



Federal Communications Commission
Washington, D.C. 20554

February 6, 2007

DA 07-554

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In Reply Refer to:

1800B3-KD

Mr. Randy Henry
Florida Public Radio, Inc.
505 Josephine Street
Titusville, FL 32796

**Re: Hoyt Sherman Place Foundation
NEW (LPFM), Des Moines, IA
Facility ID No. 134908**
Application to Assign Construction Permit
File No. BAPL-20060216AAY

**Petition for Reconsideration of Grant of
Application to Assign Construction Permit**

Dear Mr. Henry:

We have before us a Motion for Petition for Reconsideration ("Petition") filed October 26, 2006, by Florida Public Radio, Inc. ("FPR"). FPR seeks reconsideration of the September 27, 2006, decision of the Audio Division ("Staff Decision")¹ granting an application to assign construction permit No. BNPL-20010614AFN from Hoyt Sherman Place Foundation ("Hoyt") to Employee & Family Resources, Inc. ("EFR") and denying FPR's Informal Objection to the assignment application (the "Objection").² For the reasons discussed below, we dismiss the Petition.

Background. Hoyt, permittee of a new low power FM ("LPFM") station in Des Moines, Iowa, submitted an application to assign the permit and sell the assets of that facility to EFR.³ In its application, Hoyt requested a waiver of Section 73.865 of the Commission's Rules (the "Rules"),⁴ which prohibits all but involuntary and *pro forma* transfers and assignments of LPFM stations. In support of its waiver request, Hoyt indicated that it seeks to assign the Des Moines LPFM permit because, among other

¹ *Letter to Samuel O'Brien, Preston Daniels and Randy Henry*, Decision, Ref. No. 1800B3-MFW (MB Sept. 27, 2006).

² Also before us are Hoyt's November 3, 2006, Response to Petition for Reconsideration ("Response"), FPR's November 15, 2006 Reply to Response to Petition for Reconsideration, Hoyt's November 20, 2006 Surreply to Response to Petition for Reconsideration, and FPR's November 27, 2006 Response to Surreply.

³ File No. BAPL-20060216AAY.

⁴ 47 C.F.R. §73.865.

reasons, it cannot afford to build and operate the station. In its Objection, FPR argued that the factors addressed in the waiver request were insufficient to justify a waiver of Section 73.865 of the Rules. After fully considering the issues raised in FPR's Objection, we held that Hoyt's financial inability to build and operate the station was sufficient to justify waiver of Section 73.865 and granted the application. FPR now challenges the Staff Decision in the instant Petition, arguing that waiver was inappropriate.

Discussion. *Standing.* As a procedural matter, we note that FPR lacks standing to request reconsideration under Section 1.106(b) of the Rules.⁵ Section 405 of the Communications Act of 1934, as amended, states that any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration.⁶ To qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny against the application whose grant the petition now seeks to have reconsidered.⁷ If the petition for reconsideration is filed by one who is not a "party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."⁸ To determine if a party's interests have been adversely affected, the Commission frequently relies upon the three-pronged standing test under which a party must establish: (1) a distinct and palpable injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested.⁹ This is the same test that is used by the federal courts in determining whether a petitioner for judicial review of a Commission decision has standing under Article III.¹⁰

Because FPR chose to file an informal objection rather than a petition to deny, FPR did not become a party to this proceeding prior to the grant of the subject assignment application. As such, in order to have standing to file a petition for reconsideration, FPR must demonstrate that its interests were adversely affected by the Commission's grant of the application and that it was not possible for it to participate as a petitioner to deny in the earlier stages of the proceeding. FPR fails on both counts. First, FPR makes no effort to explain why it did not initially file a petition to deny. Second, FPR has not demonstrated that the grant of the assignment application has caused it any direct injury. In fact, not only does FPR fail to provide the requisite particularized explanation of how the assignment of Hoyt's construction permit to EFR would result in such injury to it, it has failed to contend that it has been adversely affected *at all* by the assignment. By failing to articulate how its interests have been adversely

⁵ 47 C.F.R. § 1.106(b).

⁶ 47 U.S.C. § 405. *See also* 47 C.F.R. § 1.106.

⁷ *See Sagittarius Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 22551 (2003); *Citicasters Co.*, Memorandum Opinion and Order, 14 FCC Rcd 17900 (MB 1999); *Arizona Lotus Corp.*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 5339 (1996); *Gulfcoast Broadcasting, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 483 (1993); *Redwood Microwave Assoc.*, Memorandum Opinion and Order, 61 FCC 2d 442 (1976) (all holding that an informal objector lacks standing as a party to file a petition for reconsideration).

⁸ 47 CFR. § 1.106(b).

⁹ *See Weblink Wireless, Inc.*, Order on Reconsideration, 17 FCC Rcd 24642 (WTB 2002); *AT&T Corp. v. Business Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd 21750 (2001); *Chris C. Hudgins*, Order on Reconsideration, 16 FCC Rcd 7941 (WTB 2001).

¹⁰ *See, e.g., Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410 (D.C. Cir. 1998).

affected in a manner cognizable by the Commission, FPR does not establish any of the elements for standing under Section 1.106(b)(1). While the procedural defects discussed above are fatal to the Petition, we will nonetheless briefly respond to FPR's arguments.

Waiver of Section 73.865. In the *Second Order and Further Notice*,¹¹ the Commission examined the issue of allowing LPFM permittees and licensees to assign their authorizations, which had been prohibited in the *Report and Order* authorizing and instituting the LPFM service.¹² The Commission stated that, while it considered the parameters under which LPFM stations may be transferred or assigned, it would delegate to the Media Bureau the authority to waive Section 73.865 of the Rules "upon a determination that such waiver will maximize spectrum use for low power FM operations."¹³ The Commission provided a non-exhaustive list of several circumstances in which waiver might be appropriate, including the "inability of the current licensee to continue operations."¹⁴

FPR presumes that the Staff Decision relied on this enumerated justification in granting the waiver and argues that it was incorrectly applied to Hoyt. Specifically, FPR argues that the justification applies only to licensees, and that as a permittee, Hoyt should not be entitled to rely upon it.

We disagree. While the justification does not explicitly include a reference to permittees, we believe that the *Second Order* clearly contemplates waiver grants to both licensees *and* permittees. In the *Second Order*, the Commission explained that it initially determined that a prohibition on transfers or assignments of construction permits and licenses for LPFM stations would best promote the Commission's interest in ensuring spectrum use for low power operations as soon as possible.¹⁵ The Commission further explained that it now believed that the "rule prohibiting transfer or assignment of LPFM *construction permits* or licenses may be unduly restrictive and may hinder, rather than promote, LPFM service."¹⁶ Accordingly, the Commission concluded that it was "critical" to introduce some level

¹¹ *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rule Making, 20 FCC Rcd 6563, 6574 (2005) ("*Second Order and Further Notice*" or "*Second Order*").

¹² *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000); *see also* 47 C.F.R. § 73.865 (LPFM authorizations may not be transferred or assigned except in cases of involuntary or *pro forma* transfers or assignments).

¹³ *Second Order and Further Notice*, 20 FCC Rcd at 6571.

¹⁴ The Commission stated that:

For example, waiver may be appropriate, assuming the public interest would be served, in certain circumstances: a sudden change in the majority of a governing board with no change in the organization's mission; development of a partnership or cooperative effort between local community groups, one of which is the licensee; and transfer to another local entity upon the inability of the current licensee to continue operations. This is not an exhaustive list of circumstances appropriate for waiver.

Id.

¹⁵ *Second Order and Further Notice*, 20 FCC Rcd at 6571.

¹⁶ *Id.* (emphasis added).

of transferability to the LPFM service and, as discussed above, delegated to the Media Bureau the authority to consider waiver requests of Section 73.865 during the pendency of the Commission's rule making proceedings.¹⁷

Given the Commission's belief that the prohibition of the assignment of construction permits hinders LPFM service and the remedy it provided by delegating authority to the Media Bureau to grant waiver requests, we cannot logically conclude that the Commission intended to restrict waiver grants to licensees alone. Indeed, denying a waiver to a permittee who is financially unable to complete construction of its station would clearly run contrary to the Commission's policy goal of maximizing spectrum use as soon as possible where, as here, there is a willing assignee that can continue construction and operation of the station. Accordingly, we find that the grant of waiver in this case was appropriate.

FPR also argues that we erred in accepting Hoyt's representations regarding its financial inability to complete construction of the station "at face value."¹⁸ FPR asserts that Hoyt's representation that it lacks funding is contradicted by an extension request filed by Hoyt on August 15, 2005, in which it claimed that it had sufficient funds to complete construction and operate the proposed station.¹⁹ FPR argues that the waiver should be vacated or reversed because the justification on which the Staff Decision relies is "at variance" with the statements made in the extension request.²⁰

We do not agree that the Staff Decision uncritically accepted Hoyt's statements regarding its financial condition. We find that Hoyt has adequately explained why it can no longer afford to construct and operate the station. In its Response and as supported by the record below, Hoyt asserts that its statements in the extension request and assignment application do not contradict each other, but reflect the economic reality of changed circumstances and limited resources.²¹ Hoyt explains that it did at one time believe that it would be able to construct and operate the station, but the passage of time, the focus on its core functions, and its realization of the costs involved led Hoyt's Board ultimately to conclude that the operation of the station would be an excessive drain on the foundation's limited personnel and financial resources. We believe this explanation is reasonable.

In sum, we conclude that FPR lacks standing to bring the instant Petition and find that the arguments it has raised regarding the grant of waiver of Section 73.865 of the Rules are without merit.

¹⁷ *Id.* at ¶ 20.

¹⁸ Petition at 2.

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ Response at 2.

Conclusion. For the foregoing reasons, the Motion for Petition for Reconsideration filed by Florida Public Radio, Inc. on October 26, 2006, IS DISMISSED.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Mr. Samuel O'Brien, President, Hoyt Sherman Place Foundation
Mr. Preston Daniels, Employee & Family Resources, Inc.
Russell C. Powell, Esq.
G. Thomas Sullivan, Esq.
Gregory P. Page, Esq.