

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

In the Matter of)	
)	
Applications for Review of Decisions Regarding	)	File No. BNPL-20000608AEN
Six Applications for New Low Power FM Stations	)	Facility ID No. 124816
)	
	)	File No. BNPL-20010615AYT
	)	Facility ID No. 135661
)	
	)	File No. BNPL-20010615BCU
	)	Facility ID No. 135761
)	
	)	File No. BNPL-20010615BDV
	)	Facility ID No. 135779
)	
	)	File No. BNPL-20010614ACY
	)	Facility ID No. 133487
)	
	)	File No. BNPL-20000601ADQ
	)	Facility ID No. 124193

MEMORANDUM OPINION AND ORDER

Adopted: August 22, 2013

Released: August 23, 2013

By the Commission:

1. By this *Memorandum Opinion and Order*, the Commission considers five Applications for Review that challenge actions taken by the Media Bureau (“Bureau”) regarding six applications for new low power FM (“LPFM”) construction permits filed in the 2000 and 2001 LPFM filing windows. For the reasons set forth, we grant in part the Application for Review filed by Mount Pisgah Adventist Educational Media (“Mount Pisgah”) but otherwise deny these Applications for Review. Recently the Commission undertook various actions to implement the Local Community Radio Act of 2010¹ and subsequently announced October 15-29, 2013, as the dates of the next LPFM filing window.² Resolution of these Applications for Review may provide guidance to entities preparing their applications ahead of the filing window and a fair opportunity for unsuccessful applicants to prepare new proposals for the upcoming window.

¹ *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Red 15402, 15481 ¶ 211 (2012) (“*LPFM Fifth Order on Reconsideration*”).

² *Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15 – October 29, 2013 Low Power FM Filing Window*, Public Notice, DA 13-1385, 2013 FCC LEXIS 2644 (rel. June 17, 2013).

2. **Dillingham Christian Radio.** Dillingham Christian Radio (“DCR”) filed an application for a construction permit to build a new LPFM station at Dillingham, Alaska, during the 2000 LPFM filing window.³ By letter dated June 11, 2001 (“*Deficiency Letter*”), the Bureau notified DCR that it was required to register its proposed antenna tower pursuant to Section 17.4(a) of the Commission’s rules (“Rules”)⁴ and that Federal Aviation Administration approval was necessary to secure such registration.⁵ The Bureau directed DCR to (1) amend its application and submit the antenna structure registration number within 30 days of the date of the *Deficiency Letter*, or (2) if the antenna structure could not be registered within 30 days, notify the staff in writing concerning the delay. The Bureau expressly cautioned DCR that if it failed to respond within this 30-day period, its application would be dismissed for failure to prosecute pursuant to Section 73.3568 of the Rules.⁶ Despite this admonition, DCR did not respond to the *Deficiency Letter*. Accordingly, on November 29, 2001, over four months after the deadline for DCR to respond, the Bureau dismissed DCR’s application.⁷

3. DCR filed a petition for reconsideration. DCR acknowledged that it had not responded to the *Deficiency Letter*. It explained that its president was on work-related travel during the summer and fall of 2001, “making it difficult for DCR’s counsel to obtain instructions on how to respond” to the *Deficiency Letter*.⁸ DCR stated that its counsel had contacted other DCR principals and, subsequent to the dismissal, DCR had taken steps to register its proposed antenna structure. DCR argued that, as there were no competing applications, no party would be prejudiced by reinstatement of its application. DCR also asserted that the eventual grant of its application would have the beneficial result of bringing a new radio service to the community of Dillingham. The Bureau denied the petition, concluding that the facts presented by DCR did not warrant reconsideration.⁹ DCR sought review.¹⁰ DCR reiterates arguments made in its petition for reconsideration and characterizes the Bureau’s approach as “unnecessarily draconian” and “inconsistent with the overall tenor of the Commission’s objectives in establishing the LPFM service.”¹¹

4. We reject DCR’s claim that the Bureau’s denial of its petition for reconsideration is at odds with the policies adopted in the *LPFM Report and Order*.¹² DCR maintains that it should not be penalized for its failure to respond to the *Deficiency Letter* because, in fashioning its LPFM rules, “the Commission indicated its willingness to tolerate a lesser degree of adherence to rigid formalities in order to foster the development of the new LPFM service.”¹³ While the Commission – in the *LPFM Report and Order* – did conclude that certain obligations imposed on full-power radio would not apply to LPFM,¹⁴ it

³ File No. BNPL-20000608AEN.

⁴ 47 C.F.R. § 17.4(a).

⁵ *Letter to Donald E. Martin, Esq.* (MMB June 11, 2001).

⁶ 47 C.F.R. § 73.3568(a)(1).

⁷ *Letter to Donald E. Martin, Esq.* (MMB Nov. 29, 2001).

⁸ DCR Petition for Reconsideration at 2.

⁹ *Letter to Donald E. Martin, Esq.*, at 1 (MB June 10, 2003).

¹⁰ DCR filed its Application for Review (“DCR AFR”) on July 14, 2003.

¹¹ DCR AFR at 2, 4 (*citing Creation of Low Power FM Service*, Report and Order, 15 FCC Rcd 2205, 2270 (2000) (“*LPFM Report and Order*”).

¹² *Id.*

¹³ DCR AFR at 3.

¹⁴ *LPFM Report and Order*, 15 FCC Rcd at 2270-82.

also identified a number of broadcast rules that would apply.¹⁵ Among those rules specifically applicable to LPFM is Section 73.3568 of the Rules, which specifies that “[f]ailure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.”¹⁶ Like all other broadcast applicants, LPFM applicants have a duty to prosecute their applications, an obligation of which the Bureau specifically reminded DCR in the *Deficiency Letter*, specifically citing Section 73.3568. Accordingly, the Bureau’s dismissal of its application was warranted.

5. We affirm the Bureau’s finding that DCR failed to provide adequate justification for its failure to respond to the *Deficiency Letter* and for its significant tardiness in registering the tower. Like the Bureau, we find unavailing DCR’s attempt to excuse its lack of response by the claimed absence of its president, “on work-related travel ... through the summer and autumn.”¹⁷ Even assuming that he was *incommunicado* throughout the over five months between the *Deficiency Letter* requesting the tower registration and the Bureau’s November 29, 2001, letter dismissing the application (which DCR has not shown to be the case), we note that the Bureau addressed the *Deficiency Letter* to counsel for DCR, whom DCR had designated its contact representative in its application, and also sent copies to DCR at its address of record and to its engineering consultant, who had certified the engineering portion of the application as DCR’s “Consulting Engineer Technician.”¹⁸ DCR fails to explain why its consulting engineer and its counsel, or one of its eight principals other than its president,¹⁹ were incapable of timely preparing and filing the necessary one-page form with the FAA and advising the Bureau that DCR had done so. In fact, as DCR acknowledges, it was only after the Bureau had dismissed the DCR Application, that the other principals of DCR stepped in to start the registration process.²⁰ DCR fails to explain, moreover, why it did not at least request an extension of time to respond, or simply file a letter to inform the staff of the reasons for its delay in registering the tower, as the staff explicitly directed.

6. Finally, like the Bureau, we find DCR’s public interest argument unpersuasive. While we do not doubt that the community of Dillingham, Alaska, could benefit from a new community radio service,²¹ DCR’s inability to offer such service is attributable solely to its own inaction. We have rejected similar public interest appeals by other applicants whose applications were dismissed for failure to prosecute.²²

¹⁵ *Id.* See also 47 C.F.R. § 73.801.

¹⁶ 47 C.F.R. § 73.3568(a)(1). See also *LPFM Report and Order*, 15 FCC Rcd at 2290, Appendix A; 47 C.F.R. § 73.801.

¹⁷ DCR AFR at 2.

¹⁸ DCR Application, Preparer’s Certification.

¹⁹ *Id.*, Exh. 3.

²⁰ The FAA Form 7460-1 Notice of Proposed Construction or Alteration dated December 20, 2001, provided as an attachment to the DCR Petition for Reconsideration, lists one of those directors as the filing’s sponsor.

²¹ We note that Dillingham (2010 U.S. Census population of 4,847) already has three full-service stations licensed to the community. The stations are: KRUP(FM), Channel 256A; KDLG-FM, Channel 210A; and KDLG(AM), 670 kHz.

²² See, e.g., *Kidd Communications*, Memorandum Opinion and Order, 10 FCC Rcd 13634 (1995) (affirming dismissal of an application for failure to respond to a deficiency letter and rejecting argument that public interest benefits of constructing a new AM station justified reinstatement); *Nevada MDS, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4754 (2004) (affirming dismissal of an application for failure to respond to a deficiency letter and rejecting argument that public interest benefits of testing new two-way Internet equipment justified reinstatement).

7. We have reviewed each of the arguments presented by DCR and conclude that the Bureau properly dismissed DCR's application for failure to prosecute. Accordingly, we affirm the Bureau's denial of DCR's petition for reconsideration challenging that dismissal.

8. **Esperanza Adventist Educational Radio and Springdale Adventist Educational Station, Inc.** During the 2001 LPFM filing window, Esperanza Adventist Educational Radio ("Esperanza") and Springdale Adventist Educational Station, Inc. ("SAES") filed applications for new LPFM stations at Sebring, Florida, and Springdale, Arkansas, respectively.²³ Esperanza certified in its application that it was eligible to hold an LPFM license because it was a "nonprofit educational organization."²⁴ Esperanza stated, "[t]he applicant is a nonstock, not-for-profit corporation organized under the laws of the State of Florida in 2001," also representing that "the corporation was formed in 2001."²⁵ SAES made the same certification and virtually identical statements in its application.²⁶

9. Esperanza and SAES, however, were not incorporated at the time they filed their applications.²⁷ Consequently, the Bureau determined Esperanza and SAES were not eligible to hold the new LPFM authorizations they sought and dismissed their applications as inadvertently accepted for filing.²⁸ SAES sought reconsideration and Esperanza filed its Application for Review.²⁹ In its petition for reconsideration, SAES argued that the dismissal of its application was inconsistent with the Commission's statements that it generally will not deny an application based on the applicant's non-compliance with state corporation law when no challenge has been made in state courts and the determination is one that is more appropriately resolved in state court. The Bureau rejected this argument and affirmed its dismissal of SAES' application, finding that "SAES has not provided any documentation to demonstrate its existence as a separate legal entity" as of the date it filed its application.³⁰ In response, SAES filed its Application for Review.³¹

10. We deny the Esperanza and SAES Applications for Review. Section 73.853(a) of the Rules states that an LPFM station may only be licensed to (1) nonprofit educational organizations for the advancement of an educational program; or (2) governmental or nongovernmental entities for the provision of public safety radio services.³² Thus, Section II of FCC Form 318 (Application for Construction Permit for a Low Power FM Broadcast Station) requires each LPFM applicant to certify its eligibility to hold the applied-for Commission authorization.³³ The Commission has stated that applicants

²³ File Nos. BNPL-20010615AYT ("Esperanza Application") and BNPL-20010615BCU ("SAES Application").

²⁴ See Esperanza Application at Section II, Question 2.

²⁵ *Id.* at Exhibits 2 and 7.

²⁶ See SAES Application at Section II, Question 2, and Exhibits 2 and 7.

²⁷ Esperanza was not incorporated until February 2004, three years after it filed its application. Esperanza Application for Review ("Esperanza AFR") at 2. SAES was not incorporated until July 3, 2001, three weeks after it filed its application. SAES Application for Review ("SAES AFR") at 2.

²⁸ *Letter to Donald E. Martin, Esq.* (MB Aug. 18, 2005); *Letter to Donald E. Martin, Esq., for SAES, Joe Hart, CER, and Vern Snyder, WTL* (MB Jun. 17, 2005).

²⁹ Esperanza filed its Application for Review on September 22, 2005.

³⁰ *Springdale Adventist Educational Station, Inc.*, Letter, 22 FCC Rcd 11957 (MB 2007) ("SAES Reconsideration Decision").

³¹ SAES filed its Application for Review on August 6, 2007.

³² 47 C.F.R. § 73.853(a).

³³ See also Instructions for FCC Form 318, Section II, Question 2.

must be incorporated or otherwise organized in a form recognized under state law *at the time of filing* in order to be eligible for an LPFM authorization.³⁴ Despite each certifying in their applications that they were non-stock, not-for-profit corporations, Esperanza and SAES were not incorporated at the time they filed their applications. Thus, to demonstrate that they were eligible to hold LPFM authorizations when they filed their applications, they must show that they were otherwise organized, as required by Section 73.853(a) of the Rules and in a form recognized under pertinent state law at that time.

11. At no time have Esperanza or SAES offered any evidence to this effect. Instead, SAES claims that the Commission previously allowed an unincorporated entity to incorporate well after it filed its application for a new noncommercial educational (“NCE”) FM station, without rendering it ineligible to hold an NCE FM authorization, and that we should therefore accord SAES the same treatment.³⁵ We reject this argument. In the situation that SAES cites, it was undisputed that the predecessor-in-interest to the applicant in question was as an unincorporated association recognized under state law at the time it filed its application. SAES has made no such showing of its *bona fides* here. Thus, the case on which SAES relies is clearly distinguishable based on this decisional factor.³⁶

12. Like the Bureau in its denial of the SAES Petition for Reconsideration, we also reject the identical arguments now made on review by SAES – and Esperanza – that the Bureau’s dismissal of the SAES and Esperanza applications is at odds with precedent in which the Commission declined to make findings about corporate status under state law without the benefit of a ruling from a state court.³⁷ Although the Commission generally will not deny an application for a *commercial* broadcast facility based on a licensee's or permittee's non-compliance with state corporate law “when no challenge has been made in the State Courts and the determination is one that is more appropriately a matter of state resolution,”³⁸ applicants for NCE stations, including LPFM stations, whose eligibility is restricted by statute,³⁹ must demonstrate their legal existence under pertinent state law at the time that their applications are filed.

³⁴ See *LPFM Report and Order*, 15 FCC Rcd at 2213-14 ¶¶ 18-19. See also *Sonido Internacional Cristiano, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 2444, 2449 ¶ 11 (2008) (“*Sonido*”); *WTL Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 2475, 2478 ¶ 7 (2008); *WTL Communications, Inc.*, Letter, 20 FCC Rcd 12066 (MB 2005).

³⁵ SAES AFR at 4 (citing *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6118, ¶ 40 (2007)).

³⁶ See, e.g., *Westchester Council for Public Broadcasting*, Memorandum Opinion and Order, 8 FCC Rcd 2213, 2214 (1993) (NCE application dismissed for, *inter alia*, failing to provide required information regarding legal status of corporate applicant in case where purported corporate applicant was not incorporated at the time of filing).

³⁷ SAES AFR at 2-3 (citing *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852 (1997); *Kathleen Benfield*, Letter, 13 FCC Rcd 4102 (MMB 1997); *North American Broadcasting*, Memorandum Opinion and Order, 15 FCC 2d 979 (Rev. Bd. 1969)); Esperanza AFR at 3 (citing the same cases as SAES).

³⁸ See *Abundant Life, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4972 (2002).

³⁹ Section 397(6)(A) of the Communications Act of 1934, as amended (“Act”), states that NCE stations such as those in the LPFM service are licensed to a “public agency or nonprofit private foundation, corporation, or association.” See 47 U.S.C. § 397(6)(A). Commercial stations, in contrast, are subject to no such stipulation. Businesses in any form (*i.e.*, corporation, partnership, sole proprietorship, or individual) may hold commercial broadcast licenses. Thus, while an applicant's corporate status under state law may not impact its eligibility to hold a commercial broadcast license, it does impact its eligibility to hold an NCE license.

13. We also reject Esperanza's and SAES' argument that the Bureau decisions finding them ineligible to hold an LPFM license were "legalistic" and contrary to Commission precedent.⁴⁰ They seek to characterize their failures to incorporate as lapses in formal technical existence and argue that the Commission has, in other situations, found such "lapses in an applicant's formal technical existence" had no impact upon an "applicant's qualifications to become or continue to be a licensee."⁴¹ The cases involving lapses in formal technical existence cited by Esperanza and SAES⁴² are not on point, however, because they relate to commercial frequencies and accordingly do not involve the issue of statutory eligibility to operate as an NCE station, including an LPFM facility, under Section 397(6)(A) of the Act. Moreover, Esperanza and SAES have not offered any evidence to support their assertions that they were experiencing "lapses in [their] formal technical existence" at the time they filed their applications. Specifically, as discussed above, they have not provided documentation sufficient to demonstrate that they existed as legal entities as of the date they filed their respective applications.

14. Finally, both Esperanza and SAES cite the *Fatima* decision, in which the Commission granted an application for consent to assignment of a non-reserved band NCE FM station despite the fact that the non-profit assignor had not continuously maintained its corporate existence.⁴³ *Fatima*, however, involved an assignment from the allegedly non-compliant non-profit corporation to an individual who then operated the station commercially. Thus, the licensee entity whose non-profit status was in question, which had been validly incorporated but purportedly was subsequently dissolved by the State of Oregon for failing to pay annual filing fees, sought Commission approval to convey the station. Where, as here, the issue is whether to award LPFM authorizations to Esperanza and SAES, which can only qualify for an LPFM authorization by being valid non-profit educational organizations at the time of application filing,⁴⁴ the question of their adherence to organizational formalities in their formation is of paramount importance.⁴⁵ We agree with the Bureau's determination that *Fatima* is inapposite,⁴⁶ and affirm its ruling

⁴⁰ Esperanza AFR at 2; SAES AFR at 2. SAES makes one additional argument, which we find equally unpersuasive. SAES states that its corporate status at the time of filing should no longer have been a factor because by the time its petition for reconsideration was filed in 2005, it had been incorporated for years. SAES AFR at 4. SAES essentially asks us to ignore our rules and procedures for LPFM applications, which require an applicant for an LPFM station to certify its eligibility to own and operate such station at the time it files its application. See Instructions for FCC Form 318, Section II, Question 2; FCC Form 318, Section II, Question 2. We will not do so. See *Best of Life Educational Services, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 15847 (2011) (affirming Bureau's dismissal of an LPFM application as defective at the time of filing for failure to satisfy eligibility criteria set forth in Section 73.853 and finding argument that applicant had incorporated after filing its application "unavailing").

⁴¹ Esperanza AFR at 2; SAES AFR at 2.

⁴² Esperanza AFR at 2-3 (citing *Abundant Life Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4972 (2002); *Fatima Response, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 18543 (1999) ("*Fatima*"); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852 (1997); *Kathleen Benfield*, Letter, 13 FCC Rcd 4102 (MMB 1997); *North American Broadcasting*, Memorandum Opinion and Order, 15 FCC 2d 979 (Rev. Bd. 1969)); SAES AFR at 2-3 (citing the same cases as Esperanza).

⁴³ Esperanza AFR at 3 (citing *Fatima*, 14 FCC Rcd at 18544); SAES AFR at 3 (citing *Fatima* also).

⁴⁴ 47 C.F.R. § 73.853(a); 47 U.S.C. § 397(6)(A).

⁴⁵ Unlike a non-reserved band FM station, an LPFM station must operate as an NCE station, and thus an LPFM licensee must maintain NCE eligibility at all times. *LPFM R&O*, 15 FCC Rcd at 2213 and n.33.

⁴⁶ *SAES Reconsideration Decision* at 2.

that an LPFM applicant's status as a valid non-profit organization at the time it files its application is fundamental to our determination of the applicant's qualifications to hold an LPFM authorization.⁴⁷

15. **Mount Pisgah Adventist Educational Media and Montmorenci United Methodist Church.** During the 2001 LPFM filing window, Mount Pisgah and Montmorenci United Methodist Church ("MUMC") filed mutually exclusive applications for a construction permit to build a new LPFM station in Candler, North Carolina.⁴⁸ After conducting a point hearing, the Commission designated both MUMC and Mount Pisgah as tentative selectees, accepted the MUMC and Mount Pisgah applications for filing and announced a 30-day period for filing petitions to deny the MUMC and Mount Pisgah applications.

16. Mount Pisgah filed a petition to deny the MUMC application. Mount Pisgah argued that through its relationship to the broader United Methodist Church, MUMC had prohibited attributable interests in at least one LPFM station, as well as in other full-service broadcast stations. The Bureau rejected Mount Pisgah's claim, finding that MUMC had shown independence from the United Methodist Church,⁴⁹ and concluding that MUMC held no attributable media interests and therefore complied with the LPFM cross and multiple-ownership restrictions.⁵⁰ Accordingly, the Bureau denied Mount Pisgah's petition and granted MUMC's application.

17. At the same time, the Bureau also considered an informal objection to the Mount Pisgah application filed by WTL Communications, Inc. The informal objection alleged that Mount Pisgah had failed to demonstrate that it was a non-profit legal entity, as it failed to provide its articles of incorporation or indicate the status of its incorporation on the date it filed its application. Mount Pisgah had certified in its application that it was eligible to hold an LPFM license because it was a "nonprofit educational organization" and stated "[t]he applicant is a nonstock, not-for-profit corporation organized under the laws of the State of North Carolina in 2001" and that "the corporation was formed in 2001."⁵¹ However, Mount Pisgah was not in fact incorporated until after it filed its application⁵² nor did Mount Pisgah demonstrate that it was otherwise recognized under North Carolina law at the time it filed the application. The Bureau determined that Mount Pisgah was not eligible to hold the new LPFM authorization it sought and dismissed Mount Pisgah's application as inadvertently accepted for filing.

18. Mount Pisgah sought reconsideration of both the Bureau's grant of the MUMC application and the Bureau's dismissal of its application. The Bureau affirmed its prior decisions.⁵³ In response, Mount Pisgah filed its Application for Review.⁵⁴ For the reasons set forth below, we grant in part and deny in part Mount Pisgah's Application for Review.

19. *MUMC Application.* Section 73.858(b) of the Rules states that "[a] local chapter of a national or other large organization shall not have the attributable interests of the national organization attributed to it provided that the local chapter is separately incorporated and has a distinct local presence

⁴⁷ See *Hope Radio of Rolla, Inc.*, Memorandum Opinion and Order, FCC 13-70 (rel. May 13, 2013). *Accord Sonido*, 23 FCC Rcd at 2449 ¶ 11.

⁴⁸ File Nos. BNPL-20010615BDV (Mount Pisgah) and BNPL-20010614ACY (MUMC).

⁴⁹ See *Letter to Donald E. Martin, Esq.*, at 5 (MB Apr. 19, 2005) ("*Mount Pisgah Decision*").

⁵⁰ *Id.*

⁵¹ See File No. BNPL-20010615BDV at Section II, Question 2, and Exhibits 2 and 7.

⁵² According to the North Carolina Secretary of State database of corporations, Mount Pisgah was not incorporated until July 3, 2001, three weeks after it filed its application.

⁵³ *Diane Johnston*, Letter, 22 FCC Rcd 11110 (MB 2007) ("*Mount Pisgah Reconsideration Decision*").

⁵⁴ Mount Pisgah filed its Application for Review ("*Mount Pisgah AFR*") on July 20, 2007.

and mission.”⁵⁵ On review, Mount Pisgah again contends that MUMC does not qualify for the attribution exception contained in Section 73.858(b) of the Rules and, therefore, that the media interests of the United Methodist Church should be attributed to MUMC.⁵⁶

20. Mount Pisgah claims that MUMC cannot qualify for the exception because it was not incorporated, much less separately incorporated, when the application was filed.⁵⁷ Mount Pisgah therefore asserts that the Bureau’s decision is contrary to the plain language of the Rules by failing to take into account the first prong of what it deems to be a two-part test – *i.e.*, the element regarding separate incorporation.⁵⁸ We agree and grant Mount Pisgah’s Application for Review to this extent. Section 73.858(b) sets forth two requirements – incorporation and maintenance of a distinct local presence and mission – that an applicant must satisfy in order to qualify for the attribution exception set forth therein. Because MUMC was not incorporated at the time it filed its application, it does not satisfy the incorporation requirement.

21. Because MUMC is not eligible for non-attribution under Section 73.858(b), the media interests of the national United Methodist Church are attributable to it. The national United Methodist Church holds an attributable interest in at least one other LPFM station.⁵⁹ This interest is attributable to MUMC.⁶⁰ Grant of the MUMC application, thus, allowed MUMC to acquire an attributable interest in a second LPFM station. This violated the Commission’s rules governing ownership of LPFM stations, which generally prohibit entities from owning more than one LPFM station.⁶¹ Thus, the Bureau should have dismissed the MUMC application. Accordingly, we grant the Mount Pisgah Application for Review to the extent it challenges the Bureau’s grant of the MUMC application, rescind the Bureau’s grant of that application and dismiss that application.

22. *Mount Pisgah Application.* As noted in paragraph 10 above, Section 73.853 of the Rules provides that an LPFM station may only be licensed to (1) nonprofit educational organizations for the advancement of an educational program; or (2) governmental or nongovernmental entities for the provision of public safety radio services.⁶² LPFM applicants must be incorporated or otherwise organized in a form recognized under state law *at the time of filing* in order to be eligible for an LPFM authorization. As was the case with Esparanza and SAES discussed above, Mount Pisgah was not incorporated at the time it filed its application. Mount Pisgah argues, as it did in its petition for reconsideration,⁶³ that its modest pre-filing activity was sufficient to render it an unincorporated

⁵⁵ See 47 C.F.R. § 73.858(b).

⁵⁶ See Mount Pisgah AFR at 2 (listing licenses allegedly held by other United Methodist Churches).

⁵⁷ *Id.*

⁵⁸ *Id.* at 3.

⁵⁹ The national United Methodist Church holds this interest through another member church – Fremont United Methodist Church (“Fremont”). Fremont holds the license for WFWC-LP, an LPFM station licensed to Fremont, North Carolina. In Exhibit 7 to its application for the station, Fremont certified that it “was formally organized on March 25, 1869, under North Carolina law, as the Fremont Methodist Episcopal Church”, whose name was subsequently changed to that of the applicant, *see* File No. BNPL-20010611AFI, a certification that was unchallenged.

⁶⁰ *LPFM Report and Order*, 15 FCC Rcd at 2225 ¶ 50; *LPFM Fifth Order on Reconsideration*, 27 FCC Rcd at 15459 ¶ 160.

⁶¹ 47 C.F.R. § 73.855.

⁶² 47 C.F.R. § 73.853.

⁶³ Mount Pisgah Petition for Reconsideration at 10.

association under North Carolina law.⁶⁴ While Mount Pisgah cites to several North Carolina statutes to support the premise that the state recognizes unincorporated associations,⁶⁵ it again fails to provide any probative evidence that its organization and planning activities prior to the filing of its application – or lack thereof – satisfied the requirements set forth in these statutes.⁶⁶

23. As did Esperanza and SAES, Mount Pisgah argues that the Commission previously allowed an unincorporated entity to incorporate well after it filed its application for a new noncommercial educational FM station, without rendering it ineligible to hold an NCE FM authorization, and that we should therefore accord Mount Pisgah the same treatment.⁶⁷ We find this argument no more persuasive in the context of the Mount Pisgah application than in others.⁶⁸ As the Bureau did, we reject the argument made by Mount Pisgah that the Bureau’s dismissal of the Mount Pisgah application was at odds with precedent in which the Commission declined to make findings about corporate status under state law without the benefit of a ruling from a state court.⁶⁹ As we explained above, in this context, Mount Pisgah’s corporate status was relevant to the issue of its statutory eligibility to hold an LPFM authorization.⁷⁰ Accordingly, we find that the Bureau’s consideration of Mount Pisgah’s corporate status at the time it filed its application was appropriate.

24. We reject Mount Pisgah’s argument that the Bureau decision was “legalistic” and contrary to Commission precedent. Like Esperanza and SAES, Mount Pisgah seeks to characterize its failure to incorporate as a lapse in formal technical existence and argues that the Commission has, in other situations, found such “lapses in an applicant’s formal technical existence” had no impact upon an “applicant’s qualifications to become or continue to be a licensee.”⁷¹ As we explained above, the cases involving lapses in formal technical existence cited by Mount Pisgah are not on point. Those cases involve commercial frequencies and accordingly do not involve the issue of eligibility to hold an NCE or LPFM station license under Section 397(6)(A) of the Act.⁷² Moreover, as discussed above, we find Mount Pisgah has not demonstrated that it existed in a form recognized under North Carolina law at the

⁶⁴ Mount Pisgah AFR at 9.

⁶⁵ *Id.* at 9 (citing *North Carolina General Statutes*, §§ 1-69.1, 55-1-40(9)a.3, and 39-24).

⁶⁶ Mount Pisgah again cites to *Cherokee Home Demonstration Club v. Oxendine*, 397 S.E. 2d 643 (NC 1990), where a North Carolina Court of Appeals recognized a club as a cognizable unincorporated association under North Carolina law, despite the fact that the club was never organized, did not have bylaws, rules, regulations, or membership cards. See Mount Pisgah AFR at 9-10. The *Mount Pisgah Reconsideration Decision* found this case to be inapposite, noting that, unlike Mount Pisgah, the club in that case had engaged in activities for fifteen years. *Mount Pisgah Reconsideration Decision*, 22 FCC Rcd at 11110. We agree, and find that the staff properly exercised its discretion in rejecting Mount Pisgah’s assertion that it operated as an unincorporated association prior to filing.

⁶⁷ See Mount Pisgah AFR at 8 (citing *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007)).

⁶⁸ See *supra* ¶ 11.

⁶⁹ Mount Pisgah AFR at 10. We note that the portion of the case that Mount Pisgah cites, *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6118 ¶ 40 (2007), addressed a LPFM applicant’s eligibility for points under the established local presence criterion, not its eligibility to hold an LPFM authorization.

⁷⁰ See *supra* ¶ 12.

⁷¹ Mount Pisgah AFR at 6.

⁷² See *supra* ¶ 13.

time it filed its application and thus could not have been experiencing a lapse in its formal technical existence at the time it filed its application. Finally, for the reasons discussed at paragraph 14 above, *Fatima*, also cited by Mount Pisgah in its Application for Review,⁷³ is inapposite to the facts here.

25. **Rock n' Roll Preservation Society.** Rock n' Roll Preservation Society ("RNR") seeks review of a Bureau decision⁷⁴ dismissing its application for a new LPFM station at Newport Beach, California.⁷⁵ For the reasons discussed below, we deny review.

26. In response to Item 3 of the Tech Box in its application, RNR specified certain geographic coordinates for its proposed facility, but did not provide an Antenna Structure Registration ("ASR") number in response to Item 4, indicating "not applicable." Gold Coast Broadcasting LLC ("Gold Coast") – licensee of a full power FM station in Oxnard, California – filed a petition to deny alleging that RNR lacked reasonable assurance to use the site, which Gold Coast stated was the location of the tower of Station KBCD(FM) (formerly KDLE(FM)), Newport Beach, corresponding to ASR number 1066158.⁷⁶ In opposing Gold Coast's petition, RNR did not dispute Gold Coast's statement that the tower was RNR's proposed site, but alleged it was given a "personal tour of the facilities" by the City of Newport Beach ("CNB") and did have reasonable assurance from it to use the site. However, RNR failed to provide specific documentation from the tower owner establishing that it had obtained such assurance. As a result of the conflicting factual accounts, the Bureau directed RNR to establish that the site specified in its application was available to it on the date its application was filed.⁷⁷ RNR's current and former presidents both provided statements regarding conversations they claimed to have had with various CNB representatives and with the tower engineer regarding the use and leasing of space on the tower.

27. An applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of the availability to it of a transmitter site specified in its application at the time it files the application.⁷⁸ It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.⁷⁹ While some latitude is afforded such "reasonable assurance," there must be, at a minimum, a "meeting of the minds resulting in some firm understanding as to the site's availability."⁸⁰

28. The Bureau found the statements proffered by RNR amounted to hearsay and were not probative of the availability of the antenna site on the KBCD tower.⁸¹ Moreover, the Bureau noted that

⁷³ See Mount Pisgah AFR at 8.

⁷⁴ *Rock n' Roll Preservation Society*, Letter, 23 FCC Rcd 16630 (MB 2008) ("*RNR Decision*").

⁷⁵ RNR filed its Application for Review ("*RNR AFR*") on December 15, 2008. Gold Coast Broadcasting LLC filed an Opposition on December 30, 2008.

⁷⁶ Petition to Deny filed by Gold Coast Broadcasting LLC (Jun. 26, 2008), at n.16.

⁷⁷ See *Letter to Brian Spencer, Rock n' Roll Preservation Society* (MB Aug. 6, 2008).

⁷⁸ *Les Seraphim and Mana'o Radio*, Memorandum Opinion and Order, 25 FCC Rcd 2785, 2787 (MB 2010).

⁷⁹ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) ("Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary.").

⁸⁰ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The "reasonable assurance" standard is satisfied by "[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated" *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

⁸¹ *RNR Decision*, 22 FCC Rcd at 16636.

RNR had not provided documentation from an agent or employee of CNB, the owner of the land on which the tower is situated, or of the actual tower owner,⁸² making the statements offered by RNR, which themselves were not made as declarations under penalty of perjury, even less reliable.⁸³ Based on the record, the Bureau concluded that RNR had failed to establish that it had reasonable assurance to locate its antenna on the tower at the specified site when it filed its application. Thus, it found that RNR's application was inadvertently accepted for filing and dismissed the application.

29. On review, RNR argues that the Bureau erred in finding RNR lacked reasonable assurance of the availability of the tower site specified in its application. Specifically, RNR submits declarations made under penalty of perjury by its current and former presidents. The declarations indicate that the prior unsworn statements made by these individuals are true and correct.⁸⁴ We have reviewed the Bureau's decision and the record of this proceeding. That record, including RNR's statements in its Application for Review, confirms that the Bureau correctly concluded that RNR lacked reasonable assurance to use the site at the time RNR filed its application.

30. In its Application for Review, RNR now maintains, notwithstanding its earlier statements in this proceeding,⁸⁵ that a question for review is whether it did "specify tower #1066158 [*i.e.*, the KBCD tower] in our original application."⁸⁶ RNR relates that it originally planned to propose locating its antenna at its headquarters in Newport Beach owned by one of its principals, but instead decided to operate about a mile away, since "[a]vailable space existed on the KBCD tower at that site" and it "felt there was a preliminary meeting of the minds with the City of Newport Beach." It indicates further that the "City owned site also has several other structures on which a mast could be mounted, should price negotiations with the tower owner prove to be beyond our budget."⁸⁷ It continues, "Our original application specified coordinates, but did not specify the tower number, therefore RNR was not locked into the existing tower in our original application... Even if negotiations with both the City of Newport Beach and the tower owner proved untenable, RNR always had a fall-back position to amend our application (and modify our construction permit) and broadcast from our headquarters building."⁸⁸

31. Thus, RNR confirms that it had no discussions before it filed its application with Citicasters, the owner of the tower, much less obtained the required reasonable assurance from it that space on the KBCD tower would be available to it if its application were granted.⁸⁹ We reject its

⁸² The Commission's ASR records indicate that, at the time that RNR filed its application, the owner of the KBCD tower was Citicasters Co. See ASR File No. A0094479.

⁸³ *Id.*

⁸⁴ RNR AFR at 2.

⁸⁵ See, e.g. RNR's July 24, 2008 Opposition to Petition to Deny at 2.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.* at 2-3.

⁸⁸ *Id.* at 3-4. RNR indicates that "we could broadcast from our headquarters, like our revised application currently shows." RNR AFR at 3. Commission records show that, on July 23, 2008, about a month after Gold Coast had filed its Petition to Deny raising the site availability issue, RNR amended its application, without explanation, to slightly change the coordinates specified in Item 3 of the Tech Box and make corresponding modifications to its responses to items 5, 6 and 7 seeking elevation and height information, apparently changing the proposed site to its headquarters. We reject RNR's attempt to evade the consequences of its lack of reasonable assurance of its original site by so amending over eight years after its original application was filed. See *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1772-73 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 830 (1990) (citing *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 (Rev. Bd. 1984)).

⁸⁹ In its Opposition to the Gold Coast Petition to Deny, RNR indicates that, subsequent to its discussions and tour with CNB before it filed its application, in 2003, it had further discussions with Ron Hunt, Chief Engineer for (continued....)

contention that it wasn't "locked-in" to that site at all, claiming that it was leaving its options open once its application was granted. In order to allow the staff to ensure that an LPFM applicant's proposal complies with all FAA, zoning and other requirements, including compliance with site availability and technical requirements, an applicant must propose a specific transmitter site in its application.⁹⁰ Either RNR specified the Citicasters site in its original application (as it acknowledged in subsequent pleadings) but failed to demonstrate that it had reasonable assurance of the site, or it specified some other site for which it also failed to demonstrate reasonable assurance of availability. In either event, its application was fatally deficient.

32. RNR also urges us to change our LPFM policies regarding reasonable assurance of site availability to give it the flexibility that it now seeks to allow "any LPFM applicant that can transmit from their headquarters or campus site to automatically assume 'reasonable assurance' at said headquarters or campus site (as an alternative site) where their application address falls outside of the existing protected contours for their proposed frequency."⁹¹ We decline to do so in the context of this adjudication. However, we note that RNR may propose this change in a petition for rulemaking with the Commission, pursuant to Section 1.401 of the Rules.⁹² The institution of a notice and comment rulemaking under the Administrative Procedure Act,⁹³ if warranted, would allow the Commission to develop a complete record from which it could make an informed determination regarding RNR's proposal. However, after reviewing the Bureau's decision and the record of this proceeding, we find that the Bureau correctly concluded that RNR did not have reasonable assurance of the availability of the transmitter site proposed in its application, and that it therefore correctly dismissed the RNR application pursuant to our rules.

33. **Ordering Clauses.** Accordingly, IT IS ORDERED that each decision involving an Application for Review in this *Memorandum Opinion and Order* shall be deemed a distinct and separate decision for purposes of petitions for reconsideration, review on the Commission's own motion, and appeals.⁹⁴ If any decision in this *Memorandum Opinion and Order* is declared invalid for any reason, the remaining portions shall be severable from the invalid part and SHALL REMAIN in full force and effect to the fullest extent permitted by law.

34. IT IS FURTHER ORDERED that the Application for Review filed by Dillingham Christian Radio on July 14, 2003, IS DENIED.

35. IT IS FURTHER ORDERED, that the Application for Review filed by Esperanza Adventist Educational Radio on September 22, 2005, IS DENIED.

36. IT IS FURTHER ORDERED that the Application for Review filed by Springdale Adventist Educational Station, Inc., on August 6, 2007, IS DENIED.

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KDLE. By that time, however, the station, and the tower had been sold to Entravision Communications Corporation. See ASD File No. A0303315. Those purported discussions do not establish that RNR had had discussions with Citicasters, the tower owner when it filed its application, much less had reached a meeting of the minds with it that the tower would be available for the proposed LPFM station.

⁹⁰ See FCC Form 318, Section V- LPFM Engineering; Instructions for FCC Form 318. Section V: LPFM Engineering and Preparer's Certification.

⁹¹ RNR AFR at 4.

⁹² 47 C.F.R. § 1.401.

⁹³ 5 U.S.C. § 553.

⁹⁴ See 5 U.S.C. §§ 702, 704, 706; 47 U.S.C. §§ 309(d), 402(b), 405; 47 C.F.R. §§ 1.106-08, 73.7004. In cases that involve separate mutually exclusive groups but present common issues, the petitions or appeals may be filed jointly or may be consolidated at the discretion of the Commission or a reviewing court. See, e.g., FED. R. APP. P. 3(b).

37. IT IS FURTHER ORDERED that the Application for Review filed by Mount Pisgah Adventist Educational Media on July 20, 2007, IS GRANTED IN PART AND DENIED IN PART.

38. IT IS FURTHER ORDERED that the grant of the application for a new Low Power FM station at Candler, Florida, filed by Montmorenci United Methodist Church IS RESCINDED and that application IS DISMISSED.

39. IT IS FURTHER ORDERED the Application for Review filed by Rock n' Roll Preservation Society on December 15, 2008, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary