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DA 22-771

In Reply Refer to:

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In re: **Centro Familiar de Restauracion y
Vida**

New NCE, Chaparral, NM

Facility ID No. 766219

File No. 0000167079

Waiver Request

Dear Applicant,

We have before us the application filed by Centro Familiar de Restauracion y Vida (Centro) for a construction permit for a new noncommercial educational (NCE) FM station at Chaparral, New Mexico (Centro Application),¹ and the request for waiver (Waiver Request) filed by Centro.² For the reasons set forth below, we deny the Waiver Request and dismiss the Centro Application.

Background. The Centro Application was filed during the 2021 NCE filing window, which was open from November 2, 2021, until November 9, 2021.³ The Media Bureau (Bureau) identified the Centro Application as part of NCE MX Group 157.⁴ In the *Fourth Fair Distribution Order*, the Bureau conducted a fair distribution analysis pursuant to section 307(b) of the Communications Act of 1934, as amended (Act), and identified the RBI Application—the only application that was eligible for a fair distribution preference—as the tentative selectee of NCE MX Group 157.⁵ The *Fourth Fair Distribution*

¹ Application File No. 0000167079.

² Centro Application at “ChaparralNM212A Waiver Request v1(1).pdf”.

³ *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).

⁴ *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) (*Settlement Public Notice*). The other applicants in the seven-way NCE MX Group 157 were: Radio Bilingue, Inc. (Application File No. 0000166379) (RBI Application); Christian Ministries of the Valley, Inc. (Application File No. 0000166725) (CMV Application), New Hope Baptist Church - Silver City (Application File No. 167508), International Scripture Ministries, Inc. (Application File No. 0000167286), Aok Media Corporation El Paso Texas 79936 (Application File No. 0000167576), and Gandara for Latinos, Inc. (File No. 0000166757) (Gandara Application).

⁵ *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 7-8, para. 19 (MB May 2, 2022) (*Fourth Fair Distribution Order*). See also 47 U.S.C. § 307(b), 47 CFR § 73.7002(a).

Order further noted that it would dismiss the remaining six applications after a 30-day petition to deny period, including the Centro Application, the CMV Application, and the Gandara Application.⁶

On June 3, 2021—the deadline established in the *Fourth Fair Distribution Order* for filing petitions to deny—Centro filed an amendment to its application in which it included the Waiver Request, which states that the Centro Application is only mutually exclusive with two applications in NCE MX Group 157—the CMV Application and the Gandara Application.⁷ Centro argues that these applications are both defective, that the Bureau staff has stated that defective applications are not subject to protection, and that the applications should be dismissed, thus rendering the amended Centro Application a singleton.⁸ Centro requests a waiver of the *Fourth Fair Distribution Order* “to the extent that it states that the Commission will dismiss this application once the tentative selectee’s application has not received any “substantial and material question” concerning its grantability.”⁹ Centro concurrently filed petitions to deny the CMV Application and the Gandara Application.¹⁰

Discussion. The Commission considered and rejected authorizing secondary grants when it established the current NCE comparative procedures, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in an inferior applicant as a secondary selectee and would be administratively cumbersome.¹¹ The Commission repeatedly affirmed the Bureau’s application of this policy of only granting one application per MX group (One Grant Policy)¹² and, in the recent rulemaking updating our NCE procedures, rejected a request to permit “secondary grants.”¹³

⁶ *Id.* at 11-12, para. 36.

⁷ Waiver at 1.

⁸ *Id.*

⁹ Waiver at 1.

¹⁰ See Pleading File Nos. 0000192820 (petition to deny CMV Application) and 0000192806 (petition to deny Gandara Application) (collectively, Petitions). The Bureau dismissed those petitions when it dismissed the CMV Application and the Gandara Application pursuant to the *Fourth Fair Distribution Order*. See *Fourth Fair Distribution Order* at 11-12, para. 36. See also Actions Public Notice, Report No. PN-2-220607-01 (MB June 7, 2022) and Pleadings Public Notice, Report No. PN-3-220607-01 (MB June 7, 2022).

¹¹ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5104-05, para. 90 (2001) (“Specifically, after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window.”).

¹² See generally *Green/Sumter Enterprise Community*, Memorandum Opinion and Order, 30 FCC Rcd 7694 (2015) (*Green/Sumter*); see also *Hampton Roads Educational Telecommunications Association*, Memorandum Opinion and Order, 30 FCC Rcd 14906, 14909, para. 8 (2015), *Hawaii Public Radio, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 13775, 13776, para. 4 (2015).

¹³ *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Education Broadcast Stations and Low Power FM Stations*, MB Docket No. 19-3, Report and Order, 34 FCC Rcd 12519, 12528, n.68 (2019) (“We continue to believe that the current policy of granting only one application (or tied applications) per MX group is the most administratively efficient approach and leads to the selection of the best qualified applicants and the expeditious introduction of new NCE service. We note, however, that we will continue to permit additional grants from an MX group if an applicant—by technical amendment, the voluntary dismissal of competing applications, and/or a valid settlement agreement—eliminates all conflicts to other applications in the group.”).

Centro seeks to circumvent this longstanding policy through two routes—its Petitions and its Waiver Request. As discussed below, we reject both of these approaches.

Although the Bureau dismissed the Petitions, we reiterate that petitions to deny may not be filed against non-tentative selectees. Section 73.3584(a) of the Commission’s rules (Rules) states that “[f]or mutually exclusive applications subject to selection by . . . fair distribution/point system (reserved channels), petitions to deny *may only be filed against . . . tentative selectee(s).*”¹⁴ Accordingly, the Petitions were procedurally inappropriate and subject to dismissal. Moreover, although an informal objection may be filed “[b]efore FCC action on any application for an instrument of authorization”¹⁵ the Bureau does not generally consider informal objections or petitions to deny filed prior to an application being announced as the tentative selectee and declared acceptable for filing unless the objection addresses the accuracy of the section 307(b) fair distribution analysis.¹⁶ Additionally, as discussed in the *Settlement Public Notice*, the Bureau does not generally review MX applications for acceptability defects prior to being identified as tentative selectees.¹⁷ Were we to entertain objections concerning technical defects, as Centro sought with regard to the CMV Application and Gandara Application, and determine that the applications should be dismissed, either applicant would be entitled to seek *nunc pro tunc* reinstatement,¹⁸ resulting in precisely the additional administrative burdens that the Commission sought to avoid when it established the One Grant policy.¹⁹ Thus, Centro’s Petitions were procedurally improper and should have been dismissed without consideration had they not been dismissed when the staff dismissed the CMB application and Gandara Application.²⁰

We also reject Centro’s Waiver Request. The Commission's rules may be waived only for good cause shown.²¹ An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action.²² The Commission must give waiver requests “a hard look,” but

recon. denied, Order on Reconsideration, 35 FCC Rcd 10180 (2020) (denying petition for reconsideration that sought to authorize “secondary grants” in NCE mutually exclusive groups).

¹⁴ 47 CFR § 73.3584(a) (emphasis added).

¹⁵ 47 CFR § 73.3587.

¹⁶ See *Fourth Fair Distribution Order* at n.35; see also *Cultural Energy*, Letter Order, 26 FCC Rcd 12766, 12768 (MB 2011) (considering objections against non-tentative selectees is wasteful and inefficient).

¹⁷ *Settlement Public Notice* at 2.

¹⁸ *Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 49 Fed. Reg. 47331 (Dec. 3, 1984).

¹⁹ See, e.g., *Greene/Sumter*, Memorandum Opinion and Order, 30 FCC Rcd at 7699 (noting that such an approach would “vastly expand staff burdens”).

²⁰ The Waiver Request states that the Bureau staff informed Centro that technically defective applications are not subject to protection. Waiver at 1. We remind Centro that any party relying on informal staff advice does so at their own risk. *WPHR(FM), Ashtabula, Ohio*, Memorandum Opinion and Order, 11 FCC Rcd 8513, 8515, para. 10 (1996) (citing *Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705, 4708, para. 22 (1991) (“A person relying on informal advice given by Commission staff does so at their own risk”). See also *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (Commission is not bound by the actions of its staff if the Commission has not endorsed those actions).

²¹ 47 CFR § 1.3.

²² See *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968)).

an applicant for waiver “faces a high hurdle even at the starting gate”²³ and must support its waiver request with a compelling showing.²⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁶ However, waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²⁷

The Waiver Request fails to identify any special circumstances that would warrant a waiver of the One Grant Policy. The only justification Centro identifies for a waiver—that the Centro Application is only mutually exclusive with two technically defective applications, neither of which is the tentative selectee—is not a special circumstance because such a situation, where dismissing technically defective applications would result in a singleton, is likely to occur repeatedly, particularly in large mutually exclusive application groups. Additionally, Centro fails to explain how the public interest would be served by granting the Waiver Request. The Commission has consistently held that conducting a secondary analysis and then granting additional potentially inferior applications—such as the Centro Application—would not serve the public interest.²⁸ Because Centro has failed to meet any of the requirements for a waiver, we deny the Waiver Request.

Conclusion/Action. Accordingly, **IT IS ORDERED** that the waiver request filed on June 3, 2022, by Centro Familiar de Restauracion y Vida **IS DENIED**.

IT IS FURTHER ORDERED, that the application of Centro Familiar de Restauracion y Vida (Application File No. 0000167079) for a construction permit for a new NCE FM station in Chaparral, New Mexico, **IS DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

cc (via electronic mail):

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²³ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

²⁴ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

²⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²⁶ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁷ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (waiver of filing deadline after counsel failed to timely remit the correct filing fee was arbitrary and capricious); *Northeast Cellular*, 897 F.2d at 1166.

²⁸ See note 11 *supra*.