

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	NCE FM 2021 Window, MX Group Number
Threshold Fair Distribution Analysis of 1)	59B
Group of Mutually Exclusive Applications)	
for a Permit to Construct a New)	
Noncommercial Educational FM Station)	

MEMORANDUM OPINION AND ORDER

Adopted: January 23, 2023

Released: January 23, 2023

By the Chief, Audio Division, Media Bureau

I. BACKGROUND

1. The Media Bureau (Bureau) has before it for comparative consideration a group of mutually exclusive (MX) applications for a new noncommercial educational (NCE) FM station construction permit.¹ By this Memorandum Opinion and Order (Order), the Bureau performs a threshold fair distribution of service analysis and identifies the tentative selectee in this group. Petitions to deny the application of this tentative selectee must be filed within 30 days of the date of release of this Order.²

2. The group addressed in this Order consists of applications that were filed in November 2021, during the filing window for new NCE FM applications.³ These applicants have had an opportunity to settle among themselves,⁴ and are now subject to a simplified, comparative process codified in Part 73, Subpart K, of the Commission's rules.⁵ During the first step of this process, the Bureau, acting pursuant to delegated authority,⁶ uses service area population data, Tribal Priority criteria, and certifications provided by the applicants to perform a threshold fair distribution analysis.

¹ On November 29, 2021, the Bureau issued a public notice identifying 231 groups of mutually exclusive NCE FM applications. *See Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Educational Stations*, MB Docket No. 20-343, Public Notice, 36 FCC Rcd 16452 (MB 2021) (*NCE MX Public Notice*). The group analyzed herein was included on the *NCE MX Public Notice*.

² *See* 47 CFR § 73.7004(b).

³ *See 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). The window was available for FM reserved band (channels 201-220) proposals. *See* 47 CFR § 73.501.

⁴ *See NCE MX Public Notice* at 2-5.

⁵ 47 CFR §§ 73.7000 – 7005.

⁶ *See Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 22 FCC Rcd 6101, n.16 (2007). *See also* 47 CFR §§ 0.61 and 0.283. A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations. *See Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7397 (2000) (*NCE Order*). In contrast, the point system analysis, which is conducted when Section 307(b) is not determinative, must be conducted by the Commission as this analysis is considered a simplified “hearing” for purposes of 47 U.S.C. § 155(c)(1). *See NCE Order*, 15 FCC Rcd at 7420.

II. THRESHOLD FAIR DISTRIBUTION OF SERVICE PROCEDURES

3. Section 307(b) of the Communications Act of 1934, as amended (Section 307(b)) states that the Commission must “provide a fair, efficient, and equitable distribution” of broadcast service among the states and communities.⁷ In accordance with this directive, the Commission considers the fair distribution of service as a first, or threshold, issue in its NCE FM comparative review process.⁸ Accordingly, when applicants in a mutually exclusive NCE FM group⁹ propose to serve different communities, the Bureau first performs a threshold “fair distribution” analysis to ascertain whether grant of any of the applications would best further the Section 307(b) objective.¹⁰ In the first step of the Section 307(b), or fair distribution, analysis, the Bureau determines whether any of the applicants in the MX group is a federally recognized Native American Tribe or Alaska Native Village proposing to serve Tribal Lands¹¹ and claims the Tribal Priority.¹²

4. If there is no Tribal Applicant in the MX group,¹³ the Bureau proceeds to the second step in the Section 307(b) analysis and determines whether any applicant would provide a first or second reserved band channel NCE aural service to a substantial population (the First or Second NCE Service Preference) and compares population coverage totals.¹⁴ Specifically, during this step, an NCE FM applicant is eligible to receive a fair distribution preference (or Section 307(b) preference)¹⁵ if it would provide a first or second reserved band channel NCE aural service to at least 10% of the population (in the aggregate), within the proposed station’s service area, provided that the population served is at least 2,000 people. If only one applicant in an MX group qualifies for the First or Second NCE Service

⁷ 47 U.S.C. § 307(b).

⁸ See 47 CFR § 73.7002; *NCE Order*, 15 FCC Rcd at 7396 (concluding that “fair distribution of stations to communities should remain a threshold issue”), Memorandum Opinion and Order, 16 FCC Rcd 5074, 5077 (2001) (*NCE MO&O*) (“when competing FM applications propose to serve different communities, a proposal would be considered best, as a threshold matter, if it would provide service to a significant unserved or underserved population”).

⁹ Conflicting NCE FM applications, which cannot all be granted consistent with the Commission’s technical rules, are considered mutually exclusive. An MX group consists of all applications which are MX to at least one other application in the group.

¹⁰ See 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 CFR § 73.7002(a). Applicants’ Form 2100, Schedule 340, Fair Distribution of Service certifications enable the Bureau to consider whether service to one community over the other would best achieve the Commission’s directive to distribute radio service fairly among communities.

¹¹ See 47 CFR §§ 73.7000, 73.7002(b).

¹² An NCE FM applicant is eligible to receive a fair distribution preference, and ultimately be awarded the construction permit, if it identifies itself as a Tribal Applicant, proposes Tribal Coverage, and proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands (the Tribal Priority). See 47 CFR § 73.7000 (defining a “Tribal Applicant” and “Tribal Coverage”); see also 47 CFR § 73.7002(b); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order, 25 FCC Rcd 1583 (2010) (establishing the Section 307(b) Tribal Priority).

¹³ The MX group addressed in this Order does not contain a Tribal Applicant. Accordingly, the first step of the Section 307(b) analysis, the Tribal Priority analysis, is unnecessary herein.

¹⁴ See 47 CFR § 73.7002(b).

¹⁵ The terms “fair distribution preference” and “Section 307(b) preference” are used interchangeably to refer to the preference given to an MX application that is deemed to substantially further the fair distribution of service goals enunciated in Section 307(b) of the Act.

Preference, its “fair distribution” (Section 307(b)) preference is dispositive,¹⁶ and the applicant will be awarded the construction permit.

5. If more than one applicant in the MX group claims a First or Second NCE Service Preference, the applicant proposing to provide the greatest number of people with the highest level of service will be awarded a construction permit, if it will provide such service to at least 10% of the people within the station's 60 dBu contour *and* to at least 5,000 more people than the next best applicant.¹⁷ First service will be preferred over second service.¹⁸ Accordingly, the Bureau first examines the applicants' first service levels alone to determine whether one of the proposals is superior and should receive a decisive preference. If such applicants are equivalent with respect to first service, or no applicant qualifies for a first service preference, the Bureau considers combined first and second NCE aural service population totals. At each stage of the Section 307(b) analysis, any applicant that is comparatively disfavored in terms of Section 307(b) eligibility or service totals is eliminated. The process ends when the Bureau determines that one applicant is entitled to a Section 307(b) preference, or that either (1) none of the remaining applicants can be selected or eliminated based on a Section 307(b) preference, or (2) each remaining applicant proposes to serve the same community. Any remaining MX applicants proposing equivalent service overall, or proposing the same community, proceed to a point system analysis.¹⁹

6. Each applicant claiming a First or Second NCE Service preference must support its fair distribution claim with an exhibit identifying the population residing within the proposed station's 60 dBu service contour and the number of people that would receive a new first or second NCE aural service.²⁰ Further, any applicant which receives a decisive Section 307(b) preference is required to construct and operate technical facilities substantially as proposed, and cannot downgrade service to the area on which the preference was based for a period of four years of on-air operations.²¹

III. GROUP ANALYSIS

7. This Section contains a narrative description of our analysis. Unless otherwise noted, each component of the analysis is based on information provided by each of the respective applicants.²²

¹⁶ As noted, in the case of an MX group with a Tribal Applicant, an applicant qualifying for a Tribal Priority, however, will prevail over any MX applicant claiming a First or Second NCE Service Preference.

¹⁷ 47 CFR § 73.7002(b).

¹⁸ *Id.*

¹⁹ See 47 CFR §73.7003 (point system selection procedures).

²⁰ See *id.* § 73.7002(b). Applicants were required to use the most recently available, *i.e.*, 2010 Census, population data. See *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window*, DA 21-885, at 5-7 and n.24 (MB rel. July 23, 2021) (*NCE Filing Procedures Public Notice*); FCC Form 2100, Schedule 340, Instructions for Fair Distribution of Service at 12-14. An applicant's fair distribution showing must be computed as of the time of filing (close of the filing window for applications filed prior to the window) and cannot be enhanced thereafter. See 47 CFR § 73.7003(e) and (f)(3); *NCE Filing Procedures Public Notice* at 11; *NCE MO&O*, 16 FCC Rcd at 5082-83. However, an applicant that subsequently makes engineering changes that would diminish its fair distribution position must amend its application to reflect that diminished position. See 47 CFR §§ 1.65 and 73.7003(e).

²¹ See 47 CFR § 73.7005(b); see also 47 CFR § 73.7002(c). During this period, such applicant may make minor modifications to its authorized facilities, provided that “(i) the modification does not downgrade service to the area on which the preference was based, or (ii) any potential loss of first and second NCE service is offset by at least equal first and, separately, combined first and second NCE service population gain(s), and the applicant would continue to qualify for a decisive Section 307(b) preference.”) *Id.*

²² See FCC Form 2100, Schedule 340, Noncommercial Educational Station for Reserved Channel Construction Permit Application, Fair Distribution of Service certifications. An applicant responding “Yes” to any of the certification questions was required to submit an attachment with a justification for its certification.

8. **Group 59B.**²³ This group consists of six applications to serve different communities in Florida and Georgia. In Florida, Faith and Action Community Outreach, Inc. (Faith) proposes to serve Madison, and Big Bend Heritage Music Association, Inc. (Big Bend) proposes to serve Perry. In Georgia, Elijah Radio (Elijah) proposes to serve Dasher; Georgia Public Telecommunications Commission (GPTC) proposes to serve Pelham; Church Planters of America (Church Planters) proposes to serve Quitman; and Bemiss Road Baptist Church and Lowndes County Christian Academy Inc. (Bemiss) proposes to serve Valdosta.

9. Group 59B originally included two additional applicants, CSN International (CSN) and Inverse Focus Ministry, Inc. (Inverse). The Bureau initially performed a fair distribution analysis of the eight applications and identified Inverse as the tentative selectee in Group 59B.²⁴ Inverse and CSN, however, subsequently requested dismissal of their applications.²⁵ Accordingly, the Bureau conducted a second 307(b) analysis and identified Big Bend as the new tentative selectee of this group.²⁶ However, Big Bend subsequently filed an amendment to its application in which it revised its population data and certified that it was not eligible for a fair distribution preference.²⁷ Accordingly, we will perform a third fair distribution analysis of this group.

10. Elijah and GPTC each claims that it is eligible for a fair distribution preference based on combined first and second NCE population totals.²⁸ The other applicants do not. Accordingly, Big Bend, Faith, Church Planters, and Bemiss are each eliminated. Elijah would provide a combined first and second NCE service to 12,723 people; and GPTC to 6,971 people. Because Elijah's proposed combined first and second NCE service exceeds GPTC's proposal by at least 5,000 people, GPTC is eliminated. Elijah is the tentative selectee for Group 59B.

IV. ADDITIONAL MATTERS

11. **Acceptability Studies.** Once the Bureau identifies a tentative selectee pursuant to the fair distribution analysis, the next step is to consider whether the selectee's application has defects.²⁹ If

²³ Group 59, which originally contained 17 applications, was bifurcated as a result of a technical amendment. The other applications in the MX group were evaluated as Group 59A in a previous order. *See 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, at paras. 32-34 (2022).

²⁴ *See Threshold Fair Distribution Analysis of 13 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-477 at 4-5, para. 11 (MB May 2, 2022).

²⁵ *See* File Nos. 167809 and 167493.

²⁶ *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 4-5, para. 10 (MB Nov. 9, 2022).

²⁷ *See* File No. 166291, Fair Distribution of Service Section and Attach. "Perry 210 Amendment Purpose.pdf" (filed Dec. 7, 2022).

²⁸ *See* File Nos. 167410 and 167018, Fair Distribution of Service Section, and associated exhibits. Elijah's 60 dBu contour encompasses 101,868 people, and its claimed aggregated first and second NCE service is 12,723 people. GPTC's 60 dBu contour encompasses 19,136 people, and its claimed aggregated first and second NCE service is 6,971 people. Thus, each would provide combined first and second NCE service to at least 10% percent of the population within its respective 60 dBu contour and to more than 2,000 people.

²⁹ If a tentative selectee's application is found unacceptable for filing, it is dismissed. The applicant then has one opportunity to submit a curative amendment and a petition for reconsideration requesting reinstatement *nunc pro tunc* within 30 days, provided that the amendment is minor and does not alter the fair distribution analysis. *See* 47 CFR § 73.3522(b)(1). A tentative selectee that is unable to cure the defect is disqualified. 47 CFR § 73.7004(d).

the Bureau finds the application acceptable for filing, we announce acceptance by the release of this Order, and petitions to deny may be filed within 30 days following the release date of the Order.³⁰

12. The Bureau has studied the application of the tentative selectee identified herein and determined that the application is acceptable for filing. The tentative selectee identified in this Order appears to be fully qualified to become the licensee of the new NCE FM station it has proposed. We tentatively conclude that the grant of the application would serve the public interest, convenience, and necessity. It is our intention to grant the application if, after the 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application. Such determinations of grantability may, of course, involve additional matters that may impact the timing or outcome of a decision. For example, a proposal to serve an area near the United States border with Canada or Mexico cannot become ripe for grant prior to the successful completion of international coordination.

V. ORDERING CLAUSES

13. **Group 59B.** Accordingly, IT IS ORDERED, that the tentative selection of the application of Big Bend Heritage Music Association, Inc. (File No. 166291), for authority to construct a new noncommercial educational FM station at Perry, Georgia, IS RESCINDED.

14. IT IS FURTHER ORDERED that the Application filed by Elijah Radio (File No. 167410) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Dasher, Georgia and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the petition to deny period has run, the Bureau finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there is no substantial and material question concerning the grantability of the tentative selectee's application, and it is determined that grant of the application serves the public interest, we intend, by public notice, TO DISMISS the mutually exclusive applications of Big Bend Heritage Music Association, Inc. (File No. 166291), Faith and Action Community Outreach, Inc. (File No. 165985), Georgia Public Telecommunications Commission (File No. 167018), Church Planters of America (File No. 167096), and Bemiss Road Baptist Church and Lowndes County Christian Academy Inc. (File No. 167233), and TO GRANT the application of Elijah Radio (File No. 167410), 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.

FEDERAL COMMUNICATIONS COMMISSION

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³⁰ 47 CFR § 73.7004.