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In re: LPFM MX Group 2

Greater Birmingham Ministries, Inc.
New LPFM Station, Birmingham, AL
Facility ID No. 194918
File No. BNPL-20131113BUA

Calvary of Birmingham
New LPFM Station, Birmingham, AL
Facility ID No. 193015
File No. BNPL-20131112ALD

The Church in Birmingham Corp.
New LPFM Station, Birmingham, AL
Facility ID No. 193990
File No. BNPL-20131024ANR

Love Commandment Ministries, Inc.
New LPFM Station, Birmingham, AL
Facility ID No. 195074
File No. BNPL-20131112BVI

Petition to Deny
Petitions for Reconsideration

Dear Counsel and Applicant:

We have before us an application (GBMI Application) for a new low power FM (LPFM) station at Birmingham, Alabama, filed by Greater Birmingham Ministries, Inc. (GBMI). In addition, we have before us a Petition to Deny (GBMI Petition) the GBMI Application filed by Kimtron, Inc. (Kimtron).¹ Finally, we have before us Petitions for Reconsideration (Petitions) filed by Kimtron, which challenge the grant of applications for new LPFM stations at Birmingham, Alabama, filed by Calvary of Birmingham (Calvary), The Church in Birmingham Corporation (CBC), and Love Commandment Ministries, Inc. (LCMI). For the reasons set forth below, we grant the GBMI Petition and dismiss the GBMI Application. In addition, we deny the Petitions.

Background. GBMI, Calvary, CBC and LCMI filed applications for new LPFM stations on Channel 227 at Birmingham, Alabama, during the LPFM window opened in late 2013. Each requested a waiver of the second-adjacent channel spacing requirements with respect to Kimtron's station, WDJC-FM, Birmingham, Alabama, asserting that their proposed LPFM stations would not result in interference to the station. Each applicant submitted an engineering analysis that found no actual interference would occur due to a lack of population within the interfering contour of its respective proposed LPFM station.²

We designated these four applications LPFM MX Group 2.³ After conducting a point hearing, the Commission announced a four-way tie.⁴ It designated each of the applicants a tentative selectee and commenced a 30-day period for filing petitions to deny the applications and a 90-day period for filing of voluntary time-share proposals and major change amendments intended to resolve technical conflicts and eliminate ties.

Two of the applicants, CBC and LCMI entered into a time-share agreement and submitted that agreement to the Commission. The other two applicants – GBMI and Calvary – amended their applications to propose operation on Channel 231. GBMI also amended its application to propose operation at a different location. As a result of these amendments, GBMI and Calvary resolved all technical conflicts and rendered their applications singletons.

¹ GBMI filed an Opposition to Petition to Deny (Opposition) on February 6, 2015. Kimtron filed a Reply to Opposition to Petition to Deny (Reply) on February 19, 2015.

² GBMI and Calvary also requested waivers of the second-adjacent channel spacing requirements with respect to WJOX-FM, Birmingham, Alabama. They demonstrated that no actual interference would occur to that station's signal in the same manner (*i.e.*, lack of population within the interfering contour). Radio License Holding CBC, LLC, licensee of WJOX-FM, did not dispute these showings.

³ *Media Bureau Identifies Mutually Exclusive Applications Filed in the LPFM Window and Announces 60-Day Settlement Period*, Public Notice, 28 FCC Rcd 16713 (MB 2013).

⁴ *Commission Identifies Tentative Selectees in 96 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, Public Notice, 29 FCC Rcd 16408 (2014).

Kimtron timely filed petitions to deny all four of the applications. In each petition, it claimed that the proposed LPFM station would cause interference to a significant population within WDJC-FM's hybrid digital operation service area.⁵ In the GBMI Petition, Kimtron put forth the additional arguments that GBMI had not "adequately established that it is a bona fide organization suitable for grant of the LPFM application," and that the application was not "properly certified."⁶ Only GBMI responded to Kimtron's petitions to deny.

We denied Kimtron's petitions to deny the Calvary, CBC and LCMI applications, and granted those applications. In each instance, we found that Kimtron had failed to "demonstrate that grant of the application would violate any Commission rule or policy" and stated that "protection to a station's digital operation is provided via protection to its analog signal."⁷ We also noted that each "application satisfie[d] all applicable spacing and interference requirements of 47 CFR Section 73.807."⁸

Kimtron seeks reconsideration of our grants of the Calvary, CBC and LCMI applications. It argues that we erred in finding Kimtron had not demonstrated that grant of these applications would violate any Commission rule or policy.⁹ Kimtron cites the Commission's statement, in its 2012 LPFM Order,¹⁰ that LPFM stations may not cause interference to a full power FM station's digital signal. Kimtron asserts that it demonstrated that the LPFM facilities proposed by the applicants would violate this policy. In addition, Kimtron argues that we failed to address why it was in the public interest to grant applications to construct LPFM stations that will cause interference to an authorized digital service.¹¹ Finally, it claims that we failed to consider its claim that the engineering analyses submitted by Calvary, CBC and LCMI were incorrect "as to the degree of interference which WDJC-FM's digital operation can expect from the proposed LPFM station."¹²

Discussion. *Petition to Deny (GBMI Application).* At the outset, we must address a procedural issue related to the Opposition, which GBMI filed one day late. GBMI acknowledged that the Opposition was late-filed in a footnote to the Opposition¹³ but did not submit a separate motion for an extension of time. Because GBMI failed to submit such a motion, Kimtron argues that we must dismiss the

⁵ GBMI Petition at 3-4; Calvary Petition to Deny at 2-3; CBC Petition to Deny at 2-4; LCMI Petition to Deny at 2-4.

⁶ GBMI Petition at 1-2. Kimtron also made an additional allegation in its petition to deny the LCMI application. It asserted that LCMI was not eligible for the established community presence point that it claimed and thus was not eligible to aggregate points with CBC. LCMI Petition to Deny at 4-5.

⁷ See *Broadcast Actions*, Public Notice, Report No. 48419 (MB Jan. 30, 2015) (denying CBC and LCMI Petitions to Deny and granting CBC and LCMI applications); *Broadcast Actions*, Public Notice, Report No. 48418 (MB Jan. 29, 2015) (denying Calvary Petition to Deny and granting Calvary application).

⁸ *Id.* With respect to the LCMI Petition, the Bureau also explained that it need not consider Kimtron's argument that LCMI was not eligible for an established community presence point (and thus was not eligible to aggregate points with CBC) because the LCMI application "only remain[ed] mutually exclusive with the one application with which it has an agreement." Kimtron does not seek reconsideration of this finding.

⁹ Calvary Petition for Reconsideration at 4; CBC and LCMI Petitions for Reconsideration at 3.

¹⁰ See Calvary Petition for Reconsideration at 4; CBC and LCMI Petitions for Reconsideration at 3, *citing Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15447 n.293 (2012). Kimtron also cites a 2010 Media Bureau order regarding digital audio broadcasting. See Calvary Petition for Reconsideration at 4; CBC and LCMI Petitions for Reconsideration at 3, *citing Digital Audio Broadcasting Systems and Their Impact on Terrestrial Radio Broadcast Service*, Order, 25 FCC Rcd 1182, 1191 paras. 21-22 (MB 2010) (*Digital Audio Broadcasting Order*).

¹¹ Calvary Petition for Reconsideration at 6-7, CBC and LCMI Petitions for Reconsideration at 6.

¹² Calvary Petition for Reconsideration 7. CBC and LCMI Petitions for Reconsideration at 6-7.

¹³ Opposition at n.1.

Opposition.¹⁴ We agree. When a party determines that there is insufficient time to file a timely responsive pleading, it must file a motion for extension of time.¹⁵ GBMI did not follow these procedures nor has it explained why it could not do so. Accordingly, we dismiss the Opposition.¹⁶

We turn now to Kimtron's allegation that the GBMI Application is defective because it was not signed in accordance with Section 73.3513 of the Commission's rules (Rules).¹⁷ Section 73.3513(a)(3) specifies that an application filed by a corporation, which GBMI claims to be, "must be signed ... [by] a member who is an officer."¹⁸ The GBMI Application was signed by "Brandon Fountain," who identifies himself as "Civic Engagement & Communications Organizer."¹⁹ We have reviewed the GBMI Application and have not found Fountain listed as either an officer, director or board member of GBMI. Accordingly, we dismiss the GBMI Application.²⁰

Petitions for Reconsideration (Calvary, CBC and LCMI Applications). In the Petitions, Kimtron argues that we erred in finding the Calvary, CBC and LCMI applications protected WDJC(FM)'s digital signal from interference. As discussed below, we disagree. Accordingly, we deny the Petitions.

Kimtron asserts that an LPFM station must protect a full power station's digital signal.²¹ We agree.²² Kimtron, however, takes issue with our statement that protection of WDJC(FM)'s digital signal is ensured by compliance with the minimum distance separation requirements related to protection of its analog signal.²³ Kimtron cannot and does not cite any Commission precedent establishing different protection requirements applicable with respect to a full power FM station's digital signal. To date, the Commission has not adopted a methodology for predicting analog-into-digital interference. It generally has relied upon the Commission's existing FM technical protection scheme, which it has characterized as having "proven its efficacy and robustness over time."²⁴ Indeed, the Commission has specifically

¹⁴ Reply at 1, *citing JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623, 628-29 para. 14 (2008).

¹⁵ 47 CFR § 1.46.

¹⁶ Because we dismiss the Opposition and because replies are limited to matters raised in oppositions, 47 CFR § 1.45(c), we also dismiss the remainder of Kimtron's Reply.

¹⁷ GBMI Petition at 2, *citing* 47 CFR § 73.3513.

¹⁸ 47 CFR § 73.3513(a)(3).

¹⁹ File No. BNPL-20131113BUA.

²⁰ Because we dismiss the GBMI Application due to a certification defect, we need not consider Kimtron's arguments related to GBMI's eligibility to be an LPFM permittee or licensee. Likewise, we need not address Kimtron's claim that the LPFM station proposed by GBMI fails to protect WDJC(FM)'s digital signal.

²¹ Calvary Petition for Reconsideration at 4; CBC and LCMI Petitions for Reconsideration at 3-4.

²² *See Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15447 n.293 (2012) ("an LPFM applicant must protect a full power station digital signal") (*2012 LPFM Order*). We note that the *Digital Audio Broadcasting Order* cited by Kimtron, *see supra* note 10, does not explicitly discuss the obligations of LPFM stations to protect the digital signals of full power FM stations. Instead, it discusses the protection rights of LPFM stations *vis-à-vis* the digital operations of full power FM stations. *Digital Audio Broadcasting Order*, 25 FCC Rcd at 1190-1191 paras. 21-22.

²³ Calvary Petition for Reconsideration at 5; CBC and LCMI Petitions for Reconsideration at 4-5.

²⁴ *Digital Audio Broadcasting Order*, 25 FCC Rcd at 1191 para. 23.

declined to take further action on the issue of interference, finding the issue had been “sufficiently addressed” in its 2002 order on digital audio broadcasting.²⁵

The interference protection obligations of LPFM stations *vis-à-vis* full power FM stations are set forth in Section 73.807 of the Rules. The Calvary, CBC and LCMI applications did not satisfy those requirements with respect to WDJC(FM). However, following the waiver process set forth in Section 73.807, each applicant demonstrated that its proposed LPFM station would not cause actual interference to WDJC(FM)’s analog signal. They did so in a manner specifically authorized by the Commission – using desired-to-undesired signal ratios and showing a lack of population within the predicted interference area.²⁶ As we stated previously, by satisfying the requirements related to protection of WDJC(FM)’s analog signal, Calvary, CBC and LCMI satisfied the requirement that they protect that station’s digital signal.

Kimtron also argues that the proposed LPFM stations are “spectrally first-adjacent” to WDJC(FM)’s digital signal, which is contained in the lower and upper digital sidebands of the station’s signal. According to Kimtron, this means that any demonstration that the proposed LPFM stations will not cause actual interference to WDJC(FM)’s digital signal should utilize the first-adjacent channel desired-to-undesired signal ratio rather than the second-adjacent channel ratio.²⁷ We reject this argument. Applicants propose LPFM stations that will operate on second-adjacent channels to WDJC(FM). Accordingly, use of the second-adjacent channel ratio was appropriate.

Finally, we acknowledge that we did not address the question of whether it is in the public interest to grant an application to construct an LPFM station that will cause interference to an authorized digital service. However, we conclude this was not an error because that question was not before us. Unlike Kimtron, we had concluded and again conclude herein that the proposed LPFM stations adequately protect WDJC(FM)’s analog signal and thus adequately protect the station’s digital signal.

Conclusion/Actions. Accordingly, IT IS ORDERED that the Petition to Deny filed on January 21, by Kimtron, Inc. IS GRANTED. IT IS FURTHER ORDERED that the application (File No. BNPL-20131113BUA) for a new low power FM station at Birmingham, Alabama, filed by Greater Birmingham Ministries, Inc. IS DISMISSED. Finally, IT IS ORDERED that the Petitions for Reconsideration filed by Kimtron, Inc. on March 5 and 6, 2015, ARE DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order; First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10384 para. 102 (2007).

²⁶ *2012 LPFM Order*, 27 FCC Rcd at 15429 para. 78.

²⁷ GMBI Petition, Engineering Statement at 1; Calvary, CBC and LCMI Petitions for Reconsideration, Engineering Statements at 1.