



Federal Communications Commission  
Washington, D.C. 20554

March 1, 2023

DA 23-157  
*In Reply Refer to:*  
1800B3-SDW  
Released March 1, 2023

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In re:

**NCE MX Group 33**

**Vida Vale Vivir, Inc.**

New NCE (FM), Meridian, CA  
Facility ID No. 765476  
Application File No. 0000165591

**Adventist Compassion Care, Inc.**

New NCE (FM), Richfield, CA  
Facility ID No. 768529  
Application File No. 0000167631

**Stonewall Alliance of Chico**

New NCE (FM), Willows, CA  
Facility ID No. 768720  
Application File No. 0000167629

**Petition to Deny**

Dear Applicants and Counsel:

We have before us three mutually exclusive (MX) applications filed by Vida Vale Vivir, Inc. (VVVI), Adventist Compassion Care, Inc. (ACCI), and Stonewall Alliance of Chico (SAC) 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 33.<sup>1</sup> The Commission identified the SAC Application as the tentative selectee of the group.<sup>2</sup> We also have before us a Petition to Deny (Petition) the SAC Application, filed on August 23, 2022, by VVVI, and related pleadings.<sup>3</sup> For the reasons set forth below, we deny the Petition, dismiss the VVVI Application, dismiss the ACCI Application, and grant the SAC Application.

*Background.* The subject applications were filed during the November 2021 NCE FM filing window.<sup>4</sup> In the *Comparative Consideration MO&O*, the Commission conducted a fair distribution analysis pursuant to section 307(b) of the Communications Act of 1934, as amended (Act), in which it eliminated the ACCI Application because it did not claim a fair distribution preference.<sup>5</sup> The Commission determined that the VVVI and SAC Applications were each eligible for a fair distribution preference based on first and second NCE service population totals, but because the applications were comparable,<sup>6</sup> the VVVI and SAC Applications proceeded to a point system analysis. The Commission awarded both VVVI and SAC two points for diversity of ownership and awarded SAC three points as an established local applicant.<sup>7</sup> Accordingly, VVVI was credited with two points, and SAC was credited with a total of five points. The Commission identified SAC as the tentative selectee of MX Group 33, and established a 30-day period for filing petitions to deny.<sup>8</sup> VVVI timely filed its Petition on August 23, 2022.

In the Petition, VVVI argues that SAC is not entitled to points for diversity of ownership because it failed to attach an exhibit stating that it holds no attributable interests in any nearby radio stations.<sup>9</sup> VVVI also argues that SAC does not qualify for points as an established local applicant because SAC's

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<sup>1</sup> *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, 2022 WL 3098826 (MB Aug. 2, 2022) (*Comparative Consideration MO&O*). See also Application File Nos. 0000165591 (VVVI Application), 0000167631 (ACCI Application), and 0000167629 (SAC Application).

<sup>2</sup> *Comparative Consideration MO&O* at \*7, para. 25-26.

<sup>3</sup> Pleading File No. 0000198175. On September 9, 2022, SAC filed an Opposition to the Petition (Opposition). Pleading File No. 0000199629. On the same date, SAC filed a consolidated supplement containing a Motion for Leave, which sought leave to file the Opposition after the filing deadline, and a Motion to Strike, which addresses arguments raised in the Petition (First Supplement). Pleading File No. 0000199633. VVVI filed a Reply to the Opposition on September 16, 2022 (Reply). Pleading File No. 0000199969. Finally, on September 20, 2022, SAC filed an additional supplement (Second Supplement). Pleading File No. 0000200319. As discussed below, we will grant SAC's First Supplement to the extent it seeks leave to file the Opposition. However, the Motion to Strike and the Second Supplement are unauthorized pleadings and, therefore, will not be considered here. See 47 CFR § 1.45; *Reier Broad. Co., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14270, 14270, para. 1, n. 4 (MB 2011) (dismissing petitioner's Motion to Dismiss as an unauthorized pleading).

<sup>4</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 11458 (MB 2021) (*Procedures Public Notice*).

<sup>5</sup> See *Comparative Consideration MO&O* at \*7, paras. 25-26.

<sup>6</sup> *Id.* Proposals are considered comparable if neither exceeds the other by at least 5,000 people.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Petition at 4-5.

headquarters is “a front.”<sup>10</sup> In support of its claim, VVVI states that it “frequently visited” SAC’s headquarters office and “always found an empty office appearing not to have been used for an extended period of time.”<sup>11</sup> VVVI further alleges that SAC is ineligible for localism points because (1) SAC’s headquarters is not within 25 miles of the reference coordinates of the proposed community of license;<sup>12</sup> (2) SAC failed to provide residential addresses for its officers;<sup>13</sup> and (3) SAC’s Articles of Incorporation are inadequate because they only reference SAC’s intention to serve Butte County, California, and not Glenn County, where the proposed community of license is located.<sup>14</sup> VVVI also contends that the SAC Application contains false certifications related to its public inspection file and compliance with local public notice rules.<sup>15</sup> Finally, VVVI argues that SAC’s proposed effective radiated power (ERP) of 10kW and antenna height above average terrain (HAAT) of 176.6 meters violate the maximum limits for Class B1 FM stations and therefore violate section 73.211(b) of the Commission’s rules (Rules).<sup>16</sup> For these reasons, VVVI urges the Commission to dismiss the SAC Application and grant the VVVI Application.

In the Opposition, SAC states that it certified in its Application that it holds no attributable interests in any radio stations and that it was not required to submit additional exhibits to support its diversity of ownership claim.<sup>17</sup> SAC states that VVVI’s allegation that its headquarters is a front is unsupported.<sup>18</sup> SAC provides a sworn declaration, under penalty of perjury, made by Andrea Mox, its Executive Director, that states SAC provided services at its headquarters address for “at least two years” prior to filing its Application.<sup>19</sup> SAC explains that for a period of time, due to the COVID-19 Pandemic, it “closed as a walk-in center” and offered its services “by appointment only.”<sup>20</sup> SAC states that it reopened for walk-in services in June 2022.<sup>21</sup> SAC further admits that its local public notice announcement was untimely,<sup>22</sup> and argues that it is not required to maintain a physical public inspection file.<sup>23</sup> Finally, SAC states that the technical defect in its Application—its selection of Class B1 instead of Class B—is inconsequential and that it is permitted to amend its Application.<sup>24</sup>

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<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 6-8.

<sup>16</sup> *Id.* at 8-9.

<sup>17</sup> Opposition at 2-5. SAC also notes that the SAC Application listed “0” as SAC’s number of existing authorizations.

<sup>18</sup> Opposition at 5-6.

<sup>19</sup> *Id.* at 16.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* at 10. Subsequently, on November 7, 2022, SAC notified the Commission that its public notice ran continuously from October 4, 2022, to November 7, 2022. See Pleading File No. 0000203323 (filed Nov. 7, 2022) (*November Public Notice Letter*).

<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 11.

In the Reply, VVVI reiterates its arguments that SAC failed to provide sufficient evidentiary documentation to support its diversity of ownership and established local applicant claims. VVVI contends that SAC misrepresented itself in the Opposition, because as of August 2022, “SAC’s office was not regularly open to the public.”<sup>25</sup> VVVI also reiterates its argument that SAC is required to maintain a physical public inspection file and that it failed to do so.<sup>26</sup> Finally, VVVI contends that the technical defect contained in the SAC Application is fatal.<sup>27</sup>

*Discussion.* Pursuant to section 309(d) of the Act,<sup>28</sup> petitions to deny 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>29</sup>

*Procedural Matters.* At the outset, we agree with VVVI that SAC’s Opposition is late-filed. Pursuant to section 73.7004(c) of the Rules, SAC’s Opposition was due on September 2, 2022,<sup>30</sup> but was not filed until September 9, 2022.<sup>31</sup> SAC explains that the Opposition was not timely filed because its broadcasting consultant was unable to assist SAC with its filing due to a wildfire near his residence.<sup>32</sup> VVVI objected to SAC’s Motion for Leave, arguing that requests for extension of time are not routinely granted.<sup>33</sup> However, we will grant SAC’s Motion for Leave and consider the Opposition based on SAC’s explanation and in the interest of having a complete record.<sup>34</sup>

*Diversity of Ownership.* We reject VVVI’s argument that SAC does not qualify for diversity of ownership points. The *Procedures Public Notice* states that in order to 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.”<sup>35</sup> The *Schedule 340 Instructions* indicate that applicants that have no other attributable stations or have only more distant attributable stations must upload a statement to that effect.<sup>36</sup> VVVI argues that SAC was required to upload a separate exhibit even though it certified in its Application that it has no

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<sup>25</sup> Reply at 5.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 6. VVVI also refutes several arguments contained in the Motion to Strike that is included in SAC’s First Supplement. However, because we have determined that the Motion to Strike in the First Supplement is an unauthorized pleading, we do not address these arguments herein.

<sup>28</sup> 47 U.S.C. § 309(d).

<sup>29</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>30</sup> See 47 CFR § 73.7004 (“The time for filing such oppositions shall be 10 days from the filing date for petitions to deny”); 47 CFR § 1.45(b) (oppositions must be filed with 10 days of a petition to deny).

<sup>31</sup> Pleading File No. 0000199629 (filed Sep. 9, 2022).

<sup>32</sup> First Supplement at 3-4.

<sup>33</sup> Reply at 9-10.

<sup>34</sup> See, e.g., *NCE MX Group 52*, Letter Order, DA 22-1055, 2022 WL 5241760, at \*1, note 4 (MB Oct. 5, 2022).

<sup>35</sup> *Procedures Public Notice* at \*6.

<sup>36</sup> *Schedule 340 Instructions* at 15.

attributable interests in any other station. We disagree. We have made clear that we will exercise “some flexibility” in our assessment of the type of acceptable documentation needed to support a diversity of ownership claim.<sup>37</sup> In this regard, we have granted diversity points in circumstances where the applicant certifies, under penalty of perjury, that it holds no attributable interests in *any* broadcast stations.<sup>38</sup> We find that SAC’s certification in its Application is sufficient documentation and, therefore, SAC is entitled to two points for diversity of ownership.

Established Local Applicant Points. To qualify for the three points as an “established local applicant”<sup>39</sup> an applicant must certify that it has been local and established in the community to be served continuously for at least two years immediately prior to the application filing.<sup>40</sup> To be considered local, a non-governmental applicant must have a physical headquarters, campus, or 75% of its governing board members residing within 25 miles of the reference coordinates of the proposed community of license.<sup>41</sup> An applicant claiming points as an “established local applicant” must submit substantiating documentation with its application to illustrate how it qualifies as local and established.<sup>42</sup>

At the outset, we reject VVVI’s allegation that SAC’s headquarters is “a front.”<sup>43</sup> VVVI’s allegation is based entirely on visits to SAC’s headquarters during periods of time in which SAC explains that it offered services online and by appointment-only due to the COVID-19 Pandemic. According to SAC, its headquarters office has since fully reopened.<sup>44</sup> SAC certified in its Application, and in its sworn declaration, that it has maintained its headquarters for at least two years prior to the filing of its Application.<sup>45</sup> Moreover, SAC’s website lists the plethora of services that SAC has provided at that location.<sup>46</sup> We also reject VVVI’s contention that SAC’s headquarters is not within 25 miles of the reference coordinates of the proposed community of license. SAC provided a topographic map evidencing that its headquarters is located 23.71 miles from Willows, California.<sup>47</sup>

We similarly reject VVVI’s contention that SAC’s Articles of Incorporation and Educational Purpose exhibits are insufficient to establish SAC’s eligibility for points as an established local applicant.

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<sup>37</sup> *Procedures Public Notice* at \*8.

<sup>38</sup> See *NCE MX Group 60*, Letter Order, DA 22-1109 (MB Oct. 20, 2022) (affirming awarding diversity points based on applicant’s certification that it has no attributable interests in any other station even though it did not attach a separate exhibit); *Comparative Consideration MO&O*, at 5-6, para. 11 (“To qualify for the diversity of ownership points, an applicant must submit either a contour map showing no overlap with the proposed NCE FM station, 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.”). In its Application, SAC also listed “zero” as its number of existing authorizations.

<sup>39</sup> See 47 CFR § 73.7000.

<sup>40</sup> See *id.* § 73.7003(b)(1).

<sup>41</sup> See *id.* § 73.7000; *Procedures Public Notice* at \*5.

<sup>42</sup> *Id.* at \*6.

<sup>43</sup> Petition at 5.

<sup>44</sup> See Opposition at 16, Declaration of Andrea Mox, Attach. B.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* at 8.

<sup>47</sup> See Application, Attach., Distance from Nonprofit Headquarters to Willows, CA.

VVVI believes these documents must specifically mention Willows, California, in order to be sufficient.<sup>48</sup> We disagree. SAC's Articles of Incorporation sufficiently reflect that it has provided services in Chico, California—which is within 25 miles of Willows, California—since August 27, 1990.<sup>49</sup> Accordingly, SAC has provided sufficient documentation to qualify as an established local applicant based on its headquarters in Chico, California.<sup>50</sup> Because VVVI has failed to raise a substantial and material question of fact concerning whether SAC's headquarters is feigned, we find that SAC is entitled to three points as an established local applicant.

Public Inspection File and Local Public Notice Requirements. Although we find that SAC misunderstood the public inspection file requirements and did not timely complete its local public notice obligations, we reject VVVI's contention that these errors merit dismissal of the Application. Section 73.3527 of the Rules requires an applicant for a construction permit for a new NCE FM station to maintain a public inspection file, containing certain documents required by that Rule, at an accessible place in the proposed community of license.<sup>51</sup> We thus reject SAC's argument that applicants for a new broadcast station construction permit are no longer required to maintain a physical file, and agree with VVVI that SAC was required to place the Application and all related documents in a public inspection file in the proposed community of license and that it failed to do so. VVVI, however, presents no evidence, and the record does not reflect, that SAC intended to deceive the Commission by its misunderstanding,<sup>52</sup> and we find that it is of no decisional significance in our comparative analysis. We direct SAC, however, to promptly familiarize itself with the Commission's public inspection file requirements and comply with these obligations.<sup>53</sup> Failure to comply with the public inspection file rule may result in future forfeitures.

In the SAC Application, SAC certified that it would comply with the local public notice requirements. Section 73.3580 of the Rules requires applicants for construction permits for new broadcast stations to post online local public notice of the Application, commencing no later than five business days following acceptance of the application for filing, and continuing for a minimum of 30 consecutive days.<sup>54</sup> SAC's Application was accepted for filing on August 2, 2022,<sup>55</sup> and SAC admits that its notice was not posted on its website until October 4, 2022.<sup>56</sup> We, however, find that SAC's late online

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<sup>48</sup> *Id.* at 6; Reply at 2.

<sup>49</sup> See Application, Attach., Stonewall Chico Articles Incorporation Original.

<sup>50</sup> SAC did not claim to qualify for points by virtue of its local governing board, and therefore was not required to submit residential addresses for the members of its governing board.

<sup>51</sup> See 47 CFR § 73.3527(a)(1), (b)(1); *Schedule 340 Instructions* at 3 (“A copy of the completed application and all related documents shall be made available for inspection by the public in the applicant’s public inspection file, pursuant to the requirements of 47 CFR § 73.3527(b)(1). An applicant for a new station or change of community shall maintain its file at an accessible place in the proposed community of license.”).

<sup>52</sup> See, e.g., *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12079-80 (2001) (“To raise a substantial and material question of deceit, it is necessary to show that the statement was inaccurate or materially incomplete and that there was an intent to deceive.”).

<sup>53</sup> See 47 CFR § 73.3527.

<sup>54</sup> 47 CFR § 73.3580(c)(1), (b)(2) (iii), (iv).

<sup>55</sup> *Comparative Consideration MO&O* at \*23.

<sup>56</sup> In the Opposition, SAC states that it “posted a public notice link on the front page of its website as of September 8, 2022.” See Opposition at 10. SAC later clarified that, while its initial notice was posted on September 8, 2022,

local notice is not a defect that the Commission considers to be disqualifying.<sup>57</sup> We also find that VVVI has not shown, and we do not perceive, any intention to deceive the Commission when SAC certified in its Application that it would comply with the public notice requirements of Section 73.3580 of the Rules. We direct SAC, however, to promptly familiarize itself with the Commission's local public notice requirements.<sup>58</sup> Failure to comply with the local public notice requirements may result in future forfeitures.

**Technical Defect.** We reject VVVI's contention that the SAC Application should be dismissed because its proposed technical parameters violate section 73.211(b) of the Rules. While SAC admits the Application contained an error in which SAC listed the proposed station class as Class B1 instead of Class B, the Application's proposed power and height levels are consistent with a Class B station, and the Bureau accepted the SAC Application for filing as a Class B station.<sup>59</sup> VVVI fails to establish that SAC's error is non-curable.<sup>60</sup> Accordingly, we find that dismissal of the SAC Application is not warranted. Moreover, the staff has independently reviewed the SAC Application, determined that the proposed power and height levels contained in the Application comply with section 73.211(b) as a Class B station, and confirmed that SAC's fair distribution population and service area data are not affected by the change from Class B1 to Class B. Therefore, we reject VVVI's argument that we should rescind the Commission's tentative selection of the SAC Application on this basis.

**Conclusion/Actions.** For the reasons set forth above, IT IS ORDERED that the Petition to Deny filed by Vida Vale Vivir, Inc. on August 23, 2022 (Pleading File No. 0000198175), IS DENIED.

IT IS FURTHER ORDERED that the Application filed by Stonewall Alliance of Chico (Application File No. 0000167629) for a construction permit for a new NCE FM station in Willows, California, 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, must comply with the restrictions on station modifications and acquisitions, and also

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due to a technical error, its notice ran continuously from October 4, 2022, to November 7, 2022. *See November Public Notice Letter.*

<sup>57</sup> *See Trinity International Foundation, Inc.*, Letter Order, 23 FCC Rcd 4000, 4003, n. 28 (MB 2008) (citing *Marri Broadcasting, L.P.*, Memorandum Opinion and Order, 16 FCC Rcd 10,772, 10,775 (MB 2001) (holding that in cases "where an applicant has failed to publish or improperly published the required local notice, the Commission generally requires the applicant to correctly republish the local notice and advise the Commission it has done so.")); *Iglesia Shekira*, Letter Order, 24 FCC Rcd 5306, 5308 (MB 2009).

<sup>58</sup> *See* 47 CFR § 73.3580.

<sup>59</sup> *See Roman Catholic Diocese of Portland, Maine*, Memorandum Opinion and Order, 29 FCC Rcd 15068, 15071, paras. 5-8 (2014) (recognizing the Bureau's authority to resolve discrepancies in applications where staff can "confidently and reliably resolve[] inconsistent data" contained within the application's Tech Box, and clarifying the Commission's standard for addressing discrepancies associated with antenna location coordinates contained within the application's Tech Box in future applications).

<sup>60</sup> *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 SAC Application for failing to designate the correct station class, SAC would have been entitled to file a curative amendment correcting that deficiency. 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).

provides that an applicant receiving a Section 307(b) preference that is decisive over another applicant must operate technical facilities substantially as proposed for a period of four years of on-air operations.

IT IS FURTHER ORDERED that the mutually exclusive applications of Vida Vale Vivir, Inc. (Application File No. 0000165591) and Adventist Compassion Care, Inc. (Application File No. 0000167631) ARE DISMISSED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau