



Federal Communications Commission
Washington, D.C. 20554

August 22, 2022

DA 22-874
In Reply Refer to:
1800B3-ARR
Released August 22, 2022

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In re: **NCE MX Group 39**

Remanente Broadcasting Network
New NCE, Firebaugh, California
Facility ID No. 766049
File No. 0000167143

Teleamerica Communications West
Palm Beach Corp.

New NCE, Los Banos, California
Facility ID No. 768217
File No. 0000167476

Modesto Independent Media
New NCE, Los Banos, California
Facility ID No. 768404
File No. 0000167222

**The Association for Community
Education, Inc.**
New NCE, Los Banos, California
Facility ID No. 767322
File No. 0000167017

Radio Vision
New NCE, Three Rocks, California
Facility ID No. 766536
File No. 0000167164

Petition to Deny

Dear Applicants and Counsel,

We have before us five mutually exclusive applications filed by Remanente Broadcasting Network (RBN), Teleamerica Communications West Palm Beach Corp. (TCW), Modesto Independent Media (MIM), Association for Community Education, Inc. (ACE), and Radio Vision (RV) for construction permits for new noncommercial educational (NCE) FM stations in various communities in California, which the Media Bureau (Bureau) designated as NCE MX Group 39.¹ The Bureau identified the MIM Application as the tentative selectee of the group.² We also have before us the Petition to Deny (Petition) the MIM Application filed by ACE³ and related responsive pleadings.⁴ For the reasons set forth below, we deny the Petition, grant the MIM Application, and dismiss the RBN, TCW, ACE, and RV applications.

¹ *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. 0000167143 (RBN Application), 0000167476 (TCW Application), 0000167222 (MIM Application), 0000167017 (ACE Application), and 0000167164 (RV Application).

² *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 5, para. 14 (MB Apr. 4, 2022) (*Third Fair Distribution Order*).

³ Pleading File No. 0000189912 (filed May 2, 2022).

⁴ MIM filed an Opposition to the Petition, Pleading File No. 0000190841 (filed May 16, 2022). ACE filed a Reply to the Opposition, Pleading File No. 0000191471 (filed May 24, 2022).

Background. The subject applications were filed during the November 2021, NCE filing window.⁵ 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),⁶ determined that the RBN Application, the MIM Application, and the ACE Application were eligible for a fair distribution preference, and because the MIM Application’s proposed first NCE service exceeded the RBN Application’s and ACE Application’s first NCE service by more than 5,000 people, identified the MIM Application as the tentative selectee of NCE MX Group 39.⁷

In the Petition, ACE argues that the MIM Application should be denied because it lacks reasonable assurance of site availability and fails to demonstrate that the proposed station would advance an NCE objective.⁸ Specifically, ACE argues that: 1) the MIM Application failed to list the name, title, or contact information of a specific person at the proposed tower site, as required by FCC Form 2100, Schedule 340 (Schedule 340), instead listing a general phone number for American Tower, the owner of the proposed tower site;⁹ 2) ACE’s counsel contacted a representative for American Tower and was advised that she could not locate records demonstrating that MIM obtained written reasonable assurance of site availability for the tower identified in the MIM Application;¹⁰ and 3) MIM is required to provide documentation of its proposed educational objective because it is a first-time NCE station applicant, and its submission of its articles of incorporation, without further explanation, is inadequate.¹¹

In the Opposition, MIM states that its technical consultant, Todd Urick, contacted American Tower prior to the filing deadline and obtained site assurance.¹² MIM supports this assertion with a sworn declaration from Urick, in which he states he spoke with Danielle Poirier at American Tower, who indicated there was space on the tower for leasing, and provides a copy of an email exchange with Poirier dated October 26, 2021.¹³ MIM argues that dismissal of its application for lack of site assurance is inappropriate because it obtained reasonable site assurance prior to the filing deadline and maintains that the statement attached to its application satisfies the requirements of Schedule 340.¹⁴

MIM further argues that it provided a sufficient educational objective and educational program description by attaching a copy of its articles of incorporation filed with the state of California, and its business search result with the California Secretary of State, which indicate that it is a noncommercial entity that creates educational media.¹⁵ MIM maintains that the educational purpose description in its articles of incorporation satisfies the Schedule 340 educational objective and programming requirements, and attaches previously granted applications for construction permits either supported only by an articles

⁵ *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).

⁶ See *Third Fair Distribution Order* at 2-3, paras. 3-6.

⁷ *Id.* at 5, para. 14.

⁸ Petition at 1-2.

⁹ *Id.* at 3.

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 4-6.

¹² Opposition at 2-3

¹³ *Id.* Attachment 1.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 5.

of incorporation attachment, or a short description comprised of two sentences.¹⁶ MIM also argues that ACE incorrectly equates the educational programming certification to a comparative point claim, which has stricter support requirements.¹⁷ Lastly, MIM argues that ACE either fails to cite to any precedent, or cites inapplicable precedent, to demonstrate that MIM's educational programming statement is insufficient.¹⁸

On May 17, 2022, MIM amended its application to include two additional exhibits containing supplemental documentation of reasonable site assurance and an advancement of educational programming description (Amended MIM Application).

In its Reply to the Opposition, ACE argues that MIM effectively admits it failed to follow instructions regarding reasonable site assurance documentation, and reiterates that dismissal is appropriate if the Bureau finds an applicant did not have reasonable site assurance at the time its application was filed.¹⁹ ACE further argues that whether or not MIM obtained reasonable site assurance, it failed to document the claimed site assurance, in violation of the application requirements, and therefore its late-filed supplemental documentation, which lacks a waiver request, should be rejected.²⁰ ACE also reiterates that MIM failed to provide any educational objective or description of its educational programming by the filing deadline, and therefore its late-filed supplemental description, which lacks a waiver request, should be rejected.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

Reasonable Site Assurance. Each NCE FM applicant must have reasonable assurance that its specified site will be available for the construction and operation of its proposed facilities at the time it files its application.²⁴ Schedule 340 instructs applicants to specify the name of the person contacted to verify the site's availability, the person's telephone number, and whether the contact is the tower owner,

¹⁶ *Id.* at 6-8 and Attachments 2A, 2B, and 2C.

¹⁷ *Id.* at 8-10.

¹⁸ *Id.* at 10-12.

¹⁹ Reply at 2.

²⁰ *Id.*

²¹ *Id.* at 3-5.

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).

²⁴ See *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427, paras. 6-7 (1974) (Wallace); *South Florida Broad. Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842, para. 3 (1984). While applicants are not required to have a binding agreement or absolute assurance of a proposed site, a mere possibility that the site will be available is not sufficient.

agent, or authorized representative.”²⁵ If the Bureau finds that an applicant did not have reasonable site assurance at the time its application was filed, the Bureau will dismiss the application.²⁶

Here, we find no reason to conclude that MIM lacked a reasonable basis to certify that it obtained reasonable site assurance when it filed the MIM Application. While MIM failed to strictly follow the documentation requirements outlined by Schedule 340, initially listing only the American Tower name and its main phone line, MIM maintains that it obtained site assurance prior to the filing deadline, as required. In support of this claim, MIM submits a declaration, signed under penalty of perjury, from its technical consultant, Todd Urick, stating that he emailed Danielle Poirier at American Tower on October 26, 2021, and attaches her email response from the same date, indicating that the site is available.²⁷ MIM also amended its application to include an attachment with the referenced contact’s name and a corresponding direct phone number.²⁸ Nothing in the *NCE Report and Order* suggests that the Commission intended to make the failure to provide all the required information in Schedule 340 documenting site availability—as opposed to actually obtaining reasonable assurance of site availability—a non-curable defect.²⁹ Accordingly, we find that dismissal of the MIM Application is not warranted since MIM obtained reasonable site assurance prior to filing its application, and amended its application to include the required site contact information.

Noncommercial Educational Eligibility. An NCE applicant applying as a nonprofit entity with a demonstrated educational purpose must show that it is a nonprofit educational organization, has an educational objective, and that its programming will further that objective.³⁰ The Bureau has previously held that articles of incorporation indicating the entity is a non-profit organization, in conjunction with a description of educational purpose, satisfies the Commission’s NCE eligibility requirements.³¹ The

²⁵ See Form 2100, Schedule 340 Instructions at page 22; see also *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, MB Docket No. 19-3, Report and Order, 34 FCC Rcd 12519, 12542, para. 59 (2019) (directing the Bureau to update the Schedule 340 instructions to explain the requirement of obtaining reasonable site availability prior to the application filing and amend Schedule 340 to add a reasonable site assurance certification).

²⁶ We will not allow applicants to amend their application to cure this fatal defect. See, e.g., *NCE MX Group 430 Marfa Public Radio*, Memorandum Opinion and Order, 31 FCC Rcd 4241 (2016); *Mark Van Bergh, Esq.*, Letter Order, 26 FCC Rcd 15135 (MB 2011).

²⁷ Opposition at 14-15, Attachment 1.

²⁸ See Amended MIM Application, MIM Tower Representative Contact Addendum Attachment.

²⁹ *Compare Christian Charities Deliverance Church et. al.*, Memorandum Opinion and Order, 30 FCC Rcd 10548 (2015) (affirming dismissal of LPFM applications that violated section 73.807 of the rules (minimum distance separations) without opportunity to cure, because section 73.870(c) of the rules explicitly provided that no curative amendments would be permitted for such violations). Thus, had the Bureau dismissed the MIM Application for failing to provide the information required in Schedule 340, MIM would have been entitled to file a curative amendment providing that information. Dismissed applicants are permitted to submit one minor modification amendment to cure certain application deficiencies. See 47 CFR § 73.3522(a)(2); *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984).

³⁰ 47 U.S.C. § 73.503(a); see also *Music Ministries, Inc.*, Hearing Designation Order, 9 FCC Rcd 3628 (MMB 1994).

³¹ See *Hisp. Arts of Tampa, Inc.*, Order, 32 FCC Rcd 1804, n.11 (MB 2017) (“As stated in its articles of incorporation, the specific purpose for which Hispanic Arts is organized in Florida as a not-for-profit corporation is ‘to provide cultural awareness of Tampa’s rich Hispanic history, through arts, entertainment, events, and media.’”). See also *NCE Reserved Allotment Group 7*, Letter Order, 27 FCC Rcd 11218, 11220–21 (MB 2012) (finding that an

Bureau has likewise granted new NCE applications after amendment of the applicant's educational objective and advancement description.³² In its timely-filed application, MIM provided a copy of its articles of incorporation filed with the California Secretary of State indicating that it is a nonprofit entity with a stated purpose to "create educational media and broadcast on non-commercial radio."³³ MIM also attached a business entity search result from the California Secretary of State website which lists MIM as a nonprofit entity.³⁴ Lastly, MIM amended its application to include a significantly longer description of its educational objectives and how it plans to advance educational programming.³⁵ Accordingly, we find that MIM has demonstrated it is a nonprofit entity with an educational objective that will advance educational programming.

Conclusion/Action. For the reasons set forth above, **IT IS ORDERED** that the Petition to Deny, filed by The Association for Community Education, Inc. on May 2, 2022, **IS DENIED**.

IT IS FURTHER ORDERED that the Application filed by Modesto Independent Media (Application File No. 0000167222) for a construction permit for a new NCE FM station in Los Banos, California **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 Remante Broadcasting Network (Application File No. 0000167143), Teleamerica Communications West Palm Beach Corp. (Application File No. 0000167476), The Association for Community Education, Inc. (Application File No. 0000167017), and Radio Vision (Application File No. 0000167164) **ARE DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

applicant's bylaws specifying a noncommercial educational objective satisfied the Commission's NCE requirements and qualifications).

³² See *Denny Hazen and Cary S. Tepper, Esq.*, Letter Order, 23 FCC Rcd 11579, 11581-82, n.25 (MB 2008) (finding that applicant's amendment of its articles of incorporation and new NCE application to include an educational programming description demonstrate "it is a nonprofit educational organization, with distinct educational objectives, and that it will use its station's programming to further those objectives.").

³³ See MIM Application, MIM Articles State of California.

³⁴ *Id.*, MIM California Nonprofit Corporation Number C4802124 Attachment.

³⁵ See Amended MIM Application, MIM Advancement of Educational Program Addendum Attachment.