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In re: **NCE MX Group 184**

**Baker Art Guild**  
New NCE FM, Baker City, Oregon  
Facility ID No. 765135  
Application File No. 0000166621

**First Baptist Church of Riverview**  
New NCE FM, Baker City, Oregon  
Facility ID No. 762640  
Application File No. 0000167571

**Idaho Conference of Seventh-Day  
Adventists, Inc.**  
New NCE FM, Baker City, Oregon  
Facility ID No. 765560  
Application File No. 0000167277

**Informal Objection**

Dear Applicants and Objector,

We have before us three mutually exclusive (MX) applications filed by Baker Art Guild (BAG), First Baptist Church of Riverview (FBCR), and Idaho Conference of Seventh-Day Adventists, Inc. (ICSA), for construction permits for new noncommercial educational (NCE) FM stations in Baker City, Oregon, which the Media Bureau (Bureau) designated as NCE MX Group 184.<sup>1</sup> The Commission identified the BAG Application as the tentative selectee of the group.<sup>2</sup> We also have before us the Informal Objection (Objection) to the BAG Application, filed by Albert Adam David (David).<sup>3</sup> For the reasons set forth below, we dismiss the Objection as moot, grant the BAG Application, and dismiss the FBCR Application and the ICSA Application.<sup>4</sup>

*Background.* The subject applications were filed during the November 2021 NCE FM filing window.<sup>5</sup> Because the three applications proposed service to the same community, in the *Third Comparative Order*, the Commission conducted a point system analysis in which it awarded BAG and ICSA three points each under the established local applicant criterion, FBCR and BAG two points each under the diversity of ownership criterion, and BAG one point under the best technical proposal criterion because its proposal would serve at least 10% more area and population than ICSA's next best proposal.<sup>6</sup> Thus, BAG was credited a total of six points, ICSA was credited with three points, and FBCR was credited with two points. The Commission, therefore, identified BAG as the tentative selectee of NCE MX Group 184.<sup>7</sup>

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<sup>1</sup> *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, 36 FCC Rcd 16452 (MB 2021); *see also* Application File Nos. 0000166621 (BAG Application), 0000167571 (FBCR Application), and 0000167277 (ICSA Application).

<sup>2</sup> *Comparative Consideration of 34 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 23-5 at \*21, paras. 81-82 (Jan. 24, 2023) (*Third Comparative Order*).

<sup>3</sup> Pleading File No. 0000211155 (filed Feb. 21, 2023). BAG did not file an Opposition, but, its technical representative emailed the Bureau staff concerning the technical amendment to the BAG Application, filed on February 22, 2023, which addressed the defects raised in the Objection. Email from Michael D. Brown to Amy Van de Kerckhove, Lisa Scanlan, James Bradshaw, and Arthur Doak, Audio Division, FCC Media Bureau (Feb. 23, 2023, 2:13 EST). *See also* BAG Application, Amendment (filed Feb. 23, 2023) (Amended BAG Application). Because the email addressed the merits of the Objection, but was not served on David, the staff forwarded a copy of Brown's email to Albert Alan David and offered him an opportunity to file a Reply. Email from Alexander Sanjenis, Audio Division, FCC Media Bureau, to Michael D. Brown and Albert Alan David (Feb. 23, 2023, 11:36 EST). As of the date of this release, David has not filed a Reply.

<sup>4</sup> In the *Third 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." *Third Comparative Order* at \*26, para. 108. 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 \*26, para. 108.

<sup>5</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 7449 (MB 2021).

<sup>6</sup> *Third Comparative Order* at \*21, paras. 81-82.

<sup>7</sup> *Id.* at \*21, para. 82.

In the Objection, David argues that the BAG Application should be dismissed because its proposed antenna radiation pattern varies more than 2 dB per 10 degrees of azimuth, between the 40 and 50 degree radials, in violation of section 73.316(b)(2) of the Commission's rules (rules).<sup>8</sup>

On February 22, 2023, BAG filed a technical amendment to its application, which revised the antenna pattern.<sup>9</sup> BAG also revised the area size and population that its proposed facility would serve.<sup>10</sup> BAG further disclosed that, as a result of this amendment, it was no longer eligible for a point under the best technical proposal criterion because it would no longer provide service to at least 10% greater population than the ICOSA Application. BAG argues that it nonetheless remains the tentative selectee of NCE MX Group 184 because it still has more points than FBCR and ICOSA.<sup>11</sup>

*Discussion.* Pursuant to section 309(d) of the Communications Act of 1934, as amended,<sup>12</sup> 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.<sup>13</sup>

Section 73.316(b)(2) of the rules specifies that directional antennas used to protect short-spaced stations with a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized.<sup>14</sup> The staff has independently reviewed the Amended BAG Application and determined that the proposed directional antenna pattern complies with section 73.316(b)(2).<sup>15</sup> David cites to no authority that the failure to adhere to antenna radiation pattern requirements is a non-curative defect,<sup>16</sup> and thus we need not address whether the original BAG Application violated section 73.316(b)(2). Accordingly, we find that dismissal of the BAG Application is not warranted since the proposed antenna radiation pattern in the Amended BAG Application complies with section 73.316(b)(2). We, therefore, dismiss the Objection as moot.

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<sup>8</sup> Objection at 1.

<sup>9</sup> Amended BAG Application at Antenna Technical Data, Directional Antenna Relative Field Value and Attachment "DESCRIPTION OF AMENDMENT.pdf" (Amendment Narrative).

<sup>10</sup> *Id.* at Point System Factors /Tiebreakers, Technical Parameters.

<sup>11</sup> Amendment Narrative at 2.

<sup>12</sup> 47 U.S.C. § 309(d).

<sup>13</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>14</sup> *See* 47 CFR § 73.316(b)(2).

<sup>15</sup> *See* Amended BAG Application.

<sup>16</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) explicitly provided that no curative amendments would be permitted for such violations). Thus, had the Bureau dismissed the BAG Application for failing to comply with section 73.316(b)(2), BAG 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).

BAG correctly notes that it is no longer eligible for a point under the best technical proposal criterion as a result of its revised antenna pattern.<sup>17</sup> However, the exclusion of this point does not affect the outcome of NCE MX Group 184 because, without the best technical proposal point, BAG has a total of five points, ICSA three points, and FBCR two points. Accordingly, because BAG still has the highest point total and remains the tentative selectee, we need not refer this group to the Commission to conduct a new point system analysis.<sup>18</sup> We thus dismiss the Objection as moot, grant the BAG Application, and dismiss the mutually exclusive FBCR Application and the ICSA Application.

**Conclusion/Action.** For the reasons set forth above, **IT IS ORDERED** that the Informal Objection, filed by Albert Adam David on February 21, 2023 (Pleading File No. 0000211155), **IS DISMISSED AS MOOT.**

**IT IS FURTHER ORDERED** that the Application filed by Baker Art Guild (Application File No. 0000166621), as amended on February 22, 2023, for a construction permit for a new NCE FM station in Baker City, Oregon **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 First Baptist Church of Riverview (Application File No. 0000167571) **IS DISMISSED.**

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<sup>17</sup> As discussed in the *Third Comparative Order*, the original BAG Application's proposed 60 dBu contour would encompass 1,307 square kilometers with a population of 13,193, and ICSA's proposed 60 dBu contour would encompass 562 square kilometers with a population of 11,985. *Third Comparative Order* at \*21, para. 82. The Amended BAG Application's proposed 60 dBu contour would encompass 1,161.9 square kilometers with a population of 12,644. See Amended BAG Application at Point System Factors/Tiebreakers, Technical Parameters. Thus, BAG's proposal would no longer serve at least 10% more area and population than ICSA's proposal. Under our rules and procedures, "[a]ny changes made [to an application] after the [the close of the NCE filing window] may potentially diminish, but cannot enhance, an applicant's comparative position and point total. Therefore, the Commission will take into account any amendments that adversely affect an applicant's point total and comparative position." See *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window*, Public Notice, 36 FCC Rcd 11458, 11468 (MB 2021).

<sup>18</sup> *Third Comparative Order* at \*26, para. 108 ("We delegate to the staff authority 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. The staff need not refer such matters to the full Commission unless the staff determines that the issues are new or novel, or raise a substantial and material question regarding the award of points. Generally, the staff should refer issues to the Commission where the exclusion or inclusion of challenged or claimed points could alter the outcome in the particular NCE group, or where a new or novel question or substantial and material question of fact otherwise exists."). See also *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6162, n.230 (2007) ("If the Bureau finds that there are no new or novel questions, or material questions that would cause the tentative selectee to have fewer than or the same number of points as another applicant in the group, the staff would act on the petition(s) to deny, and by public notice grant the application of the tentative selectee and dismiss the competing mutually exclusive application. This function is consistent with the Bureau's delegated authority." (citations omitted)).

**IT IS FURTHER ORDERED** that the mutually exclusive application of Idaho Conference of Seventh-Day Adventists, Inc. (Application File No. 0000167277) **IS DISMISSED**.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

cc (via electronic mail):

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