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In re: **NCE MX Group 205**

First Dallas Media, Inc.
New NCE FM, Golinda, Texas
Facility ID No. 763726
Application File No. 0000165973

East Texas Community Broadcasting
New NCE FM, Riesel, Texas
Facility ID No. 768280
Application File No. 0000167216

Petitions for Reconsideration

Dear Counsel and Petitioner:

We have before us: 1) the Petition for Reconsideration filed by East Texas Community Broadcasting (ETCB), seeking the rescission of the grant of the application of First Dallas Media, Inc. (FDMI) for a construction permit for a new noncommercial educational (NCE) FM station at Golinda, Texas;¹ 2) the Petition for Reconsideration filed by ETCB, seeking reinstatement of its dismissed application for a construction permit for a new NCE FM station at Riesel, Texas;² and 3) related responsive pleadings.³ The Media Bureau (Bureau) designated these two applications part of NCE MX

¹ Pleading File No. 0000205723 (filed Dec. 19, 2022) (First Petition); *see also* Application File No. 0000165973 (FDMI Application).

² Pleading File No. 0000206492 (filed Jan. 8, 2023) (Second Petition); *see also* Application File No. 0000167216 (ETCB Application).

³ FDMI filed an Opposition on December 29, 2022 (Pleading File No. 0000205723). ETCB subsequently filed an Erratum to the First Petition (Pleading File No. 0000206491 (filed Jan. 8, 2023)) and a Reply to the Opposition

Group 205,⁴ and identified FDMI as the tentative selectee of the group.⁵ For the reasons set forth below, we grant the First Petition and rescind our grant and tentative selection of the FDMI Application; grant the Second Petition and reinstate the ETCB Application; and afford FDMI and ETCB 15 days in which to file amendments to their application before further Bureau or Commission action.

Background. The subject applications were filed during the November 2021 NCE FM filing window.⁶ In the *Fifth 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 determined that the FDMI Application and ETCB Application were eligible for a fair distribution preference based on second NCE service population totals—FDMI claimed it would provide a second NCE service to 14,178 people and ETCB a combined first and second NCE service to 8,575 people.⁷ Because FDMI’s proposal would provide a new second NCE service to at least 5,000 more people than ETCB, the Bureau identified the FDMI Application as the tentative selectee of NCE MX Group 205.⁸ The Bureau established a 30-day period for filing petitions to deny, and stated if no petitions were filed, it would grant the FDMI Application and dismiss the ETCB Application.⁹ No petitions were filed, and on December 9, 2022, the Bureau granted the FDMI Application and dismissed the ETCB Application as a non-tentative selectee.¹⁰

(Pleading File No. 0000206490 (filed Jan. 8, 2023)). The First Petition was filed by “East Texas Community Media.” In the Erratum, ETCB states the reference to “East Texas Community Media” was a typographical error, and that the name of the organization is “East Texas Community Broadcasting.” Erratum at 1. The First Petition was signed by Guy Betten, who is also the signatory for the ETCB Application. Accordingly, we will accept ETCB’s explanation and refer to the petitioner as ETCB.

⁴ *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) (*MX Groups & Settlements Public Notice*).

⁵ *Threshold Fair Distribution Analysis of 5 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-1166 at *6, para. 12 (MB Nov. 9, 2022) (*Fifth Fair Distribution Order*).

⁶ *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).

⁷ See *Fifth Fair Distribution Order* at 5, para. 12.

⁸ *Id.*

⁹ *Id.* at 7, para. 21.

¹⁰ At the time of the *Fifth Fair Distribution Order*, NCE MX Group 205 consisted of eight applications, including the FDMI application. Six of remaining seven, including the ETCB Application, were dismissed as non-tentative selectees. Only ETCB sought reconsideration of its dismissal, and the dismissals of the other applications are now final. See *Actions*, Public Notice, Report No. PN-2-221213-01 (MB Dec. 13, 2022) (granting FDMI Application and dismissing mutually exclusive ECTB Application and applications of Ministerio Espiritu Santo (Application File No. 0000167797), Iglesia Cristian Restauracion y Vida (Application File No. 0000167785), Alpha Consulting Christian Education (Application File No. 0000166689), Specialized Educational Broadcasting (Application File No. 0000166809), and Centro Familiar de Restauracion y Vida (Application File No. 0000167080)). See also 47 CFR § 1.4(b)(4). The 30-day period for filing petitions for reconsideration ended on Thursday, January 12, 2023, and the dismissals became final on January 22, 2023. See 47 CFR § 1.117(a) (providing for 40 days after public notice of the Bureau’s decision for the Commission on its own motion to order the record before it for review). The eighth applicant in NCE MX Group 205, Red-C Apostolate: Religious Education for the Domestic Church (Application File No. 0000167206), filed an amendment after the issuance of the *Fifth Fair Distribution Order*, which rendered its application a singleton.

ETCB filed the First Petition on December 19, 2022, and argues that the grant of the FDMI Application should be rescinded because FDMI misrepresented the fair distribution population figures in its application.¹¹ ETCB argues that it was not previously aware of the error in the FDMI Application and thus did not participate in the proceeding earlier, but notes that the Commission has considered similar petitions for reconsideration where it would serve the public interest.¹²

ETCB notes that FDMI stated in its application that it would provide second NCE service to 14,178 persons.¹³ However, ETCB contends that this number excluded two stations from its calculation; when counting those two stations, FDMI's proposal would only provide new NCE service to 1,706 persons, and therefore, the FDMI application did not meet the requirements to claim a fair distribution preference for second NCE service.¹⁴

In the Opposition, FDMI first notes that its application was pending for 13 months, and ETCB could have raised its arguments at any points during that period.¹⁵ FDMI also argues that the cases cited by ETCB are inapposite because they involved instances where the petitioner had been precluded from participating in the proceeding or was not given proper notice of a pending application.¹⁶ FDMI does not directly address the accuracy of ETCB's claims regarding its fair distribution figures, but states that its engineer that prepared its fair distribution exhibit was not available to explain his calculations.¹⁷

In the Reply, ETCB notes that FDMI has not challenged ETCB's assertion that the fair distribution figures in the FDMI Application were incorrect, and that FDMI will not be able to construct a facility that complies with the conditions placed on its permit.¹⁸ ETCB again argues that the public interest will be served by considering the First Petition.¹⁹ Finally, ETCB states that its own application contained typographical errors in the directional antenna pattern, and that it has filed an amendment that corrects these errors, together with the Second Petition.²⁰

ETCB filed the Second Petition on January 8, 2023, seeking *nunc pro tunc* reinstatement of its application.²¹ The Second Petition also includes a paper copy of a proposed amendment to the ETCB application, which ETCB explains, is necessary because the Commission's filing database, LMS, would not allow it to file an electronic amendment to its dismissed application.²²

¹¹ First Petition at 1-2.

¹² *Id.* at 2-3.

¹³ *Id.* at 3.

¹⁴ *Id.* at 4-5.

¹⁵ Opposition at 3.

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at n.7. FDMI also raises arguments regarding defects in the ETCB Application. However, as discussed below, we will not consider the arguments raised in the Opposition at this time. *See* note 34 *infra*.

¹⁸ Reply at 2.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 4. ETCB also responded to arguments raised in the Opposition against its application. As noted, we are not considering these arguments at this time. *See* note 34 *infra*.

²¹ Second Petition at 1-2.

²² *Id.* at 2.

Discussion. Section 405(a) of the Act permits the filing of petitions for reconsideration by “any party” to a proceeding, or “any other person aggrieved or whose interests are adversely affected thereby.”²³ The Commission implemented section 405(a) through section 1.106(b)(1) of its rules (Rules),²⁴ which states that “any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken.”²⁵ If a petition for reconsideration is filed by a non-party, the non-party must “state with particularity the manner in which the [petitioner’s] interests are adversely affected” and “show good reason why it was not possible . . . to participate in the earlier stages of the proceeding.”²⁶ Further, Section 1.106(c)(2) of the Rules permits the Bureau to consider a petition for reconsideration if it determines that “consideration of the facts or arguments relied on is required in the public interest.”²⁷

Although ETCB has not provided any reason why it failed to file a petition to deny or informal objection prior to the grant of the FDMI Application, we nonetheless find that it is in the public interest to consider the merits of the First Petition.²⁸ The FDMI Application was tentatively selected over seven other MX applications based on its fair distribution claim. As ETCB notes, the FDMI Application was ultimately granted conditioned upon FDMI’s compliance with section 73.7002(c) of the Rules, which requires that FDMI operate the station substantially as proposed for four years and not downgrade service to the area on which its 307(b) preference was based.²⁹ Section 73.7002(c) further provides that if the permittee modifies its facilities “any potential loss of first and second NCE service [must be] offset by at least equal first and, separately, combined first and second NCE service population gain(s), and the applicant [must] continue to qualify for a decisive Section 307(b) preference.”³⁰

The construction permit issued to FDMI relied on FDMI’s claim that it would provide second NCE service to 14,178 people. FDMI cannot comply with this requirement because, based on ETCB’s calculations, FDMI will only provide second NCE service to 1,706 people—a clear downgrade.³¹ Because FDMI cannot construct a facility that complies with section 73.7002(c), we will rescind the grant

²³ 47 U.S.C. § 405(a).

²⁴ 47 CFR § 1.106(b)(1).

²⁵ *Id.*

²⁶ *Id.*

²⁷ 47 CFR § 1.106(c)(2).

²⁸ *See, e.g., Caron Broadcasting, Inc., and Common Ground Broadcasting, Inc.*, Letter Order, 32 FCC Rcd 5692, 5695 (MB 2017) (considering merits of petition for reconsideration where petitioner failed to participate earlier in the proceeding, but the public interest warranted consideration of arguments raised therein).

²⁹ 47 CFR § 73.7002(c).

³⁰ *Id.*

³¹ In the Opposition, FDMI neither confirmed nor denied the accuracy of ETCB’s calculation, nor did it provide a revised calculation of its own. The Bureau staff has independently determined that FDMI’s second NCE service claims are overstated.

of the FDMI Application and return it to pending status.³² We further direct FDMI to amend its application to correct its fair distribution population figures.³³

Additionally, as noted in the Second Petition, ETCB seeks to file a corrective technical amendment to its application. We will not consider the paper-filed amendment ETCB filed with the Second Petition. Rather, we will reinstate the ETCB Application in LMS to allow ETCB to electronically file its amendment.³⁴

We will afford FDMI and ETCB **15 days** from the date of this letter in which to file corrective amendments to their applications.³⁵ This will enable us to review accurate data for each applicant and compare the applications. If either applicant fails to file this required amendment, we will dismiss its application pursuant to section 73.3568(a) of the Rules.³⁶

Conclusion/Action. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration filed on December 19, 2022, by East Texas Community Broadcasting (Pleading File No. 0000205723) **IS GRANTED**.

IT IS FURTHER ORDERED that the grant and tentative selection of the application of First Dallas Media, Inc., for a construction permit for a noncommercial educational FM station at Golinda, Texas (Application File No. 0000165973) **IS RESCINDED**.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed on January 8, 2023, by East Texas Community Broadcasting (Pleading File No. 0000206492) **IS GRANTED**.

³² We reject ETCB's argument that FDMI made a misrepresentation. ETCB provides no evidence that FDMI made an intentional misrepresentation, as opposed to an engineering error. *See, e.g., Rocket Radio Corporation*, Memorandum Opinion and Order, 35 FCC Rcd 10471, 10475-76, para. 13 (MB 2020) (rejecting argument that licensee made a misrepresentation where objector failed to raise a substantial and material question of fact of intent to deceive).

³³ Under section 1.65 of the Rules, and as stated in the *NCE Filing Procedures Public Notice*, following the application filing deadline, "each applicant must continue to maintain the accuracy and completeness of the information in its application. Each applicant must notify the Commission, by electronically filing an amendment, of any substantial change that may be of decisional significance to the application." *See* 47 CFR § 1.65; *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window*, 36 FCC Rcd 11458, 11468 and n. 68 (MB 2021).

³⁴ We will not, at this time, consider the arguments raised in the Opposition against the ETCB Application. However, FDMI is not precluded from raising those arguments again in a Petition to Deny or Informal Objection if ETCB is subsequently identified as the tentative selectee of NCE MX Group 205.

³⁵ Any such amendment must propose minor changes, must correct all the application defects, including those not identified in this letter, and must comply with all relevant rules. Furthermore, applications that are amended and create any new application conflicts, or that worsen any existing conflicts (such as increasing existing overlap), will be dismissed without additional opportunity to amend. *See MX Groups & Settlements Public Notice*, 36 FCC Rcd at 16455.

³⁶ 47 CFR § 73.3568(a) ("... failure to respond to official correspondence or request for additional information, will be cause for dismissal."); *see also LPFM MX Group 37*, Memorandum Opinion and Order, 31 FCC Rcd 7512, 7517, para. 12 (2016) (dismissing application for failure to respond to letter of inquiry).

IT IS FURTHER ORDERED that the application of East Texas Community Broadcasting for a construction permit for a noncommercial educational FM station at Riesling, Texas (Application File No. 0000167216) **IS REINSTATED.**

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau