

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

In the Matter of)
Hispanic Broadcasting Institute, Inc.)
Application for a New LPFM Station at) File No. BNPL-20131021ACU
Lawrence, Massachusetts) Facility ID No. 193525

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2015

Released: September 16, 2015

By the Commission:

1. The Commission has before it a pleading entitled "Application for Review Due A Improper Dismissal, Misinterpretation of FCC Rule 855(a) Ownership Limits, Bribery and Corruption" [sic] filed by Hispanic Broadcasting Institute, Inc. ("HBI"), on October 8, 2014 ("HBI AFR").

1 In the HBI AFR, HBI alleges that the Bureau improperly interpreted Section 73.3518 of the Commission's Rules ("Rules") and dismissed the Application because the staff received bribes from the law firm of Smithwick & Belendiuk, PC, which filed an Informal Objection against the Application on behalf of another LPFM applicant, Zeitgeist Gallery, Inc. HBI raises these allegations again in a pleading styled "Complain of Bribery and Corruption [sic]" which it filed with the Commission on October 22, 2014. Because this pleading seeks the same relief as the HBI AFR, we will not consider it separately.

2 See Hispanic Broadcasting Institute, Inc., Letter, Ref 1800B3-ATS (MB Sep. 11, 2014) ("Reconsideration Decision"). See also Broadcast Actions, Report No. 28325 (MB Sep. 16, 2014).

3 See Broadcast Actions, Public Notice, Report No. 48138 (MB Dec. 18, 2013) ("Dismissal Public Notice") ("Dismissed 12/13/2013 per DA 13-1385. Applicant has a common board member (Frank Greer) with another LPFM application filed in the window. No letter sent."). 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, 8856-57 (MB 2013) ("For applicants subject to the one application filing limit, a second application filed by such an applicant in this window would be treated as a "conflicting" application subject to dismissal under Section 73.3518.").

4 The Application originally proposed to serve Nashua, New Hampshire. On January 15, 2014, HBI amended the Application to change the proposed community of license to Lawrence, Massachusetts.

5 See Dismissal Public Notice. In fact, Greer was a party to at least two other 2013 window new station LPFM applications: the application filed by Iluminacion Divina Inc. ("Iluminacion"), Lawrence, Massachusetts (File No. BNPL-20131022AHM) referred to in the Dismissal Public Notice, and that of US Pro Descubierta ("USPD"), Seffner, Florida (File No. BNPL-20131021ABI). The Bureau has dismissed both of these other applications. See Iluminacion Divina Inc. from James D. Bradshaw, Letter, Ref 1800B3 (MB Dec. 4, 2013), recon. dismissed, Letter, Ref 1800B3-JDB (MB Feb. 24, 2014), recon. dismissed, Letter, Ref 1800B3-ATS (MB Sep. 10, 2014), Application for Review (filed May 19, 2014) pending; US Pro Descubierta, Letter, Ref 1800B3 (MB Feb. 28, 2014) ("Dismissal Letter"), recon. denied, Letter, Ref 1800B3-ATS (MB Oct. 9, 2014), recon. denied, Letter Ref (MB Feb. 3, 2015),

(continued....)

LPFM ownership limits, as described below.⁶ The *Reconsideration Decision* dismissed the petitions for reconsideration because they were untimely⁷ and, in the alternative, found that the Application was properly dismissed because its filing constituted a violation of the inconsistent application rule.⁸

2. On review, HBI does not dispute or address the untimeliness of the First Petition or Second Petition. As such, we will deny the HBI AFR and affirm the dismissal of both HBI petitions as untimely for the reasons stated in the *Reconsideration Decision*.⁹

3. Although the Bureau properly dismissed the First Petition and Second Petition as untimely, we briefly address HBI's substantive arguments on review because its allegations stem from its misunderstanding of Sections 73.3518 and 73.855 of the Rules.¹⁰ As a separate and independent ground

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recon. dismissed, Letter (MB Jun. 24, 2015), Petition For Reconsideration Nunc Pro Tunc (filed Jul. 21, 2015) pending.

⁶ See 47 C.F.R. §§ 73.855, 73.858, and 73.3518 (“While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.”); see also *Jersey Shore B’casting Corp. v. FCC*, 37 F.3d 1531, 1537 (D.C. Cir. 1994) (“*Jersey Shore*”) (the inconsistent application rule prevents applicants from flooding the Commission with multiple applications that include many that are ungranatable under other Commission rules or policies).

⁷ The Bureau dismissed the Application on December 13, 2013, and gave Public Notice of the dismissal on December 18, 2013. Under Section 405 of the Communications Act of 1934, as amended, and Section 1.106(f) of the Rules, the Petition would have been due on January 17, 2014. The first petition for reconsideration (“First Petition”), however, was not filed until March 14, 2014, and the second petition for reconsideration (“Second Petition”) was not filed until August 15, 2014. The Bureau also determined that an engineering amendment to the Application filed on January 15, 2014, could not be considered a timely petition for reconsideration because the amendment – which changed the proposed station’s community of license to Lawrence, Massachusetts – did not address the violation identified in the *Dismissal Public Notice*. HBI argues, for the first time on review, that it was not notified of the dismissal of the Application. HBI AFR at 2 (“FCC failed, intentionally, to notify Applicant HBI about the dismissal.”) Section 5(c)(5) of the Act and Section 1.115(c) of the Rules bar applications for review that rely “on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass.” See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission’s order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below). HBI did not present this argument to the Bureau in the First Petition or Second Petition. Accordingly, we will dismiss this part of the HBI AFR pursuant to Section 1.115(c). As a separate and independent ground for our rejection of this new argument, we believe that it is without merit: HBI’s claim that the Bureau “failed, intentionally” to notify it about the dismissal is simply wrong. The Bureau provided appropriate notice of the dismissal of the Application by the *Dismissal Public Notice*. See 47 C.F.R. §§ 0.204(d) (“[o]rders may be issued in any appropriate form”) and 1.4(b)(4) (establishing starting date for seeking reconsideration or review of actions described by public notice).

⁸ *Reconsideration Decision* at 3. See also 47 C.F.R. § 73.3518.

⁹ On December 12, 2014, a group titled No More Discrimination Against Latino (“NMDAL”) filed a “Petition for Reconsideration Nunc Pro Tunc Due Public Interest” (“NMDAL Petition”) in this proceeding, seeking review of the *Reconsideration Decision*. The Bureau treated this pleading, which was filed more than two months after the late-filed HBI AFR, as an application for review and dismissed it on the grounds that it was untimely filed and NMDAL lacked standing to file an application for review. See *Hispanic Broadcasting Institute, Inc.*, Letter, Ref 1800B3-ATS (MB Jan. 8, 2015) (“*NMDAL Letter*”). NMDAL filed an Application for Review of that decision on February 12, 2015 (“NMDAL AFR”), which raises the same arguments as the HBI AFR – that the Bureau erred in dismissing the HBI Application on the basis of the inconsistent application rule. Indeed, but for the addressees and titles, the two NMDAL pleadings are identical. We deny the NMDLA AFR because the *NMDAL Letter* correctly dismissed the NMDAL Petition for the stated procedural defects. Additionally, on January 23, 2015, HBI filed a Petition for Reconsideration seeking to amend the Application to specify operation on Channel 235 (“Third Petition”). In light of our decision today, we dismiss the Third Petition as moot.

¹⁰ 47 C.F.R. §§ 73.3518, 73.855(a).

for affirming the Bureau's dismissal of the Application, we find that HBI's conclusory bribery allegations are unsupported and that the staff correctly interpreted the LPFM ownership and inconsistent application rules in dismissing the Application.¹¹ In its AFR, HBI maintains that, while Frank Greer, its Director, "appeared in" another application (that of Iluminacion Divina, Inc.), because it had already been dismissed by the time the HBI application was dismissed, and because Mr. Greer recused himself from the HBI Board, "this individual did not holds [sic] an attributable interest in any broadcast license or other media entity."¹²

