



**Federal Communications Commission  
Washington, D.C. 20554**

June 23, 2015

*In Reply Refer To:*  
1800B3-ATS

Mr. Todd Urick  
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Ms. Jo Ann Benns-Scott  
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P.O. Box 872125  
Vancouver, WA 98687

In re: **LPFM MX Group 283**

The Oregon Center for Photographic Arts  
New LPFM, Portland, Oregon  
Facility ID Number: 196398  
File Number: BNPL-20131114BUZ

Metroeast Community Media  
New LPFM, Gresham, Oregon  
Facility ID Number: 196088  
File Number: BNPL-20131114AXB

The Creative Music Guild  
New LPFM, Portland, Oregon  
Facility ID Number: 196305  
File Number: BNPL-20131114BUV

Jehovah Jireh International Mission  
New LPFM, Portland, Oregon  
Facility ID Number: 194894  
File Number: BNPL-20131108AEW

Slavic Community Center of NW, Inc.  
New LPFM, Portland, Oregon  
Facility ID Number: 196785  
File Number: BNPL-20131114BHV

Enlighten State Academic Services  
New LPFM, Vancouver, Washington  
Facility ID Number: 196942  
File Number: BNPL-20131114BNN

**Petitions for Reconsideration**

Dear Mr. Urick, Ms. Bradley, and Ms. Benns-Scott:

We have before us: 1) the Petition for Reconsideration (“MCM Petition”) filed by Metroeast Community Media (“MCM”), and 2) the Petition for Reconsideration (“ESAS Petition”) filed by Enlighten State Academic Services seeking (“ESAS”), both seeking review of a Media Bureau (“Bureau”) decision<sup>1</sup> that dismissed their respective applications for construction permits for new LPFM stations at Portland, Oregon, and Vancouver, Washington.<sup>2</sup> For the reasons set forth, we deny the MCM Petition and the ESAS Petition.

**Background.** As discussed in the *Staff Decision*, the Bureau determined that the applications of The Oregon Center for Photographic Arts (“OCPA”), MCM, The Creative Music Guild (“CMG”), Jehovah Jireh International Mission (“JJIM”), Slavic Community Center of NW, Inc. (“SCC”), and ESAS (“OCPA Application,” “MCM Application,” “CMG Application,” “JJIM Application,” “SCC Application,” and “ESAS Application,” respectively) were mutually exclusive and identified them as LPFM MX Group 238.<sup>3</sup> On July 9, 2014, the Commission issued a Public Notice in which it conducted a point system analysis and identified the applications of MCM, JJIM, SCC, CMG, and OCPA as the tentative selectees of LPFM MX Group 283 on a time-share basis, began a 30-day period for filing petitions to deny against those applications, and began a 90-day period in which the tentative selectee applicants could file time-share agreements.<sup>4</sup> On July 10, 2014, JJIM and SCC filed a time-share agreement (“JJIM-SCC Agreement”).<sup>5</sup> On October 8, 2014, OCPA, MCM and CMG filed their own time-share agreement (“OCPA-MCM-CMG Agreement”).

SCC filed an Informal Objection (“Objection”) to the OCPA Application, the MCM Application, and the CMG Application, arguing that the OCPA Application and MCM Application should be dismissed because they were not signed by an officer of the corporations as required by Section 73.3513(a)(3) of the Commission’s Rules (“Rules”).<sup>6</sup> In the *Staff Decision*, the Bureau granted the Objection on this basis, dismissed the OCPA Application and the MCM Application, rejected the OCPA-MCM-CMG Agreement, accepted the JJIM-SCC Agreement, granted the JJIM Application and the SCC Application, and dismissed the CMG Application and the ESAS Application.<sup>7</sup>

In the MCM Petition, MCM argues that the Objection should have been dismissed because it was not served on MCM, OCPA, and CMG “as required by Section 309(d)(1) of the [Communications Act of 1934, as amended] and Section 1.47 of the [Commission’s Rules] (“Act” and “Rules”) and thus “the

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<sup>1</sup> *LPFM MX Group 283*, Letter, Ref 1800B3-ATS (MB May 6, 2015).

<sup>2</sup> MCM filed the MCM Petition on May 26, 2015. JJIM and SCC jointly filed an Opposition on June 3, 2015. ESAS filed the ESAS Petition on June 10, 2015.

<sup>3</sup> *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).

<sup>4</sup> *Commission Identifies Tentative Selectees in 79 Groups of Mutually Exclusive Applications filed in the LPFM Window*, Public Notice, 29 FCC Rcd 8665 (2014) (“*July Public Notice*”).

<sup>5</sup> The *July Public Notice* explained that tentative selectees may file time-share agreements to aggregate their points and break ties. See *July Public Notice*, 29 FCC Rcd at 8668. See also 47 C.F.R. § 73.872(c).

<sup>6</sup> See 47 C.F.R. §§ 73.801, 73.3513(a)(3).

<sup>7</sup> The Objection also argued that the OCPA-MCM-CMG Agreement was invalid because it was not signed by officers of OCPA and MCM. Because the *Staff Decision* dismissed the OCPA Application and the MCM Application for not being properly signed, it did not address whether the agreement itself was properly signed.

Petitioned were not aware their proposed agreement was petitioned against.”<sup>8</sup> MCM also argues that the Bureau erred in dismissing the MCM Application on the basis that the OCPA-MCM-CMG Agreement was not signed by a corporate officer.<sup>9</sup> MCM further argues that the JJI-SCC Agreement is not signed by a board member of JJIM and should thus be rejected as well.<sup>10</sup> Finally, MCM argues that the JJIM-SCC Agreement should be rejected because it “does not even declare that both groups have concluded that they are combining points to conjointly propose a timeshare.”<sup>11</sup>

JJIM and SCC respond that although the Objection was not served on MCM, MCM filed an opposition to the Objection, which was considered by the Bureau in the *Staff Decision*.<sup>12</sup> The Opposition further argues that the *Staff Decision* properly dismissed the MCM Application because the application itself was not properly signed.<sup>13</sup> In response to MCM’s arguments that the JJIM-SCC Agreement is defective, the Opposition states JJIM’s officer, Petr Nakhaychuk, electronically signed the agreement when he submitted an amendment to the JJIM Application. Finally, the Opposition argues that there is no requirement that time-share proponents “must specifically request aggregation,” but rather that Section 73.872(c) of the Rules assumes that a partial time-share agreement will automatically engage in point aggregation.<sup>14</sup>

In the ESAS Petition, ESAS argues that the ESAS Application should be reinstated because it was not found to be defective and is not mutually exclusive with either the SCC Application or the JJIM Application.<sup>15</sup>

**Discussion.** The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>16</sup> MCM and ESAS have not met this burden.

*Failure to Serve the Objection.* The *Staff Decision* did not address MCM’s argument, raised in its Opposition to the Objection, that the Objection should have been dismissed because it was not served on MCM. The *ex parte* rules require service on all parties of filings addressing the merits or outcome of restricted proceedings, such as this one.<sup>17</sup> While MCM does not state how or when it eventually received the Objection, it clearly did receive it and was able to file an Opposition, which was considered in the *Staff Decision*. Thus, although SCC was required to serve MCM, OCPA, and CMG with a copy of the Objection at the time of filing,<sup>18</sup> MCM – the only part not served that has appealed the *Staff Decision* –

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<sup>8</sup> MCM Petition at 1, *citing* 47 U.S.C. § 309(d)(1), 47 C.F.R. § 1.47.

<sup>9</sup> MCM Petition at 2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 2-3

<sup>12</sup> Opposition at 2 n.6.

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> ESAS Petition at 1.

<sup>16</sup> *See* 47 C.F.R. § 1.106(c), (d). *See also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

<sup>17</sup> *See* 47 C.F.R. §§ 1.1202(b), 1.1208.

<sup>18</sup> *See* 47 C.F.R. § 1.47.

was not prejudiced by SCC's lack of service. While we caution SCC to conform to these requirements in the future, we find no basis for further action on this issue.<sup>19</sup>

*Officer Signature.* As the Oppositions notes, the *Staff Decision* dismissed the MCM Application and OCPA Application because those applications were not signed by officers of MCM and OCPA.<sup>20</sup> MCM does not challenge this aspect of the *Staff Decision*. The *Staff Decision* did not address whether the OCPA-MCM-CMG Agreement was valid and we need not address that issue here.

*JJIM-SFCF Agreement.* MCM's objections to the JJIM-SCC Agreement are improperly raised. Section 1.106(c) of the Rules provides that a petition for reconsideration which relies on facts or arguments not previously presented to the Commission may be granted only if it satisfies the circumstances provided in Section 1.106(b)(2) of the Rules.<sup>21</sup> MCM has not met this threshold requirement because it has failed to show that the Petition satisfies either of these circumstances. In accordance with Section 309(b) of the Act,<sup>22</sup> the *July Public Notice* specified a 30-day filing deadline for any pleading opposing a grant of the JJIM Application and the SCC Application. MCM did not file a petition to deny during that 30-day period, even though the JJIM Agreement and the SCC Agreement was filed the day after the *July Public Notice* was issued, nor did MCM file an informal objection in the *nine months* between the filing of the JJIM-SCC Agreement and the *Staff Decision*. MCM provides no explanation for its failure to file such a petition or objection, nor has it argued – let alone demonstrated – that it was unable to raise its arguments against the JJIM-SCC Agreement prior to the grant of the JJIM Application and the SCC Application.

It is axiomatic that an adjudicatory process cannot operate efficiently or accurately if a party does not participate in a proceeding but is permitted to “sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence.”<sup>23</sup> The staff may dismiss a petition for reconsideration seeking to overturn the grant of an application where the petitioner did not show good cause for failing to participate earlier in the proceeding.<sup>24</sup> Accordingly, we will dismiss the MCM Petition to the extent it raises these new arguments for the first time.

