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In Reply Refer To:

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In re: **NCE MX Group 122**

Grand Forks Bible Study Group
New NCE (FM), Grand Forks, North
Dakota
Facility ID No. 766460
Application File No. 0000167114

Bible Broadcasting Network, Inc.
New NCE (FM), Grand Forks, North
Dakota
Facility ID No. 762237
Application File No. 0000167299

Petition to Deny

Dear Applicants and Counsel:

We have before us two applications filed by Bible Broadcasting Network, Inc. (BBNI) and Grand Forks Bible Study Group (GFBS) for construction permits for new noncommercial educational (NCE) FM stations to serve the community of Grand Forks, North Dakota, which the Media Bureau (Bureau)

designated as NCE MX Group 122.¹ In the *Fourth Comparative Order*,² the Bureau identified the BBNI Application as the tentative selectee of NCE MX Group 122. We also have before us the Petition to Deny the BBNI Application, filed by GFBS,³ and related responsive pleadings.⁴ For the reasons set forth below, we deny the GFBS Petition, grant the BBNI Application, and dismiss the GFBS Application.

Background. The subject applications were filed during the November 2021, NCE FM filing window.⁵ In the *Second Comparative Order*,⁶ the Commission analyzed the BBNI and GFBS Applications under the point system.⁷ The Commission awarded GFBS a total of five points — three points as an established local applicant and two points for diversity of ownership.⁸ It awarded BBNI a total of two points for diversity of ownership.⁹ Thus, the Commission identified GFBS as the tentative selectee.¹⁰

BBNI filed a Petition to Deny the GFBS Application (BBNI Petition),¹¹ arguing that GFBS was not entitled to either established local applicant or diversity of ownership points because it certified in the original GFBS Application that it did not qualify for points under either criterion,¹² and the Amended GFBS Application, in which GFBS first claimed those points, cannot be considered because it was filed after the close of the filing window and enhanced GFBS's comparative status.¹³

In the *Fourth Comparative Order*,¹⁴ the Commission granted the BBNI Petition, finding that since GFBS did not certify that it qualified for established local applicant or diversity of ownership points

¹ See *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Educational Stations*, Public Notice, 36 FCC Rcd 16452 at Attach. A (MB Nov. 29, 2021); see also Application File Nos. 0000167299 (BBNI Application) and 0000167114 (GFBS Application). GFBS amended its application on January 28, 2022 (Amended GFBS Application).

² *Comparative Consideration of 10 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 23-45, at 23-25, paras. 67-72 (Jun. 5, 2023) (*Fourth Comparative Order*).

³ Pleading File No. 0000217583 (filed July 5, 2023) (GFBS Petition).

⁴ BBNI filed an Opposition to the GFBS Petition. Pleading File No. 0000218159 (filed Jul. 19, 2023) (BBNI Opposition). BBNI filed a separate opposition on the same date, Pleading File No. 0000218150, but noted that Pleading File No. 0000218159 is the corrected version. GFBS filed a Reply to the BBNI Opposition. Pleading File No. 0000218711 (filed Jul. 31, 2023) (GFBS Reply).

⁵ *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).

⁶ *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 18, paras. 74-75 (Oct. 25, 2022) (*Second Comparative Order*).

⁷ *Id.* at 18, para. 74.

⁸ *Id.* at para. 75.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pleading File No. 0000204160 (filed Nov. 22, 2022).

¹² *Id.* at 2 and Exh. A.

¹³ *Id.* at 2-4 and Exhs. B and C.

¹⁴ *Fourth Comparative Order* at 23-25, paras. 67-72.

by the close of the filing window, it was improperly awarded points under those criteria.¹⁵ The Commission reiterated the previous directive that every NCE FM applicant claiming points must certify, *at the time it files its application*, that it qualifies for those points.¹⁶ Lastly, the Commission rejected GFBS's attempt to enhance its comparative position with its post-filing window amendment.¹⁷ Without the points awarded to GFBS under those criteria, GFBS's awarded points were reduced from five to zero, and BBNI, with two points, prevailed as the new tentative selectee.¹⁸

GFBS subsequently filed its Petition, arguing that: 1) it was improperly denied localism and diversity of ownership points because, despite initially certifying that it was ineligible for those points, it included supporting exhibits in its original application;¹⁹ 2) its amended application with updated certifications should be considered because none of the cases the Commission relied on to demonstrate comparative position enhancement involved applicants, such as GFBS, that timely-filed supporting exhibits;²⁰ 3) BBNI was improperly awarded points for diversity of ownership because its contour map exhibit includes a statement that the "contour of the proposed station overlaps the principal community contour of another authorized station;"²¹ and 4) once BBNI's diversity of ownership points are rescinded, even if GFBS is not awarded any points, the parties, each with zero points, proceed to a tie breaker in which GFBS would prevail.²²

In its Opposition, BBNI counters that: 1) procedurally, the GFBS Petition should be dismissed because it repeats prior arguments, inappropriately seeks reconsideration of the interlocutory designation of BBNI as new tentative selectee, and lacks a supporting affidavit;²³ and 2) substantively, BBNI was properly awarded two points for its diversity of ownership claim because while one of its diversity of ownership exhibits includes a statement that the proposed contour overlaps with another station, that was a scrivener's error left in the exhibit, the same exhibit's contour map shows that there is no overlap, and a

¹⁵ *Id.*

¹⁶ *Id.* at para 71 (citing *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window*, 36 FCC Rcd 11458 (MB 2021) (*NCE Procedures Public Notice*)).

¹⁷ See *Fourth Comparative Order* at 23-25, paras. 67-72 (citing *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Station Filed in the February 2010 Window*, Memorandum Opinion and Order, 30 FCC Rcd 5161, 5169-70, paras. 26-27 and n.66 (2015) (*Seven Group Order*) (finding that allowance of late submission of requested information in comparative cases "would inevitably lead to abuse of the Commission's processes, applicant gamesmanship, and unfair advantage"); *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8799 (2010) (finding that applicant's post-filing window amendment was a prohibited attempt to enhance, where the amendment claimed, for the first time, eligibility for a fair distribution preference)).

¹⁸ *Fourth Comparative Order* at 23-25, paras. 67-72.

¹⁹ GFBS Petition at 2-4.

²⁰ *Id.* at 4-8.

²¹ *Id.* at 8-9; BBNI Application at Attach. "Diversity of Ownership Exhibit.docx".

²² *Id.* at 9.

²³ BBNI Opposition at 2-4.

separate diversity of ownership statement clarifies that BBNI “holds no attributable interest in any radio station or pending application with overlap with the NCE FM station proposed in this application.”²⁴

In its Reply, GFBS maintains that: 1) it has established that it is eligible for points as both an established local applicant and under diversity of ownership, despite initially certifying that it is not qualified;²⁵ 2) the Commission permits the filing of petitions to deny after the tentative selection of a new application, even if indirectly related to the tentative selectee’s qualifications;²⁶ 3) the absence of a supporting affidavit is not a procedural defect where official notice may be taken of the facts alleged;²⁷ and 4) BBNI’s diversity of ownership exhibit discrepancy nullifies BBNI’s claim for two diversity points ; however, if the Bureau accepts BBNI’s claim, it must also accept GFBS’s claim.²⁸

Discussion. Pursuant to section 309(d) of the Communications Act of 1934, as amended,²⁹ 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.³⁰

Procedural Issues. As an initial matter, in the *Fourth Comparative Order*, the Commission explained that parties asserting that the tentative selectee should have received fewer points, or that their application should have received more points, may file a petition to deny, but not to raise matters as petitions for reconsideration.³¹ GFBS adhered to this directive and filed a petition to deny³² challenging the Commission’s finding that it was not entitled to diversity or localism points. We, therefore, reject BBNI’s allegation that the GFBS Petition was procedurally defective, and consider the merits.³³

Substantive Issues. In the *Fourth Comparative Order*, the Commission determined that GFBS is not entitled to points as either an established local applicant or for diversity of ownership. Here, GFBS

²⁴ *Id.* at 4-6 and Attach. 1, Decl. of Justin Asher; BBNI Application at Attach. “Diversity of Ownership Exhibit.docx”.

²⁵ GFBS Reply at 1.

²⁶ *Id.* at 2.

²⁷ *Id.* at 3-4 (citing *Seven Group Order*, , 30 FCC Rcd at 5143 & n.56).

²⁸ *Id.* at 4-6.

²⁹ 47 U.S.C. § 309(d).

³⁰ 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).

³¹ *Fourth Comparative Order* at 27-28, para. 81; 47 CFR § 1.106 (a)(1). See also *Patrick J. Vaughn, Esq.*, Letter Order, 22 FCC Rcd 11165 (MB 2007)).

³² GFBS Petition at 2-8.

³³ We also find that because the facts at issue in this petition are included in the GFBS and BBNI Applications and publicly available through the Commission’s Licensing and Management System, we can take official notice of these facts. Accordingly, the absence of a supporting affidavit is not a procedural defect. See, e.g., *Seven Group Order*, 30 FCC Rcd at 5143, para. 21 (affidavit not required when petition relies on facts of which official notice may be taken). See also 47 U.S.C. § 309(d)(1)(“Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”).

still has not identified any case in which an applicant failed to timely certify that it qualified for points, despite submission of related exhibits, and was later allowed to amend its application to certify eligibility, thereby enhancing its comparative position.

In the *NCE Procedure Public Notice*, the Bureau repeatedly reminded applicants to carefully review their applications before filing and that each applicant “bears full responsibility for submitting an accurate, complete, and timely application.”³⁴ The Bureau also explained that “if an applicant certifies that it does not qualify for one of the point factors, it cannot later amend its application to claim such points. This is the case even if the applicant actually would have qualified for the point it is seeking at the time it filed the application.”³⁵ It is undisputed that GFBS neglected to claim points under localism or diversity of ownership *at the time it filed its application*, as required.³⁶ As the Commission held, even if the exhibits in the original GFBS Application demonstrated its eligibility for localism and diversity points, GFBS’s conflicting certifications precluded reliance upon the exhibits.³⁷ For the same reasons outlined in the *Fourth Comparative Order*, we affirm that GFBS is not entitled to established local applicant or diversity of ownership points.³⁸

We also reject GFBS’s claim that BBNI is not entitled to two points for diversity of ownership because one of its supporting exhibits included a statement that the “contour of the proposed station overlaps the principal community contour of another authorized station.” 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.³⁹

In its original application, BBNI submitted two exhibits with affirmative written statements, explaining that it holds no attributable interest in any radio station or pending application with overlap with its proposed NCE FM station.⁴⁰ BBNI also submitted a third diversity of ownership exhibit consisting of the proposed station’s contour map, which does not show any overlap between the proposed contour and any of its existing stations’ contours (Contour Exhibit).⁴¹ While the Contour Exhibit does state that the proposed station overlaps with an existing station, the corresponding map refutes this. BBNI also subsequently submitted a declaration, signed under penalty of perjury, from the technical consultant who prepared the exhibit, Justin Asher (Asher), clarifying that the text was an error and should state that the “contour of the proposed station *does not overlap* the principal community contour of another authorized station.”⁴² We find that the contour map, which clearly illustrates no overlap, sufficiently demonstrates that BBNI is entitled to points for diversity of ownership. Additionally, BBNI’s additional two affirmative statements included with its application eliminate any ambiguity and support

³⁴ *Id.* at 11460.

³⁵ *Id.* at 11468.

³⁶ See *NCE Procedures Public Notice*, 36 FCC Rcd at 11464-65.

³⁷ *Fourth Comparative Order* at 24-25, paras. 71 and 72.

³⁸ *Id.*

³⁹ See Form 2100, Schedule 340, Attributable Interests, Other Authorizations, at 15-16.

⁴⁰ BBNI Application at Attachs. “Diversity of Ownership Exhibit.docx” and “DIVERSITY STATEMENT GRAND FORKS, ND.docx”.

⁴¹ *Id.* at Attach. “Diversity of Ownership Showing for CH202A - Grand Forks, ND.pdf”.

⁴² BBNI Opposition, Attach. 1, Decl. of Justin Asher, at 1. Asher also confirms that the Contour Exhibit accurately demonstrates the lack of overlap.

its claim for diversity of ownership.⁴³ , Accordingly, we find that BBNI timely and sufficiently demonstrated it qualified for diversity of ownership points. We, therefore, deny the GFBS Petition.

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED** that the Petition to Deny filed by Grand Forks Bible Study Group, on July 5, 2023 (Pleading File No. 0000217583), **IS DENIED**.

IT IS FURTHER ORDERED that the Application filed by Bible Broadcasting Network, Inc. (Application File No. 0000167299) for a construction permit for a new NCE FM station in Grand Forks, North Dakota, **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 Grand Forks Bible Study Group (Application File No. 0000167114), **IS DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

⁴³ See note 40, *supra*.