4. HBI mischaracterizes the nature of the ownership and inconsistent application rules at issue here. As the President of HBI and USPD, and as a board member of Iluminacion, Greer held an attributable interest in each organization and was a party to each application.¹³ Due to Mr. Greer's attributable interest in each application, no two of these three applications to which he was a party could be granted without causing a violation of Section 73.855. All three applications were inconsistent and filed in violation of Section 73.3518. Contrary to HBI's suggestion, such a violation cannot be cured through amendments filed after the close of the window. As established in the Commission precedent cited in the *Reconsideration Decision*, the Commission has observed that the act of filing of inconsistent applications contrary to Section 73.3518 of the Rules is a violation that cannot be eliminated by subsequent events, such as the filing of an amendment containing a recusal commitment or change in principals, or the subsequent dismissal of another inconsistent application.¹⁴ The harms to be avoided by the rule – the consumption of limited staff resources processing applications that cannot be granted, prejudice to other applicants by delaying the processing of their applications, and the delay of service to the public – cannot be cured by such submissions.¹⁵ Thus, neither the dismissal of the conflicting applications, nor Mr. Greer's post-filing commitment to recuse himself from the HBI Board, cured this fatal deficiency.¹⁶

¹¹ HBI AFR at 2-3.

¹² HBI AFR at 2 (citing 47 C.F.R. §§ 73.855(a) and 73.858). In fact, as stated in note 5 *supra*, Mr. Greer was also a party to a third application, filed during the 2013 window, that of USPD, which was dismissed after the dismissal of the Application.

¹³ See Instructions to FCC Form 318, Section II, Question 3 ("the term 'party to the application' includes any individual or entity whose ownership or positional interest in the applicant is 'attributable.' An 'attributable interest' is an ownership interest in or in relation to an applicant or licensee which will give its holder that degree of influence or control over the applicant or licensee sufficient to implicate the Commission's multiple ownership rules. . . . The . . . officers, directors, and governing board members of the applicant and its parent and subsidiary entities are considered to be parties to the application"). See also 47 C.F.R. § 73.858.

¹⁴ *Reconsideration Decision* at 3, citing *Big Wyoming Broadcasting Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 3493, 3493 (1987) ("The graveman of the rule violation ... was the filing of the inconsistent application itself and such a violation can never be cured by subsequent amendment because the act of filing cannot be undone.") (emphasis added). See also *Jersey Shore*, 37 F.3d at 1537 (applicant cannot cure a violation of the inconsistent application rule by amendment).

¹⁵ See *Treasure Coast Media, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 5533 ¶4 (1992) ("the staff will inevitably be required to process some applications which cannot, by their nature, be granted, thus wasting staff resources. Moreover, because these ungrantable applications cannot be easily identified early in the process, they can cause substantial delay in processing other applications with which they may conflict. To avoid these clear adverse consequences which inconsistent applications entail, the Commission explicitly prohibits their filing."). See also *Big Wyoming Broadcasting Corp.*, *supra* at 3494 (1987).

¹⁶ Since each applicant has repeatedly appealed the dismissal of its application and continues to do so, thus attempting to prosecute all three defective applications, they have already consumed substantial staff resources in processing their ungrantable applications and in disposing of their repeated and meritless petitions for reconsideration. See n.5, *supra*. Those staff resources could have been better applied to the processing of applications in conformity with the Rules, resulting in their grant and in the applicants' prompt institution of service to the public.

5. ACCORDINGLY, IT IS ORDERED that Application for Review filed by Hispanic Broadcasting Institute, Inc., on October 8, 2014, (1) IS DISMISSED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Commission's Rules, to the extent that it relies on questions of fact or law not previously presented to the Bureau; and (2) otherwise IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules.¹⁷

6. IT IS FURTHER ORDERED that the "Complain of Bribery and Corruption" filed on October 22, 2014, and the Petition for Reconsideration filed by Hispanic Broadcasting Institute, Inc., on January 23, 2015, ARE DISMISSED AS MOOT, and the Application for Review filed by No More Discrimination Against Latino on February 12, 2015, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(g).