Federal Communications Commission
Washington, D.C. 20554

July 16, 2015

In Reply Refer To:
1800B3-IB

Ms. Jodi Reynhout
Nueva Esperanza, Inc.
4261 North 5th Street
Philadelphia, PA 19140

Mr. Anthony Jackson
The Social Justice Law Project of the Philadelphia NAACP, Inc.
1619 Cecil B. Moore Avenue
Philadelphia, PA 19121

In re: LPFM MX Group 304

NAACP Social Justice Law Project
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 195646
File Number: BNPL-20131112BWB

Nueva Esperanza, Inc.
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 193022
File Number: BNPL-20131113BLG

G-Town Radio
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 192746
File Number: BNPL-20131114AKY

Germantown United Community
Development Corporation
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 195118
File Number: BNPL-20131114AMB

Germantown Life Enrichment Center
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 195802
File Number: BNPL-20131114AMR

Historic Germantown Preserved
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 196209
File Number: BNPL-20131114ANP

South Philadelphia Rainbow Committee
New LPFM, Philadelphia, Pennsylvania
Facility ID Number: 196383
File Number: BNPL-20131114BLI

Petition for Reconsideration

Dear Ms. Reynhout, and Mr. Jackson:

We have before us a Petition for Reconsideration,[1] filed jointly by Nueva Esperanza, Inc. ("Esperanza") and NAACP Social Justice Law Project ("SJLP") (collectively "Petitioners"), seeking reconsideration of a Media Bureau ("Bureau") *Decision*[2] that granted four of the above-referenced applications and dismissed the remaining three.[3] For the reasons set forth below, we deny the Petition.

Background. During an October 2013 filing window for applications to construct new Low Power FM ("LPFM") stations, applicants were permitted to have an attributable interest in only one application. Multiple organizations in the Philadelphia area filed separate applications within the window. The above-referenced applications were mutually exclusive with one another, designated as Group 304, and compared using a point system.[4] By public notice of September 5, 2014, the Bureau announced that all of the seven referenced applications had been tentatively selected for grant because they had tied with the maximum of five points each, and began a 90-day period in which the applicants could voluntarily agree to share time.[5] Several of the applicants filed voluntary time-sharing agreements, thereby aggregating their individual point totals to potentially prevail as a group over other applicants with which they had been tied.

The *Decision* dismissed Petitioners' applications and granted the applications of G-Town, Germantown United, Germantown Life, and Rainbow (collectively the "Time-Share Applicants") pursuant to a voluntary time-sharing agreement that enabled them to aggregate points.[6] The Bureau

[1] Petition for Reconsideration of Esperanza and SJLP (Feb. 18, 2015) ("Petition").

[2] Letter to Jodi Reynhout, et al, Ref. 1800B3-ATS (MB Jan. 15, 2015) ("*Decision*").

[3] Also before us are responsive pleadings. G-Town Radio ("G-Town"), Germantown United Community Development Corporation ("Germantown United"), and Germantown Life Enrichment Center ("Germantown Life") filed a Consolidated Opposition on March 3, 2015. Philadelphia Rainbow Committee ("Rainbow") filed an Opposition on March 6, 2015. Nueva Esperanza and SJLP filed a Reply on March 9, 2015.

[4] *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); 47 C.F.R. § 73.872(b).

[5] *See* 47 C.F.R. § 73.872(c); *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, 10850 (2014). Release of the Public Notice also started a 30-day period for filing petitions to deny. On October 6, 2014, Esperanza and SJLP each filed a Petition to Deny against G-Town, Germantown United, Germantown Life, and Historic Germantown Preserved ("Historic Germantown").

[6] G-Town, Germantown United, Germantown Life, and Rainbow had filed a time-sharing agreement on December 4, 2015, and aggregated their individual five-point tallies to a combined total of 20 points. Esperanza and SJLP had filed their own time-sharing agreement on December 5, 2014, resulting in an aggregated total of ten points. Historic Germantown did not join either of the time-sharing groups and remained with five points.

rejected Petitioners' arguments that three of the Time-Share Applicants were unqualified and/or precluded from aggregating points. Petitioners had based their arguments on allegations that the Time-Share Applicants: (1) should have been limited to a single application because they filed collaboratively at the direction of and for the benefit of G-town; (2) colluded prior to application to gain an unfair advantage over other applicants by pre-planning to share time and aggregate points; and (3) failed to disclose various interests in common. The Bureau found that Petitioners had not made a *prima facie* case. To the extent that Petitioners based their theories on a blog entry on the Commission's web site,[7] the Bureau stated that the blog was informal staff advice without any authority. The Bureau noted, however, that the Time-Share Applicants' filing of individual applications and aggregating of points through time-sharing was generally consistent with the Blog Post and, contrary to Petitioners' claims, did not violate a rule that prohibits one organization from filing multiple applications simultaneously.[8] The Bureau stated that no Commission rule prohibits separate organizations from filing separate LPFM applications with the goal of arriving at a time-sharing agreement, provided that each applicant remains under separate control and intends to construct and operate the proposed station if its application is granted.[9]

Petitioners now seek reconsideration. The Commission will consider a petition for reconsideration only when the petitioner shows 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.[10] Petitioners argue that the Bureau erred by not fully and fairly considering their arguments. In particular, they state that the Bureau ignored a "subtle" but "critical" policy distinction in the Blog Post that would allegedly prohibit LPFM applicants from forming partnerships in advance of the filing window but permit such partnerships after announcement of a tie.[11] Petitioners believe that the purpose of this alleged policy is to prevent applicants from "stacking the deck with applications that are fully intended to be aggregated rather than operated independently."[12] They argue that the Bureau mischaracterized their argument as if Petitioners were questioning whether the Time-Share Applicants were independent entities, whereas Petitioners' concern was that the applicants, regardless of any independence, collaborated in a way that undermined Commission policy.[13] Petitioners also make a related argument that the Bureau ignored evidence of a "preemptive partnership" formed prior to application. Petitioners acknowledge the Bureau's concerns that their allegations relied upon hearsay, but contend that the Bureau nevertheless should have exercised discretion to investigate the allegations in view of what they consider admission of wrongdoing in a responsive pleading.[14]

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[7] *Seé* The Low Power FM Application Window is Fast Approaching, http://www.fcc.gov/blog/low-power-fm-application-window-fast-approaching (Sept. 19, 2013, 15:58 EST) ("Blog Post").

[8] *See* 47 C.F.R. § 73.3520 (multiple applications). *See also* 47 C.F.R. § 73.3518 (conflicting applications).

[9] *See Decision* at 5.

[10] *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).

[11] *See* Petition at 5.

[12] *Id.* at 4.

[13] *Id.* at 6.

[14] *Id.* at 6-7. *See generally,* Consolidated Opposition of G-Town, Germantown Life, and Germantown United to Petitions to Deny (Oct. 20, 2014) at 2-3 (describing and claiming permissibility of pre-application discussions).

Discussion. We have reviewed the *Decision* and find no error. Petitioners are incorrect in their contention that the Bureau ignored a so-called Commission policy prohibiting aggregation of points by applicants that discussed the possibility of time-sharing prior to application. There is no such policy. The sole basis for Petitioners' position is their interpretation of informal, non-binding staff advice in the Blog Post.[15] Blogs are by their very nature informal writings of individuals, not formal statements of agency policy. The Blog Post would thus be non-authoritative even had it expressed the proposition Petitioners allege.[16] Moreover, the blog's language cannot be properly understood as pertaining to the aggregation issue that Petitioners raised. Aggregation is explicitly limited by rule to "tied applicants" with "the same point total" whereas Petitioners rely on a portion of the blog directed at circumstances where "just one applicant succeeds in getting a construction permit," *e.g.,* a single applicant with the most points nevertheless has previously committed to allow others to share time even if the others would be eliminated due to fewer points or other problems.[17]

Discussions concerning potential aggregation of points if a tie arises, the fact pattern at issue in the instant proceeding, is addressed in a different portion of the Blog Post, which states:

> [W]e will permit organizations in a community to work together to file a single Form 318 application. Alternatively, organizations in a community could apply separately – for the same or different frequency – knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total in the same mutually exclusive group."[18]

The Bureau appropriately found that the Time-Share Applicants' filing of separate applications and aggregation of points were consistent with the relevant portion of the Blog Post. The Bureau did not

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[15] The language at issue reads: "Multiple groups should not attempt to maximize their chances of receiving an LPFM construction permit by submitting multiple applications under the different groups' names with a prior understanding that the groups will later share time or ownership with each other if just one applicant succeeds in getting a construction permit. If this prior understanding does exist, then all the applicants must be listed as parties to the application, and only one application can be filed." Blog Post at ¶ 5.

[16] We reject Petitioners' claim that the Blog Post should be considered authoritative because it was written by the Bureau Chief, whereas the Bureau cited cases of oral guidance by lower level employees. *See* Reply at 5 (citing *Malkan Associates v. FCC,* 935 F.2d 1313, 1319-20 (D.C. Cir. 1991) and *State of Oregon,* Memorandum Opinion and Order, 11 FCC Rcd 1843, 1844 (1996)). Putting aside for a moment the informal nature of a blog, written staff advice is entitled to no more deference than oral staff advice. *See generally, U.S. v. Gordon,* 291 F.3d 181, 198 (2d Cir. 2002) (treating written "Frequently Asked Questions" prepared by U.S. Sentencing Commission as informal staff advice which is not authoritative). Advice of a Bureau Chief, while that of a high level staffer, remains that of a staffer. *See generally, Petition for Declaratory Ruling Concerning Section 312(a)(7) of Communications Act,* 9 FCC Rcd 7638 (1994), *vacated on other grounds, Becker v. FCC,* 95 F.3d 75 (D.C. Cir. 1996) (referring to letter from FCC Chairman to member of Congress as an informal staff opinion, while stating that it would not be unreasonable for a licensee to follow the informal advice until the Commission provided definitive guidance).

[17] *See* 47 C.F.R. § 73.872(c); Blog Post at ¶ 5. Petitioners' belief that the informal guidance in the Blog Post reflects a policy aimed at eliminating potential gamesmanship in point aggregation is undermined by the Commission's formal statements on a similar topic shortly before the Blog Post. *See Creation of A Low Power Radio Service,* Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15474 (2012). There, the Commission acknowledged a commenter concern that point aggregation might lead to gamesmanship but declined to amend its Rules to eliminate this very useful settlement tool or to otherwise modify the voluntary time-sharing process.

[18] Blog Post at ¶ 4.

ignore or mischaracterize Petitioners' concerns. For example, the Bureau did not, as alleged, improperly focus on the Time-Share Applicants' independence. That discussion was relevant because it established that no applicant was a "front" under the control of another or had attributable interests in more than one application.

Finally, we address Petitioners' argument that the Bureau failed to consider certain information in its Petition to Deny, allegedly supporting Petitioners' claim of a "preemptive partnership." The Bureau correctly applied the standards for assessing Petitions to Deny, set forth in Section 309(d) of the Communications Act of 1934, as amended.[19] Pursuant to those procedures, the Bureau appropriately ended its evaluation upon determining that the facts presented in the Petition to Deny, which included hearsay and information of questionable veracity, were insufficient to raise a *prima facie* case that grant of the Time-Share Applicants' proposals would be contrary to the public interest.[20]

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED that the Petitions for Reconsideration filed on February 18, 2015, by Nueva Esperanza, Inc., and NAACP Social Justice Law Project ARE DENIED.

Sincerely,

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[19] *See* 47 U.S.C. § 309(d), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir.1988). The Commission first determines whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. Only if there is a *prima facie* case does the Commission proceed to examine and weigh all of the material before it, including any opposition, to determine whether there is a substantial and material question of fact requiring resolution in a hearing.

[20] *See, e.g.*, *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)").

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