



Federal Communications Commission
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In re: **NCE MX Group 223**

**Vanguard Association of Sunbelt
Colleges Corporation**

New NCE (FM), Rosendale, WI
Facility ID No. 768563
Application File No. 0000167734

Call Communications Group, Inc.

New NCE (FM), Eden, WI
Facility ID No. 769039
Application File No. 0000167822

WRVM, Inc.

New NCE (FM), Waupun, WI
Facility ID No. 766400
Application File No. 0000166135

The Salvation Poem Foundation, Inc.

New NCE (FM), Cedar Grove, WI
Facility ID No. 768708
Application File No. 0000167767

Educational Media Foundation

New NCE (FM), Fond Du Lac, WI
Facility ID No. 767351
Application File No. 0000166014

**State of Wisconsin - Educational
Communications Board**

New NCE (FM), Plymouth, WI
Facility ID No. 762147
Application File No. 0000166857

Immanuel Bible Church

New NCE (FM), Sheboygan, WI

Facility ID No. 767365
Application File No. 0000167658

Waupun Baptist Church
New NCE (FM), Waupun, WI
Facility ID No. 767323
Application File No. 0000167816

**Petition to Deny
Informal Objection**

Dear Applicants and Counsel:

We have before us eight mutually exclusive (MX) applications filed by Vanguard Association of Sunbelt Colleges Corporation (VASC), The Salvation Poem Foundation, Inc. (SPF), Call Communications Group, Inc. (Call Comm), Educational Media Foundation (EMF), State of Wisconsin - Educational Communications Board (State), Immanuel Bible Church (Immanuel), Waupun Baptist Church (Waupun), and WRVM, Inc. (WRVM) for construction permits for new noncommercial educational (NCE) FM stations in different communities in Wisconsin, which the Media Bureau (Bureau) designated as NCE MX Group 223.¹ The Commission identified the VASC Application as the tentative selectee of the group.² Also before us are: (1) an Informal Objection (Objection) filed on December 15, 2021, by Call Comm;³ and (2) a Petition to Deny (Petition) filed on January 11, 2022, by WRVM, and

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 Amendments*, Public Notice, 36 FCC Rcd 16452 (MB 2021). See also Application File Nos. 0000167734 (VASC Application), 0000167767 (SPF Application), 0000166135 (WRVM Application), 0000167822 (Call Comm Application), 0000166014 (EMF Application), 0000166857 (State Application), 0000167658 (Immanuel Application), and 0000167816 (Waupun Application).

² *Comparative Consideration of 34 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 38 FCC Rcd 789, 812-13, para. 102 (2023) (*Third Comparative Order*).

³ Pleading File No. 0000177311. VASC did not file an opposition to the Objection.

related pleadings.⁴ On April 25, 2023, the Bureau issued a Letter of Inquiry (LOI) to VASC,⁵ and we have before us VASC's response to the LOI (LOI Response),⁶ and related responses filed by WRVM (WRVM LOI Reply) and Call Comm (Call Comm LOI Reply).⁷ For the reasons set forth below, we deny the Objection, deny the Petition, dismiss the WRVM and Call Comm Applications,⁸ and grant the VASC Application.

Background. The subject applications were filed during the November 2021, NCE FM filing window.⁹ In the *Third Comparative Order*, the Commission compared the VASC Application and WRVM Application under the point system.¹⁰ In the point system analysis, VASC and WRVM each received two points for diversity of ownership and proceeded to the tie-breaker analysis.¹¹ VASC

⁴ Pleading File No. 0000179670. On January 25, 2022, VASC filed an Opposition to the WRVM Petition (Opposition). Pleading File No. 0000181241. WRVM filed a second Petition to Deny (Second WRVM Petition), and a Supplement to the Second WRVM Petition (Supplement). Pleading File Nos. 0000210644 (filed Feb. 11, 2023) and 0000211081 (filed Feb. 21, 2023). VASC filed an Opposition to the Second WRVM Petition and Supplement (Opposition to Second WRVM Petition). Pleading File No. 0000212266 (filed Mar. 8, 2023). WRVM filed a Reply to VASC's Opposition to Second WRVM Petition (Reply). Pleading File No. 0000212419 (filed Mar. 13, 2023). Finally, VASC filed a motion for leave to file a sur-reply (Motion for Leave) and a sur-reply to the Reply (Sur-Reply to Reply). Pleading File Nos. 0000213541 and 0000213545 (filed Apr. 5, 2023). The Second WRVM Petition, Supplement, Opposition to Second WRVM Petition, Reply, Motion for Leave, and Sur-Reply to Reply are unauthorized pleadings and, therefore, need not be considered here. *See* 47 CFR § 1.45; *Reier Broad. Co., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14270, 14270, para. 1, n. 4 (MB 2011) (dismissing petitioner's Motion to Dismiss as an unauthorized pleading). Even if we were to consider WRVM's argument in these unauthorized pleadings, we would deny it.. WRVM alleges that the Commission erred in crediting VASC first and second NCE service population totals from a post-window amendment. The record, however, reflects that the referenced post-window amendment reduced VASC's first and second NCE service population totals, and applicants are required to amend to reflect a *reduction* in comparative standing. *See NCE MX Group 95*, Letter Order, 37 FCC Rcd 7928 (MB 2022).

⁵ *See* Letter from Albert Shuldiner, Chief, Audio Division, FCC Media Bureau, to Donald E. Martin, Esq., counsel to VASC.

⁶ *See* E-Mail from Donald E. Martin, Esq., counsel to VASC, to Alexander Sanjenis, Audio Division, FCC Media Bureau (June 1, 2023).

⁷ *See* E-Mail from Jeffrey D. Southmayd, Esq., counsel to WRVM, to Alexander Sanjenis, Audio Division, FCC Media Bureau (June 9, 2023); E-Mail from Rob Robbins, President, Call Comm, to Alexander Sanjenis, Audio Division, FCC Media Bureau (June 13, 2023).

⁸ We also dismiss herein the SPF Application, EMF Application, State Application, Immanuel Application, and Waupun Application.

⁹ *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 11458 (MB July 23, 2021).

¹⁰ *Third Comparative Order*, 38 FCC Rcd at 813, paras. 103-104. Call Comm, EMF, State, Immanuel, and Waupun did not claim a fair distribution preference and were each eliminated. SPF claimed a fair distribution preference, but because VASC and WRVM each proposed to provide first NCE service to at least 5,000 more people than SPF, SPF was eliminated.

¹¹ *Id.*

prevailed in the first tie-breaker analysis.¹² Accordingly, the Commission identified VASC as the tentative selectee of MX Group 223 and established a 30-day period for filing petitions to deny.¹³

In the Objection, Call Comm questions the validity of VASC's reasonable site assurance certification. Specifically, Call Comm states that it personally contacted the individuals listed in the VASC Application and states that "none of the listed contacts could positively affirm that reasonable assurance was provided to" VASC.¹⁴ Call Comm also claims that "attributable interests might exist between" VASC and Elijah Radio, Inc. (Elijah Radio), a full-power FM licensee, because David Beihl (Beihl), VASC's president, and Thomas Beihl, Elijah Radio's vice-president, are siblings.¹⁵ Call Comm argues that, because Elijah Radio previously filed 10 applications in the 2021 NCE FM filing window, the VASC Application exceeds the 10-application cap and must be dismissed.¹⁶

In the Petition, WRVM argues that the VASC is ineligible to hold an NCE FM license because VASC is not registered as a nonprofit business entity in the State of Wisconsin,¹⁷ and is not a 501(c)(3) nonprofit organization under the Internal Revenue Code.¹⁸ WRVM also questions whether the VASC Application is part of "an application mill" designed by VASC's engineering consultant, Luke Rogers, to circumvent the 10-application limit.¹⁹

In the Opposition to the Petition, VASC argues that, pursuant to section 74.7004(a) of the Commission's rules, the Petition is premature and should be dismissed.²⁰ VASC also states that the Commission neither requires an NCE FM applicant to be incorporated under the laws of the state where the proposed station is located, nor requires such applicant to possess federal tax-exempt status.²¹ VASC states that it is a bona fide nonprofit corporation in the State of Arizona.²² VASC also denies that it has engaged in any attempt to circumvent the 10-application cap, and states that there is no evidence to establish that it "shares any facilities or has any untoward relationship with any other application for which [Luke Rogers] prepared applications."²³

¹² *Id.* VASC certified it had no attributable radio authorizations; WRVM certified it had 30 attributable radio authorizations.

¹³ *Id.* at 825, para. 144.

¹⁴ Objection at 1.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ Petition at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 3-4. WRVM notes that Luke Rogers is listed as a contact person for 40 applications filed in the 2021 NCE FM filing window. *Id.*

²⁰ Opposition at 2.

²¹ *Id.* at 2-3.

²² *Id.*

²³ *Id.* at 6. See also *FCC Adopts 10-Application Limit for NCE FM New Stations in Upcoming 2021 Filing Window*, Public Notice, MB Docket No. 20-343, 36 FCC Rcd 7754 (2021) (*NCE Cap Public Notice*); 47 CFR § 73.503(g).

In the LOI Response, to support its reasonable site assurance certification, VASC provided email correspondence between Luke Rogers and Heather Saxton, a representative of the tower owner's agent.²⁴ In the *Saxton Correspondence*, (1) Luke Rogers informs Ms. Saxton that "a client" would be submitting an application for a new NCE FM station and is interested in using space on a tower owned by US Cellular,²⁵ (2) Ms. Saxton confirms the availability of space on the Tower and the specific heights available, and (3) Luke Rogers informs Ms. Saxton of the antenna height his client intends to use. After VASC filed the VASC Application, Luke Rogers informed Ms. Saxton that VASC was the previously unnamed client and of VASC's inclusion of the Tower in the VASC Application.²⁶

In the Call Comm LOI Reply, Call Comm states that VASC's reasonable site assurance documentation is insufficient because VASC's name was not disclosed to the tower owner until after the VASC Application was filed.²⁷ Call Comm also questions whether Elijah Radio or Gary Beihl has exercised *de facto* control over the VASC Application and whether either is the real party-in-interest behind the VASC Application.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 Matters. At the outset, we agree with VASC that the Petition was filed prematurely. Pursuant to section 73.7004(a) of the Rules, petitions to deny will only be accepted against the tentative

²⁴ LOI Response at Attach. 1 (*Saxton Correspondence*).

²⁵ In his email, Luke Rogers identified the proposed tower as ASR #1300127 (*Tower*). This is the ASR identified in the VASC Application. See VASC Application at Antenna Location Data, ASR Number.

²⁶ In the LOI Response, VASC also provided information and documentation to support its financial certification in the VASC Application.

²⁷ Call LOI Comm Reply at 1-2.

²⁸ *Id.* WRVM also submitted an LOI Reply questioning whether VASC possesses the financial assets needed to construct and operate each of the eight stations it applied for in the 2021 NCE FM filing window. See WRVM LOI Reply at 3. We reject this argument. In its LOI Response, VASC explained that it estimated the construction and three-month operation costs for the Station to be \$50,000, and the total financial commitment to construct all eight then-pending stations, including the VASC Application, to be \$512,328. To prove its financial qualifications, VASC stated *inter alia* that it intended to rely on a loan commitment from Beihl's father, Gary Beihl, to fund the proposed stations. VASC provided a copy of Gary Beihl's IRA Statement Overview, which reflects a value of \$512,840.70, and a sworn declaration from Gary Beihl stating that he intended to loan the funds from the IRA to VASC in order to fund each of the proposed stations. Accordingly, we find that VASC has adequately demonstrated its financial qualifications. See, e.g., *Armando Garcia*, Decision, 3 FCC Rcd 1065, 1066, para. 11 (Rev.Bd. 1988), *review denied*, 3 FCC Rcd 4767 (1988) (finding documentation of an applicant's spouse's retirement plan sufficient to demonstrate financial qualifications).

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).

selectee.³¹ WRVM filed the Petition against the VASC Application prior to the Commission's selection of VASC as the tentative selectee in this MX Group.³² However, given that the VASC Application was ultimately identified as the tentative selectee for MX Group 223, and in the interest of having a complete record, we consider the Petition.³³

Reasonable Site Assurance. An NCE FM applicant must have reasonable assurance that its specified site will be available for the construction and operation of its proposed facilities at the time it files its application.³⁴ While the Commission affords some latitude regarding reasonable assurance, there must, at a minimum, be a "meeting of the minds resulting in some firm understanding as to the site's availability."³⁵ A mere possibility that the site will be available is not sufficient.³⁶ Schedule 340 requires an applicant to certify that it has such reasonable site assurance and instructs the applicant to specify the name of the person contacted to verify the site's availability, the person's telephone number, and whether the contact is the tower owner, agent, or authorized representative.³⁷

We find that VASC has sufficiently demonstrated that it had reasonable assurance of site availability at the time it filed the VASC Application. The *Saxton Correspondence* demonstrates a "meeting of the minds" between Luke Rogers and Ms. Saxton regarding VASC's intent to use the Tower in its application. Call Comm cites no authority that supports invalidating VASC's reasonable assurance documentation based on the fact that VASC's name was not disclosed to Ms. Saxton until after the VASC Application was filed, and, therefore, we reject this argument.

De Facto Control. We also reject the argument that Elijah Radio or Luke Rogers has exercised *de facto* control over VASC, and that either is the real party-in-interest behind the VASC Application, as unsupported.³⁸ The pleadings posit that the VASC Application was designed by Luke Rogers, president of Elijah Radio, to circumvent the 10-application cap because Elijah Radio previously filed 10 applications in the 2021 NCE FM filing window.³⁹ The Commission analyzes *de facto* control issues on a

³¹ 47 CFR § 73.7004(a).

³² See Petition; *Third Comparative Order*, 38 FCC Rcd at 813, para. 104.

³³ *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 37 FCC Rcd 12898 at 12907, para. 31, n.60 (2022) ("We will hold the pleadings in abeyance and consider them after the adoption of this Order."); See, e.g., *NCE MX Group 52*, Letter Order, 37 FCC Rcd 11270 at 11271, n.4 (MB 2022).

³⁴ See *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427, paras. 6-7 (1974) (*Wallace*); *South Florida Broad. Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842, para. 3 (1984).

³⁵ *NCE MX Group 337A*, Letter Order, 26 FCC Rcd 6020, 6024 (MB 2011).

³⁶ *Wallace*, 49 FCC 2d at 1427, para. 6.

³⁷ See *Schedule 340* at Technical Certifications, Reasonable Site Assurance; *Instructions – Form 2100, Schedule 340 – Noncommercial Educational Station for Reserved Channel Construction Permit Application* at page 22; see also *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, MB Docket No. 19-3, Report and Order, 34 FCC Rcd 12519, 12542, para. 59 (2019).

³⁸ See Objection at 2-3; Petition at 3-4.

³⁹ *Id.* Pursuant to the cap, no party may have an attributable interest in more than ten applications. See 47 CFR § 73.503(g); *NCE Cap Public Notice*, 36 FCC Rcd at 7758, para. 12. An entity or party with *de facto* or *de jure* control over an applicant would necessarily have an attributable interest. See, e.g., *The Helpline*, Letter Order, 23 FCC Rcd 12665, 12670 (MB 2008).

case-by-case basis.⁴⁰ In determining whether an entity has *de facto* control of an applicant or a licensee, we examine the policies governing station programming, personnel, and finances.⁴¹ A broadcast entity's surrender of control over any one of these indicia to another is sufficient to find that the other entity has *de facto* control.⁴²

The Objection and Petition base this allegation of *de facto* control on the fact that (1) a familial relationship exists between Beihl and Elijah Radio's vice-president, Thomas Beihl, and (2) Luke Rogers, VASC's consulting engineer, is listed as a contact representative on the VASC Application and numerous other applications filed in this window. However, the Commission has long recognized that familial and business relationships, standing alone, are insufficient to create real-party-in-interest or unauthorized transfer of control problems.⁴³ Similarly, the Commission has been clear that similarities in applications prepared by a third-party, such as using the same consultant, do not demonstrate common control of applications.⁴⁴ We have previously noted that it is common for multiple applications to have the same consultants.⁴⁵ Moreover, Luke Rogers submitted a declaration to the Bureau, under penalty of perjury, stating that neither he nor Elijah Radio has any ownership interest in VASC, nor has he or Elijah Radio exercised "any de jure or de facto control over" VASC.⁴⁶ Accordingly, we find that this allegation, absent any concrete indicia of common control or influence, is insufficient to establish that VASC has abdicated control to another person or entity, or that the VASC Application is an attempt to circumvent the 10-application rule.⁴⁷

Corporate Status. Finally, we reject WRVM's remaining argument that VASC is ineligible to hold an NCE FM license for the proposed Station due to the fact that VASC is registered as a nonprofit corporation in Arizona, not Wisconsin. The Commission's rules require that NCE FM applicants be, *inter alia*, nonprofit entities with a demonstrated educational purpose.⁴⁸ We do not require applicants to be incorporated, registered, or otherwise organized as nonprofit entities in the state of the proposed

⁴⁰ See *Shareholders of Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18843 (2003); *Arnold L. Chase*, Initial Decision, 6 FCC Rcd 7387, 7409, para. 158 (ALJ 1991) (*Arnold Chase*).

⁴¹ See, e.g., *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) ("Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.").

⁴² *Id.*

⁴³ *Arnold Chase*, 6 FCC Rcd at 7409, para. 160.

⁴⁴ See, e.g., *Mt. Zion Educ. Assoc.*, Letter Order, 25 FCC Rcd 15088, 15091-92 (MB 2010).

⁴⁵ *Eternal World Television Network, Inc.*, Letter Order 24 FCC Rcd 4691, 4692 (MB 2009).

⁴⁶ See Pleading File No. 0000167716 (Declaration of Luke Rogers at 1, Attach. to VASC's Opposition in MX Group 74).

⁴⁷ For this same reason, we reject Call Comm's allegation that Gary Beihl has exercised de facto control over VASC as unsupported. See Call Comm LOI Reply at 1.

⁴⁸ See 47 CFR § 73.503(a) ("A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program."); *Denny and Marge Hazen Ministries, Inc.*, Letter Order, 23 FCC Rcd 11579, 11581 (MB 2008) ("In applying Section 73.503 of the Rules, the Commission has required that NCE applicants be: (a) a government or public educational agency, board or institution; (b) a private, nonprofit educational organization; or (c) a nonprofit entity with a demonstrated educational purpose.").

station.⁴⁹ Similarly, contrary to WRVM’s contention, our rules do not require NCE FM applicants to be qualified as section 501(c)(3) nonprofit entities under the Internal Revenue Code in order to establish their eligibility.⁵⁰

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED** that the Petition to Deny filed by WRVM, Inc. on January 11, 2022 (Pleading File No. 0000179670), **IS DENIED**.

IT IS FURTHER ORDERED that the Informal Objection filed by Call Communications Group, Inc. on December 15, 2021 (Pleading File No. 0000177311) **IS DENIED**.

IT IS FURTHER ORDERED that the application filed by Vanguard Association of Sunbelt Colleges Corporation (Application File No. 0000167734) **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 acquisition, and also 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.

IT IS FURTHER ORDERED that the mutually exclusive applications of WRVM, Inc. (Application File No. 0000166135), Salvation Poem Foundation, Inc. (Application File No. 0000167767), Call Communications Group, Inc. (Application File No. 0000167822), Educational Media Foundation (Application File No. 0000166014), State of Wisconsin – Educational Communications Board (Application File No. 0000166857), Immanuel Bible Church (Application File No. 0000167658), and Waupun Baptist Church (Application File No. 0000167816) **ARE DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

⁴⁹ For instance, Educational Media Foundation and American Family Association are California and Mississippi nonprofit corporations, respectively, which hold licenses or permits for many NCE FM stations throughout the United States. *But see Oklahoma Wynnewood Community Radio Association*, Letter Order, 29 FCC Rcd 107, 110 (MB Jan 7, 2014) (finding an applicant ineligible to hold an NCE FM license because it is an unincorporated association and applicant failed to show “that it is recognized by *any* state.” (emphasis in original)).

⁵⁰ *See Fatima Response, Inc.*, Memorandum Opinion and Order, 1999 WL 809703, para. 11 (1999) (eligibility for a NCE license “does not hinge on whether or not the applicant has received tax-exempt status from the I.R.S.”).