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Our Lady of the Snows Foundation, Inc.
c/o Stuart W. Nolan, Jr., Esq.
LegalWorks Apostolate, PLLC
4 Family Life Lane
Front Royal, VA 22620
(sent by electronic mail to: nolan@legalworks.com)

Idaho State Board of Education
c/o Ernest T. Sanchez, Esq.
The Sanchez Law Firm
1629 K Street NW, Suite 300
Washington, DC 20006
(sent by electronic mail to: ernestsanchez2348@gmail.com)

In re: **NCE MX Group 82**

**Our Lady of the Snows Foundation,
Inc.**

New NCE FM, Ketchum, Idaho
Facility ID No. 763565
Application File No. 0000167668

Idaho State Board of Education

New NCE FM, Ketchum, Idaho
Facility ID No. 768287
Application File No. 0000166951

Petition to Deny

Dear Counsel,

We have before us the application filed by Our Lady of the Snows Foundation, Inc. (OLSF), and an amendment to the dismissed application of Idaho State Board of Education (ISBE), which seeks *nunc pro tunc* reinstatement of that application.¹ Both applications sought construction permits for new noncommercial educational (NCE) FM stations in Ketchum, Idaho, were determined to be mutually exclusive (MX), and were designated by the Media Bureau (Bureau) as NCE MX Group 82.² The

¹ Application File Nos. 0000167668 (OLSF Application) and 0000166951 (ISBE Application); *see also* ISBE Application, Amendment (filed Mar. 14, 2023) (March Amendment). ISBE did not file a separate petition for reconsideration of the dismissal of its application. Accordingly, we will treat the March Amendment as a petition for reconsideration.

² *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*

Commission identified the OLSF Application as the tentative selectee of the group.³ We also have before us the Petition to Deny (Petition) the OLSF Application filed by ISBE⁴ and a related responsive pleading.⁵ For the reasons set forth below, we deny the March Amendment, dismiss the Petition as moot, and grant the OLSF Application.⁶

Background. The subject applications were filed during the November 2021 NCE FM filing window.⁷ Because both applications proposed to serve the same community, in the *Second Comparative Order*, the Commission conducted a point system analysis.⁸ The Commission awarded both OLSF and ISBE three points under the established local applicant criterion, and awarded OLSF two points under the diversity of ownership criterion.⁹ The Commission thus identified the OLSF Application as the tentative selectee of NCE MX Group 82.¹⁰

In the Petition, ISBE argues that the OLSF Application was not entitled to three points under the established local applicant criterion nor two points under the diversity of ownership criterion because OLSF was not established two years prior to the snap shot date for establishing points,¹¹ but was in fact only incorporated on October 5, 2020.¹² In the Opposition, OLSF argues that it “is the recently incorporated manifestation of a previously unincorporated foundation founded five years prior to the Freeze Date” and is therefore entitled to points under the established local applicant criterion.¹³ OLSF

Amendments, MB Docket No. 20-343, Public Notice, 36 FCC Rcd 16452 (MB 2021) (*MX Groups and Settlement Public Notice*).

³ *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 22-78 at 15, paras. 57-58 (Oct. 25, 2022) (*Second Comparative Order*).

⁴ Pleading File No. 0000204323 (filed Nov. 23, 2022) (Petition).

⁵ OLSF filed an Opposition to the Petition. Pleading File No. 0000204817 (filed Dec. 5, 2022). OLSF separately filed a signed copy of the sworn declaration of the co-chair of OLSF, Claire Goodyear. Pleading File No. 0000204834 (filed Dec. 5, 2022). ISBE did not file a Reply as of the date of this letter.

⁶ In the *Second 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.” *Second Comparative Order* at 22, para. 101. 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 22, para. 102.

⁷ *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) (*Procedures Public Notice*).

⁸ *Second Comparative Order* at 15, para. 57.

⁹ *Id.* at 15, para. 58.

¹⁰ *Id.*

¹¹ The snap shot date for the 2021 NCE Window was November 9, 2021, which was the day the window closed. *Procedures Public Notice*, 36 FCC Rcd at 7459.

¹² Petition at 2.

¹³ Opposition at 5.

further asserts that the ISBE Application is defective for failing to provide coverage to the community of license—Ketchum, Idaho—and should be dismissed, thereby making the OLSF Application a singleton.¹⁴

On March 14, 2023, the Bureau reviewed the ISBE Application to determine whether it was acceptable for filing,¹⁵ identified numerous defects in the ISBE Application,¹⁶ dismissed it, and afforded ISBE 30 days in which to correct the defects in the application.¹⁷ ISBE promptly filed the March Amendment, which revised Antenna Location Data field of the ISBE Application to identify new coordinates for the proposed station's transmitter.¹⁸ ISBE explained that the purpose of the amendment was “to correct the coordinates” of the original ISBE Application.¹⁹

Discussion. Initially, we find that the March Amendment is unacceptable because it is a major amendment and creates new mutual exclusivities, which are explicitly prohibited by the *MX Groups and Settlement Public Notice*.²⁰ The March Amendment constitutes a prohibited major change amendment because its proposed 60 dbu contour does not overlap with the 60 dbu contour of the original Application.²¹ Moreover, the March Amendment creates additional overlap with the OLSF Application.²² Thus, the March Amendment is unacceptable and we deny it.

We reject ISBE's argument that the March Amendment should be accepted because it purports to correct typographical errors in the original Application. The Commission has explicitly required that “for radio station applications, that the antenna location coordinates specified in Item 3 of the FCC Form 340

¹⁴ *Id.* at 2-3.

¹⁵ Once an application is identified as a potential tentative selectee, the staff studies the application for defects and, if the application is unacceptable for filing, dismisses the application and affords them one opportunity to submit a curative amendment. *See Second Comparative Order* at 22, para. 99.

¹⁶ For example, the antenna coordinate data in the ISBE Application differed from that provided in the attached engineering exhibit. *See* Application at Antenna Location Data and Attach. “NEW 207A Ketchum ID Engr.pdf”. When determining technical acceptability, the Bureau staff relies on the data contained within the application data fields and does not rely on the data contained in engineering exhibits. *See Roman Catholic Diocese of Portland, Maine, et. al.*, Memorandum Opinion and Order, 29 FCC Rcd 15068, 15072, para. 8 (2014) (*Diocese of Portland*).

¹⁷ *Actions*, Public Notice, Report No. PN-2-230316-01 (MB Mar 16, 2023) (“Dismissed 3/14/2023 via Public Notice for the following reasons: Section 73.515 violation - fails to provide any coverage of Ketchum, ID (0% of the population and area); Section 73.509 violations - (1) 243 sq. km. overlap received from first-adjacent channel Class C0 licensed station KLRI(FM), Rugby, ID; (2) 15 sq. km. overlap caused to and 323 sq. km. received from second-adjacent channel Class C0 licensed station KEFX(FM), Twin Falls, ID; and (3) 15 sq. km. overlap caused to and 323 sq. km. received from third-adjacent channel Class C0 licensed station KAWZ(FM), Twin Falls, ID. SEE DA 21-1516 for general information about this dismissal and for information about filing curative amendments.”).

¹⁸ March Amendment at Antenna Location Data.

¹⁹ *Id.* at Attach. “NEW 207A Ketchum- purpose of amendment.pdf”.

²⁰ *See MX Groups and Settlement Public Notice*, 36 FCC Rcd at 16455 (“Only minor engineering amendments, . . . will be accepted. Amended applications must specify rule-compliant facilities. Applications that are amended and create any new application conflicts, or that worsen any existing conflicts (such as increasing existing overlap), will be dismissed.”).

²¹ *See* 47 CFR § 73.3573(a).

²² Specifically, the overlap between the ISBE Application's 60 dBu protected contour and the OLSF Application's 40 dBu interfering contour has gone from 227 sq. km (with the facilities in the dismissed original ISBE Application) to 553 sq. km. (with the facilities in the March Amendment).

Tech Box . . . or [its] equivalent[] in future form revisions, be set forth accurately.”²³ The Commission further “direct[ed] that the staff may make any technical and legal evaluations of, and take any actions regarding, such applications based upon the stated antenna location coordinates specified in the Tech Box, without resort to any other data in the Tech Box *or elsewhere in the application or attachments*. Such staff actions may include, but are not limited to, dismissal of such defective applications and *refusal to accept amendments where such amendments would conflict with accurate and rule-compliant window-filed applications*.”²⁴

Here, although the attachment in the original ISBE Application described a rule-complaint site,²⁵ the coordinate data contained in the Application’s “Antenna Location Data” field identified a non-compliant site. ISBE cannot attempt to file a non-compliant amendment on the theory that the data in the Application was a typographical error. Accordingly, we deny the March Amendment to the ISBE Application. Because ISBE has utilized its sole opportunity to file a curative amendment, it can no longer amend its application.²⁶

Furthermore, our dismissal of the ISBE Application renders the Petition moot. The Petition only challenged the points awarded to the OLSF Application. The OLSF application is now a singleton. Accordingly, we grant the OLSF Application.²⁷

Conclusion/Action. Accordingly, the March 14, 2023, amendment to the application of Idaho State Board of Education for a construction permit for a new noncommercial educational FM station at Ketchum, Idaho (Application File No. 0000166951) **IS DENIED** and when treated as a petition for reconsideration **IS DENIED**.

IT IS FURTHER ORDERED that the Petition to Deny filed by Idaho State Board of Education **IS DISMISSED AS MOOT**.

²³ See *Diocese of Portland*, 29 FCC Rcd at 15072, para. 8. The current FCC Form 2100, Schedule 340 is the LMS-based equivalent of the FCC Form 340, which was used in CDDBS .

²⁴ *Id.* (emphasis added).

²⁵ Application at “NEW 207A Ketchum ID Engr.pdf”.

²⁶ A dismissed applicant has *one* opportunity to file a minor curative amendment to its application and a petition for reconsideration, requesting reinstatement of the application *nunc pro tunc*. See *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984); 47 CFR § 1.106. The amendment and petition for reconsideration must be filed within 30 days of the dismissal of the application.

²⁷ Because the OLSF Application is now a singleton, it is not subject to the conditions stated in the *Second Comparative Order*. See *Second Comparative Order* at 28, para. 120 (conditioning grant of the OLSF Application on compliance with section 73.7005 of the Rules, 47 CFR § 73.7005).

IT IS FURTHER ORDERED that the application of Our Lady of the Snows Foundation for a construction permit for a new noncommercial educational FM station at Ketchum, Idaho (Application File No. 0000167668) **IS GRANTED.**

Sincerely,
Albert Shuldiner
Chief, Audio Division
Media Bureau

cc (via electronic mail):

Claire Goodyear. (clairegoodyear@me.com)
(Representative for Our Lady of the Snows Foundation, Inc.)

Tom Michael (tommichael@boisestate.edu)
(Representative for Idaho State Board of Education)