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<sup>19</sup> See *Iglesia Shekira*, Letter, 24 FCC Rcd 5306 (MB 2009) (applicant not served with copy of informal objection was not prejudiced because it ultimately obtained a copy of the objection and filed an opposition). MCM is incorrect in relying upon Section 301(d)(3) of the Act, as that section states the service requirements for petitions to deny, not informal objections.

<sup>20</sup> *Staff Decision* at 2-3.

<sup>21</sup> See 47 C.F.R. §§ 1.106(c); 1.106(b)(2) (“(i) The petition relies on facts or arguments which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or (ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such an opportunity.”). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966). Alternatively, Section 1.106(c)(2) allows a petition relying on new facts or arguments to be granted if the Bureau determines that consideration of such factors or arguments is required in the public interest. MCM has not argued that this provision applies, and the substantive analysis provided below shows that it does not apply to this case.

<sup>22</sup> 47 U.S.C. § 309(b).

<sup>23</sup> See, e.g., *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

<sup>24</sup> See *The Association for Community Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682 (2004) (refusing to treat an untimely informal objection to an FM translator application on Section 74.1204(f) grounds as a petition for reconsideration because the objector had failed to participate earlier and had not shown good reason for

Moreover, were we to consider these arguments, we would deny them. First, the JJIM-SCC Agreement – which was electronically filed as an amendment to the JJIM Application and the SCC Application – was in fact signed because the amendment was certified by Nakhayuchuk, who is an officer of JJIM.<sup>25</sup> This certification serves as an electronic signature and satisfies the requirements of Section 73.3513(a)(3). Second, as the Opposition notes, Section 73.872(c) does not require that time-share applicants explicitly state that they are aggregating their points, but rather infers that such proposals are point aggregations.<sup>26</sup> Thus MCM’s arguments that the JJIM-SCC Agreement is invalid are baseless.

*ESAS Petition.* ESAS is essentially seeking a “secondary” grant because it seeks the grant of the ESAS Application based on the Bureau’s dismissal of mutually exclusive applications in LPFM MX Group 238. The Commission considered and rejected this processing approach in the Sixth Order on Reconsideration in the LPFM proceeding.<sup>27</sup> The Commission stated that “we do not believe awarding additional construction permits in this manner is appropriate. Our current policies already provide LPFM applicants numerous opportunities in the settlement process to resolve mutual exclusivities.”<sup>28</sup> ESAS did not file any amendments to resolve its mutual exclusivities, even though all LPFM applicants were permitted to file minor amendments<sup>29</sup> and all applicants in mutually exclusive groups were permitted to file major amendments.<sup>30</sup> The Commission further stated that in the non-commercial educational context, it had rejected this approach because “although it might be beneficial to select more than one applicant in a mutually exclusive application group, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.”<sup>31</sup> Here, the grant of the ESAS Application solely on the basis of the dismissal of mutually exclusive applications would conflict with this Commission policy. We will deny the EAS Petition.

**Conclusion.** Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed by Metroeast Community Media on May 26, 2015, IS DENIED.

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its failure to participate); *Revival Christian Ministries*, Letter, 28 FCC Rcd 2041 (MB 2014) (dismissing petition for reconsideration that argued translator modification would cause interference in violation of Section 74.1204(f) because petitioner had failed to file an objection to the application prior to its grant).

<sup>25</sup> The complete electronic filing of the amendment, available through the Commission’s CDBS Public Access website ([http://licensing.fcc.gov/prod/cdb/publicacc/prod/app\\_sear.htm](http://licensing.fcc.gov/prod/cdb/publicacc/prod/app_sear.htm)), contain the following certification: “I hereby certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all certifications and attached Exhibits are considered material representations.”

<sup>26</sup> 47 C.F.R. § 73.872(c) (“Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; *otherwise, time-share proponents’ points will be aggregated.*”) (emphasis added). See also *July Public Notice*, 29 FCC Rcd at 8670 (“The Commission will aggregate the point totals of applicants that submit acceptable time-share proposals for the purpose of breaking a tie within a mutually exclusive group.”).

<sup>27</sup> *Creation of a Low Power Radio Service*, Sixth Order on Reconsideration, 28 FCC Rcd 14489, 14493-94 ¶¶ 13 (2013) (“*Sixth Order*”) (rejecting proposal that “once the Commission has awarded a construction permit to a tentative selectee in a mutually exclusive group, ‘to yield as many authorizations as possible,’ the Commission should review the other applicants in the mutually exclusive group for ‘secondary’ grantees.”).

<sup>28</sup> *Id.*

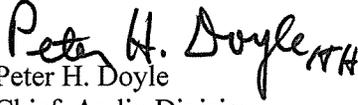
<sup>29</sup> *Media Bureau Provides Further Guidance on the Processing of Form 318 Applications Filed in the LPFM Window*, Public Notice, 28 FCC Rcd 16366, 16367 (MB 2013).

<sup>30</sup> *July Public Notice*, 29 FCC Rcd at 8671 n.35.

<sup>31</sup> *Sixth Order*, 28 FCC Rcd at 14494 ¶ 14.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Enlighten State Academic Services on June 10, 2015, IS DENIED.

Sincerely,

  
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