidance on that issue. *Synergy*, 29 FCC Rcd at 9604. In contrast to the uncertainties in *Salzer* and *Synergy*, as noted by the Commission in the *Order*: 1) the text of Section 73.858(a) made clear that it only provided an exception to the attribution rules for eligibility, and 2) there was no ambiguity in the Instructions and Loyola’s reading of the Instructions was unreasonable. Finally, Loyola not only provides no authority for its argument that a self-declared “*de minimis*” attributable interest should not be considered for comparative purposes, but also fails to explain how the Commission could base a decision on an interpretation that contradicts the plain text of Section 73.872(b)(5) of the Rules. See 47 CFR § 73.872(b)(5) (“An applicant must hold **no attributable interest in any** other broadcast station.”) (emphasis added). See also *Creation of Low Power radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15473, para. 191 (2012) (“we will award one point to an application that can certify that it has **no attributable interest in any** broadcast station.”) (emphasis added).

a voluntary time-sharing agreement ended on December 15, 2015.²⁸ On that day, CEM and UWA filed a points-aggregation time-share agreement (Second Agreement). As a result of the Second Agreement, CEM and UWA have an aggregated 10 comparative points, thus breaking the three-way tie between CEM, UWA, and BSB in favor of CEM and UWA. We have reviewed the Second Agreement and find that it meets the requirements of Section 73.872(c) of the Rules.²⁹ Accordingly, we will approve the Second Agreement, grant the CEM Application and the UWA Application with appropriate conditions, and dismiss the mutually-exclusive BSB Application and the non-tentative selectees (JHU Application and Loyola Application).³⁰

III. Conclusion

11. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed on October 16, 2015, by Loyola University Maryland IS DISMISSED as an interlocutory appeal, pursuant to Section 1.106(a) of the Rules, and as repetitious, pursuant to Section 1.106(p) of the Rules.

12. IT IS FURTHER ORDERED that the time-share agreement filed on December 15, 2015, by Center for Emerging Media, Inc., and The United Workers Association IS APPROVED pursuant to Section 73.872(c) of the Rules.

13. IT FURTHER ORDERED that the applications of Center for Emerging Media, Inc. (File No. BNPL-20131112BMA) and The United Workers Association (File No. BNPL-20131114BEV) for construction permits for new LPFM stations in Baltimore, Maryland ARE GRANTED, with appropriate conditions to be shown on the construction permit.

14. IT IS FURTHER ORDERED that the application of The Benedictine Society of Baltimore City (File No. BNPL-20131114ADS) for a construction permit for a new LPFM station in Baltimore, Maryland, IS DISMISSED.

15. IT IS FURTHER ORDERED that the application of Johns Hopkins University (File No. BNPL-20131115ANR) for a construction permit for a new LPFM station in Baltimore, Maryland, IS DISMISSED.

16. IT IS FURTHER ORDERED that the application of Loyola University (File No. BNPL-20131115ANS) for a construction permit for a new LPFM station in East Baltimore, Maryland, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

²⁸ *Order*, 30 FCC Rcd at 15044, para. 10. *See also* 47 CFR § 73.872(c).

²⁹ *See* 47 CFR § 73.872(c).

³⁰ The *September Public Notice* indicated that non-tentative selectee applications would be dismissed once the tentative selectees' applications had been granted. *September Public Notice*, 29 FCC Rcd at 10855.