



**Federal Communications Commission
Washington, D.C. 20554**

November 2, 2010

DA 10-2108

In Reply Refer To:

1800B3-SS

Released: November 2, 2010

Mr. Kurt Weiland
Bexley Public Radio Foundation
2700 E. Main St., Suite 208
Columbus, OH 43298

Ms. Marilyn Welker
Simply Living
2350 Indianola Ave.
Columbus, OH 43202

Mr. James Ebright
The Neighborhood Network
186 Hamilton Ave.
Columbus, OH 43203

Mr. John Anderson
Anderson, DeVoss & Johnson
5942 Winberry Creek Drive
Dublin, OH 43016

In re: **WCRS-LP, Groveport and Columbus, Ohio**
Facility ID No. 132329
File No. BALL-20100728AFD

Assignment of License Application

**Petition to Deny
Informal Objection**

Dear Messrs. Weiland, Ebright, Anderson, and Ms. Welker:

We have before us the referenced application (the "Assignment Application") seeking approval for the assignment of the license (the "Station License") of low-power FM ("LPFM") Station WCRS-LP, Groveport and Columbus, Ohio (the "Station"), from Simply Living ("Simply Living") to The Neighborhood Network ("TNN"). On August 27, 2010, Bexley Public Radio Foundation ("Bexley"), licensee of LPFM Station WCRX-LP, Columbus, Ohio, and party to a time-sharing agreement ("Time Share Agreement") with Simply Living, filed a Petition to Deny (the "Petition") the Assignment Application.¹ On October 6, 2010, John Anderson ("Anderson") filed an Informal Objection (the

¹ Simply Living did not file a responsive pleading.

“Objection”) to the Assignment Application.² For the reasons set forth below, we deny the Petition and Objection, and grant the Assignment Application.

Background. Between May 30, 2000, and June 5, 2000, the Commission opened a filing window for LPFM new station applicants.³ Five mutually exclusive applicants, subsequently designated LPFM Group No. 72 (“MX Group 72”), were filed for new LPFM stations in the areas of Columbus and Groveport, Ohio. Four of the five applicants received construction permits; only Bexley and Simply Living constructed facilities and were granted covering licenses. Simply Living now seeks to assign the Station License to TNN.

The Petition raises three arguments: (1) TNN has not made any arrangements on sharing time with Bexley, and therefore, Section 73.872(c) bars the assignment of the Station License to TNN;⁴ (2) grant of the Assignment Application would violate the Time Share Agreement which prohibits a party from assigning “its interest under the Agreement without the prior written consent of the other Parties . . . ;”⁵ and (3) grant of the Assignment Application is not in the public interest.⁶

In his Objection, Anderson also argues that the “transfer appears to violate . . . the [C]ommission’s own rules under 73.872 and 73.865 . . .”⁷ and would violate a provision in the Time Share Agreement. In addition, Anderson alleges that TNN appears to have exerted “operational control” over the Station.

Discussion. In assessing the merits of a petition to deny and of an informal objection under Sections 309(d) and (e), respectively, of the Communications Act of 1934, as amended (the “Act”), we first determine whether the petitioner or objector makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest.⁸ If the Commission determines that the petitioner or objector has satisfied the threshold determination, it proceeds to determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, the petitioner or objector has presented a “substantial and material

² Anderson describes himself as a member of a broadcast consulting group who is familiar with all of the parties. See Objection at 1. Simply Living did not file a responsive pleading.

³ *Low Power FM Filing Window Instructions*, Public Notice, 15 FCC Rcd 9201 (MB 2000).

⁴ Petition at 4.

⁵ Time Share Agreement ¶ 15 (“Prior Consent Term”).

⁶ Petition at 7.

⁷ Objection at 5.

⁸ See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge’s consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.” *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (“*Gencom*”), cited in *Edwin L. Edwards*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248 (2001).

question of fact" to warrant further inquiry.⁹ Using this standard, we consider Bexley's and Anderson's allegations.

The Petition. We find that Bexley's arguments are without merit. Section 73.872(c)(2) concerns the modification of time share agreements by or among its permittee and/or licensee parties. It is wholly inapplicable to the assignment of an LPFM time share license to a new entity. Accordingly, Simply Living and TNN are not required under this rule either to submit a revised time share agreement to the Audio Division or to obtain Bexley's prior consent to the proposed assignment of the Station License to TNN. An LPFM share-time license may assign its license to a qualified licensee.¹⁰ We find that TNN is fully qualified to operate an LPFM station. Accordingly, Bexley has not presented a substantial and material question of fact to warrant further inquiry on this issue.¹¹

Although a licensee is generally free to enter into agreements relating to the operation of its station, it may not "improperly delegate nondelegable licensee responsibilities . . . [or] improperly bind future exercise of the licensee's nondelegable discretion . . ."¹² To the extent that the Prior Consent Term may be interpreted to require Bexley's prior consent to the proposed license assignment, we find that this term constitutes an improper limitation on Simply Living's licensee right to make a core operational decision, namely the assignment of the Station License to a qualified buyer of its choosing.¹³ Accordingly, we find that the Prior Consent Term, as interpreted by Bexley, is contrary to Commission policy and the public interest and, therefore, is unenforceable.¹⁴ Finally, Bexley's claim that the "public interest is not served if TNN is permitted to acquire a broadcast license . . . free of obligations" set forth in the Time Share Agreement is misguided. Upon becoming licensee of the Station, TNN would be bound to the terms of the Time Share Agreement in the same manner as is Simply Living.¹⁵

⁹ *Gencom*, 832 F.2d at 181; *see also* 47 U.S.C. §§ 309(d)(2) and 309(e). *See Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁰ *See, e.g., Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21914 (2007) ("We conclude that the appropriate balance is struck by requiring the assignee . . . of an LPFM license to satisfy ownership and eligibility criteria existing at the time of the assignment . . .").

¹¹ *Gencom*, 832 F.2d at 181; *see also* 47 U.S.C. §309(d)(2).

¹² *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, Report and Order, 5 FCC Rcd 3911, 3914 (citing *Agreements Between Broadcast Licensees and the Public*, Report and Order, 57 FCC 2d 42 (1975)).

¹³ *See Hispanic Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18850-51 (2003) (television network's approval right over the sale of affiliate stations licensed to another party disallowed as an improper level of influence over the core operations of licensee's stations).

¹⁴ *See, e.g., Nancy Spears*, Letter, 54 FCC 2d 1238 (1975) (agreement improperly curtails licensee's ultimate responsibility); *see also Attribution NPRM*, 10 FCC Rcd 3606 at n.47 (1995) ("Only when such agreements reflect excessive or improper delegation of authority or control have we expressed concern and rejected such provisions.").

¹⁵ *See Israeli A. Jaffe, Barbara F. Shively, G.P. Gennaro, Charles Schenck, David M. Gerstein, Esq., M. Anne Swanson, Esq., William H. Fitz, Esq., and Dorann Bunkin, Esq.*, Letter, 24 FCC Rcd 11761, 11762 (MB 2009) (continued . . .)

The Objection. For the reasons set forth above, we reject Anderson's claims that Simply Living and TNN have violated Sections 73.865 or 73.872 of the Rules,¹⁶ or that we should entertain an argument based on an alleged breach of the Time Share Agreement. Regarding Anderson's "operational control" allegations, the determination as to whether a licensee has undergone a transfer of control is made on a case-by-case basis.¹⁷ While there is no exact formula for determining *de facto* control,¹⁸ we look to whether a new person or entity has authority to make decisions regarding station personnel, programming or finances.¹⁹ A permittee or licensee may delegate certain functions on a day-to-day basis to an agent or employee,²⁰ but delegations must be guided by policies set by the permittee or licensee.²¹

Anderson provides no factual support for allegations that TNN has prematurely asserted control over the Station apart from his uncorroborated charges that the station "sits on" property owned by a TNN board member and that TNN volunteers "currently seem to control all aspects of the station's operations." These highly speculative and unsupported allegations are insufficient to raise a substantial and material question of fact. Accordingly, we find that Anderson's allegations provide no basis for denying or designating for evidentiary hearing the Assignment Application.²²

Conclusion/Actions. Based on our review of the Assignment Application, we conclude that the proposed transaction complies with the Act and all Commission rules and policies.

Accordingly, IT IS ORDERED, that the Petition to Deny filed by Bexley Public Radio Foundation, IS DENIED.

IT IS FURTHER ORDERED that the Informal Objection filed by John Anderson, IS DENIED.

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("[W]e emphasize that licensees are required to operate in accord with the terms of their authorization, and in the public interest.").

¹⁶ Under Section 73.865, a license may not be assigned to an entity that cannot satisfy LPMF eligibility requirements. Anderson treats the alleged Section 73.872(c) violation as falling within the scope of the Section 73.865 restriction. As explained above, Section 73.872(c) is inapplicable to the proposed license assignment. For the same reasons, the Section 73.865 argument is meritless.

¹⁷ See *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 442 (D.C. Cir. 1985).

¹⁸ See, e.g., *Stereo Broadcasters, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 819, 821 (1975), *modified*, Memorandum Opinion and Order, 59 FCC 2d 1002 (1976).

¹⁹ See *WHDH, Inc.*, Memorandum Opinion and Order, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

²⁰ See, e.g., *Southwest Texas Public Broadcasting Council*, Memorandum Opinion and Order, 85 FCC 2d 713, 715 (1981).

²¹ See *David A. Davila*, Memorandum Opinion and Order, 6 FCC Rcd 2897, 2899 (1991).

²² See generally, *PCS Partners, LP*, Order, 17 FCC Rcd 21419, 21420 (WTB 2002); see also *Mayor Maurice Brown, et al., Mr. Chuck Montero, et. al., Mr. Harry Hoyler, Charles L. Spencer, Esq.*, Letter, 24 FCC Rcd 7632, 7636 (MB 2009).

IT IS FURTHER ORDERED, that the application for consent to assign the license for Station WCRS-LP, Groveport and Columbus, Ohio (File No. BALL-20100728AFD) from Simply Living to The Neighborhood Network, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: H. Scott McKenzie, Groveport Madison Local School District
Angela K. Plummer, Community Refugee & Immigration Services
Steve Koch, Capital University