



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

August 11, 2014

DA 14-1164
In Reply Refer To:
1800B3-PPD

John Crigler, Esq.
Garvey Schubert Barer
1000 Potomac Street, N.W.
Washington, DC 20007

In Re: **Application for Construction Permit
for a Low Power Broadcast FM
Station**

New-LP, Richmond, VA
Facility ID Number: 197068
Synergy Project, Inc.
File Number: BNPL-20131114AOI

Petition for Reconsideration

Dear Counsel:

This letter is in regard to the Petition for Reconsideration (“Petition”) filed by Synergy Project, Inc. (“Synergy”) on March 21, 2014. The Petition seeks reconsideration of the Media Bureau’s February 20, 2014, dismissal of Synergy’s Form 318 application for a construction permit for a low power broadcast FM (“LPFM”) station in Richmond, VA, File No. BNPL-20131114AOI (“LPFM Application”).¹ For the reasons discussed below, we conditionally grant the Petition.

Background. Synergy timely filed the LPFM Application on November 14, 2013.² The LPFM Application was accepted for filing as a singleton on November 25, 2013.³ On February 20, 2014, the Commission determined the LPFM Application was inadvertently accepted for filing and dismissed the LPFM Application because of a violation of the inconsistent application rule.⁴ This rule prohibits an applicant from filing an inconsistent or conflicting application when a prior filed application of the same applicant remains pending and undecided.⁵

¹ *Synergy Project, Inc.’s Application for Construction Permit for a Low Power Broadcast FM Station*, Letter Decision, DA 14-226 (February 20, 2014) (“*Letter*”).

² *See Media Bureau Extends Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 15763 (2013).

³ *See Broadcast Applications*, Public Notice, Report No. 28125 (November 29, 2013).

⁴ *See Letter* at 1-2 citing 47 C.F.R. § 73.3518.

⁵ *See Treasure Coast Media, Inc.*, 7 FCC Rcd 5533 (1992) (“*Treasure Coast*”).

When it filed the LPFM Application, Synergy had pending an application for review of the dismissal of its application for a new noncommercial educational (“NCE”) station at Montpelier, VA.⁶ The Commission determined that grant of both the LPFM Application and the NCE Application would give Synergy an attributable interest in an LPFM station and a full-power NCE broadcast station, in violation of the Commission’s cross-ownership rule.⁷ Thus, the *Letter* determined that the filing of the LPFM Application resulted in a violation of the inconsistent application rule.

In its Petition, Synergy argues the LPFM Application did not violate Section 73.3518 because “Synergy’s divestiture statement clearly indicates that Synergy did not ask the [Commission] to grant two applications that would result in a violation of the” multiple ownership rules.⁸ The full divestiture statement states:

As of this date of filing, Synergy Project, Inc. has three applications for Full Power that have been DISMISSED, to wit:

File Number: BNPED-20071016AIY
Facility ID: 175201
Community of License: MONTPELIER, VA

...

File Number: BNPED-20071016AJB
Facility ID: 172594
Community of License: CHESTER, VA

...

File Number: BNPED-20071019AYH
Facility ID: 176682
Community of License: CHESTER, VA

...

They are DISMISSED, Thus, no facility has yet been constructed nor are any broadcast operations at such facilities taking place or ever foreseen.

Pursuant to 47 C.F.R. Section 73.860(d), Synergy Project, Inc. hereby pledges to divest the above broadcast interests prior to the commencement of operations of an LPFM station in which Synergy Project, Inc. also holds an interest.⁹

Synergy states that Section 73.860(d) allows a LPFM applicant with an attributable interest in an existing radio station to divest the interest in the existing station to ensure compliance with the Commission’s prohibition on cross-ownership.¹⁰ Synergy also points out that the instructions to Form 318 permit “any applicant that holds an attributable interest in another station [to] include a divestiture pledge.”¹¹ Synergy

⁶ File No. BNPED-20071016AIY (“NCE Application”). The *Letter* noted that when an applicant appeals the dismissal of an application, that application is treated as “pending and undecided” for purposes of the inconsistent application rule. *Letter* at 2, citing *Premier Broadcasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 867 (1992).

⁷ 47 C.F.R. § 73.860(a) (prohibiting a party from owning an attributable interest in both an LPFM station and a full-power broadcast station).

⁸ Petition at 3.

⁹ LPFM Application at Exhibit 5.

¹⁰ 47 C.F.R. § 73.860

¹¹ Petition at 3.

believes it “reasonably interpreted Section 73.860(d)...and the instructions to Form 318, to permit it to divest itself of ‘an attributable interest in an application for a broadcast station.’”¹²

Synergy also argues its divestiture statement can be distinguished with the one at issue in *Treasure Coast Media, Inc.*¹³ Synergy states its divestiture pledge was included in the relevant LPFM Application, unlike in *Treasure Coast*, where the divestiture pledge was not “contained in the application to which it pertains.”¹⁴ Moreover, Synergy argues its “divestiture statement was not a pledge to ‘subsequently divest’ its interest in the” NCE Application after the NCE Application was granted, unlike in *Treasure Coast*, where the applicant’s “divestiture statement was ineffective because it was merely a ‘vague statement of future intent to comply with the multiple ownership rules’ and therefore was not unequivocal and unconditional.”¹⁵

Finally, while Synergy admits it should have dismissed the pending application for review for the NCE Application prior to filing the LPFM Application, Synergy believes it should be afforded some latitude as a *pro se* applicant.¹⁶ Synergy states that it is “completely reasonable for a *pro se* LPFM Applicant to assume that a dismissed application had, in fact, been dismissed [and any] remaining doubt about the status of the dismissal was addressed by the divestiture pledge....”¹⁷ It also believes that the grant of its singleton application is consistent with the inconsistent application rule’s objective to avoid unnecessary paperwork by the Commission or delay other applicants’ applications.¹⁸

Discussion. The Commission will grant reconsideration only when the petitioner shows either a material error in the Commission’s original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.¹⁹ For the reasons set forth below, we conclude that Synergy has demonstrated that reconsideration is warranted and conditionally grant the Petition.

Synergy first claims that its divestiture statement complies with Section 73.860. We disagree. Section 73.860 permits a LPFM applicant with an attributable interest in an *existing* broadcast station to comply with the cross-ownership rule by pledging to divest such station interest prior to the commencement of LPFM station broadcast operations. The rule does not specifically address the issue of whether the Commission will accept divestiture pledges of *application* interests and, if so, what requirements such a pledge must satisfy.

Synergy also states its divestiture statement can be distinguished from *Treasure Coast*, which the *Letter* cited to support the staff conclusion that the application violated the inconsistent application rule, Section 73.3518.²⁰ We agree with Synergy that in one aspect, *Treasure Coast* can be distinguished on its facts. In *Treasure Coast*, the Commission noted that the divestiture statement was contained in another

¹² *Id.* at 3-4.

¹³ *Id.* at 4 citing *Treasure Coast* at 5533.

¹⁴ *Treasure Coast* at 5533.

¹⁵ Petition at 5 quoting *Treasure Coast* at 5534-5535.

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 5.

¹⁹ See 47 C.F.R. §1.106. See also, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

²⁰ Cite to *Letter*.

application and was a general statement of intent to divest such “holdings” as would be needed to comply with the Commission’s multiple ownership rule.²¹ The Commission specifically distinguished these facts in *Treasure Coast* from earlier cases where inconsistent applications have not been dismissed because, at the time of filing, the applicant made the unequivocal statement that its earlier application is or will shortly be dismissed.²² In contrast to the applicant in *Treasure Coast*, Synergy did include its divestiture statement when it filed the LPFM Application and did specifically identify the NCE Application in that context. Nonetheless, we cannot find that Synergy’s divestiture statement was “unequivocal and unconditional” as to its intent regarding the dismissal of the NCE Application.²³

However, we find that the Form 318 instructions could be reasonably misconstrued with respect to existing station interests prohibited under the LPFM cross-ownership rule and an interest in a pending application.²⁴ The instructions require an applicant to list existing station interests and permit applicants to use a divestiture pledge “setting forth the applicant’s (or party’s) intention to divest such interest.”²⁵ The immediately following paragraph on prohibited application interests merely requires the listing of such interests. It does not explain the legal effect of such disclosure on the processing of the application or whether we would also accept a divestiture pledge in this context to satisfy both the cross-interest and inconsistent application rules. Moreover, we are unaware of any Commission guidance on the efficacy – or lack thereof – of a divestiture pledge of application interests made by a LPFM applicant in its window filing.²⁶

In these circumstances, we find that we have not provided the requisite “explicit notice” for dismissing applications based on application defects.²⁷ Although we expect all applicants to list their pending application interests²⁸ as required by the Form 318 instructions and to understand that such disclosure could implicate the inconsistent application rule,²⁹ we also recognize we have not provided applicants a means to ensure compliance with both the cross-interest and inconsistent application rules. Here, Synergy listed its pending interest in the NCE Application and attempted to comply with the Rules by providing a divestiture commitment. We will enforce this commitment by requiring the dismissal of Synergy’s application for review involving the NCE Application before we issue a public notice that grants the LPFM Application. If Synergy fails to submit such dismissal within ten business days of this letter, we will set aside our grant of reconsideration pursuant to 47 C.F.R. § 1.113(a).

²¹ *Treasure Coast* at 5534.

²² *Id.* at 5535 n. 3.

²³ *Id.* at 5535.

²⁴ 47 C.F.R. § 73.860(a)

²⁵ Instructions for FCC Form 318, Section II, Question 5(b).

²⁶ *But cf. Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, 24 FCC Rcd 12161, 12161 (MB 2009) (divestiture pledges generally ineffective as a mechanism to avoid attribution of broadcast held at close of window for certain comparative purposes).

²⁷ *See Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (strict application of processing rules is permissible provided that Commission has given explicit notice of all application requirements).

²⁸ The Commission also considers an appeal of a dismissed application as pending. *See Premier Broadcasting, Inc.*, 7 FCC Rcd 867 (1992) (returned application “was properly considered ‘pending and undecided’ for purposes of the inconsistent application rules” because applicant had on file a petition for reconsideration for the returned application).

²⁹ *North Eastern Massachusetts Law Enforcement Council*, Order, 16 FCC Rcd 12,474, 12476 (2001) (applicants must stay apprised of the Commission’s rules). *See also* 47 C.F.R. § 0.406 (“Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business”).

Conclusion/Action. Accordingly, ON THE CONDITION that Synergy promptly dismisses its application for review for the NCE Application for Montpelier, VA, File No. BNPED-20071016AIY, IT IS ORDERED that the March 21, 2014, Petition for Reconsideration filed by Synergy Project, Inc. IS GRANTED. IT IS FURTHER ORDERED that upon the dismissal of the application for review for the NCE Application, the Media Bureau will issue a public notice announcing that application BNPL-20131114AOI IS REINSTATED and GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau