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Mr. Dan J. Alpert, Esq.  
Vida Ministry Inc.  
2120 21st Rd. N  
Arlington, VA 22201  
(sent by electronic mail to: [DJA@COMMLAW.TV](mailto:DJA@COMMLAW.TV))

Mr. Charles E Keiler  
Ethree Group, Inc.  
271 NW 53 Court  
Deerfield Beach, FL 33064  
(sent by electronic mail to: [ckeiler@ethree.us](mailto:ckeiler@ethree.us))

In re: **NCE MX Group 52**

**Vida Ministry Inc.**

New NCE, Duck Key, Florida  
Facility ID No. 768208  
File No. 0000167107

**Ethree Group, Inc.**

New NCE, Key Colony Beach, Florida  
Facility ID No. 768682  
File No. 0000167098

**Petition to Deny**

Dear Counsel and Applicant:

We have before us two mutually exclusive applications filed by Vida Ministry Inc. (VMI) and Ethree Group, Inc. (EGI) for construction permits for new noncommercial educational (NCE) FM stations in communities in Florida, which the Media Bureau (Bureau) designated as NCE MX Group 52.<sup>1</sup> The

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<sup>1</sup> *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Education Stations; Opens Window to Accept Settlements and Technical Amendments*, MB Docket No. 20-343, Public Notice, DA 21-1476 (MB Nov. 29, 2021); *see also* Application File Nos. 0000167107 (VMI Application) and 0000167098 (EGI Application).

Bureau identified the EGI Application as the tentative selectee of the group.<sup>2</sup> We also have before us the Petition to Deny (Petition) the EGI Application filed by VMI,<sup>3</sup> and EGI's Opposition to the Petition.<sup>4</sup> For the reasons set forth below, we grant the Petition in part, rescind our tentative selection of the EGI Application, and refer NCE MX Group 52 to the Commission to conduct a point system analysis.<sup>5</sup>

*Background.* The subject applications were filed during the 2021 NCE filing window, which was open from November 2, 2021, until November 9, 2021.<sup>6</sup> In the *First Fair Distribution Order*, the Bureau conducted a fair distribution analysis pursuant to section 307(b) of the Communications Act of 1934, as amended (Act),<sup>7</sup> determined that only the EGI Application was eligible for a fair distribution preference, and because VMI claimed no fair distribution preference, identified the EGI Application as the tentative selectee of NCE MX Group 52.<sup>8</sup>

In the Petition, VMI argues that the Bureau improperly relied on the EGI Application's fair distribution attachment, which contained inaccurate service population totals based on a different transmitter site—located in Big Pine, Florida—instead of its proposed community of Key Colony Beach, Florida.<sup>9</sup> VMI maintains that absent accurate supporting service population totals, the Bureau should reject EGI's fair distribution claim and declare the VMI Application as the tentative selectee of NCE MX Group 52.<sup>10</sup>

In its opposition to the Petition (Opposition), EGI argues that it experienced filing complications, which it believed to be rectified, and acknowledges that it mistakenly attached the exhibit for a different application, which accordingly reflects inaccurate service population totals.<sup>11</sup> However, EGI maintains that its application states a correct claim of fair distribution preference because despite the erroneous attachment, accurate totals demonstrate that it would provide a secondary service to over 2,000 people

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<sup>2</sup> *Threshold Fair Distribution Analysis of 15 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-238 at 4, para. 11 (MB Mar. 9, 2022) (*First Fair Distribution Order*).

<sup>3</sup> Pleading File No. 0000189096 (filed Apr. 8, 2022).

<sup>4</sup> Pleading File No. 0000190787 (filed May 15, 2022). We also note that EGI's Opposition is untimely. 47 CFR § 1.45(b) requires that oppositions be filed with 10 days of a petition to deny. However, we will consider the Opposition in the interest of having a complete record.

<sup>5</sup> See 47 CFR § 73.7002(b). The point system analysis, conducted when the section 307(b) analysis is not determinative, is considered a simplified "hearing" for purposes of 47 U.S.C. § 155(c)(1). See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7420 (2001) (*NCE Order*).

<sup>6</sup> *Media Bureau Announces NCE FM New Station Application Filing Window; Window Open from November 2, 2021, to November 9, 2021*, MB Docket No. 20-343, Public Notice, 36 FCC Rcd 7449 (MB 2021).

<sup>7</sup> See *First Fair Distribution Order* at 2-3, paras. 3-6.

<sup>8</sup> *Id.* at 4, para. 11.

<sup>9</sup> Petition at 1; EGI Application at Fair Distribution of Service Attachment ("Second Service 60 dBu – Pop Served 10652, Aggregated Pop Service 42991"). The attachment identifies Big Pine, Florida, as the community of license, and the contour map does not provide any coverage to Key Colony Beach.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> Opposition at 1.

and more than 10 percent of the total population.<sup>12</sup> EGI further maintains that despite the error, it should remain the tentative selectee since it claims a fair distribution preference and VMI does not.<sup>13</sup>

*Discussion.* Pursuant to section 309(d) of the Act,<sup>14</sup> petitions to deny and informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest.<sup>15</sup>

The Bureau makes clear that applicant fair distribution claims must be readily ascertainable from timely-filed application exhibits.<sup>16</sup> EGI's Application includes a fair distribution preference exhibit reflecting the population totals of a community, which is not its proposed community of license, Key Colony Beach. In response to VMI's Petition, EGI filed an Opposition, which includes an amended fair distribution of service exhibit reflecting accurate population totals for Key Colony Beach, Florida. However, the Commission and the Bureau have consistently rejected similar post-window amendments which attempt to correct population figures.<sup>17</sup> The Bureau has also rejected an amendment as an attempt to enhance a comparative position when the initial application erroneously used population data from a different community than the applicant proposed to serve.<sup>18</sup>

Because EGI's Application did not contain the required exhibit at the time the window closed, we grant the Petition in part and rescind our initial tentative selection of the EGI Application.

Rescinding our initial tentative selection of the EGI Application, however, does not automatically render the VMI application a replacement tentative selectee as VMI requests. Therefore, we deny in part

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<sup>12</sup> Opposition at 2 and Exh. 1 ("Second Service 60 dBu – Pop Served 4299, Aggregate – Pop 11434").

<sup>13</sup> *Id.* at 2.

<sup>14</sup> 47 U.S.C. § 309(d).

<sup>15</sup> See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F. 2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864, para. 6 (1986) (petitions to deny and informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>16</sup> To be considered timely-filed, exhibits must be filed by the close of the filing window. See *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2- 9, 2021, Window Limited Application Filing Freeze to Commence on October 5, 2021*, Public Notice, DA 21-885, 2021 WL 3158377 (MB July 23, 2021) (*NCE Filing Procedures Public Notice*). See also *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, 26 FCC Rcd 9058, 9063 (2011) (comparative qualification claims not supported with documentation on file by close of window cannot be credited).

<sup>17</sup> *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 30 FCC Rcd 5161, 5170, paras. 26-27 (2015) (finding that allowance of late submission of requested information in comparative cases "would 'inevitably lead to abuse of the Commission's processes, applicant gamesmanship, and unfair advantage'"); compare *Threshold Fair Distribution Analysis of 13 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-477 at n.38 (MB May 2, 2022) (Bureau affords applicant whose timely-filed attachments were corrupted upon upload by the filing deadline, the opportunity to provide supporting documents).

<sup>18</sup> *Threshold Fair Distribution Analysis of 28 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 24 FCC Rcd 12390, 12394-12395, para. 15 (MB 2009) (amendment to identify corrected community of license was improper post-window attempt to enhance comparative standing).

the Petition. Instead, we must conduct a new fair distribution analysis in accordance with the Commission's established comparative procedures.<sup>19</sup> NCE MX Group 52 consists of two applications to serve different communities in Florida. VMI proposes to serve Duck Key, Florida. EGI proposes to serve Key Colony Beach, Florida. EGI asserts that it is eligible for a fair distribution preference. However, its fair distribution preference exhibit lacks accurate population totals and therefore does not support this claim.<sup>20</sup> Because we are unable to determine whether EGI's proposal satisfies the 10 percent threshold and 2,000-person minimum criteria based on the exhibits contained in the Application at the time of the close of the filing window, we cannot award EGI a fair distribution of service preference. VMI does not claim a fair distribution of service preference. Accordingly, we are unable to designate a tentative selectee under a 307(b) fair distribution analysis, and VMI and EGI will proceed to a point system analysis.

The point system analysis, which is conducted when section 307(b) is not determinative, must be conducted by the Commission, as this analysis is considered a simplified "hearing" for purposes of section 155(c)(1) of the Act.<sup>21</sup> Accordingly we refer the matter to the Commission to make a determination under a point system analysis.<sup>22</sup>

**Conclusion/Action.** Accordingly, **IT IS ORDERED** that the Petition to Deny filed on April 8, 2022, by Vida Ministry Inc. **IS GRANTED IN PART and DENIED IN PART.**

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<sup>19</sup> See, e.g., 47 CFR § 73.7002.

<sup>20</sup> See File No. 167098, Fair Distribution of Service Section, and associated exhibit. Each applicant claiming a First or Second NCE Service preference must support its fair distribution claim with an exhibit identifying the population residing within the proposed station's 60 dBμ service contour and the number of people that would receive a new first or second NCE aural service. See 47 CFR § 73.7002(b). Applicants were required to use the most recently available, i.e., 2010 Census, population data. See *NCE Filing Procedures Public Notice*, at 5-7 and n.24; FCC Form 2100, Schedule 340, Instructions for Fair Distribution of Service at 12-14. An applicant's fair distribution showing must be computed as of the time of filing (close of the filing window for applications filed prior to the window) and cannot be enhanced thereafter. See 47 CFR § 73.7003(e) and (f)(3); *NCE Filing Procedures Public Notice* at 11.

<sup>21</sup> See 47 CFR § 73.7002(b). The Commission compares mutually exclusive groups of NCE FM applications under the point system set forth in section 73.7003 of the rules. See also *NCE Order*, 15 FCC Rcd at 7420.

<sup>22</sup> See *Central Florida Educational Foundation, Inc. c/o Joseph E. Dunne, Esq.*, Letter Order, 22 FCC Rcd. 18332, 18334 (MB 2007) (referring the matter to the Commission for consideration where the initial outcome would be altered by the potential for a new points analysis). See also *Comparative Consideration of 24 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educ. FM Stations*, Memorandum Opinion and Order, 25 FCC Rcd 12887, 12914 (2010) ("staff should refer only those issues to the Commission where the exclusion or inclusion of challenged or claimed points could alter the outcome in the particular NCE group, or where a new or novel question or substantial and material question of fact otherwise exists."). We remind all parties that this letter, which does not grant or deny any application, constitutes an interlocutory action, and petitions for reconsideration against such actions are subject to dismissal under section 1.106(a)(1) of the Rules. See 47 CFR § 1.106(a)(1). See also *American Family Association, Inc.*, Letter Order, 22 FCC Rcd 11165 (MB 2007) (dismissing petition for reconsideration of interlocutory action). The Commission will afford a 30-day public notice period for parties to file petitions to deny or informal objections to the application of the new tentative selectee.

**IT IS FURTHER ORDERED**, that the tentative selection of the application of Ethree Group, Inc. (File No. 0000167098) for a construction permit for a NCE FM station in Key Colony Beach, Florida, **IS RESCINDED**.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau