

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

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

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2015

Released: September 16, 2015

By the Commission:

1. The Commission has before it the captioned mutually-exclusive ("MX") applications of Center for Emerging Media, Inc. ("CEM"), The Benedictine Society of Baltimore City ("BSB"), Loyola University Maryland ("Loyola"), The United Workers Association ("UWA"), and Johns Hopkins University ("JHU") ("CEM Application," "BSB Application," "Loyola Application," "UWA Application," and "JHU Application," respectively). These applications and the applications for new LPFM stations filed by St. Joseph's, Sykesville, Roman Catholic Congregation, Inc. ("St. Joseph's"), Eldersburg, Maryland, and Radiant Foundation Corporation ("RFC"), Ellicott City, Maryland¹ were filed in the 2013 LPFM filing window and identified by the Media Bureau as LPFM MX Group 198.²

¹ File Nos. BNPL-20131115AIE ("St. Joseph's Application") and BNPL-20131113BTK ("RFC Application").

² See Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period; CDBS Is Now Accepting Form 318 Amendments, Public Notice, 28 FCC Rcd 16713 (MB 2013).

2. On September 5, 2014, the Commission issued a Public Notice in which it conducted a point-system analysis of 111 mutually exclusive LPFM groups.³ With regard to LPFM MX Group 198, the *September Public Notice* determined that the applications of CEM, BSB, UWA, JHU, and St. Joseph's were each entitled to a total of five comparative points awarded pursuant to Section 73.872 of the Rules,⁴ while the applications of Loyola and RFC were each entitled to four points.⁵ The Commission thus identified the applications of CEM, BSB, UWA, JHU, and St. Joseph's as tentative selectees of LPFM Group 198 on a time-share basis. The *September Public Notice* began a 30-day period for filing petitions to deny those applications, and began 90-day periods in which MX applicants could file major amendments to resolve their mutual exclusivities or those named as tentative selectees could file point-aggregation time-share agreements. Loyola timely filed a Petition to Deny ("Petition") in which it argues that the Commission erred in: 1) not awarding the Loyola Application a point under the diversity of ownership criterion; and 2) awarding the JHU Application a point under that criterion.⁶ Subsequently, BSB, St. Joseph's, and JHU amended their respective applications to file a time-share agreement in which they aggregated their points awarded them in the *September Public Notice* for a total of 15 points.⁷

3. *Loyola Application.* The Loyola Application stated that a member of Loyola's Board of Trustees, Rosemary Juras, holds attributable interests in Station WQLL(AM), Pikesville, Maryland, and WCBM(AM), Baltimore, Maryland.⁸ Loyola stated that, pursuant to Section 73.858(a) of the Commission's Rules ("Rules"),⁹ Juras would recuse herself from any decision involving Loyola's proposed LPFM station.¹⁰ Loyola further certified that it was eligible to receive a point under the

³ *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window; Announces a 30-Day Petition to Deny Period and a 90-Day Period to File Voluntary Time-Share Proposals and Major Change Amendments*, Public Notice, 29 FCC Rcd 10847 (2014) ("*September Public Notice*").

⁴ 47 C.F.R. § 73.872.

⁵ These applications each received a point under each of the following four criteria: 1) established community presence of at least two years; 2) commitment to originate local programming; 3) commitment to maintain a main studio; and 4) commitment to originate local programming and to maintain a main studio. The CEM Application, the BSB Application, the UWA Application, and the JHU Application also each received a point under the diversity of ownership (new entrant) criterion. *Id.* at Attachment A.

⁶ Loyola filed the Petition on October 3, 2014, against the five tentative selectee applications: the CEM Application, the BSB Application, the UWA Application, the JHU Application, and the St. Joseph's Application. CEM, UWA, and JHU did not file oppositions. BSB and St. Joseph's filed an Opposition on October 16, 2014, in which they argue that the Petition was improperly filed against their respective applications because it does not raise any allegations against them. Opposition at 2-3. We disagree. The *September Public Notice* stated that "[a]ny argument that a tentatively selected application should not be granted must be raised in such a petition [to deny], even if the objection relates only indirectly to the tentative selectee's comparative points. For example, an applicant that concedes that the tentative selectee is qualified for the points received but believes its own proposal should have received a greater number of points than the tentative selectee's must make its argument in a petition to deny." *September Public Notice*, 29 FCC Rcd at 10851. The Petition was thus properly filed against the BSB Application and the St. Joseph's Application. The Opposition also states that BSB and St. Joseph's take no position with regard to the Petition's merits against the JHU Application. Opposition at 3.

⁷ See "Low Power FM Time-Share Agreement" between BSB, St. Joseph's and JHU dated as of December 4, 2014 ("Agreement"). The *September Public Notice* explained that tentative selectees may file time-share agreements to aggregate their points and break ties. See *September Public Notice*, 29 FCC Rcd at 10850. See also 47 C.F.R. § 73.872(c). On April 30, 2015, the Bureau dismissed the RFC Application after it concluded that RFC was not eligible to hold an LPFM license. See *Broadcast Actions*, Public Notice, Report No. 48482 (MB May 5, 2015). This resulted in the St. Joseph's Application becoming a singleton. The Bureau granted the St. Joseph's Application on June 12, 2015. See *Broadcast Actions*, Public Notice, Report No. 48512 (MB June 17, 2015).

⁸ Loyola Application at Section II, Question 3.b. and Exhibit 3.

⁹ 47 C.F.R. § 73.858(a).

¹⁰ Loyola Application at Exhibit 3.

diversity of ownership criterion.¹¹ In the *September Public Notice*, the Commission explained that Loyola was not entitled to this point because although Juras' attributable interests in WQLL(AM) and WCBM(AM) did not render it ineligible to hold an LPFM license due to the recusal exception to the ownership attribution rules, they did preclude the Loyola Application from receiving a point under the diversity of ownership criterion.¹²

4. In the Petition, Loyola argues that Juras' interests in WQLL(AM) and WCBM(AM) should not be attributable to Loyola for the purposes of the diversity of ownership point. Loyola states that Section 73.858(a) makes such interests non-attributable, and that the Instructions to FCC Form 318 ("Instructions") notes that applicants that provide a recusal statement pursuant to Section 73.858(a) will "not have those interests attributed to them for purposes of an LPFM station application."¹³ Loyola argues that it is contradictory to "simultaneously treat a recusal commitment as both effective and ineffective in negating an otherwise attributable interest."¹⁴ Loyola further argues that the mutually exclusive group public notices were the first time that the Commission indicated that Section 73.858(a) applicants would not be entitled to this point.¹⁵ Accordingly, Loyola states it was entitled to a point under the diversity of ownership criterion under Section 73.872(b)(5).

5. We find that the Commission correctly denied Loyola a diversity of ownership point. Section 73.858(a) expressly provides for an attribution exception only to the Commission's ownership limits (Section 73.855) and cross-ownership (Section 73.860) applicant eligibility restrictions, and does not provide that the Commission will disregard an applicant's attributable interests for other purposes.¹⁶ Thus, Section 73.858(a) does not apply the exception to the Commission's attribution rules to the LPFM selection point criteria awarded under Section 73.872, including that for diversity of ownership under Section 73.872(b)(5). The Commission made this same distinction with regard to Section 73.858(b) which in certain circumstances makes non-attributable to a local chapter of a national organization the

¹¹ Loyola Application at Section IV, Question 5. *See also* 47 C.F.R. § 73.872(b)(5) ("An applicant must hold no attributable interests in any other broadcast station."). Subsection (b)(5) also is called the "new entrant" criterion.

¹² *September Public Notice* at 10850, n.22 ("[Loyola] is eligible for a LPFM station because its Board Member with an attributable interest in WQLL(AM) and WCBM(AM) pledges to recuse herself on voting on any matters affecting the proposed LPFM station. The Board Member's broadcast interests, however, are attributable to the applicant for purposes of the new entrant point criterion. [Loyola], therefore, does not qualify for a new entrant point."). *See also id.* at 10848, n.13 ("Similarly, although a director of an LPFM applicant may hold otherwise attributable interests in a broadcast licensee or media entity without making the LPFM applicant ineligible for a license, provided that the director recuses himself/herself from any matters affecting the LPFM station (47 C.F.R. § 73.858(a)), the director's broadcast interests are still considered attributable to the LPFM applicant for the purpose of the 'new entrant' point.").

¹³ Petition at 2-3, *citing* Instructions at 5, Section II.C.

¹⁴ Petition at 3.

¹⁵ *Id.* at 4, *citing Commission Identifies Tentative Selectees in 79 Groups of Mutually Exclusive Application Filed in the LPFM Window; Announces a 30-Day Petition to Deny Period and a 90-Day Period to File Voluntary Time-Share Proposals and Major Change Amendments*, Public Notice, 29 FCC Rcd 12686 (2014).

¹⁶ 47 C.F.R. § 73.858(a) ("Ownership and other interests in LPFM station permittees and licensees will be attributed to their holder and deemed cognizable for the purposes of §§ 73.855 [Ownership limits] and 73.860 [Cross-ownership], in accordance with the provisions of § 73.3555, subject to the following exceptions: "[a] director of an entity that holds an LPFM license will not have such [ownership] interest treated as attributable if such director also holds an attributable interest in a broadcast license or other media entity but recuses himself of herself from any matters affecting the LPFM station.") (emphasis added). *See also Caribbean Festival Association, Inc.*, Letter, 22 FCC Rcd 19238 (MB 2007) (rejecting argument that LPFM board member's recusal under Section 73.858(a) cured violation of 47 U.S.C. § 310(b)(3) because Section 73.858(a) "by its terms, merely provides a mechanism to permit an LPFM applicant or licensee to insulate certain positional interests for the purpose of satisfying LPFM ownership restrictions").

attributable interests of the national organization. In carving out this ownership *eligibility* exception, it noted that such local chapters would not be entitled to a diversity of ownership point.¹⁷

6. We also disagree with Loyola's strained reading of the Instructions. The text Loyola cites instructs applicants how to complete Section II, Question 3 and Question 5 of FCC Form 318, questions which are designed to identify the parties to the application and to establish their *basic qualifications* under the Commission's ownership rules.¹⁸ The Instructions do not state that applicants that are eligible to apply for an LPFM construction permit pursuant to Section 73.858 will be entitled to a point for diversity of ownership for comparative purposes. Loyola's interpretation of the Instructions is not only inconsistent with the limited scope of the recusal exception to the attribution rules established by Section 73.858(a), it is also unreasonable, as it would permit applicants with attributable broadcast interests to be awarded a point for diversity of ownership, thus undermining the Commission's goal in establishing the new entrant point in the *Sixth Report and Order* of encouraging new entrants to broadcasting, thus fostering diversity.¹⁹ Because there is no conflict between Section 73.858(a) and the Instructions, and Loyola's interpretation of the Instructions contradicts the language of Section 73.858 and Commission's stated purpose in awarding a comparative point to new entrants, we reject Loyola's argument.²⁰

7. *JHU Application*. The JHU Application, as originally filed, did not claim a point under the diversity of ownership criterion, but rather first claimed the point in an amendment filed on February 14, 2014 ("Amendment"), after the November 15, 2013 close of the filing window.²¹ Loyola argues that both the Rules and the Instructions prohibit such an amendment and JHU should have thus been denied a point under this criterion.²² Accordingly, Loyola argues that JHU should not have been a tentative selectee of LPFM MX Group 198.

8. We agree that the *September Public Notice* erred in awarding JHU a point under the diversity of ownership criterion. As Loyola notes, the Rules and the Instructions clearly state that post-window amendments will not be accepted if they result in additional points being claimed.²³ Accordingly, we deduct this point from the JHU Application's total, leaving it with four points.

¹⁷ See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15459 ¶ 160 ("*Sixth Report and Order*") (broadcast interest of parent organization will be considered attributable for diversity purposes).

¹⁸ The instructions cited by Loyola involve Section II of Form 318, whereas the comparative point factors are addressed in Section III of the form and instructions. In addition, the instructions noted by Loyola cite to Section 73.858(a) of the Rules, which explicitly refers to rules involving basic qualifications (Section 73.855 and 73.860), and not comparative points awarded under Section 73.872.

¹⁹ *Sixth Report and Order*, 27 FCC Rcd at 15473 ¶ 191 ("we also believe that our selection process should encourage new entrants to broadcasting and foster a diverse range of community voices . . . we will award one point to an applicant that can certify that it has no attributable interest in any other broadcast station.").

²⁰ Loyola acknowledges the limited effect of Ms. Juras' recusal in its application, noting that it is making the commitment "in order to satisfy the cross-ownership restrictions set forth in Section 73.860 of the Commission's Rules." Loyola Application, Exhibit 3.

²¹ See JHU Application at Section III, Question 5; Amendment at Section III, Question 5.

²² Petition at 4, citing 47 C.F.R. § 73.871(b) and Instructions at 8, Section III.A.

²³ 47 C.F.R. § 73.871(b) ("Amendments that would improve the comparative position of new and major change applications will not be accepted after the close of the pertinent filing window."); Instructions at 8, Section IIIA ("Applicants may not enhance their comparative position after the close of the filing window during which they filed their applications."). See also *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, 28 FCC Rcd 8854, 8857 (MB 2013) ("The comparative qualifications of applicants, *i.e.*, maximum possible points awarded pursuant to Section 73.872, are established as of the close of the filing window. While new and major change applications may

(continued....)

9. As a result of deducting one point from JHU, the applications of CEM, BSB, and UWA are tied with five points each, and these applications are the new tentative selectees of LPFM MX Group 198. We reject the Agreement because the St. Joseph's Application has been granted as a singleton and, with this deduction, the JHU Application is now a non-tentative selectee. Finally, we will afford CEM, BSB, and UWA 90 days from the issuance of this order in which they can submit point-aggregation time-share agreements.²⁴

10. Accordingly, IT IS ORDERED that the Petition to Deny filed on October 3, 2015, by Loyola University Maryland IS DENIED in part and IS GRANTED in all other respects, as noted herein. IT IS FURTHER ORDERED that the tentative selection of the application of Johns Hopkins University (File No. BNPL-20131115ANR) for a construction permit for a new LPFM station in Baltimore, Maryland, IS RESCINDED. IT IS FURTHER ORDERED that the "Low Power FM Time-Share Agreement" between The Benedictine Society of Baltimore City, St. Joseph's, Sykesville, Roman Catholic Congregation, Inc., and Johns Hopkins University IS REJECTED. IT IS FURTHER ORDERED that Center for Emerging Media, Inc., The Benedictine Society of Baltimore City, and The United Workers Association ARE TENTATIVELY SELECTED to be awarded a construction permit for a new LPFM station. If, after the time-share period has run, there is no substantial and material question concerning the grantability of the tentative selectees' application, we direct the staff, by public notice, TO DISMISS the mutually exclusive applications of Johns Hopkins University and Loyola University Maryland and TO GRANT the applications of Center for Emerging Media, Inc., The Benedictine Society of Baltimore City, and The United Workers Association on a time-share basis.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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be amended without limitation during the filing window, amendments that would improve the comparative position of these new and major change applications will not be accepted after the close of the filing window.”).

²⁴ See 47 C.F.R. § 73.872(c).