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

In the Matter of	)	
	)	
LPFM MX Group 37	)	
	)	
SF Indiefest	)	
	)	
Application for a Construction Permit for a New LPFM Station at San Francisco, California,	)	File No. BNPL-20131108AIR Facility ID No. 192510
	)	
The San Francisco Public Press	)	
	)	
Application for a Construction Permit for a New LPFM Station at San Francisco, California,	)	File No. BNPL-20131113BRJ Facility ID No. 195885
	)	
Outsound	)	
	)	
Application for a Construction Permit for a New LPFM Station at San Francisco, California,	)	File No. BNPL-20131114AEX Facility ID No. 196855
	)	
and	)	
	)	
San Francisco Community Radio, Inc.	)	
	)	
Application for a Construction Permit for a New LPFM Station at San Francisco, California	)	File No. BNPL-20131114AQD Facility ID No. 192498

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 2016 **Released: June 24, 2016**

By the Commission:

1. The Commission has before it the captioned mutually exclusive (MX) applications of SF Indiefest (SFI), The San Francisco Public Press (SFPP), Outsound, and San Francisco Community Radio, Inc. (SFCR), for construction permits for new LPFM stations in San Francisco, California (SFI Application, SFPP Application, Outsound Application, and SFCR Application, respectively). These applications and the application of a fifth applicant, Independent Arts & Media (IAM Application),[1] were filed during the 2013 LPFM filing window and identified by the Media Bureau (Bureau) as LPFM MX Group 37.[2]

[1] File No. BNPL-20131114AEK.

[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). On December 16, 2013, the Bureau dismissed the latter-filed IAM Application because one of the Independent Arts & Media (IAM) board members–Neal Gorenflo–was also identified as a board member of SFPP. *See Broadcast Actions*, Public Notice, Report No. 48139 (MB Dec. 19, 2013), *recon. denied, Independent Arts & Media*, Letter Order (MB July 14, 2014).

2. On July 9, 2014, the Commission issued a Public Notice in which it conducted a point system analysis of this group and determined that the Outsound Application, the SFPP Application, the SFCR Application, and the SFI Application were each entitled to five comparative points.[3] The *July Public Notice* identified these four applications as the tentative selectees of LPFM MX Group 37 on a time-share basis, began a 30-day period for filing petitions to deny these applications, and afforded the applicants 90-day periods in which to file time-share agreements or major change amendments in order to resolve their mutual exclusivities.

3. Subsequently, the Commission received: 1) the Petitions to Deny the Outsound Application filed by SFCR and SFI (Outsound-SFCR Petition and Outsound-SFI Petition, respectively);[4] 2) the Petitions to Deny the SFPP Application filed by SFCR and SFI (SFPP-SFCR Petition and SFPP-SFI Petition, respectively);[5] 3) the Informal Objection to the SFCR Application filed by Loren Dobson (SFCR-Dobson Objection);[6] 4) the Informal Objection to the SFI Application filed by SFPP (SFI-SFPP Objection);[7] and 5) the points-aggregation time-share agreements filed by Outsound and SFPP (Outsound-SFPP Agreement), and by SFCR and SFI (SFCR-SFI Agreement).

4. Procedural Matters. The *July Public Notice*, released on July 9, 2014, stated that it was beginning "a 30-day period from release of the Public Notice for the filing of petitions to deny."[8] Accordingly, petitions to deny the tentative selectee applications in LPFM MX Group 37 were due on August 8, 2014. The Outsound-SFI Petition and the SFPP-SFI Petitions were filed on August 12, 2014. Accordingly, we will treat them an as informal objections. Pursuant to Section 309(d) of the Communications Act of 1934, as amended (Act),[9] petitions to deny and informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest.[10]

5. Outsound Application. *Main Studio Point*. SFI and SFCR argue that Outsound should not be a tentative selectee because it was improperly awarded a point under the main studio criterion.

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[3] *Commission Identifies Tentative Selectees in 79 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 8665 (2014) (*July Public Notice*).

[4] The Outsound-SFCR Petition was filed on August 7, 2014. Outsound filed an Opposition to this filing on August 19, 2014 (Outsound-SFCR Opposition). SFCR filed an "Answer of Petitioner to Applicants Opposition to Petition to Deny," which we will treat as a Reply, on August 28, 2014 (Outsound-SFCR Reply). The Outsound-SFI Petition was filed on August 12, 2014. Outsound filed an Opposition to this filing on August 21, 2014 (Outsound-SFI Opposition).

