



Federal Communications Commission
Washington, D.C. 20554

January 12, 2015

In Reply Refer To:
1800B3-ATS

Ms. April Game
1955 Julian Street
San Diego, CA 92101

Ms. Melanie Fletcher
Hi Neighbor Inc.
3632 Dwight Street
San Diego, CA 92104

Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P.O. Box 41177
Washington, DC 20018

In re: LPFM MX Group 41

Art Pulse
New LPFM, San Diego, California
Facility ID Number: 197674
File Number: BNPL-20131115ATM

Hi Neighbor, Inc.
New LPFM, San Diego, California
Facility ID Number: 196123
File Number: BNPL-20131112BCZ

San Diego Catholic Radio, Inc.
New LPFM, San Diego, California
Facility ID Number: 19314
File Number: BNPL-20131113ADT

Petitions to Deny

Dear Ms. Game, Ms. Fletcher, and Counsel:

We have before us: 1) the applications of the Art Pulse (“AP”), Hi Neighbor Inc. (“HN”), and San Diego Catholic Radio, Inc. (“SDCR”) for new LPFM stations at San Diego, California (“AP Application,” “HN Application,” and “SDCR Application,” respectively); 2) the Petition to Deny the AP Application filed by SDCR (“SDCR Petition”); and 3) the Petition to Deny the SDCR Application filed by AP (“AP Petition”).¹ For the reasons set forth below, we grant the SDCR Petition, deny the AP Petition, dismiss the AP Application, grant the SDCR Application, and dismiss the HN Application.

Background. AP, SDCR, and HN filed their respective applications during the October 2013 LPFM filing window. The Bureau determined that the three applications were mutually exclusive and

¹ The AP Petition was filed on August 6, 2014. SDCR filed an Opposition on August 20, 2014 (“SDCR Opposition”). AP did not file a Reply. The SDCR Petition was filed on August 8, 2014. AP filed an Opposition on August 25, 2014 (“AP Opposition”). SDCR filed a Reply on September 9, 2014.

identified them as LPFM MX Group 41.² On July 19, 2014, the Commission issued a Public Notice in which it identified the AP Application and the SDCR Application as the tentative selectees of LPFM MX Group 41 on a time-share basis, began a 30-day period for filing petitions to deny against those applications, and allowed all applicants in the group the opportunity to file major change amendments to their applications to resolve their mutual exclusivities.³

SDCR argues that AP is not eligible to hold an LPFM license because AP has not demonstrated that it was recognized as a nonprofit organization at the time it filed the AP Application. SDCR states that AP is not listed in the California Secretary of State's database and has not submitted a copy of the documents establishing its nonprofit status.⁴ Instead, AP submitted a copy of a letter from the Internal Revenue Service ("IRS") granting 501(c)(3) status to San Diego Fine Art Society ("SDFAS").⁵ SDCR notes that AP does not explain the nature of its relationship to SDFAS.⁶ Moreover, SDFAS's corporate charter had been suspended by the California Franchise Tax Board ("FTB") and was thus no longer recognized by the state.⁷

The AP Opposition states that SDFAS "is licensed to do business under the name 'Art Pulse'" and the IRS 501(c)(3) determination thus applies to AP as well as SDFAS.⁸ AP further argues that the fact that SDFAS's corporate charter has been suspended is irrelevant because it is still recognized as a nonprofit entity by the IRS.⁹

The AP Petition argues that the SDCR Application should be dismissed because SDCR did not have reasonable assurance of site availability at the time it filed the SDCR Application. The SDCR Application identifies a transmitter site owned by Clear Channel Communications, Inc. ("Clear Channel").¹⁰ AP states that its engineer, Al Davis, contacted Gary Hess, Director of Vertical Real Estate for Clear Channel, and was informed that SDCR never obtained assurance of use of Clear Channel's tower.¹¹ AP provides an email from Hess supporting this argument.¹²

² *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).

³ *Commission Identifies Tentative Selectees in 79 Groups of Mutually Exclusive Applications filed in the LPFM Window*, Public Notice, 29 FCC Rcd 8665 (2014). The Commission further indicated that non-tentative selectee applications – in this case, the HN Application – would be dismissed once the tentative selectees' applications had been granted. *Id.* at 8670. AP filed an amendment on September 29, 2014, which resolved its mutual exclusivities with both the SDCR Application and the HN Application.

⁴ SDCR Petition at 2.

⁵ AP Application at Attachment 2.

⁶ SDCR Petition at 2.

⁷ *Id.* Petition at 2 and Exhibits C and D. The records of the FTB indicated that SDFAS has been suspended since February 1, 2013. *See* https://www.ftb.ca.gov/businesses/Exempt_organizations/Revoked_Entity_list.shtml. SDCR also states that a June 24, 2014, newspaper article indicates that AP no longer had funding and intended to cease operations by August 2014. Because we are dismissing the AP Application on other grounds, we need not address what effect this has on AP's eligibility to hold an LPFM license.

⁸ AP Opposition at 1. In support, AP attached a printout from the website www.nonprofits.com. *Id.* at Attachment.

⁹ *Id.* at 2-3. AP also states that although it is shutting down its gallery, it plans nonetheless to pursue an LPFM license.

¹⁰ SDCR Application at Section IV, Question 3.

¹¹ AP Petition at 1-2 and Attachment 4 (Declaration from Al Davis).

The SDCR Opposition disputes AP's assertion that SDCR lacked assurance of site availability at the Clear Channel tower and accuses AP of "attempting to tamper with SDCR's transmitter site reasonable assurance, which it obtained prior to the filing of [the SDCR Application]".¹³ SDCR provides another email from Hess in which he confirms to Stephen Beurle, SDCR's engineer, that SDCR did in fact have assurance of site availability from Clear Channel, and that he was mistaken when he informed Davis that SDCR had not obtain such assurance.¹⁴

Discussion. Pursuant to Section 309(d) of the Communications Act of 1934, as amended, petitions to deny 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.¹⁵

Eligibility. The Commission's Rules provide that an LPFM station may be licensed to a nonprofit educational organization for the advancement of an educational program.¹⁶ An applicant "must submit complete copies of the documents establishing their nonprofit status, such as corporate charters or articles of incorporation. Applicants that fail to provide these materials are subject to dismissal."¹⁷ AP does not dispute that SDFAS has been suspended by the State of California, but argues this is irrelevant because SDFAS is still recognized as a 501(c)(3) entity. This is incorrect, as the Commission has consistently required that an LPFM applicant be recognized under state law at the time it files its application.¹⁸ SDFAS was suspended by the FTB in February 2013, and was not reinstated at the time the AP Application was filed (nor has it ever been reinstated). Accordingly, AP was not recognized by the State of California as a non-profit entity at the time it filed the AP Application and thus failed to meet the eligibility requirement set forth in Section 73.853(a) of the Rules.¹⁹

Site Availability. It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be

¹² *Id.* at Attachment 3 ("First Hess Email"). The email is not dated, although it was filed in response to a July 21, 2014, email from Davis. The email states: "I checked with the local market and they are not aware of any contact for tower space with [SDCR]. As indicated on the Clear Channel towers website . . . [the tower] is not available for collocation."

¹³ SDCR Opposition at 2.

¹⁴ *Id.* at Exhibit B ("Second Hess Email"). The email, dated August 9, 2014, states: "It appears that I have created confusion over the availability of this tower site. Although, we list this site as off limits in our towers database indeed you have previously secured an assurance from Clear Channel on its availability for your LPFM. A recent inquiry from a competing application again asked that question which I replied it was not available. Please understand that we have been deluged with these requests so memory sometimes conflicts with the facts."

¹⁵ 47 U.S.C. § 309(d).

¹⁶ 47 C.F.R. § 73.853(a). *See also Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2213 (2000) ("having decided to establish LPFM as a noncommercial service, we will require that LPFM licensees comply with the eligibility requirements of [47 U.S.C. § 397(6)(A)].").

¹⁷ Instructions to FCC Form 318, Section II, Question 2, Subsections 2(a).

¹⁸ *See Application for Review of Decisions Regarding Six Applications for New Low Power FM Stations*, Memorandum Opinion and Order, 28 FCC Rcd 13390, 13393-96 (2013) (affirming dismissal of LPFM applications where applicants did not incorporate until after filing their respective applications and did not demonstrate that they were recognized nonprofit entities under state law at the time of filing).

¹⁹ 47 C.F.R. § 73.853(a).

available.²⁰ While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”²¹ We find that SDCR has sufficiently demonstrated that it obtained reasonable site assurance. The Second Hess Email refutes the First Hess Email, and explains that SDCR did in fact have such assurance at the time it filed the SDCR Application. We thus deny the AP Petition.

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Petition to Deny filed by Art Pulse on August 6, 2014, IS DENIED.

IT IS FURTHER ORDERED, that the Petition to Deny filed by San Diego Catholic Radio, Inc., on August 8, 2014, IS GRANTED.

IT IS FURTHER ORDERED, that the application of Art Pulse (BNPL-20131115ATM), for a new LPFM station at San Diego, California, IS DISMISSED.

IT IS FURTHER ORDERED, that the application of Hi Neighbor Inc. (BNPL-20131112BCZ), for a new LPFM station at San Diego, California, IS DISMISSED.

IT IS FURTHER ORDERED, that the application of San Diego Catholic Radio, Inc. (BNPL-20131113ADT), for a new LPFM station at San Diego, California, IS GRANTED.

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" followed by the initials "PH".

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: San Diego Catholic Radio, Inc.

²⁰ See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“Some indication by the property owner that he is favorably disposed toward making an arrangement is necessary.”).

²¹ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated . . .” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).