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In re: **NCE MX Group 22**

Arizona Western College
New NCE (FM), Quartzsite, AZ
Facility ID No. 766433
File No. 0000166975

Remanente Broadcasting Network
New NCE (FM), La Paz Valley, AZ
Facility ID No. 766061
File No. 0000167392

**The Association for Community
Education, Inc.**
New NCE (FM), Desert Center, CA
Facility ID No. 767325
File No. 0000167307

Informal Objection

Dear Applicant and Objector:

We have before us three mutually exclusive (MX) applications filed by Arizona Western College (AWC), Remanente Broadcasting Network (RBN), and The Association for Community Education, Inc., (ACE) for construction permits for new noncommercial educational (NCE) FM stations in various communities in California and Arizona, which the Media Bureau (Bureau) designated as NCE MX Group

22.¹ The Bureau identified the AWC Application as the tentative selectee of the group.² We also have before us an Informal Objection (Objection) to the AWC Application filed on April 21, 2022, by Albert Adam David (David), and related pleadings.³ For the reasons set forth below, we deny the Objection and grant the AWC Application.

Background. The subject applications were filed during the 2021 NCE filing window, which was open from November 2, 2021, until November 9, 2021.⁴ In the *Fair Distribution MO&O* the Bureau conducted a fair distribution analysis pursuant to section 307(b) of the Communications Act of 1934, as amended (Act),⁵ in which it rejected ACE's first NCE service claim because it failed to satisfy the 2,000 people minimum threshold, eliminated the ACE Application, and tentatively selected the AWC Application because it would provide a new second NCE service to at least 5,000 more people than the RBM Application.⁶ The Bureau established a 30-day period for filing petitions to deny.⁷ On April 21, 2022, David timely filed his Objection.

In the Objection, David argues that the Bureau improperly conducted the fair distribution analysis for Group 22.⁸ Specifically, David argues that the Bureau should have selected the ACE Application based on a first aural reception service preference.⁹ David explains that because the ACE Application "qualifies for the first aural reception service preference," the Bureau should not have considered the first and second NCE preference claims contained in the AWC and RBN Applications.¹⁰ David argues that the Bureau failed to follow the comparative review guidelines set forth in the *Procedures Public Notice*,¹¹ and contends that the *Allotments Report and Order* supports his proposition that the Bureau should not have

¹ *Threshold Fair Distribution Analysis of 19 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-314, 2022 WL 905218 (MB Mar. 24, 2022) (*Fair Distribution MO&O*). See also Application File Nos. 0000167392 (RBN Application), 0000166975 (AWC Application), and 0000167307 (ACE Application).

² *Fair Distribution MO&O* at *2, para. 8.

³ Pleading File No. 0000189575. AWC filed an Opposition to Informal Objection (Opposition) on April 25, 2022. Pleading File No. 0000189680. David filed a Reply to AWC's Opposition on May 9, 2022 (Reply). Pleading File No. 0000190270.

⁴ *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, DA 21-1362, 2021 WL 5056358 (MB 2021).

⁵ See *Fair Distribution MO&O* at *2, para. 8.

⁶ *Id.*

⁷ *Id.* at *7, para. 31.

⁸ Objection at 1-2.

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.* (citing *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)) (*Procedures Public Notice*).

compared first or second NCE service totals in its fair distribution analysis.¹² David posits that the ACE Application's "first aural service to a population of 223 people would be a greater benefit to the public interest" rather than "either of the competing proposals, which merely propose second noncommercial educational service."¹³ Accordingly, David urges the Commission to select ACE over the competing applicants.

In the Opposition, AWC states that the Bureau's fair distribution analysis for Group 22 was correct. AWC argues that, pursuant to section 73.7002(b) of the Commission's rules (Rules),¹⁴ the *Procedures Public Notice*,¹⁵ the *Rural Radio First Report and Order*,¹⁶ and the Schedule 340 Instructions,¹⁷ the Commission only considers first aural service in situations where one of the mutually exclusive applicants claims a Tribal Priority.¹⁸ AWC argues that David seeks to create a "non-existent preference that would consider first aural reception service despite the absence of a tribal applicant."¹⁹ AWC requests that the Commission dismiss the Objection and grant the AWC Application.

In the Reply, David reiterates his argument that the *Procedures Public Notice* supports his contention that the Bureau should not have compared first or second NCE service in its comparative analysis of the applicants in Group 22.²⁰ David further argues that it is not in the public interest to have a first aural reception preference only in instances where there is a Tribal applicant because it creates a system that is inconsistent and inequitable.²¹

Discussion. Pursuant to section 309(d) of the Act,²² 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.²³

¹² *Id.* at 2 (citing *Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations (Cheyenne, Wyoming and Gering, Nebraska*, MM Docket No. 97-106, Report and Order, 15 FCC Rcd 7528 (MMB 2000) (*Allotments Report and Order*)).

¹³ *Id.*

¹⁴ Opposition at 2 (citing 47 CFR § 73.7002(b)).

¹⁵ *Id.* (citing *Procedures Public Notice*).

¹⁶ *Id.* at 3. (citing *Policies to Promote Rural Radio Service and to Streamline Auction, Allotment and Assignment Policies*, First Report and Order, 25 FCC Rcd 1583, 1594, para. 22 (2010) (*Rural Radio First Report and Order*)).

¹⁷ Opposition at 3 (citing Form 2100, Schedule 340 Instructions at 12-13) (*Schedule 340 Instructions*).

¹⁸ *Id.* at 2-4.

¹⁹ *Id.* at 4.

²⁰ Reply at 1-2.

²¹ *Id.* at 2.

²² 47 U.S.C. § 309(d).

²³ 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).

The Commission has been clear regarding its process for considering mutually exclusive (MX) applications within its NCE FM comparative review process. Specifically, when applicants in a MX NCE FM group propose to serve different communities, the Commission performs a threshold “fair distribution” analysis²⁴ to ascertain whether grant of any of the applications would best further the objectives set forth in section 307(b) of the Act to “provide a fair, efficient, and equitable distribution” of broadcast service among the states and communities.²⁵ In the *first* step of the Commission’s section 307(b) fair distribution analysis, the Bureau determines whether any of the applicants in the MX group is a federally recognized Native American Tribe or Alaska Native Village proposing to serve Tribal Lands and claims the Tribal Priority.²⁶ If there is no applicant within the MX group claiming the Tribal Priority, the Bureau proceeds to the *second* step in the analysis and determines whether any applicant would provide a first or second reserved band channel NCE aural service to a substantial population (the First or Second NCE Service Preference) and compares population coverage totals.²⁷ Section 73.7002(b) of the Rules explicitly instructs that in a section 307(b) fair distribution analysis “that does not include a Tribal Applicant,” the Commission must next compare the first or second NCE service population totals of the mutually exclusive applicants, and that first or second service to fewer than 2,000 people will be considered insignificant.²⁸

Within this comparative analysis framework, the Commission has explained the circumstances under which it will consider an applicant’s claim of first aural reception service. Specifically, in the Form 2100, Schedule 340 Instructions, the Commission explicitly instructs that it will only consider an applicant’s first aural certification claim if the application is mutually exclusive with another application claiming the Tribal Priority.²⁹ Similarly, the *Rural Radio First Report and Order* states that an applicant

²⁴ The Bureau has delegated authority to analyze service population data, and to perform threshold fair distribution analyses of NCE FM proposals. See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 22 FCC Rcd 6101, n.16 (2007). See also 47 CFR §§ 0.61 and 0.283.

²⁵ See *Fair Distribution MO&O* at *1, para. 3; 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 CFR § 73.7002(a).

²⁶ See *Fair Distribution MO&O* at *1, para. 3 (emphasis added). An NCE FM applicant is eligible to receive a fair distribution preference, and ultimately be awarded the construction permit, if it identifies itself as a Tribal Applicant, proposes Tribal Coverage, and proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands (Tribal Priority). See 47 CFR § 73.7000 (defining a “Tribal Applicant” and “Tribal Coverage”).

²⁷ See *Fair Distribution MO&O* at *1, para. 3 (emphasis added).

²⁸ See 47 CFR § 73.7002(b) (“In an analysis performed pursuant to paragraph (a) of this section that does not include a Tribal Applicant, a full service FM applicant that will provide the first or second reserved channel noncommercial educational (NCE) aural signal received by at least 10% of the population within the station's 60dBu (1mV/m) service contours will be considered to substantially further fair distribution of service goals and to be superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant.”).

²⁹ See Form 2100, Schedule 340 Instructions at page 12-13. (stating that the Commission will consider an applicant’s first aural certification claim, only if it “determines (a) that the applicant has answered “yes” [to the application’s first aural certification question] and provided an attachment indicating first aural reception service to a significant population, and (b) that the application is mutually exclusive with an application claiming the Tribal Priority.”) (emphasis added).

that qualifies for the Tribal Priority will not be compared to other mutually exclusive applicants on a fair distribution basis, but will be the tentative selectee, except that the Tribal Priority will not prevail where mutual exclusivity exists with a *bona fide* proposal to provide first aural reception service to a significant population.³⁰ The Commission has *never* provided for a first aural reception service preference in the NCE context prior to the establishment of the Tribal Priority.

Based upon this framework, we reject David’s contention that the Bureau improperly conducted the fair distribution analysis for Group 22. No applicant within Group 22 claimed a Tribal Priority, and, therefore, the Bureau was correct to proceed to the second step in the fair distribution analysis—comparing the First or Second NCE Service Preference totals of AWC and RBN. ACE’s first aural reception service claim need not be considered in the absence of a competing application claiming the Tribal Priority. The Bureau tentatively selected the AWC Application because it would provide a new second NCE service to at least 5,000 more people than the RBN Application, and David does not challenge the Bureau’s second NCE service analysis between the AWC and RBN Applications. Accordingly, the Bureau’s selection of AWC was proper.

We reject David’s argument that the *Procedures Public Notice* supports his argument that the Bureau erred in its fair distribution review process. Specifically, David cites a portion of the *Procedures Public Notice* that states: “If no applicant in an MX group qualifies for either the first aural reception service preference or the Tribal Priority, the Bureau will use the applicants’ service area and population data certifications to compare first and second NCE aural radio service.”³¹ David contends that the Commission’s use of the word “either,” when referring to the first aural reception service preference or the Tribal Priority, “explicitly means that one is not dependent on the other.”³² David posits that, “following this guideline,” the Bureau should not have compared the AWC and RBN Application’s First or Second NCE Service Preference claims because the ACE Application “qualifies for the first aural reception service preference.”³³ We find that David misreads this portion of the *Procedures Public Notice*, which only explained how the Commission would evaluate MX groups that included a Tribal Applicant, not MX groups that do *not* include a Tribal Applicant, which is the case here. The *Procedures Public Notice* makes clear that for MX groups in which NCE FM applicants propose service to different communities, the Commission conducts the threshold fair distribution analysis as set forth in section 73.7002 of the Rules.³⁴ As discussed above, section 73.7002 specifically details that, in circumstances where there is no applicant claiming the Tribal Priority, the Commission compares the first and second NCE service population totals of mutually exclusive applicants. The *Procedures Public Notice* also directs applicants to the Form 2100 Schedule 340 Instructions, which explicitly inform applicants that the

³⁰ See *Rural First Report and Order* at 5194, para. 22 (establishing the section 307(b) Tribal Priority detailing the Commission’s framework for considering mutually exclusive applications that include Tribal Priority claims); *Threshold Fair Distribution Analysis of Mutually Exclusive Applications of The Southern California Tribal Chairmen’s Association and the Foundation for Economic Justice d/b/a Center for Economic Justice for Permits to Construct New Noncommercial Educational FM Stations Filed in November 2021 Window*, Memorandum Opinion and Order, FCC 22-28, 2022 WL 1201901, at *2, n. 23 (Apr. 19, 2022).

³¹ Objection at 2 (citing *Procedures Public Notice*).

³² Reply at 1.

³³ Objection at 2.

³⁴ *Procedures Public Notice* at 4-5. (citing section 73.7002 of the Rules and indicating that “for MX groups in which NCE FM applicants propose service to different communities, a threshold fair distribution study pursuant to Section 307(b)” of the Act).

first aural certification is considered only where the application is mutually exclusive with an application claiming the Tribal Priority.³⁵ We therefore find David's argument unavailing.

We similarly reject David's contention that the *Allotments Report and Order* serves as precedent for "giving one applicant preference over competing applicants based on first aural service."³⁶ We find David's reliance on the *Allotments Report and Order* to be misplaced because it does not deal with the matter at hand—MX NCE applications, submitted within a filing window, for permits to construct new noncommercial educational FM stations, and for which the Commission, pursuant to section 73.7002 of the Rules, resolves through a fair distribution analysis. Conversely, the *Allotments Report and Order* involves a proposal to amend the FM Table of Allotments for commercial radio stations, and for which the Commission applied the FM Allotment priorities to resolve competing proposals.³⁷

Finally, to the extent that David disapproves of a first aural service preference solely in instances involving a Tribal Applicant, the Commission adopted this policy through a notice and comment rulemaking, and David is untimely seeking reconsideration of the *Rural Report and Order* establishing the Tribal Priority. We thus reject this argument.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED that the Informal Objection, filed by Albert Adam David on April 21, 2022, IS DENIED.

IT IS FURTHER ORDERED that the Application filed by Arizona Western College (File No. 0000166975) for a construction permit for a new NCE FM station in Quartzsite, Arizona IS GRANTED CONDITIONED UPON that selectee's compliance with section 73.7002(c) of the Commission's Rules, 47 CFR § 73.7002(c), which sets forth a four-year period of on-air operations substantially as proposed. IT IS FURTHER ORDERED that the mutually exclusive applications of Remanente Broadcasting Network (File No. 0000167392) and The Association for Community Education, Inc. (File No. 0000167307) ARE DISMISSED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

³⁵ *Procedures Public Notice* at pg. 6, note 23.

³⁶ Objection at 2 (citing *Allotment Report and Order*).

³⁷ See *Allotment Report and Order* at 7529, para. 3.