[5] The SFPP-SFCR Petition was filed on August 7, 2014. SFPP filed an Opposition on August 19, 2014 (SFPP-SFCR Opposition). SFCR filed a pleading styled "Answer of Petitioner to Applicant's Opposition to Petition to Deny," which we will treat as a Reply, on August 28, 2014 (SFPP-SFCR Reply). The SFPP-SFI Petition was filed on August 12, 2014. SFPP filed an Opposition (SFPP-SFI Opposition) on August 22, 2014.

[6] The SFCR-Dobson Objection was filed on August 15, 2014. On December 11, 2015, SFCR filed a pleading styled "Answer of Applicant to Informal Objection," which we will treat as an Opposition (SFCR-Dobson Opposition).

[7] The SFI-SFPP Objection was filed on November 18, 2014. SFI filed an Opposition on December 17, 2014 (SFI Opposition). SFPP filed a Supplement on March 30, 2015 (SFI-SFPP Supplement). SFPP filed an Opposition to the Supplement on April 10, 2015 (SFI-SFPP Second Opposition).

[8] *July Public Notice*, 29 FCC Rcd at 8665.

[9] 47 U.S.C. § 309(d).

[10] *See, e.g.*, *WWOR-TV, Inc*., Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F. 2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Area Christian Television, Inc*., Memorandum Opinion and Order, 60 RR 2d 862, 864, para. 6 (1986) (petitions to deny and informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

Specifically, they argue that the location of Outsound's main studio–755 O'Farrell Street, Apartment #51 in San Francisco[11]–is not publicly accessible.[12] Outsound admits that its proposed main studio "is not ideal for unplanned public access," but adds that it "cannot afford such open access accommodations [in] San Francisco, with one of the highest rental rates in the country."[13] Outsound states that it intends to honor its pledge to maintain an accessible main studio via appointment and would move its studio upon grant of its application.[14] Outsound also notes that many commercial broadcasters require visitors to be "buzzed in" and that its current studio would operate on a similar basis except for the fact that "access is granted by appointment only."[15]

6. Section 73.872(a)(3) provides that "[a]pplicants claiming a point under this criterion must specify the proposed address . . . for the proposed main studio in FCC Form 318 at the time of filing their applications."[16] In promulgating the main studio point, the Commission stated:

> [W]e will award one point to any organization that pledges to maintain a meaningful staff presence . . . in a publicly accessible main studio location that has local program origination capability for at least 20 hours per week between 7 a.m. and 10 p.m. . . . **We will require applicants to list the proposed main studio address in their applications**, as well as the local telephone number to be maintained by the main studio at all times. Applicants failing to include this information will not receive credit for this point.[17]

7. We find that Outsound has failed to meet the requirements to claim this point. We reject Outsound's argument that it should receive comparative credit for a local main studio even though it plans to find a suitable main studio location upon the grant of its application. In both the FCC's Rules (Rules) and in the *Sixth Report and Order*, the Commission has stated that, to be eligible for the main studio point, applicants must identify their *proposed* main studio address, not a placeholder site such as Outsound has provided.[18] Additionally, although there is no rule that prohibits an LPFM licensee from having its main studio in a private residence, Outsound's appointment-only access to the site identified as its main studio does not satisfy the requirement that its studio be publicly accessible. In the *Sixth Report and Order*, the Commission explained that a main studio "is integral to a station's ability to serve community needs" and promotes "'meaningful interaction between the station and the community.'"[19] Outland's appointment-only policy and its concession that its studio is unsuitable for "unplanned public access" are fundamentally inconsistent with the requirement that the main studio be "publicly accessible" in order to receive a comparative credit.[20] Accordingly, we deduct this point from Outsound's total, as

[11] Outsound Application at Section III, Question 3.

[12] Outsound-SFI Petition at 3; Outsound-SFCR Petition at 2 and Exh. A. The Outsound-SFI Petition and the Outsound-SFCR Petition raise multiple issues, but we need only address the dispositive main studio issue.

[13] Outsound-SFI Opposition at 2-3; Outsound-SFC Opposition at 2-3.

[14] *Id.*

[15] *Id*.

[16] 47 CFR § 73.872(a)(3). *See also* Instruction to FCC Form 318, Section III, Question 3 ("Applicants claiming a point under this criterion must specify the address and telephone number for the proposed main studio in response to this question.").

[17] *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15470, para. 185 (2012) (*Sixth Report and Order*) (emphasis added).

[18] 47 CFR § 73.872(a)(3); *Sixth Report and Order*, 27 FCC Rcd at 15470, para. 185.

[19] *Sixth Report and Order*, 27 FCC Rcd at 15469-70, paras. 185-86 (citations omitted).

[20] We note in the analogous context of providing access to the public file, stations are prohibited from requiring members of the public to make an appointment in advance. *Availability of Locally Maintained Records for Inspection by Members of the Public*, Public Notice, 28 FCC 2d 71 (1971); *Availability of Locally Maintained Records for Inspection by Members of the Public*, Public Notice, 13 FCC Rcd 17959 (MMB 1998) ("a station may

(continued….)

well as its bonus point.[21] Therefore, the Outsound Application is left with three comparative points and is no longer a tentative selectee.

8. SFI Application. *Unlicensed Broadcasting*. SFPP argues that SFI is not eligible to hold an LPFM license because a party to the SFI Application, Jeff Ross,[22] worked as a radio host on Radio Valencia, when it allegedly operated an unlicensed radio station in San Francisco in violation of Section 301 of the Act.[23] In support of this allegation, SFPP cites to the website Archive.org, which states that Radio Valencia broadcast on 87.9 FM in San Francisco and that Ross was a DJ for the station.[24] In the SFPP-SFI Supplement, SFPP provides screen captures from various websites in which Radio Valencia stated that it was broadcasting a radio signal and that Ross would be a DJ on the station.[25] Accordingly, SFPP requests dismissal of the SFI Application.[26]

9. SFI argues that the SFPP-SFI Objection fails because it does not present any probative evidence that Ross engaged in unlicensed broadcasting. Specifically, SFI argues that SFPP's reliance on archived Internet websites fails to meet the standard of Section 309(d) of the Act because they are not based on personal knowledge.[27] SFI further argues that the websites do not prove that Radio Valencia ever actually engaged in unlicensed broadcasting, but instead was an Internet radio operation.[28] SFI further states that "[a]lthough 'operation' would appear to implicate practical specifics such as

(Continued from previous page)
not require that a member of the public make an appointment in advance or return at another time to inspect the public file, or that members of the public examine the public file only at times most convenient to the licensee or its staff"). Similarly, in the context of enforcing the public file rule, the Enforcement Bureau has held that an appointment-only system does not meet the requirement for public access. *See, e.g., Community Television of So. Cal.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 1107 (EB 2011) (finding licensee did not maintain an accessible main studio where studio was accessible on appointment only basis); *Christopher H. Bennett Broad. of Wash., Inc.,* Forfeiture Order, 23 FCC Rcd 11286 (EB 2008) (*Bennet*) (same).

[21] *See* 47 CFR § 73.872(b)(4) (awarding a bonus point to applicants that "make both the local program origination and main studio pledges").

[22] SFI Application at Section II, Question 3.a. (identifying Ross as a director and president of SFI).

[23] SFI-SFPP Objection at 1-2.

[24] SFI-SFPP Objection at 2, *citing* https://web.archive.org/web/20130216203409/http://radiovalencia.fm/about; https://web.archive.org/web/20130216203419/http://radiovalencia.fm/shows. Radio Valencia is still an online streaming and podcasting service. *See* www.radiovalencia.org.

[25] SFI-SFPP Supplement at 2-3. Among the pages are: 1) two posts on Facebook.com by SFI and Radio Valencia stating that Radio Valencia is broadcasting on 87.9 FM and that Ross would be appearing on the air; 2) a copy of Radio Valencia's website from Archive.org and dated February 16, 2013, which stated that Radio Valencia broadcasts on 87.9 FM; 3) an article from the San Francisco Chronicle that referred to Radio Valencia as an "unlicensed pirate station" which is funded by radio hosts and in which one of its founders stated that it has been visited by FCC inspectors; 4) an article from SF Weekly that refers to Radio Valencia as a "pirate radio station;" 5) an article from WIRED Magazine that describes Radio Valencia as a "pirate radio station" operating on 87.9 FM; and 6) emails from Radio Valencia's Google Group where members state that Ross would not re-appear on the air because of his involvement with SFI and its LPFM application. *See id.* at Addendums A, C, D, E, F, G,

[26] Section 632(a)(1)(B) of the Making Appropriations for the Government of the District of Columbia for Fiscal Year 2001 Act provides that the Commission must "prohibit any applicant from obtaining a low power FM license if the applicant has *engaged in any manner* in the unlicensed operation of any station in violation of Section 301 [of the Act]." *See* Pub. L. No. 106-553, 114 Stat. 2762 (2000) (Appropriations Act) (emphasis added), amended by Pub. L. No. 111-371, 124 Stat. 4072 (2011). *See also Creation of a Low Power Radio Service*, Second Report and Order, 16 FCC Rcd 8026, 8030, paras. 10-11 (2001) (*Second Report and Order*); 47 CFR § 73.854; *Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002)*, rev'd en banc,* 317 F.3d 239 (D.C. Cir. 2003).

[27] SFI-SFPP Opposition at 2 and SFI-SFPP Second Opposition at 1-4, *citing* 47 U.S.C. § 309(d).

[28] SFI-SFPP Opposition at 2 and SFI-SFPP Second Opposition at 1-4.

transmitting electrical energy, plugging in a power cable, adjusting an antenna, or twisting a dial, the phrase 'engaged in any manner' is dangerously broad and amorphous."[29]

10. On March 4, 2016, the Bureau issued a Letter of Inquiry to SFI, in which it directed that SFI: 1) provide documentation regarding Ross's relationship with Radio Valencia; 2) provide copies of any financial records "reflecting payments made [by Ross] in connection with any radio program broadcast by any station from January 1, 2011, to December 31, 2013;" and 3) state whether Ross "participated in any capacity (other than as listener) in any radio communications (licensed or unlicensed) from January 1, 2011, to December 31, 2013."[30]

11. Ross responded to the *LOI* on behalf of SFI on April 4, 2016.[31] In the *SFI Response*, Ross refused to answer Question 1 of the *LOI*, invoking his Fifth Amendment[32] right against self-incrimination, and stating that he was unwilling to provide "documents that might tend to incriminate others or might provide leads for those seeking to develop criminal charges against others."[33] Ross further stated that there were no such financial records that were within the scope of Question 2. In response to Question 3, Ross made certain evidentiary objections and stated:

> I have denied, and here deny again that I have ever been involved in the "operation of any station" 47 U.S.C. Se. 301 [sic] that was unlicensed. Specifically, I have never handled, obtained, operated, or assisted in the operation of any apparatus for the transmission of electrical energy in violation of Federal law. In fact, to my knowledge I have never seen such apparatus.[34]

12. Congress expressly intended to prevent applicants from obtaining LPFM licenses if they have engaged in any manner of unlicensed broadcasting.[35] The SFI-SFPP Objection raised sufficient concerns about Ross' activities to warrant further investigation.[36] The *LOI* was issued in accordance with

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[29] SFI-SFPP Second Opposition at 5.

[30] *Letter of Inquiry from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Jeff Ross, SF IndieFest* (MB Mar. 4, 2016) (*LOI*).

[31] *Letter of Inquiry Response from Jeff Ross, SF IndieFest, to Peter H. Doyle, Chief, Audio Division, Media Bureau* (Apr. 4, 2016) (*LOI Response*).

[32] U.S. CONST. amend. V.

[33] *LOI Response* at 1-2. The *LOI* ordered SFI–a corporation–to produce the requested documents. *See*, *e.g., LOI* at 1 ("Accordingly, SFI is directed to submit . . . truthful and complete responses to the following inquiries . . ."). The *LOI* was addressed to Ross because he is identified as SFI's President and signed the SFI Application. *See* SFI Application at Section II, Question 3 and Section V, Certification. As a corporation, SFI generally cannot assert a Fifth Amendment right against self-incrimination. *See* ***Hale v. Henkel***, 201 U.S. 43 (1906). However, because the records in question are not SFI's corporate records, but rather Ross' own personal records, we will entertain Ross' invocation of the Fifth Amendment.

[34] *LOI Response* 1.

[35] The Commission originally provided that applicants that had engaged in unlicensed broadcasting could disclose this violation without affecting their LPFM applications if they had ceased such operations. *See Creation of a Low Power Radio* Service, Report and Order, 15 FCC 2205, 2226, para. 54 (2000). The Appropriations Act thus specifically superseded the Commission in this regard. *See Second Report and Order*, 16 FCC Rcd at 8030-31, para 12 ("The amendment of the unlicensed operation rule is a non-discretionary action that merely codifies a Congressional requirement."). The Commission has recently affirmed the dismissal of an LPFM application where a party to the application had engaged in unlicensed operations. *See WKMJ Radio Live the People Station*, Memorandum Opinion and Order, 30 FCC Rcd 13779 (2015), *recon. denied*, FCC 16-56 (rel. Apr. 28, 2016).

[36] For example, the Enforcement Bureau has relied on Internet and social media postings as part of their investigations into unlicensed broadcasting. *See, e.g., Fabrice Polynice*, Forfeiture Order, 28 FCC Rcd 4297, 4298-99, para. 4 (EB 2013) (relying in part on posts made to Facebook to affirm Notice of Apparent Liability issued for unlicensed broadcasting); *McArthur Bussey*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8036, 8036-37, para. 4 (EB 2012) (Facebook posts link unauthorized broadcasts to broadcaster).

Section 73.1015 of the Rules[37] and sought factual information needed to determine whether Ross had engaged in unlicensed radio operations in violation of Section 301 of the Act, and therefore whether SFI is eligible to hold an LPFM authorization. The refusal to cooperate with a Commission investigation, even while invoking the Fifth Amendment, is grounds to deny a license.[38] SFI's refusal to provide the specified documentation set forth in Question 1 of the *LOI* and failure to provide fully the information specified in Question 3 of the *LOI* frustrates the Commission's investigation into SFI's eligibility to hold an LPFM license and delays the commencement of new LPFM service to San Francisco by the remaining qualified applicants in LPFM MX Group 37. Accordingly, we will dismiss the SFI Application pursuant to Section 73.3568(a) of the Rules for failing to provide the information specified in the *LOI*.[39]

13. SFPP Application. *Second Adjacent Waiver*. SFI argues that the SFPP Application should be dismissed because it contains a defective second-adjacent channel waiver request. Specifically, SFI states that SFPP's proposal would cause interference to persons driving on Interstate 280 (I-280).[40] SFPP responded that it is entitled to an opportunity to file a corrective amendment,[41] and on September 25, 2014, it filed such an amendment.[42] We have reviewed this amendment and find that it complies with the Section 73.807(e) of the Rules.[43] Accordingly, we will dismiss the SFPP-SFI Petition as moot.

14. *Site Availability*. SFCR argues that the SFPP Application should be dismissed because it did not have reasonable assurance of the availability of the specified transmitter location.[44] In support of this argument, SFCR provides a Declaration of William F. Ruck, who states that he does not believe that

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[37] 47 CFR § 73.1015.

[38] *Warren L. Percival*, Order of Revocation, 8 FCC 2d 333, 333-34, para. 4 (1967) ("While information which is self-incriminatory may be withheld, the licensee, in doing so, frustrates the Commission in the performance of its duty. In such event, denial or revocation of a license where such information is not furnished may be warranted on this ground alone, since it is the licensee who deprives the Commission of information necessary to determine its compliance with the public interest standard."), *citing Carol Music, Inc.*, Decision, 37 FCC 379, 384 (1964). *See Blumenthal v. FCC*, 318 F.2d 276, 279 (D.C. Cir. 1963) (affirming dismissal of application where applicant refused to answer questions relating to his character by invoking Fifth Amendment, and stating "The Fifth Amendment privilege protects a person who invokes it from self-accusation; but when he seeks a license at the hands of an agency acting under the standard of the public interest, and information substantially relevant to that standard is withheld under the privilege, as may be done, the need for the information and the cooperation of the applicant with respect to it remains. The agency cannot be required to act without the information"). *Cf. Borrow v. FCC*, 285 F. 2d 666, 670 (D.C. 1960) (affirming dismissal of application where applicant refused to answer questions based on the First Amendment).

[39] 47 CFR § 73.3568(a) (". . . failure to respond to official correspondence or request for additional information, will be cause for dismissal."). *See also Innovative Women's Media Ass'n v. FCC*, 16 F.3d 1287, 1289 (D.C. Cir. 1994), *citing The Dunlin Group*, Memorandum Opinion and Order, 6 FCC Rcd 4642, 4644, para. 9 (Rev. Bd. 1991) (among the valid grounds for dismissing an application pursuant to Section 73.3568(a) is open defiance of an order to produce a witness). Failing to produce a witness impedes efforts to adduce relevant evidence, just as SFI's actions here did.

[40] SFPP-SFI Petition at 1-2, *citing Living Way Ministries, Inc.*, Memorandums Opinion and Order, 17 FCC Rcd 17054, 17058, para. 11 (2002) (listeners and potential listeners include persons who travel through an area). The SFPP-SFI Petition is supported by an Engineering Statement showing interference over portions of I-280. *See* SFPP-SFI Petition at Engineering Statement.

[41] SFPP-SFI Opposition at 2-3.

[42] *See* Amendment to SFPP Application at Section VI, Question 5 and 6, Exhibit 1 and Attachment 11.

[43] *See Christian Charities Deliverance Church*, Memorandum Opinion and Order, 30 FCC Rcd 10548, 10550, paras. 7-8 (2015) (allowing for curative amendments of defective second-adjacent channel waiver requests). We direct the Bureau to grant the second-adjacent channel waiver request when it grants the SFPP Application. *See* para. 27 *infra*.

[44] SFPP-SFCR Petition at 4. *See also* SFPP Application at Section VI, Question 2 and Exhibit 11 (identifying proposed site as ATT Tower "12816").

SFPP could have obtained permission to use the tower.[45] He states that the tower is owned by Crown Castle and leased to AT&T, and that in his experience, "tower operators such as Crown Castle do not permit lessees to enter into subleases."[46] We give no weight to the Ruck Declaration because it is entirely based on speculation, contains no documentation to support its stated opinions, and also repeatedly references a different applicant, namely Outsound. We thus reject this argument.[47]

15. SFCR Application. *Localism*. Dobson argues that SFCR is not entitled to a point under the established community presence criterion. Dobson first argues that the address provided by SFCR in its Articles of Incorporation corresponds to an address in Oakland, over 15 miles from San Francisco.[48] SFCR responds that its Articles of Incorporation explicitly state that this address is for SFCR's "initial agent for service of process" and not the address of SFCR itself.[49] We reject Dobson's argument. The address provided in SFCR's Articles of Incorporation is in fact for its agent for service of process, not the organization itself.[50]

16. Dobson further states that the second exhibit SFCR provides in support of its localism claim–a letter from Light Rail Studios stating that SFCR has been a tenant at its 672 Toland Place offices for over two years–is "fatally flawed" because it is not a lease and does not demonstrate that SFCR has been at that location prior to December 2011.[51] Dobson also alleges that SFCR misrepresented that it was a tenant at Light Rail Studios since 2011 because SFCR did not have a bank account prior to February 2012.[52] SFCR provides in response a letter from the Internal Revenue Service, dated June 17, 2011, and addressed to SFCR at the Toland Place address.[53] We find that the IRS Letter resolves any ambiguity in the Light Rail Letter and demonstrates that SFCR was headquartered at the Toland Place address for at least two years prior to the filing of its application. Additionally, there is no requirement that an LPFM applicant have a bank account or even pay for use of its headquarters, and it is immaterial to SFCR's qualifications what means of compensation–if any–Light Rail Studios required for SFCR's use of its facilities. We therefore reject this argument as well.

17. SFPP and SFCR Applications. *Real-Party-In-Interest and Multiple Application Rule*. SFCR argues that the SFPP Application should be dismissed because it failed to identify Josh Wilson as holding an attributable interest in SFPP.[54] In support of its allegations against SFPP, SFCR provides a declaration from its Secretary, Caroline Keddy, wherein she states that she contacted Michael Stoll of SFPP to discuss their LPFM applications and was told that "Josh Wilson is the go-to guy who is pushing

[45] SFPP-SFCR Petition at Exhibit D, Declaration of William F. Ruck (Ruck Declaration).

[46] *Id.*

[47] In the SFPP-SFCR Reply, SFCR requests that the Commission refer to the Engineering Statement provided in the SFPP-SFI Petition in support of its argument that the transmitter site is not "credible." SFPP-SFCR Reply at 3. That Engineering Statement, however, did not discuss whether SFPP had reasonable assurance of site availability, but rather whether SFPP had proposed a viable second-adjacent channel waiver request.

[48] SFCR-Dobson Objection at 1-2. The address provided is 3001 Blossom Street, Oakland, CA. *See* SFCR Application at Attach. 2, San Francisco Community Radio Articles of Incorporation (Articles).

[49] SFCR-Dobson Opposition at 2.

[50] *See* Articles at para. 3.

[51] SFCR-Dobson Objection at 1-2. *See also* SFCR Application at Attach. 10, San Francisco Community Radio lease for Light Rail Studios (Light Rail Letter) ("This letter is to certify that San Francisco Community Radio has been our tenant in good standing here since 2011.").

[52] SFCR-Dobson Objection at 2-3

[53] SFCR-Dobson Opposition at Exh. A (IRS Letter).

[54] SFPP-SFCR Petition at 3-4.

this forward. He is our coordinator, spokesman on this project."[55] SFCR also provides a declaration from Thomas Dively, also an SFCR board member, who similarly states that he contacted Stoll and was told that "'Josh Wilson knows more than I do'" and that Josh Wilson was behind the SFPP Application.[56] SFCR also argues that the Commission should have dismissed the SFPP Application at the same time it dismissed the IAM Application.[57] Finally, SFCR states that "[w]hile not disqualifying in and of itself, it is significant to note that Wilson is listed on SFPP's website as an Assistant Editor."[58]

18. SFPP states that the statements allegedly made by Stoll were taken out of context. It explains that Wilson assisted SFPP with preparing its application.[59] SFPP furthers states that although Wilson is an editorial contributor, he is neither a member of SFPP's board or senior staff, and has no control over the organization.[60]

19. Similarly, Dobson alleges that Josh Wilson also holds an attributable interest in the SFCR Application. Dobson states that IAM, for which Wilson serves as a board member, transferred funds to another entity, Media Arts Center (MAC), which provides funding to SFCR and that Wilson "played a part in SFCR strategic planning."[61] Dobson also states that Wilson discouraged applicants in LPFM MX Group 37 from filing petitions to deny against each other.[62]

20. We reject SFCR's and Dobson's arguments against the SFPP Application and Dobson's arguments against the SFCR Application. The Keddy Declaration contains hearsay[63] and its veracity is questionable because Keddy is an officer of SFCR.[64] Likewise, the Dively Declaration contains hearsay, and its veracity is also questionable because Dively is a board member of SFCR. We reject Dobson's

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[55] *Id.* at Exh. A (Keddy Declaration).

[56] *Id.* at Exh. B (Divey Declaration).

[57] *Id.* at 4. *See supra* n.2.

[58] SFPP-SFCR Petition at 4 and Exhibit D.

[59] SFPP-SFCR Opposition at 1-3

[60] *Id*. at 3.

[61] SFCR-Dobson Objection at 3. In support of this allegation, Dobson provides an e-mail from the SFCR Google Group titled "Treasurer's Report," which states that SFCR received funds from MAC. *Id*. at Exhibit A. Dobson also provides an email dated August 1, 2011, from Wilson directed to "Supporters of KUSF" and explains that, although his role with IAM precluded Wilson from being a member of Friends of KUSF (described by Wilson as a "bridge" to SFCR while SFCR was being created), Wilson was "your biggest cheerleader and your passionate adviser." SFCR-Dobson Objection at Exh. 4, pp. 1-2. However, Dobson makes no showing as to how serving as a cheerleader and advisor to a precursor organization in 2011 resulted in control of SFCR in 2013.

[62] *Id.* at 4, *citing* http://www.slidehsare.net/joshwilson6/california-fm-a-network-vision-36095670.

[63] ***See*** *Johnson v. United States,* 628 F.2d 187, 190-191 (D.C. Cir. 1980) (the weight to be accorded to a hearsay statement depends on its truthfulness, reasonableness, and credibility). *See also* ***Excellence in Education Network***, Memorandum Opinion and Order, 8 FCC Rcd 6269, 6272 n.9 (1993) ("an affidavit of a party attesting to another person's assertions . . . is hearsay and as such has no probative value under Section 309(d)"); *Living Proof, Inc. Big Pine, California*, Letter Order, 24 FCC Rcd 2382, 2385, n.29 (MB 2009) (declining to credit hearsay statements of third party).

[64] *See, e.g., Janice Fay Surber*, Decision, 5 FCC Rcd 6155, 6158, para. 18 (Rev. Bd. 1990) ("weight to be accorded hearsay 'depends on its truthfulness, reasonableness, and credibility,' and . . . 'a prime indicium of probity is whether the declarants are disinterested witnesses'") (citations omitted); *Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16310, 16319, para. 25 (MB 2010) (petitioner's engineering consultant's hearsay statement, uncorroborated by independent documentation, should be given little weight because he was not a disinterested witness); *Second Samoan Congregation Church*, Letter Order, 23 FCC Rcd 16630, 16636 (MB 2008) (applicant's counsel's statements should be given little weight because he is not a disinterested witness).

arguments as well, as they too fail to show that Wilson in fact controlled the SFCR Application.[65] Additionally, even taking these declarations at face value, we find that they do not show that Wilson in fact influenced or controlled any of these applications or that Wilson is the real party in interest behind either the SFPP Application or the SFCR Application.[66]

21. We also reject SFCR's suggestion that the SFPP Application should be dismissed based on the overlapping board member with IAM.[67] SFCR provides no authority for this proposition, and in fact the Bureau specifically stated that the remedy for such inconsistent applications is to dismiss the latter filed application.[68] As such, only the IAM Application was subject to dismissal, and the Bureau took that action *sua sponte*.[69] We likewise reject SFCR's suggestion that Wilson's role as an Associate Editor at SFPP is somehow "significant." SFCR again cites no authority that would suggest such a position grants Wilson influence or control over SFPP to implicate the Commission's multiple ownership rules, and as SFPP notes, this position does not give Wilson any role in the governance of SFPP.[70]

22. Time-share Agreements. As a result of deducting two points from the Outsound Application, that application is no longer a tentative selectee and the Outsound-SFPP Agreement must be rejected.[71] Likewise, as a result of dismissing the SFI Application, the SFCR-SFI Agreement is rejected. The SFPP Application and the SFCR Application remain tentative selectees with five points each. Because SFPP and SFCR have not filed an acceptable time-share agreement, the Bureau will–by separate letter–afford these two applicants the opportunity to reach a new voluntary time-share agreement or

[65] The fact that SFCR filed petitions to deny against Outsound and SFPP, all three of which are allegedly controlled by Wilson, suggests that any attempts by Wilson to control the outcome of LPFM MX Group 37 have not been successful.

[66] *See Edwin L. Edwards, Sr.*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248, para. 20 (2001), *aff'd sub nom. Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539 (D.C. Cir. 2003). In assessing the locus of control, the Commission examines who establishes an entity's basic operating polices with respect to programming, personnel, and finances. *See WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142-46, paras. 11-30 (1995), *vacated on other grounds sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Choctaw Broad. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39, para. 11 (1997). In a real-party-in-interest inquiry, the focus is whether a third person has an undisclosed ownership interest in an application or will be in a position to actually or potentially control the applicant. *See Georgia Public Telecomm. Comm.*, Memorandum Opinion and Order, 7 FCC Rcd 7996, 7998, para. 13 (1992), *citing Astroline Commc'ns. Co. **v. FCC***, 857 F.2d 1556, 1564 (D.C. Cir. 1998); *KOWL, Inc.,* Memorandum Opinion and Order, 49 FCC 2d 962 (1974) (same, *citing Creek County Broad. Co.***,** Memorandum Opinion and Order, 31 FCC 2d 462 (1971) and *Sumiton Broad. Co.,* Memorandum Opinion and Order, 15 FCC 2d 400 (1968)). The petitioners' allegations fail to show that Wilson ever controlled or was in a position to control any applicant other than IAM, or that Wilson has controlled litigation or settlement strategy within MX Group 37. *See* note 59 *supra*.

[67] SFPP-SFCR Petition at 4.

[68] *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).

[69] *See note 2 supra.*

[70] *See also* Instructions for FCC Form 318, Section II, Question 3 ("Specifically, as used in this application, 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").

[71] Points-aggregation time-share agreements maybe only be accepted from applicants whose mutually exclusive applications have the same point total. 47 CFR § 73.872(c).

identify their preferred timeslots pursuant to the involuntary time-sharing procedures set forth in Section 73.872(d).[72]

23. ACCORDINGLY, IT IS ORDERED THAT the Petitions to Deny the application of Outsound filed by SF Indiefest and by San Francisco Community Radio, Inc., ARE GRANTED to the extent indicated above and ARE DISMISSED as moot in all other respects. IT IS FURTHER ORDERED that the tentative selection of the application of Outsound (File No. BNPL-20131114AEX) for a construction permit for a new LPFM station in San Francisco, California, IS RESCINDED.

24. IT FURTHER ORDERED that the application of SF Indiefest (File No. BNPL-20131108AIR) for a construction permit for a new LPFM station at San Francisco, CA IS DISMISSED. IT IS FURTHER ORDERED that the Informal Objection to the application of SF Indiefest filed by The San Francisco Public Press IS DISMISSED as moot.

25. IT IS FURTHER ORDERED that the Petition to Deny the application of The San Francisco Public Press filed by SF Indiefest IS DISMISSED as moot in part and IS DENIED in all other respects. IT IS FURTHER ORDERED that the Petition to Deny the application of The San Francisco Public Press filed by San Francisco Community Radio, Inc. IS DENIED.

26. IT IS FURTHER ORDERED that the Informal Objection to the application of San Francisco Community Radio filed by Loren Dobson IS DENIED.

27. IT IS FURTHER ORDERED that the time-share agreements filed by Outsound and The San Francisco Public Press, and by San Francisco Community Radio, Inc. and SF Indiefest, ARE REJECTED. 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 application of Outsound and TO GRANT the applications of The San Francisco Public Press and San Francisco Community Radio, Inc. on a time-share basis.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[72] 47 CFR § 73.872(d); *see also* Instructions to FCC Form 318, Section IV at 9; *Creation of a Low Power Radio Service, Fifth Order on Reconsideration and Sixth Report and Order*, 27 FCC Rcd 15402, 15475-76, para. 197 (2012).