

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

In the Matter of)	
)	
CASA DE ORACION GETSEMANI	)	File No. BNPL-20000605AFI
	)	Facility ID No. 124214
Application for a Construction Permit for a New)	
LPFM Station at Providence, Rhode Island)	
)	
EPHESE FRENCH SDA CHURCH	)	File No. BNPL-20000606AAV
	)	Facility ID No. 124196
Application for a Construction Permit for a New)	
LPFM Station at Providence, Rhode Island)	
)	
ZION BIBLE INSTITUTE	)	File No. BNPL-20000601ADH
	)	Facility ID No. 123967
Application for a Construction Permit for a New)	
LPFM Station at Barrington, Rhode Island)	
)	
BROWN STUDENT RADIO	)	File No. BNPL-20000605AGJ
	)	Facility ID No. 124263
Application for a Construction Permit for a New)	
LPFM Station at Providence, Rhode Island)	
)	
PROVIDENCE COMMUNITY RADIO	)	File No. BNPL-20000605AJO
	)	Facility ID No. 124478
Application for a Construction Permit for a New)	
LPFM Station at Providence, Rhode Island)	

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 2008

Released: March 14, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it the captioned, mutually exclusive applications of Casa de Oracion Getsemani (“Casa”); Ephese French SDA Church (“Ephese”); Zion Bible Institute (“Zion”); Brown Student Radio (“BSR”); and Providence Community Radio (“PCR”), each seeking a construction permit for a new station in the Low Power FM (“LPFM”) Service in the Providence, Rhode Island, area. In accordance with our procedures,¹ the staff tallied the comparative point totals claimed by each

¹ See *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000) (“*LPFM Report and Order*”); *recon. generally denied*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208 (2000); *regulation modification granted by* Second Report and Order, 16 FCC Rcd 8026 (2001); Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 07-204 (rel. Dec. 11, 2007) (“*Third Report and Order*”).

applicant and listed those point totals in a Public Notice accepting the applications for filing, establishing a petition to deny period, and specifying the applications' tentative selectee status.² Therein, Zion, Casa, Ephese, BSR, and PCR were designated as tentative selectees for the subject authorization. BSR filed separate petitions to deny the PCR, Casa, and Ephese applications on March 30, 2005.³ On April 25, 2005, Casa, Ephese and Zion amended their respective applications to report that they had entered into a voluntary time-share agreement.⁴ BSR also filed an "Objection to Share-Time Agreement and Point Aggregation" of Casa, Ephese, and Zion on May 9, 2005.⁵ On June 13, 2005, John O. Broomall ("Broomall") filed an Informal Objection to the BSR application. On October 27, 2005, PCR filed a "Motion to Reopen Proceedings," alleging that, notwithstanding its filing of change of address notices with the Commission, the Commission sent certain notices in this proceeding to an old mailing address, which resulted in PCR being "unfairly shut out of the MX resolution process." On October 11, 2007, BSR filed a "Supplement" to its Objection to the time-share agreement.⁶ For the following reasons, we grant the BSR Petition to Deny the PCR application to the extent indicated, deny the BSR petitions to deny the Casa and Ephese applications, and we deny the BSR Objection to the time-share agreement. In addition, we grant the Casa, Ephese and Zion applications and dismiss those of PCR and BSR, and, in light of these actions, dismiss, as moot, the Broomall Objection and the PCR Motion.⁷

II. DISCUSSION

2. *BSR Petitions to Deny.* We have evaluated the merits of BSR's petitions and the responsive pleadings and, for the reasons stated below, deny BSR's petitions against the Ephese and Casa applications. However, we grant the BSR Petition against the PCR application and conclude that PCR is not entitled to the comparative point that it claimed for "established community presence." Accordingly, as explained below, we will disallow PCR that point and re-evaluate the applications on a comparative basis.

3. In its respective petitions to deny the captioned PCR, Ephese, and Casa applications, BSR alleges that those applicants are each not entitled to a comparative point for "established community presence" because: (1) PCR was not incorporated until January 28, 2000, only five months prior to filing its application, and PCR's claimed status as an unincorporated association has been neither documented nor recognized by the State of Rhode Island; (2) Ephese was not incorporated until August 18, 2000, more than two months after it filed its application, and, although it appears from the Ephese application

² See *Broadcast Applications*, Public Notice, Report No. 25930 (rel. Feb. 28, 2005).

³ PCR did not file an opposition to the BSR Petition against its application; Casa and Ephese each untimely filed a separate opposition to their respective BSR petitions on May 19, 2005, to which, on May 25, 2005, BSR filed replies.

⁴ The amendments appeared on Public Notice, Report No. 25973, dated April 28, 2005.

⁵ Casa, Zion, and Ephese filed "Consolidated Replies" on May 19, 2005, in opposition to the Objection, to which BSR replied on May 25, 2005.

⁶ Casa, Zion, and Ephese have not responded to this supplemental pleading.

⁷ Among the Bureau documents with which PCR claims it was not served is the February 23, 2005, letter to the applicants advising them of a 60-day window during which applicants tied for the highest point total could enter into voluntary time-share agreements. Because we conclude herein that PCR is not among those tied applicants under the point system, it cannot participate in a time-share agreement with the three selectees, Casa, Ephese and Zion. See 47 C.F.R. § 73.73.872(c). Accordingly, we dismiss its Motion as moot.

that there was some kind of organization in existence for more than two years prior to filing, it was not the same entity that was newly chartered to apply for a radio station license; and (3) Casa and Ephese were each incorporated in the State of Rhode Island as a “church,” and thus cannot be credited with two years’ existence as an “educational organization.” Thus, BSR asserts that, because PCR, Ephese, and Casa did not legally exist as educational organizations for two years prior to filing their applications, the award of each applicant’s claimed point for established community presence must be rescinded.

4. In its Opposition, Casa states that it has been incorporated in the State of Rhode Island since September 9, 1976,⁸ and the fact that it was incorporated as a church has no bearing on its captioned application.⁹ In response to the BSR claim that there is an issue regarding which Ephese entity intends to operate the station, Ephese responds in its Opposition that “Ephese French Seventh-Day Adventist (SDA) Corp.’ did not exist in June 2000 and thus could not have applied for an LPFM station” and did not do so.¹⁰ Ephese asserts that the entity that filed the captioned application, “Ephese French SDA Church,” is a valid one, having held tax-exempt status as an “un-incorporated association” in the State of Rhode Island since September 6, 1991.¹¹ As to PCR, although its counsel of record was served with the BSR Petition, PCR did not file an opposition. However, the PCR application contains an exhibit stating that PCR was incorporated on January 28, 2000, and began its corporate existence on February 29, 2000.¹² PCR also states in its application that it “is the successor organization to an unincorporated association that has been active in Rhode Island since May 1, 1995,”¹³ but it does not identify that organization or provide any documentation supporting this assertion.

5. In its petitions, BSR also argues that both Casa and Ephese are “pure” churches that did not exist as educational organizations, and therefore, are not eligible for the subject construction permit.¹⁴ Section 73.853 of the Commission’s Rules (the “Rules”) provides that an LPFM station may be licensed to a non-commercial educational (“NCE”) organization for the advancement of an educational program.

⁸ See Casa Opposition at 2 and Exhibit 2. Casa submitted a copy of a certification bearing the signature and seal of the Secretary of the State of Rhode Island that “Casa de Oracion ‘Getsemani’” is a Rhode Island non-profit corporation that filed its original articles of association in September 1976.

⁹ See Casa Opposition at 2.

¹⁰ See Ephese Opposition at 2.

¹¹ *Id.*; see also captioned Ephese Application at Exhibit 7, which is a copy of a tax exemption granted to the Ephese French SDA Church on September 6, 1991. Ephese states that:

Ephese is not asking the Commission to “tie together” these two entities but to disregard as moot and irrelevant all references to the August 2000 corporation. The statement that the corporation was “newly chartered to apply for a radio license” has no significance, since it never applied for an LPFM station. The applicant, Ephese, is an unincorporated association (church congregation) in Providence, not a Rhode Island corporation. LPFM applicants are not required to be incorporated.

Ephese Opposition at 2.

¹² See captioned PCR application at Exhibit 1.

¹³ *Id.*

¹⁴ See BSR petitions to deny Casa and Ephese applications at 3-4. BSR cites 47 C.F.R. § 73.503(a) and *Bible Moravian Church*, 28 FCC 2d 1 (1971) in support of its argument.

In the *LPFM Report and Order*, the Commission stated that the establishment of LPFM as a noncommercial educational service requires that licensees comply with the eligibility requirements of Section 397(6) of the Communications Act of 1934, as amended (the “Act”).¹⁵ Section 397(6) of the Act defines a “noncommercial educational broadcast station” as a station which “(A) . . . under the rules and regulations of the Commission on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association. . . .”¹⁶ Because the statute incorporates by reference the Commission’s NCE organization eligibility rules, we must look to those rules in determining NCE and, consequently, LPFM eligibility under Section 397(6) of the Act. The Rules limit NCE station eligibility to nonprofit educational organizations that show that the station will be used “for the advancement of an educational program.”¹⁷

6. In applying Section 73.503, the Commission has required that NCE applicants be: (a) a government or public educational agency, board or institution; (b) a private, nonprofit educational organization; or (c) a nonprofit entity with a demonstrated educational purpose.¹⁸ We require that an applicant described in (a) or (b) above have an educational program and demonstrate how its programming will be used for the advancement of that program. An applicant applying as (c) above must specifically show: (i) that it is, in fact, a nonprofit educational organization, (ii) that it has an educational objective, and (iii) how its programming will further that objective.¹⁹ The requirement that NCE licensees provide programming that advances an educational objective may be satisfied by a variety of programs, including, but not limited to, “instructional programs, programming selected by students, bible study, cultural programming, in-depth news coverage, and children’s programs such as Sesame Street that entertain as they teach.”²⁰ We have also stated that “in order to qualify as an educational station, it is not necessary that the proposed programming be exclusively educational.”²¹

7. In its Petition, BSR relies on *Bible Moravian Church*²² in which the Commission rejected an application for an NCE construction permit filed by a purely religious institution. BSR states that, in *Bible Moravian Church*, the Commission held that “organizations with religious purposes can and have been qualified if, as is the case of religious educational institutions, the primary thrust is educational,

¹⁵ *LPFM Report and Order*, 15 FCC Rcd at 2215.

¹⁶ 47 U.S.C. § 397(6).

¹⁷ 47 U.S.C. § 73.503(a). The same eligibility requirements were in effect on the effective date of Section 397(6) of the Act. See also Appendix A to *Eligibility for Noncommercial Educational FM and TV Broadcast Station Licenses*, Notice of Inquiry, FCC 77-382, 43 Fed. Reg. 30842 30844 (1978) (processing guidelines for institutional and organizational applicants for noncommercial educational licenses).

¹⁸ *Id.*

¹⁹ See, e.g., *Music Ministries, Inc.*, Hearing Designation Order, 9 FCC Rcd 3628 (MMB 1994).

²⁰ *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167, 21169 (1998).

²¹ *Lower Cape Communications, Inc.*, Memorandum Opinion and Order, FCC 80-453, 47 RR 2d 1577, 1579 (1980). See also *Florence Bridges*, Memorandum Opinion and Order, FCC 78-719, 44 RR 2d 667, 668 (1978), and *LPFM Report and Order*, 15 FCC Rcd at 2214.

²² *Bible Moravian Church*, 28 FCC 2d 1 (1971).

albeit with a religious aspect to the educational activity.”²³ The Bible Moravian Church did not meet this test, argues BSR, and “Casa fits the *Bible Moravian* model, because Casa is purely a church; so its application does not qualify [for consideration pursuant to the point system] under Section 73.503(e).”²⁴

8. At the outset, in its more recent decision in *Way of the Cross of Utah, Inc.*, the Commission made clear that an applicant organization such as a church, which is primarily religious in nature, may operate on channels reserved for NCE stations.²⁵ Although in *Way of the Cross*, the Commission rejected an application of a religiously oriented entity seeking a license to operate on a reserved NCE television channel because it had failed to make the showing required of NCE applicants for full-service noncommercial television authorizations,²⁶ it stated that “noncommercial, educational organizations, even though religiously oriented, can qualify upon an appropriate showing for licenses on reserved channels.”²⁷ Moreover, the Commission specifically held that “[the Bureau’s conclusion that,] [o]ver the years, the Commission has articulated the principle that organizations which are primarily religious in nature, even though they have some educational aspects, will not be allowed to operate on channels reserved for educational use . . . was clearly in error.”²⁸ Thus, *Bible Moravian Church* is no longer good law and BSR’s reliance on it is misplaced.²⁹

9. We have examined both Casa’s and Ephese’s application exhibits in which each describes how its proposed station will be used to advance educational purposes.³⁰ We find that both applicants have

²³ BSR Petition at 3, quoting *Bible Moravian Church, supra*.

²⁴ BSR Petition at 3.

²⁵ *Way of the Cross of Utah, Inc.*, 101 FCC 2d 1368 (1985) (“*Way of the Cross*”).

²⁶ Specifically, the Commission rejected the application, concluding that the applicant’s board of directors was not sufficiently representative of the community of license and that the applicant had failed to provide a program schedule to allow the Commission to determine that the station would be used to serve the educational needs of the community as required by the Rules. *Way of the Cross*, 101 FCC 2d at 1374-1377.

²⁷ *Id.* at 1374.

²⁸ *Id.* at 1374, n. 8.

²⁹ Subsequent to *Way of the Cross*, the Media Bureau and the Commission have designated several cases for hearing concerning an applicant’s eligibility for NCE reserved channels based on the standards in the guidelines. See e.g., *Music Ministries, Inc., supra*; *Toccoa Falls College*, Hearing Designation Order, 8 FCC Rcd 3085 (1994); *Holy Spirit Harvest Church*, Hearing Designation Order, 7 FCC Rcd 3043 (1992) (“*Holy Spirit*”); *Dry Prong Educational Broadcasting Foundation*, Hearing Designation Order, 7 FCC Rcd 496 (1992) (“*Dry Prong*”); *Christian Family Cinema*, Hearing Designation Order, 6 FCC Rcd 7364 (1991). These cases, however, involved applications for NCE FM stations similar to that considered in *Way of the Cross*, in which the applicant’s exhibit provided no program schedule or only the barest of descriptions concerning the nature of the proposed programs.

³⁰ Casa attaches to its Opposition a copy of the first page of its original Articles of Incorporation filed with the Rhode Island Secretary of State’s office. These indicate that Casa de Oracion “Getsemani” is constituted “for the purpose of establishing a Spanish-speaking Church which will fulfill the necessity of Religious Education among the people of Spanish Nationality.” Opposition, Exhibit 2. Additionally, Exhibit 2 to Casa’s application indicates that its proposed LPFM station:

. . . plans to transmit educational, cultural, and entertainment programs to the public, with a variety of educational objectives, such as:

- (1) To provide educational and religious instruction, and moral teaching;

(continued . . .)

demonstrated that they are nonprofit educational organizations, with distinct educational objectives, and that they will use their stations' programming to further those objectives. Accordingly, Casa and Ephese are each eligible to hold an LPFM authorization.

10. With regard to BSR's remaining claims, Section 73.872 of the Rules, entitled "Selection Procedure for Mutually Exclusive LPFM Applications," provides, in pertinent part, that:

[e]ach mutually exclusive application will be awarded one point for each of the following criteria, based on application certification that the qualifying conditions are met: (1) *Established community presence.* An applicant must, for a period of at least two years prior to application, have been physically headquartered, have had a campus, or have had seventy-five percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna. . . .³¹

11. The language of the Rule requires that the applicant must be in existence for at least two years prior to filing the application. Further, in the proceeding establishing the low power FM service,³² the Commission discussed the underpinning for this requirement that "applicants" must make a threshold showing that they existed two years prior to filing its application. Therein, the Commission contemplated that the organization filing the application would have been in existence and based in the community for at least two years at the time of filing. For example, it stated that the criterion for demonstrating

(continued from previous page)

- (2) To provide the opportunity for and to promote informative discussion and debate in areas pertaining to contemporary social and religious issues, as well as citizenship and its responsibilities;
- (3) To provide solutions to community problems such as drug and alcohol abuse, pornography and indecency, the breakdown of the family unit, crime, the economy, the environment and education, and
- (4) To teach citizenship, patriotism, conflict resolution, and family life enhancement.
- (5) These objectives, while general, are consonant with those accepted by the staff and Commission in past applications. Casa also provides specific examples, and descriptions, of regular features and programs that it states will advance its educational objectives, such as Dr. James Dobson's "Focus on the Family," "The Alternative, a show that "addresses issues of importance to the urban community with well-communicated biblical solutions, hosted by Dr. Tony Evans, and "Point of View," a talk show featuring "everyday issues that affect the core of the American family." Casa Application, Exhibit 2 at 2.

Ephese indicates in its Opposition that "Ephese fulfills its role as an unincorporated educational organization through an established Sabbath School and other programs with classes for all ages. Meetings are held several times weekly, with classrooms, teachers/lecturers, students, and textbooks covering a wide range of subjects." Opposition, Exhibit 1, Declaration of Lucien Louis-Jean. Additionally, Ephese represents that it will provide the following types of programs specifically designed to provide information to the Haitian, Latin American, and West African immigrant communities: programs aiming at the Haitian community on the mode of operation of the School System, from Kindergarten to High School; how to prepare for college; what are the new laws on immigration; communication skills between couples; financial planning; pronunciation and diction for those speaking English as a second language, etc.

³¹ 47 C.F.R. § 73.872(b)(1).

³² *LPFM Report and Order, supra*, 15 FCC Rcd 2205.

established community presence favors “organizations” that have been operating in the communities where “they” propose to construct an LPFM station and thus have “track records” of community service and established constituencies within their communities. The Commission expressed its belief that such “applicants,” because of their “longstanding organizational ties” to their communities, are more likely to be attuned to, and have “organizational experience” addressing the needs and interests of their communities.³³ Further, the Commission stated that “preferring organizations that have been in existence and physically present in the community for two years” would “help prevent maneuvering of the point system by those who might otherwise establish multiple organizations to file the LPFM applications.”³⁴

12. Further, the Instructions to FCC Form 318, regarding claiming the point for established community presence expressly provides that:

To qualify for a point under this criterion, the applicant must have an established community presence of at least two years duration in the community it proposes to serve. Educational institution and organization applicants must be able to certify that, during the two years prior to application, (a) it has been in existence as a nonprofit educational institution or organization, **and** (b) it has been physically headquartered, has had a campus, or has had seventy-five percent of its governing board members residing within 10 miles of the coordinates of the proposed transmitting antenna.³⁵

13. The Rule language, the Commission’s Order adopting the Rule, and the instructions to the application for an LPFM construction permit make clear that, if an applicant desires to claim the point for establishment of a community presence, it must meet the threshold requirement of existing as an entity for at least two years prior to filing its application. Although PCR certifies in its application that it was incorporated, we have determined, and PCR has acknowledged, that it was incorporated in the State of Rhode Island in January of 2000, approximately six months before it filed its application.³⁶ Notably, PCR has alluded to but has not directed the staff to any documentary evidence that it existed in a legally recognized form prior to 2000. Thus, we find that PCR is not entitled to a point for “established community presence.”

14. As to Casa, the record reveals that it was incorporated on September 9, 1976,³⁷ long before it filed its application. That record also indicates that, while Ephese did not form a corporation until August 18, 2000, two months *after* it filed its application, the captioned applicant entity has been recognized by the State of Rhode Island as an “unincorporated association” for many years.³⁸ Therefore, we find that BSR’s arguments against Casa and Ephese on this issue are without merit. Accordingly, we find that both

³³ *Id.*

³⁴ *Id.* at 2260 ¶ 140.

³⁵ Instructions to FCC Form 318, Page 8, A. Question 1: Established Community Presence (emphasis added).

³⁶ See Secretary of State of Rhode Island website, <http://ucc.state.ri.us/CorpSearch/CorpSearchInput.asp>, visited July 13, 2005.

³⁷ See *id.*; see also File No. BNPL-20000605AFI at Exhibit 7.

³⁸ See n. 10, *supra*.

Casa and Ephese meet the threshold requirement of existing as entities with organizational ties to their proposed community of license for at least two years prior to filing their applications.

15. BSR also claims that a principal of Casa appears to have been involved in the unlawful operation of an unlicensed radio station, in violation of Section 73.854 of the Rules.³⁹ In its Opposition, Rev. Eliseo Noguerras, Casa's President, has declared under penalty of perjury that "Casa operated a legal unlicensed 100 mW Tran-AM Radio Transmitter TA100, serial number 14075" but discontinued operation because coverage was so poor.⁴⁰ BSR has not established a *prima facie* case that Casa's short-lived attempt to operate this 100 mW low-power AM radio station violated any of the Rules.⁴¹ Consequently, BSR's argument is without merit.

16. BSR also alleges that "Ephese may be ineligible under the alien ownership restriction of Section 310(b) of the Communications Act."⁴² It claims that some of the original principals of Ephese were not U.S. citizens.⁴³ In its Opposition, Ephese asserts that it has complied with the Commission's alien ownership standards since its original application filing in 2000;⁴⁴ it states that, on

³⁹ 47 C.F.R. § 73.854, which reads:

No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with other persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended.

See also In the Matter of Creation of a Low Power Radio Service, Second Report and Order, 16 FCC Rcd 8029, 8033 (2001).

⁴⁰ *See* Casa Opposition at Exhibit 1. Casa states that the "whole city" involved was Central Falls, which is one mile in diameter.

⁴¹ *See, e.g.*, 47 C.F.R. §§ 15.209, 15.219, and 15.221; *Public Notice*, "Permitted Forms of Low Power Broadcast Operation," Mimeo No. 14089 (July 14, 1991); OET Bulletin No. 63, "Understanding the FCC Regulations for Low-Power, Non-Licensed Transmitters" (Feb. 1996). Section 15.219 permits operation of an unlicensed 100-milliwatt AM transmitter on a secondary, non-interfering basis, provided that the total length of the antenna and ground lead does not exceed three meters.

⁴² BSR Petition at 2.

⁴³ BSR indicates that Ephese's application lists 16 directors, of whom three (16.75%) are citizens of Haiti. BSR submits that Pastor Eddy LaGuerre, one of the U.S. citizens on Ephese's Board, had left and been replaced by Pastor Bernadot, whose citizenship is unknown to BSR. Further, BSR claims that, during unsuccessful negotiations between BSR and Ephese for a settlement of their competing interest in the Providence LPFM proceeding, Pastor Bernadot gave BSR a list of its then current board members, which included nine members listed in the original application (two of whom were Haitian citizens), and eight new members, whose citizenship was unknown. If two of the new Board members are Haitian citizens, BSR speculates, then four of Ephese's 17 Board members will be aliens (23.5%), and Ephese's proposal will violate 47 U.S.C. § 310(b)(3). BSR states that in light of the fact that Ephese's stated purpose is to serve the Haitian community and it has some Haitian citizens on its board, "the Commission should insist on an amendment to Ephese's application listing all current officers and Board members and their citizenship." BSR Petition at 6.

⁴⁴ *See* Ephese Opposition at 3.

April 25, 2005, it filed an amendment to its application to report its time-share agreement in this proceeding and that all its Board members are United States citizens.⁴⁵

17. Section 310(b)(3) of the Act bars the issuance of a construction permit to an entity that is more than 20 percent owned or controlled by persons who are not U.S. citizens.⁴⁶ Because Ephese does not have stockholders, we look to the persons “who would have the ability, comparable to that of a traditional owner, to influence or control the licensee.”⁴⁷ The record reveals that, at the time Ephese filed its application, only 18.6 per cent of its board members were not U.S. citizens.⁴⁸ In addition, at the time Ephese filed its time-share agreement, Ephese stated that “all board members are United States citizens.”⁴⁹ BSR has provided no evidence that Ephese is in violation of Section 310(b) of the Act, and Ephese has demonstrated that its amended application fully complies with Section 310(b). Accordingly, we find that BSR has not established a *prima facie* case that Ephese does not comply with the alien ownership requirements of Section 310(b).

18. Moreover, BSR claims that one of Ephese’s original principals may have been convicted of a felony. In support of this contention, BSR attaches to its Petition a copy of a description of Case ID P2-1996-0097B from the Superior Court in Providence, Rhode Island, regarding a charge of possession of marijuana (second offense) with regard to a person named “Jacques Darius.” A person with that name was listed as a director and Board member in Ephese’s original application. BSR contends that, if the “Jacques Darius” in the court record is the same person listed in the application as a Director of Ephese,⁵⁰ then Ephese improperly answered the certification at Section II, Question 7 of FCC Form 318 regarding whether any of its principals had ever been convicted of a felony.⁵¹ In its Opposition, Ephese states that, although a person bearing the name of the individual that BSR alleges is a convicted felon was listed as a member of Ephese’s Board in the original Ephese application, he “is no longer a member of the board.”⁵² Ephese adds that BSR has not submitted any substantiated proof that Ephese’s former Board member and

⁴⁵ *See id.*

⁴⁶ 47 U.S.C. § 310(b)(3).

⁴⁷ *See Creation of a Low Power Radio Service*, Memorandum Opinion & Order on Reconsideration, 15 FCC Red 19208, 19244 (2000).

⁴⁸ *See* originally-filed captioned Ephese application, Section II, Question 3(a).

⁴⁹ *See* Ephese Opposition at 3. In the April 25, 2005, amendment, Ephese lists five parties to the application and indicates that each is a citizen of the United States. *See* captioned Ephese application, Section II, Question 3(a), as amended on April 25, 2005.

⁵⁰ BSR states that “[a] search of the ‘Anywho’ website shows only one person with the name ‘Jacques Darius’ in the entire state of Rhode Island. BSR Petition at 7.

⁵¹ Section II, Question 7 of FCC Form 318 states:

The applicant certifies that no adverse finding has been made and no adverse final action has been taken by any court or administrative body as to the applicant, any party to this application, or any non-party equity owner in the applicant, in a civil or criminal proceeding brought under the provisions of any law related to the following: any felony, mass media-related antitrust or unfair competition; fraudulent statements to another governmental unit; or discrimination?

⁵² Ephese Opposition at 3.

the alleged convicted felon are the same person.⁵³ Furthermore, Ephese maintains that it “honestly answered the question on Form 318 at the time of filing in which it affirmed that no felons were on its board.”⁵⁴

19. In determining whether allegations raise a substantial and material question of fact requiring an evidentiary hearing, we are guided by the statutorily prescribed two-prong test of Section 309(d)(1) of the Act. This Section mandates that we must determine whether the allegations of fact, if true, constitute a *prima facie* case that grant of the application would be inconsistent with Section 309(k) of the Act.⁵⁵ If so, the Commission must determine whether, “on the basis of the application, the pleadings filed, or other matters which it may officially notice,” a “substantial and material question of fact is presented.” We must weigh against the allegations all evidence before us and, on the basis of all of these materials, we must decide whether the ultimate question of fact is “substantial” (*i.e.*, “whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.”)⁵⁶ The Commission may focus on either of the two steps, as it deems appropriate, in resolving the issues raised by a petition.⁵⁷

20. Although we find Ephese’s response to these allegations concerning “Jacques Darius” less than definitive, as a result of our review of the matter, we conclude that, as was the case with BSR’s contention that Ephese “*may* be ineligible under the alien ownership restrictions,” its similarly couched contention that “one of Ephese’s directors *may* have been convicted of a felony”⁵⁸ is without basis in fact. First, even assuming *arguendo* that the “Jacques Darius” listed in Case ID P2-1996-0097B is the same individual who was once a member of Ephese’s Board, BSR has failed to provide evidence that he was convicted of a felony by a final adjudication order, which is generally required by the Commission’s *Character Policy Statement* for such a conviction to be considered relevant to Commission licensing proceedings.⁵⁹ Our review of the record revealed that the conviction of the “Jacques Darius” listed in Case ID P2-1996-0097B was amended down from a felony to a misdemeanor on July 1, 1994, when the defendant entered a plea of *nolo contendere*.⁶⁰ Our review of the record has also revealed that the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 47 U.S.C. §§ 309(d)(1), 309(k).

⁵⁶ *Citizen for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985) (citing *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 330 (D.C. Cir. 1974); *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968)).

⁵⁷ *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996).

⁵⁸ *See* Petition at 2 (emphasis added).

⁵⁹ *Character Qualifications in Broadcast Licensing* (“*Character Policy Statement*”), 102 FCC 2d 1179, 1205 (1986) (subsequent history omitted). Non-FCC misconduct is considered to have been “adjudicated” when the “ultimate trier of fact” renders its decision. Generally, the “ultimate trier of fact” is that tribunal whose factual findings are not subject to review *de novo*. *Id.* at n. 62. *See also Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3254 n.6 (1990), and *GAF Broadcasting Company, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 5496, 5499 (2003).

⁶⁰ *See* E-mail from Hon. Henry S. Kinch, Jr., Clerk, Superior Court, Providence/Bristol Counties, Rhode Island, to William D. Freedman, Associate Chief, Media Bureau (April 6, 2007).

previous conviction of “Jacques Darius” was for the misdemeanor of driving with a suspended license.⁶¹ Accordingly, BSR’s meritless allegations against “Jacques Darius” will be given no further consideration in this proceeding.⁶² For this reason, as to BSR’s claim that Ephese may have improperly certified in its application that none of its principals had been convicted of any felony count, because BSR has not established a *prima facie* case that “Jacques Darius” had been convicted of a felony at the time the application was filed (and our review of the record reveals that he was not), we have nothing before us suggesting that the certification was not accurate. Therefore, we conclude that there is no substantial and material question of fact concerning whether Ephese has the character qualifications to be a Commission licensee, and we deny BSR’s Petition as to this issue.

21. *BSR Objection to Time-Share Agreement and Point Aggregation.* In its May 9, 2005 Objection to the amendments reporting the time-share agreement filed by Casa, Ephese, and Zion, BSR reasserts its arguments, considered and rejected above, against Casa and Ephese. BSR also maintains that Zion had entered into a settlement agreement with BSR which was filed with the Commission on December 5, 2003.⁶³ BSR contends that, under that agreement, Zion committed to dismiss its application for consideration, thus, negating BSR’s need to file a petition to deny against Zion’s application, but that Zion subsequently filed its “inconsistent” proposal with Casa and Ephese.

22. Initially, for the reasons stated above, we reject as meritless BSR’s allegations against Casa and Ephese. With regard to Zion’s participation in the time-share agreement, BSR claims that Zion never provided BSR notice that it was terminating its December 5, 2003, agreement with BSR. It states that, because Zion “is pursuing inconsistent paths, [only] the first filing should be honored.”⁶⁴ In its Opposition, Zion argues that, pursuant to Section 73.872(e) of the Rules,⁶⁵ the settlement agreement was “void on its face,” and both parties have known this since 2003. Thus, Zion asserts that BSR can claim no prejudice from Zion’s having elected to pursue another alternative long after BSR knew that the December 2003 settlement agreement was not grantable.⁶⁶ In its Reply, BSR argues that the December 2003 settlement agreement was not subject to Section 73.872(e) because the agreement was merely

⁶¹ See Judiciary of Rhode Island website, www.courts.ri.gov, visited April 16, 2007.

⁶² Section II, Question 9 of the FCC Form 318 requires an applicant to certify that “neither the applicant nor any party to the application is subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862.” Ephese so certified in its application. Our inspection of the Department of Justice’s computer database of “Parties Excluded from Federal Procurement or Nonprocurement Programs” (more commonly known as the “Debarment List”) found no listing for “Jacques Darius” or “Robert Vendettoli,” an assumed name; accordingly, there is no indication in the record that Ephese falsely certified. See U.S. Department of Justice website, <http://www.epls.gov/epls/search.do?multiName=true>, visited April 13, 2007.

⁶³ BSR states that their settlement agreement gave Zion the right to terminate if the settlement had not been approved after one year, but termination was not automatic, and Zion never gave notice of termination to BSR. BSR acknowledges that the agreement also was conditioned on the Commission’s approving BSR’s reimbursing Zion’s expenses and allowed Zion to continue to prosecute its application if expense reimbursement were disallowed. See Objection to Share-Time Agreement and Point Aggregation at 6.

⁶⁴ *Id.* at 2. BSR provides no authority supporting its position.

⁶⁵ 47 C.F.R. § 73.872(e).

⁶⁶ See Casa, Ephese, and Zion “Consolidated Replies to Opposition” at 3.

intended to result in the dismissal of Zion's application and not necessarily in the grant of BSR's application or "a merger of the applicants."⁶⁷

23. We reject BSR's challenge to Zion's participation in its time-share agreement with Casa and Ephese. In the Joint Petition for Approval of Settlement Agreement accompanying the December 5, 2003, BSR/Zion Settlement Agreement, BSR and Zion state as follows:

BSR's obligation to reimburse Zion's expenses is expressly contingent upon a final grant of the BSR application. Zion specifically reserves the right to continue to prosecute its application if its expenses are not reimbursed. Therefore, in the absence of a universal settlement, or withdrawal of the remaining applications other than BSR's, the instant settlement cannot be fully implemented, *and Zion's application should not be dismissed.*⁶⁸

There has been no universal settlement in this case, notwithstanding the fact that these applicants were provided with the specific opportunity to reach one,⁶⁹ and the three other mutually exclusive applications have not been withdrawn or dismissed. Therefore, by the terms of the December 5, 2003, Settlement Agreement, Zion's application was not to be dismissed, and Zion was free to enter into the voluntary time-share agreement with Casa and Ephese.⁷⁰ Moreover, we dismiss as defective the BSR/Zion settlement agreement. Public notices announced a settlement period for mutually exclusive LPFM new station applicants.⁷¹ The several notices which announced the settlement window clearly stated that only universal settlements may be submitted.⁷²

24. Finally, BSR argues in a "Supplement" to its Objection to the time-share agreement that "Zion has contracted to sell its campus and to move the entire institution to a location more than 10 miles away from its proposed community of license."⁷³ BSR argues, therefore, that Zion's established community presence point should be disallowed, causing Zion to be ineligible to participate in a time-sharing agreement with the other tentative selectees.⁷⁴ As evidence, BSR relies on newspapers

⁶⁷ See BSR Reply at 3.

⁶⁸ Joint Request at 2 (emphasis added, footnote omitted).

⁶⁹ See *Letter to Zion Bible Institute et al.*, Reference 1800B3 (MB Feb. 3, 2004).

⁷⁰ The Commission is clearly not the forum for BSR to raise its contractual allegations against Zion. Should BSR believe that Zion has breached the Settlement Agreement, it may make such claims before a court of competent jurisdiction.

⁷¹ See *Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications Filed in Windows I, II, and III*, Public Notice, DA 03-2744 (rel. Aug. 28, 2003); see also *Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications Filed in Window IV*, Public Notice, DA 03-3009 (rel. Oct. 1, 2003). See also *LPFM Report and Order*, 15 FCC Rcd at 2264; 47 C.F.R. § 73.872(e).

⁷² See *id.*

⁷³ BSR Supplement at 1.

⁷⁴ *Id.*

articles⁷⁵ reporting that Zion has placed its campus up for sale and that Zion will move to the former campus of Bradford College in Haverhill, Massachusetts. These submissions cannot provide a basis for disallowing Zion's comparative point for established community presence.⁷⁶ The Commission has consistently held that newspaper articles are the equivalent of hearsay and cannot act as a substitute for affidavits based on personal knowledge that are required to substantiate serious allegations.⁷⁷ Furthermore, BSR's generic and unsupported allegation of "critical harm done to the point process"⁷⁸ does not contain adequate and specific factual allegations sufficient to warrant further inquiry into Zion's captioned application.⁷⁹

25. BSR adds that pursuant to Section 1.65 of the Rules,⁸⁰ Zion should have reported to the Commission its alleged relocation plans. All Commission applicants are responsible for the continuing accuracy of their applications, and therefore, must amend pending applications whenever the information furnished is no longer substantially accurate and complete.⁸¹ Information generally must be reported within 30 days of the change.⁸² Because BSR has not provided probative evidence of a proposed Zion relocation, we find that BSR's claim of a Section 1.65 violation does not contain adequate and specific factual allegations sufficient to warrant further inquiry.

26. *LPFM Selection Process.* Before applying the LPFM mutually exclusive selection procedure preferences to determine the number of merit points to be awarded to each applicant, we first ascertain the basic eligibility of the applicants. In order to further our diversity goals and foster local, community-based service, we do not allow any broadcaster or other media entity subject to our ownership rules to control or to hold an attributable ownership interest in an LPFM station or enter broadcast-related operating agreements with an LPFM licensee.⁸³ Additionally, to foster the local nature of LPFM service, we have limited eligibility to local entities during the first two years that LPFM licenses are available.⁸⁴

⁷⁵ See *id.* at Exhibits 1 and 2. Scott O'Connell, *Zion Bible College Campus in Barrington for Sale for \$13 Million*, *Barrington (Rhode Island) Times*, January 31, 2007; *Barrington Bible College to Move to Massachusetts After All*, *Associated Press*, September 28, 2007.

⁷⁶ *American Mobile Radio Corporation*, Memorandum Opinion and Order, 16 FCC Rcd, 21431, 21436 (2001) ("[T]he Commission has consistently held that newspaper and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements in a petition to deny.").

⁷⁷ *Id.* See also, *Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139 (2003); *Heidi Damsky*, Order, 13 FCC Rcd 16352 (1998); *Pikes Peak Broadcasting Co.*, Memorandum Opinion and Order, 12 FCC Rcd 4626 (1997).

⁷⁸ BSR Supplement at 3.

⁷⁹ *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862 (1986).

⁸⁰ 47 C.F.R. § 1.65.

⁸¹ See *id.*

⁸² *Id.*

⁸³ See 47 C.F.R. § 73.860.

⁸⁴ See 47 C.F.R. § 73.853(b). The *Third Report and Order* amends this rule section. Pursuant to the amended rule 47 C.F.R. § 73.853(b), "[o]nly local applicants will be permitted to submit applications." The amended rule takes effect on March 17, 2008.

Based on the record before us, we conclude that Casa, Ephese, PCR, Zion and BSR are each qualified to hold an LPFM authorization.

27. Mutually exclusive LPFM applications filed by qualified applicants are subject to the comparative selection procedures set forth in Section 73.872 of the Rules.⁸⁵ This procedure awards a maximum of three points, based on three criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which LPFM spectrum has been allocated, with the applicant with the highest points awarded named the tentative selectee:⁸⁶

- Each applicant that certified that it has had an *established community presence of at least two years' duration* is awarded one point. An applicant is deemed to have an established community presence if, for a period of at least two years prior to application, the *applicant* has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna.
- An applicant that has *pledged to operate at least 12 hours per day* is awarded one point.
- An applicant that has *pledged to originate locally at least eight hours of programming per day* is awarded one point. For purposes of this criterion, local origination is defined as the production of programming within 10 miles of the reference coordinates of the proposed transmitting antenna.⁸⁷

28. Under this comparative selection process, the remaining applicants here are awarded the following points:

- *Established Community Presence.* Casa, Ephese, Zion and BSR are each entitled to a point because they have each certified that, for a period of at least two years prior to the filing date of their applications, they had existed as an educational institution or organization and had been physically headquartered, had had a campus, or had had 75 percent of their board members residing within 10 miles of the coordinates of its proposed transmitting antenna.⁸⁸ For the foregoing reasons, notwithstanding PCR's claim of a point under this criterion, because it did not exist for at least two years prior to filing its application, it is not entitled to a point.⁸⁹
- *Proposed Operating Hours.* Casa, Ephese, Zion and BSR are each entitled to a point because they have each pledged to operate at least 12 hours per day.⁹⁰

⁸⁵ 47 C.F.R. § 73.872.

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *See* captioned Casa Application at Section III, Question 1(a); *see also* Exhibit 7; captioned Ephese Application at Section III, Question 1(a); *see also* Exhibit 7; captioned Zion Application at Section III, Question 1(a); *see also* Exhibit 7; and captioned BSR Application at Section III, Question 1(a); *see also* Exhibit 7.

⁸⁹ *See* ¶ 4, *supra*.

⁹⁰ *See* captioned Casa, Ephese, Zion, PCR and BSR Applications at Question 2.

- *Local Program Origination.* Casa, Ephese, Zion and BSR are each entitled to one point because they have each pledged to originate at least eight hours of local programming per day.⁹¹

Total Points. Accordingly, Casa, Ephese, Zion, and BSR are entitled to three points, and PCR is entitled to two points. A time-share agreement regarding the subject facility has been submitted by and between Casa, Ephese, and Zion.⁹² Under the terms of the agreement, Casa proposes to operate its station from midnight to 6:00 a.m. seven days a week; 7:00 to 10:00 a.m. and 8:00 p.m. to midnight on Sundays; 7:00 a.m. to midnight Monday through Thursday; 7:00 a.m. to 9:00 p.m. on Fridays; 7:00 a.m. to 8:00 p.m. on Saturdays; and 10:00 p.m. to midnight on Friday and Saturday. Ephese proposes to operate its station from 6:00 to 7:00 a.m. seven days a week; 9:00 to 10:00 p.m. on Fridays; and 8:00 to 10:00 p.m. on Saturdays. Finally, Zion proposes to operate its station from 10:00 a.m. to 8:00 p.m. on Sundays. We conclude that the acceptance of Casa's, Ephese's and Zion's voluntary time-share agreement, which also aggregates their points and fully complies with the requirements of Section 73.872 of the Rules,⁹³ would serve the public interest, convenience and necessity. Thus, Casa, Ephese, and Zion are the prevailing tentative selectees in this LPFM mutually exclusive group. The terms of the time-share agreement will be made part of the authorization issued to each of these applicants.

III. ORDERING CLAUSES

29. Accordingly, in light of the above discussion, IT IS ORDERED that the Joint Request for Approval of Settlement Agreement filed December 5, 2003, by BSR and Zion IS DENIED and the parties' Settlement Agreement IS DISMISSED.

30. IT IS FURTHER ORDERED that the Petition to Deny filed by Brown Student Radio against the application of Providence Community Radio (File No. BNPL-20000605AJ0) IS GRANTED to the extent indicated and is otherwise DENIED.

31. IT IS FURTHER ORDERED, that the applications of Providence Community Radio (File No. BNPL-20000605AJ0) and Brown Student Radio (File No. BNPL-20000605AGJ) ARE DISMISSED.

32. IT IS FURTHER ORDERED that the Informal Objection filed by John O. Broomall to the application of Brown Student Radio (File No. BNPL-20000605AGJ) IS DISMISSED as moot.⁹⁴

⁹¹ See captioned Casa, Ephese, Zion, PCR and BSR Applications at Question 3.

⁹² See 47 C.F.R. §73.872. Section 73.872(c) states in part:

Voluntary time-sharing. If mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by submitting, within 30 days of the release of a public notice announcing the tie, a time-share proposal. Such proposals shall be treated as amendments to the time-share proponents' applications, and shall become part of the terms of the station license. Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; otherwise, time-share proponents' points will be aggregated to determine the tentative selectees. . . .

⁹³ See 47 C.F.R. § 73.872(c).

⁹⁴ The Commission is dismissing the BSR application in this Order as a non-prevailing tentative selectee.

33. IT IS FURTHER ORDERED that the “Motion to Reopen Proceedings” filed by Providence Community Radio, Inc. IS HEREBY DISMISSED as moot.⁹⁵

34. IT IS FURTHER ORDERED that the March 30, 2004, Petitions to Deny filed by Brown Student Radio against the applications of Casa and Ephese ARE DENIED.

35. IT IS FURTHER ORDERED that the May 9, 2005 “Objection[s] to Share-Time Agreement and Point Aggregation” filed by Brown Student Radio regarding the applications of Casa, Ephese, and Zion ARE DENIED.

36. IT IS FURTHER ORDERED that the voluntary time-share agreement filed April 25, 2005, by and between Casa, Ephese, and Zion IS GRANTED, and the terms of that agreement will become part of each party’s authorization.

37. IT IS FURTHER ORDERED, that the applications of Casa de Oracion Getsemani (File No. BNPL-20000605AFI); Ephese French SDA Church (File No. BNPL-20000606AAV); and Zion Bible Institute (File No. BNPL-20000602ADH) ARE GRANTED.

38. IT IS FURTHER ORDERED that copies of this *Memorandum Opinion and Order* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Casa de Oracion Getsemani, 702-704 Broad Street, Central Falls, Rhode Island 02863; Ephese French SDA Church, 857 Eddy Street, Providence, Rhode Island 02905; Zion Bible Institute, 27 Middle Highway, Barrington, Rhode Island 02806, and to its counsel Stephen T. Yelverton, Esq., 601 Pennsylvania Avenue, N.W., Suite 900, Washington, DC 20004; Brown Student Radio, P.O. Box 1930, Providence, Rhode Island 02912, and to its counsel, Peter Tannenwald, Esq., Fletcher, Heald & Hildreth, PLC, 1300 N. 17th St., 11th Floor, Arlington, Virginia 22209; and Providence Community Radio, P.O. Box 6785, Providence, Rhode Island 02940, and John O. Broomall, 284 Louie Lane, Canton, Georgia 30115.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁵ In its Motion, PCR states that the staff mailed two “notices” in February 2004 and 2005 to the incorrect address even though PCR alleges that it properly filed an FCC Form 5072, “Change in Official Mailing Address” with the Commission in November 2003. However, because the Commission is dismissing the PCR application herein as a non-prevailing tentative selectee, the Motion PCR filed to reopen proceedings is dismissed as moot.