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In re: **NCE MX Group 205**

First Dallas Media, Inc.

New NCE (FM), Golinda, Texas

Facility ID No. 763726

Application File No. 0000165973

East Texas Community Broadcasting

New NCE (FM), Riesel, Texas

Facility ID No. 768280

Application File No. 0000167216

Informal Objections

Dear Applicants, Counsel, and Objector:

We have before us two mutually exclusive (MX) applications filed by First Dallas Media, Inc. (FDMI), and East Texas Community Broadcasting (ETCB) for construction permits for new noncommercial educational (NCE) FM stations for different communities in Texas, which the Media Bureau (Bureau) designated as NCE MX Group 205.¹ The Bureau initially identified the FDMI

¹ *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*

Application as the tentative selectee and granted the application.² The Bureau subsequently rescinded the tentative selection and grant, and directed FDMI and ETCB to file amendments to their respective applications.³ Albert Alan David (David) then filed two Informal Objections to the ETCB Application (First David Objection and Second David Objection, respectively, and collectively, David Objections).⁴ Based on its review of the responsive amendments, the Bureau identified the ETCB Application as the new tentative selectee, established a 30-day petition to deny period, and deferred action on the David Objections until after that 30-day period.⁵ For the reasons set forth below, we deny the David Objections, grant the ETCB Application, and dismiss the FDMI Application.

Background. The subject applications were filed during the November 2021 NCE FM filing window.⁶ In the *Fifth Fair Distribution Order*, the Bureau conducted a fair distribution analysis pursuant to section 307(b) of the Communications Act of 1934, as amended, identified the FDMI Application as the tentative selectee of NCE MX Group 205, and established a 30-day petition to deny period.⁷ No petitions to deny were filed, and the Bureau granted the FDMI Application and dismissed the remaining applications as non-tentative selectees.⁸

Amendments, Public Notice, 36 FCC Rcd 16452 (MB 2021); *see also* Application File Nos. 0000165973 (FDMI Application) and 0000167216 (ETCB Application).

² *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 6, para. 12 (MB Nov. 9, 2022) (*Fifth Fair Distribution Order*); *Actions*, Public Notice, Report No. PN-2-221213-01 (MB Dec. 13, 2022) (December 13 Public Notice) (granting FDMI Application).

³ *NCE MX Group 205*, Letter Order, DA 23-264 (MB Mar. 29, 2023) (*First Letter Order*).

⁴ *See* Pleading File Nos. 0000213747 (filed Apr. 12, 2023) and 0000214116 (filed Apr. 22, 2023). ETCB filed separate oppositions to the First David Objection and the Second David Objection. Pleading File Nos. 0000213797 (filed Apr. 12, 2023) (First ETCB Opposition) and 0000214175 (filed Apr. 24, 2023) (Second ETCB Opposition). David filed separate replies to the First ETCB Opposition and the Second ETCB Opposition. Pleading File Nos. 0000214115 (filed Apr. 22, 2023) (First David Reply) and 0000214334 (filed Apr. 29, 2023) (Second David Reply).

⁵ *NCE MX Group 205*, Letter Order, DA 23-500 (MB June 12, 2023) (*Second Letter Order*).

⁶ *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).

⁷ *See Fifth Fair Distribution Order* at 5, para. 12. At the time of the *Fifth Fair Distribution Order*, NCE MX Group 205 consisted of eight applications: the FDMI and ETCB applications, and the applications of Ministerio Espiritu Santo (Application File No. 0000167797), Iglesia Cristian Restauracion y Vida (Application File No. 0000167785), Alpha Consulting Christian Education (Application File No. 0000166689), Specialized Educational Broadcasting (SEB) (Application File No. 0000166809), Centro Familiar de Restauracion y Vida (Application File No. 0000167080), and Red-C Apostolate: Religious Education for the Domestic Church (Red-C) (Application File No. 0000167206). FDMI, ETCB, and SEB each claimed a fair distribution preference, and the other five applicants did not claim such a preference. FDMI provided a second NCE service to 14,178 people; SEB to 6,151 people; and ETCB a combined first and second NCE service to 8,575 people. Because FDMI proposed to provide a new second NCE service to at least 5,000 more people than ETCB, it prevailed.

⁸ After the issuance of the *Fifth Fair Distribution Order* but prior to the Bureau taking action on the applications in NCE MX Group 205, Red-C filed an amendment which rendered its application a singleton. The remaining six applications, including the ETCB Application, were dismissed as non-tentative selectees. Only ETCB sought reconsideration of its dismissal, and the dismissals of the other five applications are now final. *See December 13 Public Notice* (granting FDMI Application and dismissing mutually exclusive ECTB Application and remaining five applications).

On December 19, 2022, ETCB filed a Petition for Reconsideration, claiming that FDMI misrepresented its fair distribution population figures and did not qualify for a fair distribution preference.⁹ Additionally, on January 8, 2023, ETCB filed a second Petition for Reconsideration seeking *nunc pro tunc* reinstatement of its dismissed application.¹⁰ In the second Petition for Reconsideration, ETCB also acknowledged that its own application contained typographical errors in the directional antenna pattern and attached an amendment correcting those errors.¹¹

On March 29, 2023, the Bureau released the *First Letter Order* in which it (1) rescinded the grant and tentative selection of the FDMI application; (2) reinstated the ETCB Application; and (3) afforded FDMI and ETCB each 15 days to file amendments to their applications before further Bureau or Commission action.¹²

On April 5, 2023, ETCB filed a timely responsive amendment to correct the errors it identified in the directional antenna pattern proposed in the ETCB Application.¹³ However, the Bureau determined that the ETCB Application, as modified by the April 5 Amendment, was defective, dismissed the amended ETCB Application, and directed ETCB to the procedures for filing curative amendments.¹⁴ On April 12, 2023, ETCB filed an amendment to correct the errors identified by the Bureau and sought reinstatement of its application.¹⁵ Separately, on April 10, 2023, FDMI amended its Application to disclaim its eligibility for a fair distribution preference.¹⁶ Finally, on June 12, 2023, the Bureau issued the *Second Letter Order*, which identified ETCB, the only remaining applicant to claim a fair distribution preference, as the new tentative selectee of NCE MX Group 205 and established a new 30-day petition to deny period.¹⁷

In the First David Objection, David argues that ETCB's initial application did not qualify for a fair distribution preference, and the April 5 Amendment, therefore, constitutes a prohibited increase in ETCB's comparative standing. Specifically, David contends that "[t]he overall population covered by the proposed facility under its initial antenna pattern greatly exceeded the population claimed on its initial application, causing the number of people receiving first or second NCE service under the proposed facility to be less than 10%,"¹⁸ making ETCB ineligible for a Section 307(b) preference. David argues

⁹ See Pleading File No. 0000205723 (filed Dec. 19, 2022).

¹⁰ See Pleading File No. 0000206492 (filed Jan. 8, 2023).

¹¹ *Id.* at 4.

¹² *First Letter Order*, *supra* note 3, at 3.

¹³ ETCB Application, Amendment (filed Apr. 5, 2023) (April 5 Amendment).

¹⁴ See *Actions*, Public Notice, Report No. PN-2-230414-01 (MB Apr. 14, 2023) ("Application, as amended 4/5/2023, dismissed 4/12/2023 via Public Notice for the following reason: Section 73.509 violation – 54 sq km. overlap caused to the granted construction permit, File No. 0000167146, of co-channel Class A FM station in Bedias, Texas. See DA 21-1516 for general information about this dismissal and for information about filing curative amendments.") (April 14 Public Notice).

¹⁵ ETCB Application, Amendment (filed Apr. 12, 2023) (April 12 Amendment).

¹⁶ FDMI Application, Amendment (filed Apr. 10, 2023).

¹⁷ *Second Letter Order* at 4. The Bureau noted that it would withhold action on the David Objections until the end of the new 30-day petition to deny period.

¹⁸ First David Objection at 1. David states that "under the originally proposed pattern, the city of Waco was included in the 60 dBu contour. As a result the 8,575 claimed by the application to be receiving first or second NCE service was far under 10% of the total population covered..." *Id.*

that because the April 5 Amendment “brought the overall population down so that the number of people receiving first or second NCE service exceeds 10%, this constitutes a prohibited increase in comparative standing.”¹⁹

In the First Opposition, ETCB argues that “enhancements” refers to “changes filed per numbers in the tech/point boxes (population, new area, points) and original declaration of primary and secondary services population numbers in the original application” and that their April 5 Amendment made no changes to those types of figures.²⁰ Rather, ETCB argues that the April 5 Amendment merely corrected a typographical error in the antenna data, and that it has always qualified for a fair distribution preference.²¹

In the Second David Objection, David argues that ETCB’s April 12 Amendment was not permitted because the application had been previously dismissed, amended, and reinstated.²² Specifically, David asserts that “ETCB had already had one opportunity to file a curative amendment, which it filed on April 5, 2023,”²³ and cites the *Singletons Public Notice* to support his contention that the April 12 Amendment is prohibited.²⁴ David, therefore, urges the Commission to dismiss the ETCB Application.

In the Second Opposition, ETCB argues that the one curative amendment policy is inapplicable here because the ETCB Application was only dismissed once for a technical defect. Rather, the first dismissal of the application occurred because the Bureau determined that ETCB was a non-tentative selectee in the *Fifth Distribution Order*.²⁵ Thus, ETCB argues that it was permitted to file the April 12 Amendment to correct the specific technical defect identified for the first time by the Bureau.²⁶

Discussion. Pursuant to section 309(d) of the Act,²⁷ 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.²⁸

We first reject David’s argument that ETCB’s initial application did not qualify for a fair distribution preference, and the April 5 Amendment was, therefore, a prohibited attempt to enhance its

¹⁹ *Id.*

²⁰ First ETCB Opposition at 3.

²¹ *Id.* In the First Reply, David reiterates his contention that based on the antenna pattern proposed in the initial application, ETCB was ineligible for a Section 307(b) preference. *See* First David Reply at 1.

²² Second David Objection at 1.

²³ *Id.*

²⁴ *Id.* at 1-2 (citing *Media Bureau Dismisses Defective Singleton Applications Submitted in the November 2021, Filing Window For New Noncommercial Educational FM Stations*, Public Notice, 36 FCC Rcd 16718 (MB 2021) (*Singletons Public Notice*)).

²⁵ Second ETCB Opposition at 4. ETCB also argues that the Second David Objection was procedurally improper. *Id.* at 3. We find no merit to this allegation and do not consider it further.

²⁶ *Id.* In the Second David Reply, David reiterates his contention that the ETCB exhausted its one opportunity to file a curative amendment, and the ETCB Application must, therefore, be dismissed. *See* Second David Reply at 2.

²⁷ 47 U.S.C. § 309(d).

²⁸ *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).

comparative position. David does not support his argument with any technical studies or population data. Rather, David merely submits a contour map, which is a screenshot from the Commission's Licensing and Management System, and the standalone map does not provide any data by which the staff can verify if David's argument has merit.²⁹ Accordingly, we deny the First David Objection.

We also reject David's argument that the April 12 Amendment was prohibited and that the ETCB Application should, therefore, be dismissed. The initial dismissal of the ETCB Application was not for a specific application defect, but rather was based on its classification as a non-tentative selectee. Therefore, this dismissal action did not trigger the Commission's one curative amendment policy.³⁰ Specifically, under our procedures, an application that is found to be defective is dismissed by public notice, and the dismissal public notice advises the applicant what defects were found in its application and triggers the opportunity to submit a curative amendment.³¹ The staff never reviewed the ETCB Application for acceptability prior to its initial dismissal as a non-tentative selectee, nor did it do so when it issued the *First Letter Order*—to the contrary, the *First Letter Order* explicitly held that the staff would *not* review the paper-filed amendment ETCB attached to the Second Petition.³² In contrast, the Bureau's subsequent acceptability review of the application and April 12 dismissal of the ETCB Application for specific defects triggered ETCB's one curative amendment opportunity. In fact, in the April 14 Public Notice, dismissing the ETCB Application as amended on April 5, 2023, the Bureau explicitly directed ETCB to information on filing curative amendments.³³ Thus, prohibiting ETCB from filing the April 12 Amendment would have deprived ETCB of the same opportunity provided to other applicants—one opportunity to amend following a dismissal for an application defect.³⁴

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED** that the Informal Objections filed by Albert Alan David on April 12, 2023 (Pleading File No. 0000213747), and April 22, 2023 (Pleading File No. 0000214116) **ARE DENIED**.

IT IS FURTHER ORDERED that the application filed by East Texas Community Broadcasting (Application File No. 0000167216) **IS GRANTED 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.

²⁹ See e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (the Commission need not sift through pleadings and documents to identify arguments not stated with clarity), *cert. denied*, 409 U.S. 1027 (1972); *Northside Sanitary Landfill v. Thomas*, 849 F.2d 1515, 1519 (D.C. Cir. 1988) (the petitioner has the burden of clarifying its position before the agency), *cert. denied*, 489 U.S. 10978 (1989). See also *MCI WorldCom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (finding that a party did not raise an argument with sufficient force to obligate the Commission to respond). Moreover, we note that David is incorrect in his assertion that the original ETCB Application included Waco in its 60 dbu contour. As David's own exhibit shows, the 60 dbu contour of the original ETCB Application did not cover the entire city of Waco, but only a small portion of the city.

³⁰ See *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984) (providing for reinstatement of "incomplete and patently defective" applications "after an initial dismissal or return of an application *as unacceptable for filing*" (emphasis added)).

³¹ See, e.g., *supra* n.14 (stating technical defects found in the ETCB Application, as amended on April 5).

³² *First Letter Order* at 5.

³³ See April 14 Public Notice, *supra* n. 14 (directing ETCB to "DA 21-1516 [*Singletons Public Notice*] for general information about this dismissal and for information about filing curative amendments").

³⁴ To the extent that the *First Letter Order* advised ETCB that it could only file a single corrective amendment, without opportunity to amend, we find that instruction was erroneous and disavow it. *First Letter Order* at n.35.

IT IS FURTHER ORDERED that the mutually exclusive application of First Dallas Media, Inc. (Application File No. 0000165973) **IS DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau