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Washington, D.C. 20554

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DA 23-80

In Reply Refer to:

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In re: **NCE MX Group 59B**

Elijah Radio

New NCE FM, Dasher, Georgia
Facility ID No. 767346
Application File No. 0000167410

**Big Bend Heritage Music Association,
Inc.**

New NCE FM, Perry, Florida
Facility ID No. 767145
File No. 0000166291

**Georgia Public Telecommunications
Commission**

New NCE FM, Pelham, Georgia
Facility ID No. 765562
Application File No. 0000167018

**Faith and Action Community
Outreach, Inc.**

New NCE FM, Madison, Florida
Facility ID No. 762792
Application File No. 0000165985

Church Planters of America

New NCE FM, Quitman, Georgia
Facility ID No. 768382
Application File No. 0000167096

**Bemiss Road Baptist Church and
Lowndes County Christian Academy
Inc.**

New NCE FM, Valdosta, Georgia
Facility ID No. 768409
Application File No. 0000167233

Petition to Deny

Dear Counsel and Applicants:

We have before us six mutually exclusive applications filed by Elijah Radio (Elijah), Big Bend Heritage Music Association, Inc. (Big Bend), Georgia Public Telecommunications Commission (GPTC), Faith and Action Community Outreach, Inc. (Faith), Church Planters of America (Church Planters) and Bemiss Road Baptist Church and Lowndes County Christian Academy Inc. (Bemiss) for construction

permits for new noncommercial educational (NCE) FM stations in communities in Florida and Georgia,¹ which the Media Bureau (Bureau) designated as NCE MX Group 59B.² On January 23, 2023, the Bureau rescinded its tentative selection of the Big Bend Application and identified the Elijah Application as the new tentative selectee of the group.³ We also have before us a petition to deny the Big Bend Application filed by GPTC, which the Bureau did not review prior to release of the *NCE MX Group 59B Order*.⁴ For the reasons set forth below, on our own motion,⁵ we rescind in part the *NCE MX Group 59B Order*, rescind our tentative selection of the Elijah Application, dismiss the GPTC Petition as moot, and refer NCE MX Group 59B to the Commission to conduct a point system analysis.⁶

Background. The subject applications were filed during the November 2021, NCE FM filing window.⁷ Group 59B originally included two additional applicants, CSN International (CSN) and Inverse Focus Ministry, Inc. (Inverse).⁸ The Bureau initially performed a fair distribution analysis of the eight applications and identified Inverse as the tentative selectee in Group 59B.⁹ Inverse and CSN, however, subsequently requested dismissal of their applications. Accordingly, the Bureau conducted a second 307(b) analysis and identified Big Bend as the new tentative selectee of this group.¹⁰ 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.¹¹

¹ Application File Nos. 0000167410 (Elijah Application); 0000166291 (Big Bend Application); 0000167018 (GPTC Application); 0000165985 (Faith Application); 0000167096 (Church Planters Application); 0000167233 (Bemiss Application).

² *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Education Stations; Opens Window to Accept Settlements and Technical Amendments*, MB Docket No. 20-343, Public Notice, DA 21-1476 (MB Nov. 29, 2021). Group 59, which originally contained 17 applications, was bifurcated as a result of a technical amendment.

³ *Threshold Fair Distribution Analysis of 1 Group of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 23-59 (MB Jan. 23, 2023) (*NCE MX Group 59B Order*).

⁴ Pleading File No. 0000204974 (filed Dec. 9, 2022) (GPTC Petition). Big Bend did not file an opposition to this pleading.

⁵ See 47 CFR § 1.108 (Commission may, on its own motion, reconsider any action within 30 days).

⁶ See 47 CFR § 73.7002(b). The point system analysis, conducted when the section 307(b) analysis is not determinative, is considered a simplified “hearing” for purposes of 47 U.S.C. § 155(c)(1). See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7420 (2001) (*NCE Order*).

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).

⁸ See Application File Nos. 0000167809 and 0000167493.

⁹ 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).

¹⁰ *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) (*November 2022 Fair Distribution Order*).

¹¹ See Big Bend Application, Fair Distribution of Service Section and Attach. “Perry 210 Amendment Purpose.pdf” (filed Dec. 7, 2022).

Discussion. In the *NCE MX Group 59B Order*, the Bureau rescinded the tentative selection of Big Bend and conducted a third 307(b) analysis and identified Elijah as the tentative selectee of this group.¹² However, upon release of the Order, counsel for GPTC informed the Bureau that the staff neglected to address the GPTC Petition.¹³ Although the GPTC Petition primarily argues that the tentative selection of Big Bend should be rescinded, the petition also noted that the *November 2022 Fair Distribution Order* relied on the incorrect fair distribution exhibit when analyzing the Elijah Application, specifically relying on the exhibit provided in the original application instead of the revised exhibit in the application as amended on January 28, 2022.¹⁴ The *NCE MX Group 59B Order* also mistakenly relied on Elijah's original fair distribution exhibit instead of its revised exhibit. Accordingly, we rescind the *NCE Group MX 59B Order* to the extent it identified the Elijah Application as the new tentative selectee of NCE MX Group 59B and conduct a new fair distribution analysis considering Elijah's revised fair distribution exhibit.¹⁵

Elijah and GPTC each claims that it is eligible for a fair distribution preference based on combined first and second NCE population totals.¹⁶ 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 2,149 people; and GPTC to 6,971 people. The proposals are comparable because neither exceeds the other by at least 5,000 people.¹⁷ Thus, we are unable to designate a tentative selectee under a 307(b) fair distribution analysis, and GPTC and Elijah will proceed to a point system analysis.

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 section 155(c)(1) of the Act.¹⁸ Accordingly we have referred the matter to the Commission to make a determination under a point system analysis.¹⁹

¹² *NCE MX Group 59B Order* at 4, para. 10.

¹³ Email from Margaret L. Miller, Counsel for GPTC, to Albert Shuldiner, Chief, Audio Division (January 23, 2023).

¹⁴ GPTC Petition at 2-3, n. 4. *See also* Elijah Application at Attachs. "1st & 2nd NCE Service, rev 1.pdf" (original fair distribution attachment) and "Engineering Exhibits for 767346 Amendment.pdf" (revised fair distribution attachment filed on January 28, 2022).

¹⁵ An applicant's fair distribution showing must be computed as of the time of filing and cannot be enhanced thereafter. *See* 47 CFR § 73.7003(e) and (f)(3). 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). Elijah's revised fair distribution exhibit, which the staff inadvertently did not consider, reflects Elijah's diminished position.

¹⁶ *See* Elijah Application and GPTC Application, Fair Distribution of Service Section, and associated exhibits. Elijah's 60 dBu contour encompasses 16,634 people, and its claimed aggregated first and second NCE service is 2,149 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.

¹⁷ The applicant proposing to provide service to the greatest number of people will only 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. *See* 47 CFR § 73.7002(b).

¹⁸ *See* 47 CFR § 73.7002(b); *see also* *NCE Order*, 15 FCC Rcd at 7420.

¹⁹ *See Central Florida Educational Foundation, Inc. v. Joseph E. Dunne, Esq.*, Letter Order, 22 FCC Rcd. 18332, 18334 (MB 2007) (referring the matter to the Commission for consideration where the initial outcome would be altered by the potential for a new points analysis). *See also Comparative Consideration of 24 Groups of Mutually*

Conclusion/Action. For the reasons discussed above, **IT IS ORDERED** that the Petition to Deny (Pleading File No. 0000204974) filed by Georgia Public Telecommunications Commission on December 9, 2022, **IS DISMISSED AS MOOT.**

IT IS FURTHER ORDERED, that the tentative selection of the application of Elijah Radio (Application File No. 0000167410) for authority to construct a new noncommercial educational FM station at Dasher, Georgia, **IS RESCINDED.**

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

Exclusive Applications for Permits to Construct New or Modified Noncommercial Educ. FM Stations, Memorandum Opinion and Order, 25 FCC Rcd 12887, 12914 (2010) (“staff should refer only those issues to the Commission where the exclusion or inclusion of challenged or claimed points could alter the outcome in the particular NCE group, or where a new or novel question or substantial and material question of fact otherwise exists.”).