

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
LPFM MX Group 304)
NAACP Social Justice Law Project) File No. BNPL-20131112BWB
Application for a Construction Permit for a New) Facility ID No. 195646
LPFM Station at Philadelphia, Pennsylvania,)
Nueva Esperanza, Inc.) File No. BNPL-20131113BLG
Application for a Construction Permit for a New) Facility ID No. 193022
LPFM Station at Philadelphia, Pennsylvania,)
G-Town Radio) File No. BNPL-20131114AKY
Application for a Construction Permit for a New) Facility ID No. 192746
LPFM Station at Philadelphia, Pennsylvania,)
Germantown United Community Development) File No. BNPL-20131114AMB
Corporation) Facility ID No. 195118
Application for a Construction Permit for a New)
LPFM Station at Philadelphia, Pennsylvania,)
Germantown Life Enrichment Center) File No. BNPL-20131114AMR
Application for a Construction Permit for a New) Facility ID No. 195802
LPFM Station at Philadelphia, Pennsylvania,)
Historic Germantown Preserved) File No. BNPL-20131114ANP
Application for a Construction Permit for a New) Facility ID No. 196209
LPFM Station at Philadelphia, Pennsylvania,)
South Philadelphia Rainbow Committee) File No. BNPL-20131114BLI
Community Center, Inc.) Facility ID No. 196383
Application for a Construction Permit for a New)
LPFM Station at Philadelphia, Pennsylvania)

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 2015

Released: December 3, 2015

By the Commission:

1. We have before us the Application for Review (“AFR”)¹ filed by Nueva Esperanza, Inc. (“NEI”), seeking Commission review of a Media Bureau decision² that denied reconsideration and affirmed the grant of the applications filed by G-Town Radio, Germantown United Community Development Corporation, Germantown Life Enrichment Center (collectively, “Germantown Applicants”), and South Philadelphia Rainbow Committee Community Center, Inc. (collectively, “Time-Share Applicants”), for construction permits for new LPFM stations serving Philadelphia, Pennsylvania, and the dismissal of the applications filed by NEI, NAACP Social Justice Law Project, and Historic Germantown Preserved, also for construction permits for a new LPFM station at Philadelphia, Pennsylvania. These seven applications were mutually exclusive, identified as LPFM MX Group 304,³ and were tentatively selected to receive a construction permit on a time-share basis.⁴ Pursuant to the Commission’s Rules (“Rules”), the Time-Share Applicants filed a time-share agreement in which they aggregated their comparative points to break the seven-way tie in LPFM MX Group 304 in their favor.⁵

2. The AFR raises the same argument that the Bureau rejected in the *Staff Decision* and the *Reconsideration Decision*: that the Germantown Applicants were prohibited from agreeing to aggregate their comparative points at the time that they filed their applications, but were instead required to wait until after the Commission issued the *September Public Notice* which declared those applicants tied under the Commission’s LPFM point system.⁶ NEI again cites to a blog entry on the Commission’s website in support of this argument.⁷ The *Staff Decision* and *Reconsideration Decision* held that NEI misinterpreted the LPFM Blog Post and that pre-filing aggregating agreements were in fact not prohibited by the Rules.⁸

3. We deny the AFR for the reasons stated in the *Staff Decision* and the *Reconsideration Decision*. Neither the Rules nor the LPFM Blog Post prevented the Germantown Applicants from agreeing to aggregate their comparative points prior to filing their applications.⁹ Moreover, as the Bureau noted, the LPFM Blog Post is informal staff advice and not authoritative. Accordingly, we deny the AFR.¹⁰

¹ The AFR was filed on August 17, 2015. The Germantown Applicants filed an Opposition on August 31, 2015. A Reply was filed by NEI on September 14, 2015.

² *LPFM MX Group 304*, Letter, Ref 1800B3-IB (MB July 16, 2015) (“*Reconsideration Decision*”) (denying Petition for Reconsideration filed by NEI); Letter, Ref 1800B3-ATS (MB Jan. 15, 2015) (“*Staff Decision*”) (denying Petition to Deny filed by NEI).

³ *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).

⁴ *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 (2014) (“*September Public Notice*”).

⁵ 47 C.F.R. § 73.872(c).

⁶ AFR at 6-7.

⁷ Bill Lake, *The Low Power FM Application Windows is Fast Approaching*, Official FCC Blog, Sept. 19, 2013, 15:58 EST, <http://www.fcc.gov/blog/low-power-fm-application-window-fast-approaching> (“LPFM Blog Post”).

⁸ *Staff Decision* at 4-5; *Reconsideration Decision* at 4-5. The *Staff Decision* and the *Reconsideration Decision* further held that the LPFM Blog Post is not authoritative because it is informal staff advice. See *Staff Decision* at 4 n.21; *Reconsideration Decision* at 4 n.16.

⁹ Compare Section 1.2105(c) of the Rules, 47 C.F.R. § 1.2105(c), which prohibits certain collusive communications between auction bidders, which was adopted by notice and comment rulemaking. See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 (1994) ¶¶ 221-226.

¹⁰ NEI also argues that “in deciding that there was no policy that prohibited pre-application agreements to aggregate points and share time, the Bureau answered a question of law or policy that had not previously been resolved by the
(continued....)

4. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Nueva Esperanza, Inc., on August 17, 2015, IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules.¹¹

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Commission” and therefore “exceeded its authority” in the *Staff Decision* and *Reconsideration Decision*. AFR at 4-5. This argument is moot because we are affirming Bureau’s reasoning in the *Staff Decision* and the *Reconsideration Decision*. In any event, we note that, among the areas of authority delegated to the Media Bureau is that it “develops, recommends and administers the policy and licensing programs for the regulation of media, including cable television, broadcast television and radio, and satellite services in the United States and its territories.” See 47 C.F.R. §.0.61. Included in that delegated authority is that the Bureau may “[p]rocess applications for authorization...of media services,” “administer and enforce rules and policies regarding...[r]adio and television broadcast industry service” and “[p]rocess and act on all applications for authorization...” See 47 C.F.R. §.0.61(a), (f)(1) and (h). The Bureau’s determination that the applicable rules do not prohibit the subject agreement between the Germantown Applicants fell squarely within that authority.

¹¹ 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(g).