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In Reply Refer to:
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In re: **Reserved Allotment Group 44**
New NCE-FM, Rhinebeck, New York
Christian Media Associates, Inc.
Facility ID No. 184688
File No. BNPED-20100226AFU

New NCE-FM, Rhinebeck, New York
Calvary Chapel of the Hudson Valley
Facility ID No. 185008
File No. BNPED - 20100226AAJ

New NCE-FM, Rhinebeck, New York
Birds of a Feather Media Limited
Facility ID No. 184660
File No BNPED-20100223ABY

Petition for Partial Reconsideration

Dear Counsel:

We have before us: the referenced applications, filed by Christian Media Associates, Inc. ("CMA"), Birds of a Feather Media Limited ("BFML"), and Calvary Chapel of the Hudson Valley ("CCHV"), for a new, noncommercial educational ("NCE") FM station on Channel 273A at Rhinebeck, New York (the "CMA Application", "BFML Application", and "CCHV Application," respectively); the Petition for Partial Reconsideration filed by BFML on July 21, 2011 ("Petition")¹; and a Response to a

¹ BFML subsequently submitted a Supplement to its Petition ("Supplement") on February 23, 2012. CMA submitted a Response to the Supplement ("Opposition") on March 6, 2012. BFML submitted a Response to the Opposition ("Reply") on March 9, 2012. CCHV did not submit a response to the Petition.

staff letter of inquiry filed by CMA on April 30, 2012 (“LOI Response”).² For the reasons set forth below, we dismiss BFML’s Petition and Supplement.

Background. CMA, BFML, CCHV, and eight other parties³ filed mutually exclusive applications for a new NCE FM station on Channel 273A at Rhinebeck, New York. The Commission subsequently designated these applications as NCE Reserved Allotment Group No. 44.⁴ In the point hearing, the CMA, BFML, CCHV, Marist, and SLF Applications tied for the highest total with five points. These Applications proceeded to a tie-breaker where Marist was eliminated.⁵ The remaining four Applications—CMA, BFML, CCHV, and SLF—were tentatively selected on a time-sharing basis, triggering a 30-day period to file petitions to deny against the tentative selectees.⁶

In the Petition, BFML argues that neither CMA nor CCHV is entitled to points as an established local applicant or for diversity of ownership, and that each applicant would only expand the “already-dominate [sic] presence of evangelical programming.”⁷ In its Supplement, BFML argues that CMA does not qualify for local diversity of ownership points as defined by the Commission’s Rules (“Rules”)⁸ because it has other attributable radio interests in the community.⁹ BFML asserts that CMA is a wholly-owned subsidiary of Redeemer Broadcasting, Inc. (“RBI”), making RBI the real party in interest to the CMA Application. It notes that RBI is also the licensee of translator station W287BG in Rhinebeck, New York and reasons that CMA should not have been awarded two comparative points under the diversity of ownership criterion because the service contours of translator station and proposed new station overlap. Without these points, BFML notes that the CMA Application would no longer be tied with the BFML Application, its tentative selection would be rescinded, and the CMA Application would be dismissed.

In its Opposition, CMA responds that it severed its relationship with RBI on November 18, 2009, three months prior to the filing of the CMA Application. CMA maintains that Dan Elmendorf, President of RBI, formerly served as CMA’s Technical Director but resigned from his position after the severance. Mr. Elmendorf declares that he no longer exerts any control over CMA and only occasionally offers his technical input as a consultant.¹⁰

On March 29, 2012, the staff sent CMA a *Letter of Inquiry* (“LOI”), requesting that CMA address the issues raised by BFML’s Supplement and the related documents. Specifically, the LOI asked CMA to

² BFLA submitted the Declaration, under penalty of perjury, of Randi Ripley on May 10, 2012 (“Ripley Declaration”).

³ The other eight applicants were JCM Radio of NY, Inc. (File No. BNPED-20100222AAP), PZK Hudson Foundation Radio, Inc. (File No. BNPED-20100222ACJ), Grace Public Radio (File No. BNPED-20100223AAD), WMHT Educational Telecommunications (File No. BNPED-20100225AAK), Counterpoint Communications, Inc. (File No. BNPED-20100226ACD), Foothills Public Radio, Inc. (File No. BNPED-20100226AEM), Marist College (File No. BNPED-20100226AGS) (“Marist”), and Somos La Llave del Futuro (File No. BNPED-20100226AIM) (“SLF”).

⁴ See *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058, 9071 (MB 2011) (“*Comparative Consideration Order*”).

⁵ Marist certified that it had an attributable interest in two pending license applications, whereas CMA, BFML, CCHV, and SLF only had an attributable interest in the present license application for Rhinebeck, New York.

⁶ *Id.* at 9098.

⁷ Petition at 2–3.

⁸ See 47 C.F.R. § 73.7003(b).

⁹ Supplement at 2 – 3.

¹⁰ Opposition, Declaration, under penalty of perjury, of Dan Elmendorf (“Elmendorf Declaration”).

explain its current relationship with RBI and Mr. Elmendorf, disclose sources of funding, and identify who has control over CMA's policy decisions and operations. On April 30, 2012, CMA submitted its LOI Response, stating that RBI and Mr. Elmendorf do not have an ownership interest in or exercise any degree of *de facto* nor *de jure* control over CMA. CMA maintains that the CMA Board of Directors controls all policies regarding programming, personnel, and finances, and it will manage the operations of the station if CMA's Application is granted.¹¹ Additionally, CMA lists several members of the Elmendorf family and RBI as contributors to CMA for the purpose of helping CMA pay outstanding legal fees.¹² In the Ripley Declaration, BFML argues that these contributions are evidence of a financial relationship between CMA and RBI, which extend beyond the date of separation in 2009.¹³ BFML claims this financial relationship is sufficient to establish an attributable interest in RBI's FM translator station in Rhinebeck, New York, and that as such, CMA is ineligible for points for local diversity of ownership.

Discussion. We initially note that the *Comparative Consideration Order* against which reconsideration is sought took no action with regard to any of the underlying applications in Group 44. Confirming the interlocutory nature of the *Comparative Consideration Order*, the Bureau repeatedly emphasized that the selections were "tentative" and took no final action on either the CMA or BFML Applications.¹⁴ Section 1.106(a)(1) of the Rules specifically prohibits petitions for reconsideration of such interlocutory orders.¹⁵ We, therefore, dismiss BFML's Petition and Supplement as procedurally improper.

However, even if we consider BFML's arguments, we find them unpersuasive. With respect to its allegations that CCHV is neither local nor diverse because it is part of a larger national Calvary Chapel organization, BFML's Petition does nothing to counter the CCHV Application materials which support its established local applicant and for local diversity of ownership point claims.¹⁶ Further, even if we were to consider CCHV as formally affiliated with the national network of Calvary Chapel entities, BFML does not introduce any other overlapping Calvary Chapel service contours, which would potentially invalidate CCHV's points. Therefore, BFML has not established a *prima facie* case that CCHV was not entitled to its credited points.

Additionally, BFML asserts that CCHV's proposed programming will not serve the interests of localism and diversity because of the existing prevalence of evangelical Christian stations in the region. The Commission requires that NCE applicants have an educational program and demonstrate how its programming will be used for the advancement of that program.¹⁷ We find that CCHV's Application has demonstrated that it is a nonprofit educational organization, with distinct educational objectives, and that

¹¹ LOI Response at ¶ 2.

¹² LOI Response at ¶ 3.

¹³ Ripley Declaration at 1 – 2.

¹⁴ See *Comparative Consideration Order*, 26 FCC Rcd at 9098 (explaining that "[BFML and CMA] . . . are TENTATIVELY SELECTED to be awarded construction permits ON A TIME-SHARING BASIS for a new NCE FM station in Rhinebeck, New York").

¹⁵ See 47 C.F.R. § 1.106(a)(1). See also *Comparative Consideration Order*, 26 FCC Rcd at 9094 ("Parties should not raise . . . [objections] as petitions for reconsideration of the instant Order because the point hearings herein take no final action on any application, and petitions for reconsideration do not lie against such interlocutory decisions"); *State of Oregon*, Letter, 23 FCC Rcd 11576 (MB 2008).

¹⁶ CCHV Application at Exhibit 14. CCHV included its "Bylaws Amendment" and "Certificate of Incorporation" as proof of its points qualifications. It is incorporated in Poughkeepsie, New York, which is within 25 miles of Rhinebeck, New York.

¹⁷ See *Denny and Marge Hazen Ministries, Inc.*, Letter, 23 FCC Rcd 11579, 11581-82 (MB 2008) ("*Hazen Ministries*").

it would use its station's programming to further those objectives.¹⁸ We decline to consider BFML's other format-based objections. It is well settled that the Commission historically "has had the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming."¹⁹

BFML's Petition raises the same arguments against the CMA Application. They are equally unsupported, with one exception. In its Supplement, BFML alleges that CMA has an attributable interest in RBI's translator authorization in the Rhinebeck, New York region and, therefore, is not eligible for diversity points. BFML claims that CMA, a former subsidiary of RBI, maintains a relationship with RBI that necessitates treating RBI as a party in interest. We find BFML's arguments unpersuasive.

BFML has not provided sufficient evidence to establish that CMA has an attributable interest in RBI's existing authorization.²⁰ CMA has provided documentary evidence demonstrating that it formally severed its subsidiary-parent relationship with RBI on November 18, 2009, more than three months prior to CMA filing its present Application on February 26, 2010.²¹ The fact that CMA was RBI's subsidiary until that time is immaterial.²² Moreover, BFML's assertion that RBI and CMA have a continuing "financial relationship" because of RBI's contributions to CMA does not support the claim that CMA has an attributable interest in RBI. In its LOI Response, CMA affirms that RBI does not hold any of CMA's equity or debt and has no influence on CMA's programming.²³ Therefore, based on the evidence available, the relationship that RBI and CMA currently share is not recognized by Section 73.7000 of the Rules as creating an attributable interest.

Finally, with respect to BFML's allegation that RBI is a real party-in-interest to the CMA Application, the Separation Agreement confirms that RBI does not have *de jure* control over CMA. There is also insufficient evidence to support a claim that RBI exercises *de facto* control.²⁴ Both CMA and BFML present hearsay evidence as to what was specifically said regarding Mr. Elmendorf's position with CMA after the separation.²⁵ However, CMA's LOI Response, the Elmendorf Declaration,²⁶ and the

¹⁸ See CCHV Application at Exhibit 2. An applicant organization such as a church or ministry may operate on channels reserved for NCE stations. See *Hazen Ministries*, 23 FCC Rcd at 11581.

¹⁹ *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Notice of Proposed Rule Making, 87 FCC 2d 716, 732 (1981). See also *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) (licensees have broad discretion over programming decisions).

²⁰ See 47 C.F.R. § 73.7000. Attributable interests include the authorizations of an applicant, its parent, subsidiaries, their officers, or members of their governing boards. Alternatively, the interests of an entity providing more than 33 percent of an applicant's equity or debt or supplying at least 15 percent of the station's programming are also considered an attributable interest. This criterion is measured from the snapshot date of filing onward.

²¹ LOI Response at Attachment A ("Separation Agreement").

²² See *Calvary Chapel of Honolulu, Inc.*, Letter, 22 FCC Rcd 17654, 17657 – 58 (MB 2007) (finding that a board member's expired position with another organization did not establish an attributable interest in that organization).

²³ LOI Response at ¶¶ 2 – 3.

²⁴ The Commission evaluates real party in interest allegations concerning an application as it does those concerning *de facto* control of a permittee or licensee. See *Univision Holdings, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6675 (1992), *recon. denied*, Memorandum Opinion and Order, 8 FCC Rcd 3931 (1993). In determining whether an entity has *de facto* control of a broadcasting applicant or licensee, we examine the policies governing station programming, personnel, and finances. A broadcast entity's surrender of control over any one of these indicia is sufficient to find that the other entity has *de facto* control. See, e.g., *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) ("Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control").

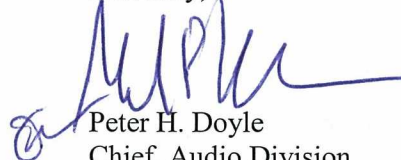
²⁵ BFML presents the Declaration under penalty of perjury of Albert Davis, who claims that Kenneth Plog told him that Mr. Elmendorf was "handling CMA's affairs." Supplement at Exhibit 1. CMA presents the Elmendorf

Affidavit of Kenneth Plog²⁷ each state clearly that Mr. Elmendorf does not exercise any operational control over CMA and that CMA's Board controls all policies on programming, personnel, and finances. CMA has stated that it holds a "different educational methodology"²⁸ than RBI and has provided a list of potential programming sources, none of which relate to RBI.²⁹ CMA and RBI do not share any of the same management, engineering, or legal personnel.³⁰ CMA's information on programming and personnel is uncontested by BFML. Finally, BFML has not shown that the donations from RBI or the Elmendorf family, which were used for payments to CMA's counsel, provide RBI with any influence over CMA's financial policies, particularly when CMA has provided sworn, uncontested declarations that its board of directors controls those policies.³¹ In this context, BFML's hearsay statement of Albert Davis, even if true, is of little probative value.³² CMA has adequately rebutted BFML's charges.

In light of its procedural and substantive defects, we find that BFML's arguments do not warrant dismissal of the CMA Application or the CCHV Application.

Conclusions/Actions: Accordingly, IT IS ORDERED, that the Petition for Partial Reconsideration filed on July 21, 2011, and the Supplement filed on February 23, 2012, by Birds of a Feather Media Limited ARE DISMISSED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Birds of a Feather Media Limited
Christian Media Associates, Inc.
Calvary Chapel of the Hudson Valley
Somos La Llave del Futuro

Declaration, who claims that Mr. Plog actually said that CMA was "using [Mr. Elmendorf's] services." Opposition, Elmendorf Declaration.

²⁶ Opposition, Elmendorf Declaration.

²⁷ Opposition, Affidavit of Kenneth Plog.

²⁸ LOI Response at ¶ 2.

²⁹ LOI Response at ¶ 6.

³⁰ LOI Response at ¶ 4; compare CMA Application at 6 (listing CMA's Board of Directors), with RBI Ownership Report (File No. BOA-20111118CRP) (listing RBI's Board of Directors).

³¹ LOI Response at ¶¶ 2 – 3. CMA indicates that RBI's donation to CMA, apparently made at the time of the corporate separation from RBI, offset an earlier donation from CMA to RBI. LOI Response at ¶ 2.

³² See *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968) ("Contradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing").