

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

In Matter of	)	
	)	
<b>WATER OF LIFE RADIO</b>	)	File No. BNPL-20010615AVY
	)	Facility ID No. 135554
	)	
<b>ST. GREGORY'S COMMUNICATION ASSOCIATION</b>	)	File No. BNPL-20010615ACT
	)	Facility ID No. 133205
	)	
Applications for a Construction Permit for a New LPFM Station at Missoula, Montana	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 6, 2008**

**Released: February 8, 2008**

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it the captioned, mutually exclusive applications of Water of Life Radio ("WLR") and St. Gregory's Communication Association ("St. Gregory"), each seeking a construction permit for a new station in the Low Power FM ("LPFM") Broadcast Service at Missoula, Montana. In accordance with our procedures,<sup>1</sup> the staff tallied the comparative point totals claimed by each applicant and listed those point totals in a Public Notice accepting the applications for filing, establishing a petition to deny period, and specifying the applications' tentative selectee status.<sup>2</sup> Therein, WLR was designated as the tentative selectee for the subject authorization. WTL Communications, Inc. ("WTL")<sup>3</sup> filed an Informal Objection to WLR's application on May 7, 2004 (the "Objection"), to which WLR filed an Opposition on August 26, 2004. No parties filed petitions to deny or informal objections to the St. Gregory application. For the following reasons, we grant WTL's Objection to the extent indicated, dismiss the St. Gregory application, and grant the WLR application.

**II. DISCUSSION**

2. *WTL Objection.* WTL argues in its Objection that: (1) WLR failed to demonstrate that it was a nonprofit legal entity, as it failed to provide its articles of incorporation or the status of its incorporation on the filing date; (2) even if WLR is properly incorporated, it improperly claimed a

<sup>1</sup> See *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000) ("*LPFM Report and Order*"); *recon. generally denied*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208 (2000); *regulation modification granted by* Second Report and Order, 16 FCC Rcd 8026 (2001); Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 07-204 (rel. Dec. 11, 2007) ("*Third Report and Order*").

<sup>2</sup> See *Closed Groups of Pending Low Power FM Mutually Exclusive Applications Accepted for Filing*, Public Notice, 19 FCC Rcd 4624 (2004).

<sup>3</sup> WTL, an applicant for a new LPFM facility in Grants Pass, Oregon (File No. BNPL-20010615BDF), claims to have discovered deficiencies in a number of pending LPFM applications, to which it has filed objections, including that of WLR here.

comparative point for established community presence;<sup>4</sup> and (3) WLR appears to be controlled by a central organization and will not truly be serving the local community.

3. In its Opposition, WLR states that it described itself in the application as a “non-stock, not-for-profit corporation organized under the laws of the state of Montana in 2001” and that the form requires nothing further concerning the identification of corporate existence.<sup>5</sup> Further, WLR states that Section 73.872 of the Commission’s Rules (the “Rules”) is silent as to any requirement that an applicant be in existence for at least two years prior to filing its application, and that there “is no logical reason” that the language in the *LPFM Report and Order* should not apply also to individuals. In this regard, WLR submits that community presence can only be attained by the actions of the individuals that comprise the corporation, not the corporate entity itself, and concludes that the local residence of the members of its governing board alone is sufficient to demonstrate “established community presence.” Finally, WLR maintains that WTL’s real party in interest contention is “unsupported by any extrinsic evidence and flows entirely from WTL’s unfounded speculation.” WLR indicates that it was formed by and operates entirely under the initiative and control of individuals in Missoula, Montana, who undertook to establish an LPFM station there. WLR states that, for the educational objectives exhibit in its application, it reviewed a model document provided by counsel and determined that it was appropriate to include as part of WLR’s application; and it had no knowledge about whether its counsel provided a similar draft to his other LPFM clients.<sup>6</sup>

4. Pursuant to the applicable Rules and procedures, an applicant for an LPFM station must certify its eligibility to own and operate such station at the time it files its application.<sup>7</sup> Section 73.853(a)(1) of the Rules states that an LPFM station may be licensed to a noncommercial educational (“NCE”) organization for the advancement of an educational program.<sup>8</sup> Because individuals are not eligible to own and operate LPFM stations,<sup>9</sup> the certification requires that the applicant be a noncommercial educational institution, corporation, or entity that is recognized under state law.<sup>10</sup> Thus, an LPFM applicant must be incorporated, registered, or otherwise organized as a nonprofit entity under state law at the time its application is submitted.<sup>11</sup> However, there is no requirement that LPFM

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<sup>4</sup> WTL notes that the Instructions to FCC Form 318 indicate that, to be eligible for a point for established community presence, the applicant must have a community presence for at least two years prior to the date of the application. WTL states that WLR claims the point, even though WLR had not been incorporated for two years prior to filing, because “at least 75 percent of its directors have lived within 10 miles of the proposed antenna site during the past two years.”

<sup>5</sup> Nevertheless, WLR provides a copy of a page from the website of the Montana Secretary of State verifying that WLR was incorporated on May 16, 2001 and remains in good standing. Opposition, Attachment 1.

<sup>6</sup> In fact, WLR observes that each of the applicants of the more than 34 LPFM applications to which WTL objected and levied its “controlled by a central organization” claim were represented by the same counsel. According to WLR, this does not give the applicants any relationship to each other, nor “does it consign them all to becoming part of some grand conspiracy.” Opposition at 12-14.

<sup>7</sup> See Instructions for FCC Form 318, Section II, Question 2. See also FCC Form 318, Section II, Question 2.

<sup>8</sup> 47 C.F.R. § 73.853(a)(1).

<sup>9</sup> *LPFM Report and Order*, 15 FCC Rcd 2205 at ¶ 20, n.40. See also Instructions for FCC Form 318, Section II, Question 2(b).

<sup>10</sup> *Id.* at ¶¶ 18 and 19. See also 47 U.S.C. § 397(6)(A).

<sup>11</sup> The Commission restricted the initial LPFM filing windows to “local” applicants. 47 C.F.R. §§ 73.853(b). See also, *LPFM Report and Order*, 15 FCC Rcd at 2215.

applicants submit documentation of their corporate status with their original applications. Furthermore, mere allegations are insufficient to rebut such a certification. Thus, we reject WTL's claim that WLR has failed to comply with Section 73.853(a)(1). We note that, in its Opposition, WLR provided evidence that it was incorporated on May 16, 2001.<sup>12</sup> Furthermore, to the extent that WLR's failure to provide the exact date of its incorporation renders the application not grantable, that minor defect can be corrected by amendment.<sup>13</sup> This omission is not a defect that would cause dismissal of an LPFM application.<sup>14</sup> Finally, WTL's allegation that it "appears" WLR is controlled by a central organization amounts to mere speculation. WTL does not identify this "central organization," or specify any alleged Commission rule or policy violation that would warrant dismissal of the application.<sup>15</sup>

5. With respect to WTL's claim that WLR improperly claimed a comparative point for "established community presence," we note that Section 73.782 of the Rules, entitled "Selection Procedure for Mutually Exclusive LPFM Applications," provides, in pertinent part, that:

[e]ach mutually exclusive application will be awarded one point for each of the following criteria, based on application certification that the qualifying conditions are met: (1) *Established community presence.* An applicant must, for a period of at least two years prior to application, have been physically headquartered, have had a campus, or have had seventy-five percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna. . . .<sup>16</sup>

6. The language of the Rule requires that a LPFM applicant must be in existence for at least two years prior to filing the application in order to merit a point for established community presence. Consistent with this, in the proceeding establishing the LPFM service,<sup>17</sup> the Commission discussed the underpinning for its requirement that an applicant must make a threshold showing that it existed two years prior to such filing. Therein, the Commission contemplated that the organization filing the application would have been in existence and based in the community for at least two years at the time of the filing. For example, the Commission expressed its belief that the criterion for demonstrating established community presence favors *organizations* that have been operating in the communities where they propose to construct an LPFM station and thus have "track records" of community service and established

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<sup>12</sup> See Opposition, Attachment 1.

<sup>13</sup> See 47 C.F.R. § 73.871(c)(4).

<sup>14</sup> Cf. *Superior Broadcasting Of California*, Decision, 94 FCC 2d 904 (1983) (slight comparative demerit assessed for failure to report information already on file with FCC) and *Post-Newsweek Stations, Florida, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 92 (1974) (supplemental filings falling within certain parameters were properly accepted and considered by the Bureau).

<sup>15</sup> See, e.g., 47 C.F.R. § 73.858(b) and the Instructions to FCC Form 318, pp. 5-6, which reads:

Under this provision a local chapter of a national organization will not have the attributable media interests of the national organization attributed to it, provided that the local chapter: (1) is incorporated in its local area separately from the national organization with which it is affiliated; and (2) has a distinct local presence and mission. To satisfy the second element of this standard, an applicant must demonstrate that it has significant membership within its local area and that it has a local purpose that can be distinguished from the purpose of the national organization with which it is affiliated.

<sup>16</sup> 47 C.F.R. § 73.782(b)(1).

<sup>17</sup> *LPFM Report and Order*, *supra*, 15 FCC Rcd 2205.

constituencies within their communities. The Commission believed that such applicants, because of their “longstanding organizational ties” to their communities, are likely to be more attuned to, and have “organizational experience” addressing, the needs and interests of their communities.<sup>18</sup> Further, the Commission stated that its “preferring organizations that have been in existence and physically present in the community for two years” would “help prevent maneuvering of the point system by those who might otherwise establish multiple organizations to file the LPFM applications.”<sup>19</sup>

7. Moreover, the Instructions to FCC Form 318, regarding claiming the point for established community presence, expressly provide that:

To qualify for a point under this criterion, the applicant must have an established community presence of at least two years duration in the community it proposes to serve. Educational institution and organization applicants must be able to certify that, during the two years prior to application, (a) it has been in existence as a nonprofit educational institution or organization, **and** (b) has been physically headquartered, has had a campus, or has had seventy-five percent of its governing board members residing within 10 miles of the coordinates of the proposed transmitting antenna.<sup>20</sup>

8. Thus, we reject WLR’s interpretation of Section 73.782. The Rule language, the Commission’s Order adopting the Rule, and the instructions to the application for an LPFM construction permit all contradict WLR’s contention that Section 73.782 does not require that an applicant be in existence for two years prior to filing its application. If an applicant desires to claim the point for establishment of a community presence, it must meet the threshold requirement of existing as an entity for at least two years prior to filing its application. An applicant cannot certify that “it has had 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna”<sup>21</sup> if the applicant itself has not been in existence for two years. WLR’s incorporation on May 16, 2001, one month before it filed its application, does not demonstrate the “longstanding organizational ties” to Missoula envisioned by the Rule.<sup>22</sup> Although the information that WLR has submitted regarding the local residence of members of its governing board is sufficient to demonstrate that WLR is “community-based,”<sup>23</sup> it is not sufficient to demonstrate that it had an “established community presence” for two years prior to the filing of the application, entitling it to claim the comparative point for the criterion set forth under Section 73.872(b)(1). Accordingly, we will grant WTL’s Objection on this issue only, and we find that WLR is not entitled to the point for “established community presence.”

9. *LPFM Selection Process.* Before applying the LPFM mutually exclusive selection procedure preferences to determine the number of merit points to be awarded to each applicant, we first ascertain the basic eligibility of the applicants. In order to further our diversity goals and foster local, community-based service, we do not allow any broadcaster or other media entity subject to our ownership

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2260 ¶ 140.

<sup>20</sup> Page 8, A. Question 1: Established Community Presence (emphasis added).

<sup>21</sup> *LPFM Report & Order, supra*, 15 FCC Rcd at 2260 ¶ 140.

<sup>22</sup> *Id.* We do not question whether WLR’s listed principals have lived in Missoula for more than two years. However, the Commission does not license LPFM stations to individuals, and the WLR principals’ individual ties to the community do not provide the “organizational ties” valued by the Commission for LPFM applicants.

<sup>23</sup> *Id.* at ¶ 33. *See also* 47 C.F.R. § 73.853.

rules to control or to hold an attributable ownership interest in an LPFM station or enter broadcast-related operating agreements with an LPFM licensee. Additionally, to foster the local nature of LPFM service, we have imposed limited eligibility to local entities during the first two years that LPFM licenses are available.<sup>24</sup> Based on the complete application record, we conclude that WLR and St. Gregory are each qualified to hold an LPFM authorization.

10. Mutually exclusive LPFM applications filed by qualified applicants are subject to the comparative selection procedures set forth in Section 73.872 of the Rules.<sup>25</sup> This procedure awards a maximum of three points based on three criteria deemed to be most relevant to predicting the applicant found to be best qualified to provide the service for which LPFM spectrum has been allocated, with the applicant with the highest points awarded named tentative selectee.<sup>26</sup>

- Each applicant that certified that it has had an *established community presence of at least two years' duration* is awarded one point. An applicant is deemed to have an established community presence if, for a period of at least two years prior to application, the *applicant* has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna.
- An applicant that has *pledged to operate at least 12 hours per day* is awarded one point.
- An applicant that has *pledged to originate locally at least eight hours of programming per day* is awarded one point. For purposes of this criterion, local origination is defined as the production of programming within 10 miles of the reference coordinates of the proposed transmitting antenna.<sup>27</sup>

11. Under this comparative selection process, the applicants here are awarded the following points:

- *Established Community Presence.* Neither WLR nor St. Gregory is entitled to a point. WLR is not entitled to a point because, even though it certified to having an “established community presence,” it does not meet the requirements of existing as an entity and being physically headquartered, having a campus, or having 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna for a period of at least two years prior to the filing date of its application.<sup>28</sup> St. Gregory is not entitled to a point because it has not so certified.
- *Proposed Operating Hours.* WLR and St. Gregory are each entitled to a point because they each have pledged to operate at least 12 hours per day.<sup>29</sup>

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<sup>24</sup> See 47 C.F.R. § 73.853(b). The *Third Report and Order* amends this rule section. Pursuant to the amended 47 C.F.R. § 73.853(b), “[o]nly local applicants will be permitted to submit applications.” The amended rule takes effect on March 17, 2008.

<sup>25</sup> 47 C.F.R. § 73.872.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See* captioned WLR application at Section III, Question 1(a); *see also* Exhibit 7; *see also* captioned St. Gregory Application at Section III, Question 1(a); *see also* Exhibit 7.

<sup>29</sup> *See* captioned WLR and St. Gregory applications at Question 2.

- *Local Program Origination.* WLR is entitled to a point because it has pledged to originate at least eight hours of local programming per day.<sup>30</sup> St. Gregory is not entitled to one point because it has not so pledged.<sup>31</sup>

*Total Points.* Accordingly, WLR is entitled to two points, and St. Gregory is entitled to one point. Thus, WLR is the prevailing tentative selectee in LPFM Mutually Exclusive Group No. 59. We conclude that grant of WLR's application would serve the public interest, convenience and necessity.

### III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, that the application of St. Gregory's Communication Association (File No. BNPL-20010615ACT) IS DISMISSED.

13. IT IS FURTHER ORDERED, that the Informal Objection to the application of Water of Life Radio (File No. BNPL-20010615AVY) filed by WTL Communications, Inc. IS GRANTED to the extent indicated and is otherwise DENIED.

14. IT IS FURTHER ORDERED that the application of Water of Life Radio (File No. BNPL-20010615AVY) IS GRANTED.

15. IT IS FURTHER ORDERED that copies of this *Memorandum Opinion and Order* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Water of Life Radio, 800 South Avenue West, Missoula, Montana 59801, and to St. Gregory's Communication Association, 305 Luby Lane, Florence, Montana 59833, and WTL Communications, Inc., P.O. Box 1199, Merlin, Oregon 97532, and to its counsel Dan J. Alpert, Esquire, 2120 N. 21<sup>st</sup> Rd., Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>30</sup> See captioned WLR application at Question 3.

<sup>31</sup> See captioned St. Gregory application at Question 3.