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In Reply Refer To:

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Elijah Radio
c/o Donald Martin, Esq.
P.O. Box 8433
Falls Church, VA 22041
(sent by electronic email to: dempc@prodigy.net)

Central Baptist Church of Ocala Inc.
c/o James E. Price, III, Esq.
P.O. Box 1877
LaFayette, GA 30728
(sent by electronic email to: sterlingjamesp@gmail.com)

Big Bend Heritage Music Association, Inc.
c/o Jason Bennett
7017 South Yale #444
Tulsa, OK 74136
(sent by electronic email to: jason@fmexpansion.com)

Florida Educational Radio, Inc.
c/o Kyle Magrill
2805 NW 6th Street
Gainesville, FL 32609
(sent by electronic email to: kyle@circuitwerkes.com)

Learning Avenue, Inc.
c/o Donald Martin, Esq.
P.O. Box 8433
Falls Church, VA 22041
(sent by electronic email to: dempc@prodigy.net)

D N D Ministries, Inc.
c/o James Hamilton, Esq.
330 Willow Street
Mayo, FL 32066
(sent by electronic mail to: tv23jax@yahoo.com)

In re:

NCE MX Group 59A

Elijah Radio

New NCE (FM), Live Oak, Florida

Facility ID No. 768185

Application File No. 0000167035

Central Baptist Church of Ocala Inc.

New NCE (FM), West Lake, Florida

Facility ID No. 762509

Application File No. 0000166339

Big Bend Heritage Music Association, Inc.

New NCE (FM), Cross City, Florida

Facility ID No. 767144

Application File No. 0000166684

New NCE (FM), Perry, Florida

Facility ID No. 767149

Application File No. 0000166293

Florida Educational Radio, Inc.

New NCE (FM), Lee, Florida

Facility ID No. 768734

Application File No. 0000167677

Learning Avenue, Inc.

New NCE (FM), Live Oak, Florida

Facility ID No. 767785

Application File No. 0000167472

D N D Ministries, Inc.

New NCE (FM), Mayo, Florida

Facility ID No. 768357

Application File No. 0000167338

Petition to Deny

Dear Applicants and Counsel:

We have before us seven mutually exclusive (MX) applications filed by Big Bend Heritage Music Association, Inc. (BBH), Elijah Radio (ER), Learning Avenue, Inc. (LAI), Florida Educational Radio, Inc. (FER), DND Ministries, Inc. (DND), and Central Baptist Church of Ocala, Inc. (CBCO) for construction permits for new noncommercial educational (NCE) FM stations in different communities in Florida, which the Media Bureau (Bureau) designated as NCE MX Group 59A.¹ In the *Fourth*

¹See *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. 0000167035 (ER Application), 0000166339 (CBCO Application), 0000166684 (BBH-Cross City Application), 0000167677 (FER Application), 0000167472 (LAI Application), 0000166293 (BBH-Perry Application), and 0000167338 (DND Application). 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 59B in previous orders. See *Threshold Fair Distribution Analysis of 13 Groups of Mutually*

Comparative Order,² the Commission identified the CBCO Application as the tentative selectee of NCE MX Group 59A. We also have before us the Petition to Deny the CBCO Application filed by BBH,³ and a related responsive pleading.⁴ For the reasons set forth below, we grant the BBH Petition, rescind our tentative selection of the CBCO Application, and identify the BBH-Cross City Application as the new tentative selectee of NCE MX Group 59A.

Background. The subject applications were filed during the November 2021, NCE FM filing window.⁵ In the *First Comparative Order*, the Commission determined that ER and CBCO had comparable fair distribution of service claims, analyzed the ER and CBCO applications under the point system, and identified ER as the tentative selectee.⁶

On August 29, 2022, CBCO filed an informal objection against the ER Application (CBCO Objection), arguing that ER should have been eliminated under the first tie-breaker analysis because it failed to update its application to reflect four recent grants of its applications for new NCE FM stations from the 2021 NCE Window.⁷ In the *Fourth Comparative Order*, the Commission granted the CBCO Objection, rescinded the tentative selection of the ER Application, and identified CBCO as the new tentative selectee of Group 59A.⁸

BBH subsequently filed its Petition, arguing that CBCO is not entitled to a first NCE service preference because it failed to consider Station WILA(FM), Live Oak, Florida, an existing NCE station that operates on a “permanently reserved channel outside of the reserved band,” and, once WILA is taken into account, the CBCO Application would not provide a first NCE service to at least 2,000 people and 10% of the population within its proposed service area.⁹

In the CBCO Opposition, CBCO argues that section 73.7002 of the Commission’s rules (Rules) only requires applicants to consider reserved channel NCE signals, not allotments reserved for NCE use

Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations, Memorandum Opinion and Order, DA 22-477 (MB May 2, 2022); *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 (June 5, 2023) (*Fourth Comparative Order*).

² *Fourth Comparative Order* at 24-26, paras. 75-79.

³ Pleading File No. 0000217528 (filed Jul. 5, 2023) (BBH Petition).

⁴ CBCO filed an Opposition to the BBH Petition. Pleading File No. 0000217824 (filed Jul. 12, 2023) (CBCO Opposition).

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 27 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 22-61, at 10-11, paras. 32-34 (Aug. 2, 2022) (*First Comparative Order*). ER, CBCO, and BBH-Cross City each claimed a first NCE service preference. In the *First Comparative Order*, the Commission eliminated FER, LAI, and BBH-Perry because each did not claim eligibility for a fair distribution preference, eliminated DND because it failed to provide sufficient documentation to support its fair distribution claim, and eliminated BBH-Cross City because ER’s next best proposal would serve at least 5,000 more people.

⁷ See Pleading File No. 0000198584 (filed Aug. 29, 2022) at 1-2. ER amended its application on January 28, 2022, and April 5, 2022, prior to the adoption of the *First Comparative Order*, but neglected to reflect the recent grants.

⁸ *Fourth Comparative Order* at 26-27, paras. 77-79.

⁹ BBH Petition at 2, Decl. of John Jason Bennett, and Fair Distribution Analysis.

outside the reserved band, in first and second NCE service calculations.¹⁰ CBCO, therefore, maintains that because WILA operates outside of the reserved band, it should not be included in its first NCE service calculation.¹¹

Discussion. Pursuant to section 309(d) of the Communications Act of 1934, as amended,¹² 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.¹³

We reject CBCO's argument that WILA should not be counted in its first and second NCE service calculations because the station operates on an allotment outside the reserved band. Section 73.7002 of the Rules specifies that an "applicant that will provide the first or second reserved channel noncommercial educational (NCE) aural signal" is considered superior to a mutually exclusive applicant that does not propose such service.¹⁴ To determine whether an applicant qualifies for a first or second NCE service preference, the Form 2100, Schedule 340 Instructions specify that "applicants must consider all full-service FM *reserved channel authorizations* placing a 60 dBμ contour over areas that the applicant also proposes to cover with a 60 dBμ contour."¹⁵ The *Filing Procedures Public Notice* clarifies that only "AM stations and/or FM stations that voluntarily operate with a noncommercial format on channels *not specifically reserved for that purpose* (i.e., non-reserved channels in the commercial band) are not counted in determining first and second NCE service."¹⁶ WILA, in contrast, operates on Channel 261, Live Oak, Florida, which is specifically reserved for NCE operation.¹⁷ Accordingly, WILA should have been included in CBCO's first NCE service fair distribution calculation.

Based on the corrected study BBH submits, had WILA been considered, CBCO would not provide a first NCE service to at least 2,000 people and 10% of the population in the proposed service area.¹⁸ Accordingly, we grant the BBH Petition, rescind the tentative selection of the CBCO Application,

¹⁰ CBCO Opposition at 1.

¹¹ *Id.*

¹² 47 U.S.C. § 309(d).

¹³ 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).

¹⁴ 47 CFR § 73.7002.

¹⁵ See Form 2100, Schedule 340 Instructions at page 14 (emphasis added).

¹⁶ See *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window*, Public Notice, 36 FCC Rcd 11458, 11464 (2021) (emphasis added) (*Filing Procedures Public Notice*).

¹⁷ On October 16, 2009, the Bureau announced a filing window for vacant FM allotments exclusively reserved for noncommercial educational use, and identified Channel 261, Live Oak, Florida, as a vacant NCE reserved channel. See *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621 and Attach. A (MB 2009).

¹⁸ BBH Petition at 6-8, Fair Distribution Analysis. An NCE FM applicant is only eligible to receive a fair distribution preference 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. See 47 CFR § 73.7002(b).

and conduct a new fair distribution analysis in accordance with the Commission's established comparative procedures.¹⁹

ER, CBCO, and BBH-Cross City each claim eligibility for a first NCE service fair distribution preference.²⁰ FER, LAI, and BBH-Perry do not. Although DND certifies that it is eligible for a first NCE service fair distribution preference, it failed to provide sufficient documentation to support its claim.²¹ Accordingly, DND, FER, LAI, and BBH-Perry are each eliminated.

BBH-Cross City claims to provide new first NCE service to 2,131 people, 17% of the population, and ER to 6,656 people, 13% of the population. However, the staff has reviewed the ER Application and determined that it also failed to account for WILA. The staff's independent analysis shows that, when WILA is taken into account, ER would provide new first NCE service to only 2,050 people and 4% of the population. Therefore, ER is not eligible for a first NCE service preference and is eliminated.

Further, while CBCO initially claimed to provide new first NCE service to 7,471 people, based on BBH's corrected figures, CBCO would only provide a first NCE service to 1,164 people and 2.9% of the population, disqualifying it from claiming a first NCE service preference. CBCO is therefore also eliminated. Accordingly, BBH-Cross City, the only applicant eligible for a first NCE service preference, is the new tentative selectee for MX Group 59A.²²

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED** that the Petition to Deny filed by Big Bend Heritage Music Association, Inc., on July 5, 2023 (Pleading File No. 0000217528), **IS GRANTED**.

IT IS FURTHER ORDERED that the tentative selection of the application of Central Baptist Church of Ocala for a construction permit for a noncommercial educational FM station at West Lake, Florida (Application File No. 0000166339) **IS RESCINDED**.

IT IS FURTHER ORDERED that the application filed by Big Bend Heritage Music Association, Inc. (Application File No. 0000166684) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Cross City, Florida, 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

¹⁹ See, e.g., 47 CFR § 73.7002.

²⁰ See Application File Nos. 0000167035, 0000166339, and 0000166684, Fair Distribution of Service Section, and associated exhibits.

²¹ See Application File No. 0000167338, Fair Distribution of Service Section, and associated exhibits. DND's application does not enumerate the population that would receive first and/or second NCE service. Accordingly, we find DND's claim of 307(b) eligibility lacking the basic information that is needed to include and compare the proposal with the others in the group.

²² The naming of a new tentative selectee in this proceeding is a routine action consistent with the Bureau's authority and Commission directives. Specifically, the Bureau has delegated authority to conduct a fair distribution analysis and make section 307(b) determinations. See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7397 (2000). Moreover, our decision does not involve new or novel issues or the points awarded to any applicant. See, e.g., *Fourth Comparative Order* at 28, para. 83 ("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").

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 Elijah Radio (Application File No. 0000167035), Florida Educational Radio, Inc. (Application File No. 0000167677), Learning Avenue, Inc. (Application File No. 0000167472), DND Ministries, Inc. (Application File No. 0000167338), Big Bend Heritage Music Association, Inc. (Application File No. 0000166293), and Central Baptist Church of Ocala (Application File No. 0000166339), and TO GRANT the application of Big Bend Heritage Music Association, Inc. (Application File No. 0000166684) CONDITIONED UPON that selectee's compliance with section 73.7005 of the Commission's rules, 47 CFR § 73.7005, which provides that an applicant receiving a Section 307(b) preference that is decisive over another applicant must operate technical facilities substantially as proposed for a period of four years of on-air operations.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau