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In re: **NCE MX Group 57**

**Ethree Group, Inc.**  
New NCE, Cypress Quarters, Florida  
Facility ID No. 768250  
File No. 0000166667

**Montgomery Broadcasting, Inc.**  
New NCE, Okeechobee, Florida  
Facility ID No. 762663  
File No. 0000165531

**Indian River State College**  
New NCE, Okeechobee, Florida  
Facility ID No. 763889  
File No. 0000165949

**Northeast Gospel Broadcasting, Inc.**  
New NCE, Fort Pierce, Florida  
Facility ID No. 768867  
File No. 0000167435

**World Federation of Pastors and  
Ministers of the Full Gospel, Inc.**  
New NCE, Okeechobee, Florida  
Facility ID No. 768134  
File No. 0000167415

#### **Petition to Deny**

Dear Applicants and Counsel,

We have before us five mutually exclusive applications filed by Ethree Group, Inc. (EGI), Montgomery Broadcasting, Inc. (MBI), Indian River State College (IRSC), Northeast Gospel Broadcasting, Inc. (NGB), and World Federation of Pastors and Ministers of the Full Gospel, Inc. (WFP), for construction permits for new noncommercial educational (NCE) FM stations in communities in Florida, which the Media Bureau (Bureau) designated as NCE MX Group 57.<sup>1</sup> The Bureau identified the EGI Application as the tentative selectee of the group.<sup>2</sup> We also have before us an Informal Objection (REC Objection) to the EGI Application, filed by REC Networks (REC),<sup>3</sup> a Petition to Deny the EGI Application, filed by MBI (MBI Petition),<sup>4</sup> a Petition to Deny the EGI Application, filed by IRSC (IRSC

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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 Educational 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. 0000166667 (EGI Application), 0000165531 (MBI Application), 0000165949 (IRSC Application), 0000167435 (NGB Application), and 0000167415 (WFP Application).

<sup>2</sup> *Threshold Fair Distribution Analysis of 16 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-356 at 6, para. 16 (MB Apr. 4, 2022) (*Third Fair Distribution Order*).

<sup>3</sup> Pleading File No. 0000189279 (filed Apr. 12, 2022). As of the date of this release, EGI has not filed an Opposition to the REC Objection. EGI uploaded an Opposition from an unrelated proceeding, which appears to be in error. Pleading File No. 0000190101 (filed May 5, 2022).

<sup>4</sup> Pleading File No. 0000189431 (filed Apr. 18, 2022).

Petition),<sup>5</sup> and related responsive pleadings.<sup>6</sup> For the reasons set forth below, we grant the REC Objection and the IRSC Petition to the extent discussed below, dismiss the MBI Petition as moot, rescind our tentative selection of the EGI Application, and refer NCE MX Group 57 to the Commission to conduct a point system analysis.<sup>7</sup>

*Background.* The subject applications were filed during the November 2021, NCE FM filing window.<sup>8</sup> In the *Third 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>9</sup> determined that the EGI, MBI and IRSC Applications were eligible for a fair distribution preference, eliminated the NGB and WFP Applications because each claimed no fair distribution preference, and ultimately identified the EGI Application as the tentative selectee of NCE MX Group 57.<sup>10</sup>

In the REC Objection, REC argues that EGI's fair distribution claims are flawed because: 1) the EGI Application's population totals fail to account for the overlapping contours of at least six additional stations in the proposed 60 dBu service area, which if considered, result in EGI providing first NCE service to 6,208 people, second NCE service to 19,539 people, and combined first and second NCE service to 25,747 people;<sup>11</sup> 2) using these population totals, no applicant claims a first, or a combined first and second, NCE service, that is at least 5,000 more than any other applicant, and therefore, EGI, MBI, and IRSC should be considered by the Commission under a point system analysis.<sup>12</sup>

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<sup>5</sup> Pleading File No. 0000189881 (filed May 2, 2022).

<sup>6</sup> EGI filed an Opposition to the MBI Petition, Pleading File No. 0000190788 (filed May 15, 2022) (MBI Opposition) and an Opposition to the IRSC Petition, Pleading File No. 0000191978 (filed May 30, 2022) (IRSC Opposition). In the MBI Petition, MBI argues that the EGI Application should be dismissed because EGI falsely certified that it had reasonable assurance of the proposed transmitting site, failed to attach any exhibits to support its certification, and inaccurately represented in its certifications that it owned the proposed site. MBI Petition at 1-3; Exh. 1. Because we are rescinding our tentative selection of the EGI Application based on the fair distribution arguments raised in the REC Objection and the IRSC Petition, we need not consider the MBI Petition or the MBI Opposition.

<sup>7</sup> See 47 CFR § 73.7002(b); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7420 (2001) (*NCE Order*).

<sup>8</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>9</sup> See *Third Fair Distribution Order* at 2-3, paras. 3-6 (identifying EGI as the tentative selectee based on its proposal to provide first NCE service to at least 5,000 more people than MBI and IRSC).

<sup>10</sup> *Id.* at 6, para. 16.

<sup>11</sup> In contrast, in the EGI Application, EGI claims that it will provide first NCE service to 44,142 people, and combined first and second NCE service to 45,671 people. See File No. 0000166667, Fair Distribution of Service Section, and associated exhibit.

<sup>12</sup> REC Objection at 1-3; Appendices A and B. REC also argues that EGI's claims for point system eligibility are flawed because the EGI Application lacks either a contour map or an affirmative statement to support its diversity claim, and states that EGI has no pending applications but in fact, EGI has eight pending applications. *Id.* at 4. REC concludes that under a point system analysis, IRSC should be the tentative selectee in MX Group 57. *Id.* at 4-5. Any dispute regarding an applicant's eligibility to claim points should only be raised once the Commission identifies the applicant as the tentative selectee after a point system analysis. See 47 CFR § 73.7004(a) ("For mutually exclusive applicants subject to the selection procedures in subpart K of this part, Petitions to Deny will be accepted only against the tentative selectee(s)"). Accordingly, we will not consider this argument.

In the IRSC Petition, IRSC argues that the EGI Application should be dismissed because EGI's stated population totals are inaccurate, and the actual totals reflect that no proposal would provide first or second NCE service to at least 5,000 more people than any other proposal.<sup>13</sup> Therefore, IRSC asserts that no applicant prevails under a fair distribution preference.<sup>14</sup>

In the IRSC Opposition, EGI maintains that its proposal is superior to the IRSC Application because, according to REC's calculations, both its first and second service populations totals, and its total land and population area covered, are greater than IRSC's totals.<sup>15</sup>

*Discussion.* Pursuant to section 309(d) of the Act,<sup>16</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>17</sup>

*Fair Distribution of Service Claim.* The Bureau makes clear that applicant fair distribution claims must be readily ascertainable from timely-filed application exhibits.<sup>18</sup> 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.<sup>19</sup> EGI submits no opposition to counter REC's conclusion that it would only provide combined first and second NCE service to roughly half the populations listed in the EGI Application. Moreover, EGI admits that it erred in calculations regarding

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<sup>13</sup> IRSC's independent analysis indicates that EGI would provide first NCE service to 6,040 people and second NCE service to 21,531 people.

<sup>14</sup> IRSC Petition at 1, 3-5, 7. IRSC also argues that: 1) EGI did not have reasonable site assurance at the time it filed its application, which was confirmed by MBI's communications with general counsel for the tower company; 2) the EGI Application lacks required supporting contour maps, includes significant areas of water in its surface area calculations, lacks any documentation to support a claim for diversity of ownership, and fails to disclose its seven other pending applications; and 3) under a point system analysis, IRSC should be the tentative selectee for MX Group 57. *Id.* at 5-9; Exh. A. Because we are rescinding our tentative election of the EGI Application, we need not consider the site availability arguments. Any dispute concerning an application's entitlement to points should be raised only after the Commission has identified that application as the tentative selectee through a point system analysis. *See* note 12, *supra*.

<sup>15</sup> IRSC Opposition at 1. EGI also addresses IRSC's arguments concerning site availability and whether EGI is entitled to points for diversity of ownership. *Id.* at 2-5. Because we are not considering IRSC's arguments, we need not consider EGI's response herein.

<sup>16</sup> 47 U.S.C. § 309(d).

<sup>17</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>18</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>19</sup> *See* 47 CFR § 73.7002(b).

another station within the proposed contour, admits to including areas of water in its calculations, and does not challenge the lower population totals in the REC Objection.<sup>20</sup> Based on the record, the EGI Application's fair distribution exhibit and claims are inaccurate and therefore cannot support its claim for a fair distribution preference.<sup>21</sup> We are unable to rely on EGI's calculations either to determine if its proposal satisfies the 10% threshold and 2000-person minimum criteria, or to determine how EGI's proposal compares to the other applicants' proposals in MX Group 57.<sup>22</sup> Therefore, EGI is ineligible for a fair distribution of service preference. Accordingly, we grant in part the REC Objection and IRSC Petition, dismiss the MBI Petition as moot, and rescind our initial tentative selection of the EGI Application.

In light of this finding, we conduct a new fair distribution analysis. NCE MX Group 57 consists of five applications to serve different communities in Florida. EGI proposes to serve Cypress Quarters, NGB proposes to serve Ft. Pierce, and WFP, IRSC, and MBI propose to serve Okeechobee. EGI, MBI, and IRSC each claims eligibility for a fair distribution of service preference.<sup>23</sup> NGB and WFP do not and are therefore each eliminated. Because we are unable to rely on EGI's fair distribution exhibit, we are unable to determine if its proposal satisfies the 10% threshold and 2000-person minimum criteria, or how it compares to the other applicants' proposals. Accordingly, we cannot award EGI a fair distribution of service preference, and EGI is eliminated.<sup>24</sup> The fair distribution analysis ends here because the two remaining applicants, MBI and IRSC, propose to serve the same community.<sup>25</sup> Accordingly, because we

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<sup>20</sup> IRSC Opposition at 1-2. *See also* REC Objection, Appendices A and B.

<sup>21</sup> The Bureau staff has also independently determined that EGI would not, as claimed in the application, provide first NCE service to 44,142 people, and combined first and second NCE service to 45,671 people. Rather, Bureau staff concludes that the EGI Application would provide first NCE service to 6,032 people, second NCE service to 20,854 people, and combined first and second NCE service to 26,886 people.

<sup>22</sup> An NCE FM applicant is eligible to receive a fair distribution preference if it would provide a first or second reserved band channel NCE aural service to at least 10% of the population (in the aggregate), within the proposed station's service area, provided that the population served is at least 2,000 people. *See* 47 CFR §73.7002(b).

<sup>23</sup> *See* File Nos. 166667, 165531, and 165949, Fair Distribution of Service Section, and associated exhibits. IRSC claims that it would provide first NCE service to 5,920 of the 41,861 people within its 60 dBu contour. MBI claims that it would provide first NCE service to 4,758 of the 40,191 people within its 60 dBu contour. Thus, each applicant would provide a first NCE service to at least 10% of the population within its 60 dBu contour and to more than 2,000 people.

<sup>24</sup> *See* File No. 166667, Fair Distribution of Service Section, and associated exhibit. 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. Although EGI concedes errors in its fair distribution analysis, it never amended its application to provide an accurate and updated fair distribution of service claim. Under section 1.65 of the Commission's rules, and, as stated in the *NCE Filing Procedures Public Notice*, following the application filing deadline, "each applicant must continue to maintain the accuracy and completeness of the information in its application. Each applicant must notify the Commission, by electronically filing an amendment, of any substantial change that may be of decisional significance to the application." 47 CFR § 1.65; *NCE Filing Procedures Public Notice* at 11 and n. 68. Additionally, an applicant that subsequently makes engineering changes that would diminish its fair distribution position must amend its application to reflect that diminished position. *See* 47 CFR §§ 1.65 and 73.7003(e). *See also* *NCE MX Group 95*, Letter Order, DA 22-749 (MB July 12, 2022) (accepting amendment that reduced an applicant's fair distribution population figures).

<sup>25</sup> We note that even if we were to rely on the EGI population figures from either the REC analysis, IRSC analysis, or the Bureau's independent analysis, we would find that the EGI, MBI, and IRSC's proposals are comparable

are unable to designate a tentative selectee under a 307(b) fair distribution analysis, MBI and IRSC 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>26</sup> Accordingly we have referred the matter to the Commission to make a determination under a point system analysis.<sup>27</sup>

**Conclusion/Action.** Accordingly, **IT IS ORDERED** that the Informal Objection filed on April 12, 2022, by REC Networks, and the Petition to Deny filed on May 2, 2022, by Indian River State College **ARE GRANTED IN PART.**

**IT IS FURTHER ORDERED**, that the Petition to Deny filed on April 18, 2022, by Montgomery Broadcasting, Inc., **IS DISMISSED AS MOOT.**

**IT IS FURTHER ORDERED**, that the tentative selection of the application of Ethree Group, Inc. (File No. 0000166667) for a construction permit for a NCE FM station in Cypress Quarters, Florida, **IS RESCINDED.**

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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because no proposal exceeds any other by at least 5,000 people. EGI, therefore, would not prevail as the tentative selectee under the 307(b) analysis.

<sup>26</sup> See 47 CFR § 73.7002(b); see also *NCE Order*, 15 FCC Rcd at 7420.

<sup>27</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.