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DA 07-2679

In Reply Refer to:

1800B3-BSH

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Rick Anderson, President
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In Re: Montmorenci United Methodist Church
Candler, North Carolina
Facility ID No. 133487
File No. BNPL-20010614ACY

Mount Pisgah Adventist Educational
Media
Candler, North Carolina
Facility ID No. 135779
File No. BNPL-20010615BDV

**Applications for New LPFM Stations
Petition for Reconsideration**

Dear Ms. Johnston and Mr. Anderson:

This letter refers to the above-noted applications of Montmorenci United Methodist Church ("MUMC") and Mount Pisgah Adventist Educational Media ("Mount Pisgah") for a new Low Power FM ("LPFM") station in Candler, North Carolina. By letter dated April 19, 2005,¹ the Audio Division, Media Bureau granted MUMC's application and dismissed Mount Pisgah's application ("Letter Decision"). On May 23, 2005, Mount Pisgah filed a Petition for Reconsideration ("Petition").² For the reasons set forth below, we deny the Petition.

Background. MUMC and Mount Pisgah filed mutually exclusive applications for a construction permit to build a new LPFM station in Candler, North Carolina.

MUMC Application Issues. On April 12, 2004, Mount Pisgah filed a Petition to Deny the MUMC application, first alleging that MUMC is not an incorporated, not-for-profit local entity as

¹ Letter to Donald E. Martin, Esq. Henry A. Solomon, Esq., and Vernon G. Snyder, Ref. 1800B3-SS (MB Apr. 19, 2005).

² MUMC filed an Opposition on June 7, 2005, and Mount Pisgah filed a Reply on June 17, 2005.

required by Section 73.853(a)(1) of the Commission’s Rules (the “Rules”).³ Mount Pisgah further alleged that, through its relationship to the broader United Methodist Church, MUMC has prohibited attributable interests in at least one LPFM station, as well as in other full-service broadcast stations. The Letter Decision initially found that MUMC had demonstrated that it was a *bona fide* unincorporated association recognized by North Carolina law and engaged in activities in the Candler community at the time that it filed its original application.⁴ In rejecting Mount Pisgah’s claim to the contrary, the Letter Decision stated that “[T]here is no requirement in the Commission’s LPFM rules requiring applicants for LPFM facilities to be incorporated”⁵

Concerning Mount Pisgah’s prohibited attributable interests claim against MUMC, the Letter Decision next found that “MUMC has demonstrated that it has a local purpose that can be distinguished from the purpose of the national organization with which it is affiliated.”⁶ Additionally, the Letter Decision stated that the “program” statement submitted with MUMC’s application⁷ “also serves to distinguish MUMC from other individual UMC applicants, and individual UMC licensees that operate various broadcast stations throughout the country.”⁸ Accordingly, the Letter Decision found that MUMC held no attributable media interests and therefore complied with the LPFM cross and multiple-ownership restrictions. The Letter Decision concluded that Mount Pisgah had raised no substantial and material question of fact calling for further inquiry regarding MUMC’s application.⁹

Mount Pisgah Application Issues. On May 7, 2004, WTL Communications, Inc. filed an Informal Objection to the Mt. Pisgah application, alleging, *inter alia*, that Mount Pisgah failed to demonstrate that it was a non-profit legal entity, as it failed to provide its articles of incorporation or indicate the status of its incorporation on the application filing date. The Letter Decision agreed and found that Mount Pisgah was not incorporated on June 15, 2001, when it filed the captioned application, claiming to be a non-profit corporation organized under the laws of North Carolina.¹⁰ Thus, the staff found that Mount Pisgah had incorrectly claimed corporate status at the time of filing. Moreover, unlike MUMC, Mount Pisgah had not provided “any other official documentation showing the applicant’s existence as a legal entity at the time the application was filed.”¹¹ Accordingly, the Letter Decision dismissed Mount Pisgah’s application as inadvertently accepted for filing.

³ 47 C.F.R. § 73.853(a)(1).

⁴ Letter Decision at 3.

⁵ *Id.*

⁶ *Id.* at 4, citing Instructions for FCC Form 318, pp. 5-6.

⁷ MUMC Application, Exhibit 2,

⁸ Letter Decision at 4-5.

⁹ *Id.* at 4.

¹⁰ *Id.* at 6. Review of the North Carolina Secretary of State database of corporations revealed that Mount Pisgah was not incorporated until July 3, 2001.

¹¹ *Id.*

Discussion. The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of the petitioner’s last opportunity to present such matters.¹² The Petition repeats arguments previously made, but has failed to show a material error or omission in the grant of MUMC’s application.

MUMC Application. On reconsideration, Mount Pisgah again contends that MUMC’s application should not be granted because MUMC holds attributable interests in other broadcast stations.¹³ Specifically, Mount Pisgah reargues that MUMC is not sufficiently autonomous from the national United Methodist Church to escape the attribution of ownership interests in broadcast stations held by other entities within the denomination. Mount Pisgah acknowledges that under the Rules a “local chapter of a national or other large organization shall not have the attributable interests of the national organization attributed to it provided that the local chapter is separately incorporated and has a distinct local presence and mission.”¹⁴ It contends, however, that MUMC cannot avail itself of this exemption because MUMC is not incorporated.

We disagree. As stated in the Letter Decision, there is no requirement in the Commission’s LPFM Rules that applicants be incorporated. Eligible applicants must be non-profit educational organizations,¹⁵ but may include NCE institutions, non-stock corporations, associations, state and local governments, or other entities recognized under state law. It therefore follows that a local entity applying for an LPFM license that is affiliated with an unincorporated national organization¹⁶ need not be incorporated to qualify for the exception. The rule is designed to limit the attribution of the parent’s media interests in situations in which the applicant has both a distinct legal status and a local presence and mission. In this regard, MUMC has met its burden. As stated in the Letter Decision, “[A]lthough MUMC is not incorporated, it has clearly demonstrated that it is lawful, locally organized, and independent of the national UMC.”¹⁷

Mount Pisgah argues in the alternative that if the exemption is not limited to incorporated applicants, attribution is required because MUMC is not truly independent of the national organization.¹⁸ We find Mount Pisgah’s argument unpersuasive. In its Opposition, MUMC attests that it has shown independence from the United Methodist Church during its “close to 150-year ministry to congregants in

¹² 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).

¹³ *See* 47 C.F.R. §§ 73.855, 73.860.

¹⁴ 47 C.F.R. § 73.858(b).

¹⁵ 47 C.F.R. § 73.853(a)(1).

¹⁶ A staff call to the information service number provided at the United Methodist Church website confirms that the United Methodist Church is not incorporated. *See* <http://www.umc.org> (accessed Apr. 26, 2007).

¹⁷ Letter Decision at 4.

¹⁸ Petition at 4.

Candler, N.C.”¹⁹ Moreover, we agree with the Letter Decision’s finding that “[T]he information contained in the program statement,²⁰ coupled with the fact that MUMC has been physically headquartered in the city of Candler, North Carolina, since its establishment in 1857 persuades us that MUMC can be considered to have a local purpose distinguishable from any ‘national’ UMC entity.”²¹ On reconsideration, Mount Pisgah argues for the first time that *The Book of Discipline of the United Methodist Church*, “the book of law of the United Methodist Church,”²² supports its contention that MUMC lacks independence from the United Methodist Church. We will not consider this untimely raised issue because Mount Pisgah has failed to demonstrate that it could not have raised this argument at an earlier stage of this proceeding or that consideration of this flyspecking argument is required in the public interest.²³

Mount Pisgah Application. Concerning the dismissal of its application, Mount Pisgah argues that the staff action is unsustainable because Mount Pisgah completed its incorporation process less than three weeks after application filing, on July 3, 2001.²⁴ Mount Pisgah further argues that, should the Commission “fail to recognize Mount Pisgah’s corporate status . . . Mount Pisgah is entitled to recognition as an eligible unincorporated association for the period of time between its FCC filing date and the date on which the corporation came into existence.”²⁵ We disagree. As an initial matter, Mount Pisgah was unincorporated when it filed its application on June 15, 2001. It is simply not the case, as Mount Pisgah erroneously claimed in its initial application filing, that it was at the time of application filing a “non-stock, not-for-profit corporation organized under the laws of the State of North Carolina in 2001.”²⁶

Moreover, we note that Mount Pisgah fails to provide any documentation in support of its new alternative theory that it was an eligible unincorporated association at the time that it filed the application. This theory is based solely on Mount Pisgah’s claim that by “associating together for the purpose of obtaining and operating new a LPFM station (sic), the principals of Mount Pisgah performed enough conduct to indicate a unity of purpose that would qualify it to be a cognizable legal entity under North Carolina law.”²⁷ In support of this theory Mount Pisgah states that North Carolina law recognizes and permits unincorporated associations, and submits portions of three state statutes. The first cited statute

¹⁹ Opposition at 2.

²⁰ See notes 7 and 8 *supra* and accompanying text.

²¹ Letter Decision at 5.

²² Petition at 4.

²³ See 47 C.F.R. § 1.106(c); see also *Southeast Arkansas Radio, Inc.*, Memorandum Opinion and Order, 61 FCC 2d 72 (1976) (reconsideration denied where evidence could have been discovered with due diligence).

²⁴ Petition at 6.

²⁵ *Id.* at 10.

²⁶ Mount Pisgah Application, Exhibit response to Section II, Question 2(a).

²⁷ Petition at 10.

states that unincorporated associations “may hereafter sue or be sued under the name by which they are commonly known or called, or under which they are doing business, to the same extent as any other legal entity established by law. . . .”²⁸ The second state statute is cited to demonstrate that unincorporated entities can be non-profit in nature,²⁹ and the third statute is cited to show that such entities are authorized to hold real estate in their own names.³⁰ Notwithstanding the state recognition of unincorporated associations, Mount Pisgah posits that there is “no statutory guidance for the requisites to become a recognizable unincorporated association.”³¹ However, Mount Pisgah contends, a decision from the North Carolina Court of Appeals indicates that the requirements are minimal.

The only case cited as support by Mount Pisgah involves a dispute between two factions of the Cherokee Home Demonstration Club (“Club”).³² Club members had erected a clubhouse on property owned by the club. The decision states that the clubhouse was used for approximately fifteen years for Club activities and fellowship dinners. Two factions of the Club had a falling out and litigation ensued. The decision notes that the Club had no rules, regulations, bylaws, or membership cards of its own. Instead, the decision states, the Club followed the guidelines of the North Carolina Extension Homemakers Association, Inc., a state organization administered through the offices of North Carolina County Agents. Mount Pisgah’s only argument that this case supports Mount Pisgah’s existence as an unincorporated association is that the Club did not have its own bylaws. We find the case to be inapposite, and that citation to a Club which engaged in activities for fifteen years does not support Mount Pisgah’s assertion of being an unincorporated entity at the time of filing its application, merely because the Club did not have its own bylaws.

Mount Pisgah’s argument that unincorporated, non-profit organizations are recognized under North Carolina law does not demonstrate that Mount Pisgah’s modest pre-filing activity qualified it to be such an organization at the time of the filing of its application. Furthermore, Mount Pisgah has offered no evidence to indicate that it was considered by itself or others to be an unincorporated association at the time of its filing. In sum, Mount Pisgah has not provided a sufficient legal basis to demonstrate that it qualifies under North Carolina law as a recognizable unincorporated association. Accordingly, we must reject Mount Pisgah’s conclusory assertion that it is eligible to hold an LPFM authorization as an unincorporated association. The Petition neither establishes material error nor raises additional facts after its last opportunity to present such matters, and will therefore be denied.³³

²⁸ *North Carolina General Statutes*, § 1-69.1.

²⁹ *Id.*, § 55-1-40(9)a.3.

³⁰ *Id.*, § 39-24.

³¹ Petition at 10.

³² *Cherokee Home Demonstration Club v. Oxendine*, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

³³ See *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

Conclusion/Actions. Accordingly, IT IS ORDERED, that Mount Pisgah Adventist Educational Media's May 23, 2005, Petition for Reconsideration IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Donald E. Martin, Esq.
Henry A. Solomon, Esq.