

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

In the Matter of)	
)	
JBN, INC.)	File No. BNPL-20010615AQK
)	Facility ID No. 135228
)	
EBENEZER PENTECOSTAL RADIO SERVICE)	File No. BNPL-20010615AIG
)	Facility ID No. 134678
)	
Applications for a Construction Permit for a New LPFM Station at Hendersonville, North Carolina)	

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 JBN, Inc. (“JBN”) and Ebenezer Pentecostal Radio Service (“EPRS”), each seeking a construction permit for a new station in the Low Power FM (“LPFM”) Broadcast Service at Hendersonville, North Carolina. In accordance with our procedures,¹ 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.² Therein, JBN was designated as the tentative selectee for the subject authorization. WTL Communications, Inc. (“WTL”)³ filed an Informal Objection to the JBN application on May 7, 2004 (the “WTL Objection”).⁴ JBN filed a “Petition to Deny” EPRS’ application on February 7, 2005. However, petitions to deny the captioned Hendersonville applications were due no later than April 12, 2004.⁵ We will, therefore, treat the untimely JBN filing as an informal objection (the “JBN Objection”) pursuant to Section 73.3587 of the

¹ See *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000) (“*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*”).

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

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

⁴ JBN filed an Opposition on December 23, 2004, and a Supplement to its Opposition on January 3, 2005.

⁵ See n.2, *supra*.

Commission's Rules (the "Rules").⁶ For the following reasons, we grant the WTL Objection to the extent indicated, deny the JBN Objection, and grant both the JBN and EPRS applications.

II. DISCUSSION

2. *WTL Informal Objection.* WTL argues in its Objection that: (1) JBN 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 JBN is properly incorporated, it improperly claimed a comparative point for established community presence;⁷ and (3) JBN "appears" to be controlled by a central organization and will not truly be serving the local community of Hendersonville, based on generic references and the similarity of language found in JBN's application and other applications.

3. In its Opposition, JBN states that it described itself in the application as a "non-stock, not-for-profit corporation organized under the laws of the state of North Carolina in 2001" and that the application form requires nothing further concerning the identification of corporate existence.⁸ Further, JBN states that Section 73.872 of the Rules is silent as to any requirement that a LPFM applicant be in existence for at least two years prior to filing its application in order to claim a comparative point for established community presence. JBN also argues that WTL's contention that there is some unspecified real party in interest to its application is unsupported by any extrinsic evidence and flows entirely from WTL's unfounded speculation. In this regard, JBN states that it was formed by and operates entirely under the initiative and control of the individuals in Hendersonville, North Carolina, who undertook to establish an LPFM station there. JBN states that for its educational objectives, it reviewed a model document provided by counsel and determined that it was appropriate to include as part of JBN's application; it had no knowledge about whether its counsel had provided a similar draft to his other LPFM clients.⁹

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.¹⁰ 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.¹¹ Because individuals are not eligible to

⁶ 47 C.F.R. § 73.3587.

⁷ WTL notes that the Instructions to FCC Form 318 indicate that the applicant must have a community presence for at least two years prior to the date of the application. WTL states that JBN claims the point for such presence, even though JBN 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."

⁸ In its Opposition, JBN provides a copy of a page from the website of the North Carolina Secretary of State verifying JBN's Hendersonville headquarters' location and that JBN was incorporated on June 12, 2001, and remains in good standing. *See* JBN Opposition at p. 3 and Attachment 1. This showing was not made in JBN's captioned application. Therefore, we cannot accept it as a basis for awarding a point for "established community presence," because accepting an amendment to an application that would improve the comparative position from that established in the original application is in contravention of Section 73.871(b). *See* 47 C.F.R. § 73.871(b). In any event, the information JBN has submitted does not establish that JBN met the two-year requirement for such a point. We will accept JBN's December 23, 2004, filing as an amendment to its application for informational purposes only.

⁹ In fact, JBN observes that each of the more than 30 LPFM applicants whose applications to which WTL has objected and presented its "controlled by a central organization" claim were represented by JBN's counsel. 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.

¹⁰ *See* Instructions for FCC Form 318, Section II, Question 2. *See also* FCC Form 318, Section II, Question 2.

¹¹ 47 C.F.R. § 73.853(a)(1).

own and operate LPFM stations,¹² the certification requires that the applicant be a noncommercial educational institution, corporation, or entity that is recognized under state law.¹³ 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.¹⁴ However, there is no requirement that LPFM 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 JBN has failed to comply with Section 73.853(a). We note that JBN, in its Opposition, provided evidence that it was incorporated in North Carolina on June 12, 2001, three days before it filed its subject application.¹⁵ Additionally, WTL's allegation that it "appears" that JBN is controlled by a central organization amounts to mere speculation. WTL does not identify this "central organization," nor specify any Commission rule or policy that has been violated so as to warrant the dismissal of this application.¹⁶

5. With respect to WTL's contention that JBN 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:

[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. . . .¹⁷

6. Thus, the language of the Rule requires that the applicant must be in existence for at least two years prior to filing the application. In the proceeding establishing the low power FM service,¹⁸ the Commission discussed the underpinning for its requirement that applicants must make a threshold showing that they 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 filing. For example, the Commission stated 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 constituencies within their communities. The Commission expressed its belief 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.¹⁹ Further, the Commission stated that its "preferring organizations that have been in

¹² *LPFM Report and Order*, 15 FCC Rcd 2205 at ¶ 20, n. 40. See also Instructions for FCC Form 318, Section II, Question 2(b).

¹³ *Id.* at ¶¶ 18 and 19. See also 47 U.S.C. § 397(6)(A).

¹⁴ 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.

¹⁵ See JBN Opposition at 3 and Attachment 1; see also www.secretary.state.nc.us/corporations/Search/Results/asp, viewed by Bureau staff on March 31, 2005.

¹⁶ See, e.g., 47 C.F.R. § 73.858(b) and Instructions to FCC Form 318, pp. 5-6.

¹⁷ See 47 C.F.R. § 73.782(b)(1)

¹⁸ *LPFM Report and Order*, *supra*, 15 FCC Rcd 2205.

¹⁹ *Id.* (emphasis added).

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 LPFM applications.”²⁰

7. Further, 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. Education institutions 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 education 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.²¹

8. Thus, we reject JBN’s argument that Commission precedent requires us to award it the point for established community presence in this situation. The Rule language, the Commission’s Order adopting the Rule, and the instructions to the application for an LPFM construction permit all clearly state that, if an applicant desires to claim the point for establishment of a community presence, it must meet the threshold requirement of having existed as an entity for at least two years prior to filing its application. JBN’s incorporation on June 12, 2001, three days before it filed its application, does not demonstrate the “longstanding organizational ties” to Hendersonville envisioned by the Rule.²² Although the information JBN submits regarding the local residence of members of its governing board²³ is sufficient to demonstrate that JBN is community-based for purposes of fulfilling the basic eligibility requirement under Section 73.853(b), 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 in Section 73.872(b)(1). Accordingly, we will grant WTL’s Objection on this issue only, and we find that JBN is not entitled to the point for “established community presence.”

9. *JBN Petition to Deny*. JBN alleges that EPRS is not an incorporated not-for-profit local entity pursuant to Section 73.853(a)(1) of the Rules. As explained above,²⁴ an applicant for an LPFM station must be a noncommercial educational institution, corporation, or entity that is incorporated, registered or otherwise organized under state law.²⁵ There is, however, no requirement in the Commission’s Rules requiring applicants for LPFM facilities to be incorporated, and we reject JBN’s claim to the contrary. In an exhibit provided with the application, EPRS stated that it was an unincorporated association and engaged in activities in the Hendersonville community at the time that it filed its original application.²⁶

²⁰ *Id.* at 2260 ¶ 140.

²¹ Page 8, A. Question 1: Established Community Presence (emphasis added).

²² *Id.* We do not question whether JBN’s listed principals have lived in Hendersonville for more than two years.

²³ *See* n.7, *supra*.

²⁴ *See supra* para. 4.

²⁵ *LPFM Report and Order*, 15 FCC Rcd 2205 at ¶¶ 18 and 19. *See also* 47 U.S.C. § 397(6)(A).

²⁶ *See* captioned EPRS application at Exhibits 2 and 3.

Because JBN has failed to demonstrate that EPRS is not a valid and recognized unincorporated association under North Carolina law, we deny its Objection.²⁷

10. *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 rules to control or to hold an attributable ownership interest in an LPFM station or enter broadcast-related operating agreements with an LPFM licensee.²⁸ Additionally, to foster the local nature of LPFM service, we have limited eligibility to local entities during the first two years that LPFM licenses are available.²⁹ Based on the record before us, we conclude that JBN and EPRS are each qualified to hold an LPFM authorization.

11. Mutually exclusive LPFM applications filed by qualified applicants are subject to the comparative selection procedures set forth in Section 73.872 of the Rules.³⁰ This procedure awards a maximum of three points based on three criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which LPFM spectrum has been allocated, with the applicant with the highest points awarded named the tentative selectee:³¹

- 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.³²

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

- *Established Community Presence.* Neither EPRS nor JBN is entitled to a point. JBN is not entitled to a point because, even though it certified to having an “established community presence,” it does not meet the requirement that, for a period of at least two years prior to the

²⁷ We find JBN’s search of the North Carolina Office of the Secretary of State corporations’ database to be irrelevant. See JBN’s Objection at 3. EPRS certified in its application that it is an “unincorporated association.” See also captioned EPRS application at Exhibits 2 and 3.

²⁸ See 47 C.F.R. § 73.860.

²⁹ 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.

³⁰ 47 C.F.R. § 73.872.

³¹ *Id.*

³² See *id.*

filing date of its application, it existed as an educational institution or organization and had been physically headquartered, had a campus, or had 75 percent of their board members residing within 10 miles of the coordinates of the proposed transmitting antenna.³³ EPRS is not entitled to a point because it has not so certified.

- *Proposed Operating Hours.* EPRS and JBN are each entitled to a point because they have each pledged to operate at least 12 hours per day.³⁴
- *Local Program Origination.* EPRS and JBN are each entitled to a point because they have each pledged to originate at least eight hours of local programming per day.³⁵

Total Points. Accordingly, JBN and EPRS are each entitled to two points. Thus, JBN and EPRS are the prevailing tentative selectees in LPFM Mutually Exclusive Group No. 67. In accordance with our established procedures when applicants are tied for the highest point total in a LPFM Mutually Exclusive Group, JBN and EPRS may submit amendments to their applications incorporating a voluntary time-share proposal within thirty (30) days of the release date of this *Order*.³⁶ If the tie between JBN and EPRS is not resolved through time-sharing, the applicants will be eligible for equal, successive license terms of four years each.³⁷ The terms of the grant (whether for successive license terms or for a voluntary time-share if an acceptable agreement is filed by the parties) will also be made part of the authorization issued to each of these applicants. We conclude that grant of JBN's and EPRS' applications would serve the public interest, convenience and necessity.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that the May 7, 2004, Informal Objection filed by WTL Communications, Inc. to the application of JBN, Inc. (File No. BNPL-20010615AQK), IS HEREBY GRANTED to the extent indicated and is otherwise DENIED.

14. IT IS FURTHER ORDERED that the February 7, 2005, Petition to Deny filed by JBN, Inc. against the application of Ebenezer Pentecostal Radio Service (File No. BNPL-20010615AIG), considered as an informal objection, IS HEREBY DENIED.

15. IT IS FURTHER ORDERED, that the applications of JBN, Inc. and Ebenezer Pentecostal Radio Service ARE GRANTED.

16. IT IS FURTHER ORDERED that the effective date of this *Memorandum Opinion and Order* shall be thirty (30) days from its release to enable the applicants to negotiate and submit a voluntary time-share proposal.³⁸

³³ See captioned EPRS Application at Section III, Question 1(a); see also Exhibit 7; see also captioned JBN Application at Section III, Question 1(a); see also Exhibit 7.

³⁴ See captioned JBN and EPRS Applications at Question 2.

³⁵ See captioned JBN and EPRS Applications at Question 3.

³⁶ Because these two applicants became tied, prevailing tentative selectees by virtue of our action in this *Order*, we are providing them with an opportunity to amend their applications, pursuant to 47 C.F.R. § 73.872(c).

³⁷ See 47 C.F.R. § 73.872(d); see also 47 C.F.R. § 73.873.

³⁸ See 47 C.F.R. § 1.103(a).

17. 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 JBN, Inc., 311 Linda Vista Drive, Hendersonville, North Carolina 28792, and to Ebenezer Pentecostal Radio Service, P.O. Box 780, Dana, North Carolina 28724.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary