

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

In the Matter of)
)
ANCHORAGE CHRISTIAN LIFE) File No. BNPL-20000607ABG
) Facility ID No. 124523
)
ORGANIZATION FOR NORTHERN) File No. BNPL-20000602AFS
DEVELOPMENT) Facility ID No. 124266
)
Applications for a Construction Permit for a New)
LPFM Station at Anchorage, Alaska)
)
)

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 Anchorage Christian Life ("ACL") and Organization for Northern Development ("OND"), each seeking a construction permit for a new station in the Low Power FM ("LPFM") Broadcast Service at Anchorage, Alaska. In accordance with our procedures, 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. Therein, OND and ACL were designated as the tentative selectees for the subject authorization. Also on file are two pleadings directed to the ACL application, the February 27, 2004, Petition to Deny ("Petition") filed by OND and the May 19, 2004, Informal Objection ("Objection") filed by WTL Communications, Inc. ("WTL"). For the following reasons, we grant the Petition and the Objection to the extent indicated, grant the OND application, and dismiss the ACL application.

1 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").

2 See Closed Groups of Pending Low Power FM Mutually Exclusive Applications Accepted for Filing, Public Notice, 19 FCC Rcd 1034 (MB Jan. 28, 2004) ("LPFM Notice of Acceptance Public Notice").

3 ACL filed an Opposition to the Petition on March 18, 2004, to which OND filed a Reply on March 30, 2004.

4 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 ACL here.

II. DISCUSSION

2. OND and ACL filed mutually exclusive applications for a construction permit to build a new LPFM station in Anchorage, Alaska. The ACL and OND applications were accepted for filing and each applicant was tentatively awarded three points under the selection procedure set forth in Section 73.872 of the Commission's Rules (the "Rules").⁵ OND timely filed its Petition; because WTL submitted its Objection after the petition period, its untimely pleading will be considered as an informal objection under Section 73.3587 of the Rules.⁶

3. *OND Petition to Deny.* We have evaluated the merits of OND's Petition and ACL's Opposition, and conclude that ACL is not entitled to the point that it claimed for "established community presence." Accordingly, for the reasons discussed herein, we disallow that point and reevaluate the applications on a comparative basis.

4. Section III, Item 1 of the low power construction permit application form, FCC Form 318, requests that the applicant demonstrate that it has an "established community presence" by certifying that "[the applicant], for a period of at least two years prior to application, has been physically headquartered, has had a campus, or has had seventy-five percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna." ACL indicated "Yes" to that certification, attaching a supporting Exhibit "certifying" that four of its five directors had lived within 10 miles of the proposed antenna site at least two years before the application was filed.

5. In its Petition, OND argues that it is the "comparatively superior applicant" because ACL should not have been awarded the point for certifying that it had an "established community presence." Specifically, OND maintains that ACL did not exist as an entity for two years prior to filing its application, as prescribed by the Rules, but rather based its certification on the two-year residence of the members of its governing board, which by itself, is not sufficient to establish a community presence under Section 73.872(b)(1) of the Rules. OND challenges this certification because ACL had not existed as an entity for two years prior to filing its application, as required by Section 73.872(b)(1). In support, OND submits a copy of ACL's Educational Programs application exhibit,⁷ wherein ACL specifies that it was incorporated on May 5, 2000, only a month prior to the June 7, 2000, filing of its application.

6. In its Opposition to OND's Petition, ACL states that Section 73.872 is silent as to the 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, infra*, should not apply also to individuals. In this regard, ACL submits that community presence can only be attained by the actions of the individuals that comprise the corporation, not the corporate entity itself, and therefore maintains that it claimed the "established local presence" point "on the strength of the local residence" of at least

⁵ 47 C.F.R. § 73.872(a) and (b) require that following the close of each window for new LPFM stations and for modifications in the facilities of authorized LPFM stations, the Commission is to issue a public notice identifying all groups of mutually exclusive applications. Such applications will be awarded points to determine the tentative selectee. Unless resolved by settlement, the tentative selectee will be the applicant within each group with the highest point total. Each mutually exclusive application is awarded one point, based on application certification, for: (1) established community presence (*see discussion infra*); (2) proposed operating hours (if the applicant proposes operation for at least 12 hours per day); and (3) local program origination (if the applicant pledges to originate locally at least eight hours of programming per day). Each applicant in this proceeding was tentatively awarded three points. *LPFM Notice of Acceptance Public Notice*, 19 FCC Rcd at 1036, Attachment A, at 1.

⁶ 47 C.F.R. § 73.3587.

⁷ ACL captioned application, Attachment A, Exhibit 1 ("Anchorage Christian Life Educational Programs").

75% of its governing board members within 10 miles of the proposed antenna site for two years prior to filing the application. ACL concludes that the residence of its governing board, alone, is sufficient to demonstrate “established community presence.” We disagree.

7. Section 73.872 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. . . .⁸

8. Thus, the language of the Rule requires that, in order to be entitled to a point for community presence, the applicant must be in existence for at least two years prior to filing the application. Further, in the proceeding establishing the LPFM service,⁹ the Commission discussed the underpinning for its requirement that such a LPFM applicant must make a threshold showing that it existed two years prior to filing its application. 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.¹⁰ 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.¹¹ Further, the Commission stated that “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.”¹²

9. 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. 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.¹³

⁸ 47 C.F.R. § 73.872(b)(1).

⁹ *LPFM Report and Order*, *supra*, 15 FCC Rcd 2205.

¹⁰ *Id.* at 2260 ¶ 140 (emphasis added).

¹¹ *Id.*

¹² *Id.* at 2260 ¶ 140.

¹³ Page 8, A. Question 1: Established Community Presence (emphasis added).

10. Thus, we must reject ACL's interpretation of Section 73.872. The Rule language, the Commission's Order adopting the Rule, and the instructions to the application for an LPFM construction permit all contradict ACL's contention that Section 73.872 is silent regarding the two-year prior existence prescription for applicants. 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. ACL's incorporation one month before filing its application does not demonstrate the "longstanding organizational ties" to Anchorage envisioned by the Rule.¹⁴ Although the information that ACL has submitted regarding the local residence of members of its governing board demonstrates that ACL 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 ACL to claim the comparative point for the criterion set forth in Section 73.872(b)(1).

11. Finally, ACL's contention that a corporation, as a legal entity, is incapable of establishing a community presence, as opposed to the actions of individuals comprising the corporation, is devoid of merit. Indeed, OND has done so in this case. For these reasons, the point claimed by ACL for "established community presence" will be disallowed.

12. *WTL Informal Objection.* In its Objection, WTL asserts, as did OND, that ACL improperly claimed a comparative point for "established community presence" because it did not exist for at least two years prior to filing the application. WTL also argues that: (1) ACL failed to prove that it is a nonprofit legal entity because the application did not provide "a document showing its articles of incorporation or the status of its incorporation as of the filing date, and does not give an exact date of its incorporation;"¹⁵ and (2) ACL "appears" to be controlled by a central organization and "will not" serve Anchorage, based on the similarity of the language and generic references found in ACL's and other applications.¹⁶

13. Initially, and for the reasons stated above, we agree that ACL is not entitled to a comparative point for "established community presence." We note, however, that 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.¹⁷ 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.¹⁸ Because individuals are not eligible to own and operate LPFM stations,¹⁹ the certification

¹⁴ *Id.* We do not question whether ACL's listed principals have lived in Anchorage for more than two years. However, the Commission does not license LPFM stations to individuals, and the ACL principals' individual ties to the community do not provide the "organizational ties" valued by the Commission for LPFM applicants.

¹⁵ WTL is incorrect in this assertion; ACL's original application indicates that ACL was incorporated on May 5, 2000.

¹⁶ WTL states that, while doing research against an application mutually exclusive with its LPFM application for Grants Pass, Oregon, it discovered that the applicant there used "almost the identical text to state their educational purpose" and used the same rationale and text to claim a comparative point for Established Local Presence. WTL observes that there is nothing in the statement to demonstrate any connection to Anchorage, only to "the proposed service area." WTL charges that it cannot be a coincidence that the same text and "flawed reasoning" could be used in multiple applications unless it was directed by a "central organization." WTL does not identify that "central organization."

¹⁷ See Instructions for FCC Form 318, Section II, Question 2. See also FCC Form 318, Section II, Question 2.

¹⁸ 47 C.F.R. § 73.853(a)(1).

requires that the applicant be a noncommercial educational institution, corporation, or entity that is recognized under state law.²⁰ 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.²¹ 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. WTL's attack on ACL's corporate status is without merit. ACL's original application indicates that ACL was incorporated on May 5, 2000, and WTL offers no evidence beyond mere allegations that ACL fails to comply with Section 73.853(a)(1). Finally, we cannot credit WTL's speculative allegation that it "appears" that ACL is controlled by a central organization. WTL does not identify this "central organization," nor any rule violation that would warrant dismissal of the application.²²

14. *LPFM Selection Process.* Before applying the LPFM mutually exclusive selection procedure preference 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.²³ 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.²⁴ Based on the record before us, we conclude that ACL and OND are each qualified to hold an LPFM authorization.

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

¹⁹ *LPFM Report and Order*, 15 FCC Rcd 2205 at paragraph 20, footnote 40. *See also* Instructions for FCC Form 318, Section II, Question 2(b).

²⁰ *Id.* at paragraph 18 and 19. *See also* 47 U.S.C. §397(6)(A).

²¹ 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.

²² *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.

²³ *See* 47 C.F.R. § 73.860.

²⁴ *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.

²⁵ 47 C.F.R. § 73.872.

²⁶ *Id.*

- 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.²⁷

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

- *Established Community Presence.* OND is entitled to a point because it has certified that, for a period of at least two years prior to the filing date of its application, it has existed as an educational institution or organization and has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna.²⁸ ACL is not entitled to a point because, as discussed above, it did not exist for at least two years prior to filing its application.²⁹
- *Proposed Operating Hours.* OND and ACL are each entitled to a point because they each pledge to operate at least 12 hours per day.³⁰
- *Local Program Origination.* OND and ACL are each entitled to one point because they have each pledged to originate at least eight hours of local programming per day.³¹

Total Points. Accordingly, OND is entitled to three points, and ACL is entitled to two points. Thus, OND is the prevailing tentative selectee in LPFM Mutually Exclusive Group No. 1. We conclude that grant of OND's application would serve the public interest, convenience and necessity.

III. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the application of Organization for Northern Development (File No. BNPL-20000602AFS) IS GRANTED.

²⁷ See *id.*

²⁸ See captioned OND application at Section III, Question 1(a).

²⁹ See ¶¶ 7-11, *supra*.

³⁰ See captioned OND application at Section III, Question 2; see also captioned ACL Application at Section III, Question 2.

³¹ See captioned OND application at Section III, Question 3; see also captioned ACL Application at Section III, Question 3.

18. IT IS FURTHER ORDERED that the application of Anchorage Christian Life (File No. BNPL-20000602AFS) IS DISMISSED.

19. IT IS FURTHER ORDERED, that the Petition to Deny the application of Anchorage Christian Life filed by Organization for Northern Development IS GRANTED, to the extent indicated herein and is otherwise DENIED.

20. IT IS FURTHER ORDERED, that the Informal Objection to the application of Anchorage Christian Life filed by WTL Communications, Inc. IS GRANTED to the extent indicated herein and is otherwise DENIED.

21. Finally, 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 Anchorage Christian Life, 6100 O'Malley Road, Anchorage, Alaska 99516, and to its counsel, Donald E. Martin, Esq., P.O. Box 8433, Falls Church, Virginia 22041; and to the Organization for Northern Development, 1325 Primrose Street, Anchorage, Alaska 99508, and WTL Communications, Inc., P.O. Box 1199, Merlin, Oregon 97532, and to its counsel Dan J. Alpert, Esq., 2120 N. 21st Rd., Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary