



Federal Communications Commission
Washington, D.C. 20554

October 20, 2022

DA 22-1109
In Reply Refer to:
1800B3-JAC
Released October 20, 2022

Community Public Radio, Inc.
c/o Lee G. Petro, Esq.
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, D.C. 20036
(sent by electronic mail to: lee.petro@pillsburylaw.com)

Lumpkin Educational Broadcasting, Inc.
c/o Jeffrey D. Southmayd, Esq.
Southmayd & Miller
4 Ocean Ridge Blvd S
Palm Coast, FL 32137
(sent by electronic mail to: jdsouthmayd@msn.com)

In re: **NCE MX Group 60**

**Lumpkin Educational Broadcasting,
Inc.**

New NCE, Dahlonega, Georgia
Facility ID No. 767745
Application File No. 0000166638

Community Public Radio, Inc.

New NCE, Cleveland, Georgia
Facility ID No. 762469
Application File No. 0000166735

Petition to Deny

Dear Applicants and Counsel:

We have before us two mutually exclusive applications filed by Lumpkin Educational Broadcasting, Inc. (LEBI) and Community Public Radio, Inc. (CPRI) for construction permits for new noncommercial educational (NCE) FM stations in communities in Georgia, which the Media Bureau (Bureau) designated as NCE MX Group 60.¹ The Commission identified the LEBI Application as the

¹ 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. 0000166638 (LEBI Application) and 0000166735 (CPRI Application).

tentative selectee of the group.² We also have before us the Petition to Deny (Petition) the LEBI Application filed by CPRI,³ and related responsive pleadings.⁴ For the reasons set forth below, we deny the Petition, grant the LEBI Application, and dismiss the CPRI Application.⁵

Background. The subject applications were filed during the November 2021, NCE filing window.⁶ On December 8, 2021, one month after the close of the filing window, CPRI amended its application to include a contour map and statement for its claim of two points under diversity of ownership. In the *First Comparative Order*, the Commission compared the CPRI Application and LEBI Application under the point system.⁷ In the point system analysis, the Commission did not award CPRI two points for diversity of ownership, finding that CPRI did not timely support its diversity claim. The Commission ultimately identified LEBI as the tentative selectee, as LEBI received two points and CPRI received one point.⁸

In the Petition, CPRI argues that the Commission incorrectly concluded that CPRI did not timely support its claim for two points under diversity of ownership.⁹ Specifically, CPRI asserts that its two exhibits that identified it as the licensee of one other station, WNEE(FM), Patterson, Georgia (WNEE), were sufficient to qualify as statements that it held no attributable interests in any nearby radio stations under section 73.7003(b)(2) of the Commission's rules, and that its amendment provided further confirmation that it was eligible for diversity of ownership credit.¹⁰ CPRI also asserts that LEBI did not provide an exhibit to support its diversity of ownership claim.¹¹

In its Opposition, LEBI states that the Commission correctly concluded that CPRI was not eligible for diversity of ownership credit because CPRI "did not include an exhibit to demonstrate that the contours of the proposed noncommercial station at Cleveland, Georgia would not overlap with the service contours of WNEE or that CPRI was otherwise entitled to the credit."¹² LEBI also states that it was not

² Comparative Consideration of 27 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations, Memorandum Opinion and Order, FCC 22-61 at 11-12, paras. 35-36 (Aug. 2, 2022) (*First Comparative Order*).

³ Pleading File No. 0000199063 (filed Sept. 1, 2022).

⁴ LEBI filed an Opposition to the Petition, Pleading File No. 0000199289 (filed Sept. 6, 2022) (LEBI Opposition), and CPRI filed a Reply to the Opposition, Pleading File No. 0000199620 (filed Sept. 9, 2022) (CPRI Reply).

⁵ In the *First Comparative Order*, the Commission directed Bureau staff to "consider any petitions, comments, and objections to determine whether there is any substantial and material question of fact concerning whether grant of the tentatively selected application would serve the public interest." *First Comparative Order* at 25, para. 86. The Commission delegated authority to the Bureau staff "to act on any routine matter that may be raised, including whether the applicant is eligible, as certified, for the points awarded herein, and whether the application complies with all relevant Commission rules and policies." *Id.* at 25, para. 87.

⁶ 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).

⁷ *First Comparative Order* at 11, para. 35. Neither applicant claimed eligibility for a fair distribution preference.

⁸ *Id.* at 11-12, para. 36. LEBI received two points for diversity of ownership, and CPRI received one point under the best technical proposal criterion.

⁹ Petition at 2.

¹⁰ *Id.* at 4-6.

¹¹ *Id.* at 3.

¹² LEBI Opposition at 3.

required to include an exhibit to support its claim for diversity of ownership credit because it does not have an attributable interest in any other broadcast station.¹³ In its Reply, CPRI asserts that the LEBI Opposition does not provide any support for its conclusion that CPRI is not entitled to diversity of ownership credit.¹⁴

Discussion. Pursuant to section 309(d) of the Communications Act of 1934, as amended (Act),¹⁵ 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.¹⁶

When it announced filing procedures for the NCE window, the Bureau stated that “[t]o qualify for the diversity of ownership points, an applicant must submit either a contour map showing no overlap with the proposed NCE FM station, or a statement that the applicant holds no attributable interests in any nearby radio stations.”¹⁷ Here, CPRI did not include a contour map or a statement in its original application that qualifies as sufficient documentation for diversity of ownership credit. Instead, CPRI simply listed in two exhibits the call sign, city, and state of the other station, WNEE, in which it holds an attributable interest. Neither exhibit included a statement that WNEE’s principal community contour did not overlap with, or was not near, the proposed new station.¹⁸ While there is some flexibility in the type of documentation an applicant may provide to support a diversity of ownership claim, we do not independently check the distance between an applicant’s existing authorization(s) and its proposed new station, and whether the principal community contours of the stations will overlap.

In addition, CPRI’s amendment, which was submitted one month after the filing window closed, did not cure its lack of documentation. Unlike the decision that CPRI cites in its Petition,¹⁹ CPRI’s amendment provided support that enhanced its comparative points position after the filing deadline, and therefore is not considered.²⁰

We also reject CPRI’s assertion that LEBI did not provide an exhibit to support its claim for two

¹³ *Id.*

¹⁴ CPRI Reply at 2-3. CPRI also asserts that LEBI’s Opposition did not include a required affidavit under 47 CFR § 73.7004(c). We concur. However, we consider the LEBI Opposition in the interest of having a complete record.

¹⁵ 47 U.S.C. § 309(d).

¹⁶ 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).

¹⁷ 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, 36 FCC Rcd 11458 (MB July 23, 2021).

¹⁸ CPRI Application Attachs., Eligibility Certification, Holdings List.

¹⁹ Petition at 5 (citing *The Association for Community Education, Inc.*, Letter Order, DA 22-874, Ref. No. 1800B3-ARR (MB Aug. 22, 2022)).

²⁰ 47 CFR § 73.7003(e); see also *First Comparative Order* at 7, para. 18 (“Applicants must submit timely filed exhibits supporting their point claims.”); *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, 30 FCC Rcd 5135, 5144, para. 22 (2015) (“it is well established that an NCE applicant’s qualifications for points are established at the close of the filing window and cannot be enhanced after that time.”).

points under diversity of ownership.²¹ LEBI was not required to include an exhibit to support its claim because it certified that it did not have an attributable interest in any other broadcast station.²²

Conclusion/Action. For the reasons set forth above, **IT IS ORDERED** that the Petition to Deny, filed by Community Public Radio, Inc. on September 1, 2022, **IS DENIED**.

IT IS FURTHER ORDERED that the Application filed by Lumpkin Educational Broadcasting, Inc. (Application File No. 0000166638) for a construction permit for a new NCE FM station in Dahlonega, Georgia **IS GRANTED CONDITIONED UPON** that selectee's compliance with section 73.7005 of the Commission's rules, 47 CFR § 73.7005, which sets forth a four-year period in which an applicant, that is awarded a permit by use of the point system, must maintain the comparative qualifications for which it received points, and must comply with the restrictions on station modifications and acquisitions.

IT IS FURTHER ORDERED that the mutually exclusive application of Community Public Radio, Inc. (Application File No. 0000166735) **IS DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

²¹ Petition at 3.

²² *First Comparative Order* at 5-6, para. 11 (“To qualify for the diversity of ownership points, an applicant must submit . . . a statement that the applicant holds no attributable interests in any nearby radio stations, *or a certification that it holds no attributable interests in any broadcast stations.*”) (emphasis added).