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In re: **NCE MX Group 74**

**Vanguard Association of Sunbelt
Colleges Corporation**

New NCE (FM), Dubuque, Iowa
Facility ID No. 768573
Application File No. 0000167716

Augustana College

New NCE (FM), Epworth, Iowa
Facility ID No. 766325
Application File No. 0000166936

Petition for Reconsideration

Dear Applicants and Counsel,

We have before us a Petition for Reconsideration (Petition),¹ filed by Augustana College (AC), the dismissed applicant for a construction permit for a new noncommercial educational (NCE) FM station in Epworth, Iowa,² and related pleadings.³ AC seeks reconsideration of the grant by the Audio Division,

¹ Pleading File No. 0000240655 (filed Mar. 11, 2024).

² Application File No. 0000166936 (AC Application).

³ Vanguard Association of Sunbelt Colleges Corporation (VASC) filed a motion for extension of time to respond to the Petition on March 19, 2024. Pleading File No. 0000241513. VASC filed its Opposition on March 29, 2024, and a supplement that corrected typographical errors in the Opposition on April 1, 2024. Pleading File Nos. 0000242659 and 0000242734, respectively. AC filed a motion for extension of time to respond to the Opposition on

Media Bureau (Bureau) of the above-referenced application of Vanguard Association of Sunbelt Colleges Corporation (VASC) for a new NCE FM station in Dubuque, Iowa (VASC Application).⁴ For the reasons discussed below, we deny the Petition and uphold the grant of the VASC Application.

Background. The subject applications were filed during the November 2021 NCE FM filing window.⁵ The Bureau determined that the AC Application and VASC Application were mutually exclusive.⁶ The Commission subsequently analyzed the applications under the point system, identified VASC as the tentative selectee in NCE MX Group 74,⁷ and established a 30-day period for filing petitions to deny.⁸ On November 25, 2022, AC filed a petition to deny the VASC Application in which it questioned VASC's financial certification, argued that VASC lacked reasonable site assurance, and alleged that the VASC Application was part of a scheme to circumvent the 2021 NCE FM filing window's 10-application cap.⁹ Additionally, on June 22, 2023, Iowa Public Radio, Inc. (IPR) filed an informal objection (Objection) alleging that VASC could not have obtained reasonable site assurance because the tower location specified in the VASC Application is already occupied by IPR's existing NCE FM station, KNSY(FM), Dubuque, Iowa.¹⁰

On February 8, 2024, the Bureau released the *Staff Decision*, which denied both the AC petition to deny and the IPR Objection and granted the VASC Application.¹¹ The *Staff Decision* found VASC financially qualified¹² and determined that the record did not reflect a scheme to circumvent the 10-application rule.¹³ Finally, the *Staff Decision* found that VASC provided sufficient documentation to establish that it had reasonable assurance of site availability at the time it filed the VASC Application.¹⁴

April 1, 2024, and filed its reply to the Opposition on April 12, 2024 (Reply). Pleading File Nos. 0000242761 and 0000243456, respectively.

⁴ See Application File No. 0000167716 (filed Nov. 9, 2021).

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 11458 (MB July 23, 2021).

⁶ *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*, MB Docket No. 20-343, Public Notice, 36 FCC Rcd 16452 (MB 2021). The AC Application and VASC Application were designated as NCE MX Group 74.

⁷ *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, 12911, para. 53 (2022) (*Second Comparative Order*). VASC received two points for diversity of ownership; AC did not receive any points.

⁸ *Id.* at 12924, para. 118.

⁹ Pleading File No. 0000204282.

¹⁰ Pleading File No. 0000217055. See also Application File No. BLED-20170503AAR (active license for IPR's existing NCE FM station KNSY(FM)).

¹¹ *Vanguard Association of Sunbelt Colleges Corporation*, Letter Order, DA 24-119 (MB Feb. 8, 2024) (*Staff Decision*).

¹² *Id.* at 5-6.

¹³ *Id.* at 7.

¹⁴ *Id.* at 6.

Accordingly, the Bureau granted the VASC Application and issued VASC a construction permit for a new NCE FM station (Permit).

On March 11, 2024, AC filed the instant Petition, asserting that the *Staff Decision* “made errors of law and fact when it concluded that [VASC] had reasonable assurance of site availability . . . despite un rebutted record evidence that [VASC] cannot build at the parameters specified in its application.”¹⁵ AC further argues that, pursuant to section 1.65 of the Commission’s rules (Rules),¹⁶ VASC “was required to amend its application within thirty days once pleadings in the record put it on notice that another station’s facilities occupy the tower space it proposed,” and that its failure to amend the VASC Application “for more than a year” constitutes “either an intent to conceal information or a reckless irresponsibility,” both of which, it argues, “are disqualifying.”¹⁷ AC, therefore, urges the Commission to “reverse the [*Staff Decision*]” and “reevaluate the comparative status” of NCE MX Group 74 after VASC submits an amendment reflecting a buildable facility.¹⁸

In the Opposition, VASC resubmits e-mail correspondence it previously provided, in which the tower owner’s representative confirms to VASC’s consulting engineer that space was available on the Tower¹⁹ at various heights, including the height specified in the Application—77 meters above ground.²⁰ VASC states that, when it submitted the VASC Application proposing to install its antenna at 77 meters, it was unaware that the information provided by the tower owner’s representative was erroneous and that such installation would conflict with KNSY(FM). On March 11, 2024, VASC filed an application to modify the Permit, proposing to lower the proposed antenna height to approximately 60 meters above ground, and also revised the area and population that its proposed facility would serve.²¹ VASC states that the modified height “is also covered in the reasonable assurance correspondence” and resolves any conflicts with KNSY(FM).²² VASC asserts that although it did not “strictly observe the time constraints prescribed by” section 1.65 of the Rules in submitting its Permit Modification Application, it possessed

¹⁵ Petition at 1-2.

¹⁶ See 47 CFR § 1.65.

¹⁷ Petition at 2.

¹⁸ *Id.* at 9-10.

¹⁹ The e-mail correspondence identified the proposed tower as ASR #1037059 (Tower). This is the ASR identified in the VASC Application. See VASC Application at Antenna Location Data, ASR Number.

²⁰ The email correspondence, as originally submitted in response to a Bureau letter of inquiry, indicated that space was available on the proposed tower for VASC’s use. E-Mail from Donald E. Martin, Esq., counsel to VASC, to Alexander Sanjenis, Audio Division, FCC Media Bureau at Attach. 1 (June 1, 2023). VASC resubmitted the correspondence to include additional text that was omitted from the original email correspondence. The text provides specific details indicating that space was available on the Tower for VASC’s use between (1) the ground up to 153 meters, and (2) between 183 meters and 262 meters above ground. See Opposition at Attach. 1.

²¹ Application File No. 0000240650 (filed Mar. 11, 2024) (Permit Modification Application). VASC subsequently amended this application to provide population coverage data, noting that the population within the proposed 60 dbu contour is 93,700 people, and the area within the proposed 60 dbu contour is 1,600 square kilometers. Permit Modification Application, Amendment at Attach. “Purpose for Amendment to Minor Mod Application.” (filed Mar. 29, 2024).

²² Opposition at 2.

no “motive to deceive the Commission.”²³ Finally, VASC asserts that the comparative analysis for NCE MX Group 74, based on the Permit Modification Application, remains unchanged.²⁴

In the Reply, AC argues that the Opposition provides no justification for VASC’s failure to timely amend the VASC Application, and thus, the VASC Application should be denied.²⁵

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the original order or raises additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.²⁶ We find that AC has not shown legal error in the *Staff Decision*.

AC asserts that the Bureau erred in finding VASC’s documentation sufficient to establish that it had reasonable site assurance at the time it filed the Application. We disagree. VASC submitted direct evidence from the Tower owner’s representative indicating that space was available on the Tower for its use, including at the height proposed in the original VASC Application. We find that, although the Tower owner’s representative was incorrect about the available height, this error does not diminish VASC’s good faith reliance on the assurance of site availability.²⁷ VASC has modified its Permit to lower the antenna’s location to a height on the Tower that it states is also covered by its reasonable assurance documentation.²⁸ Because the record reflects that VASC secured site assurance prior to filing the original VASC Application, there is no impediment to its subsequent minor Permit Modification Application.²⁹ Furthermore, we reject AC’s contention that, pursuant to section 1.65 of the Rules, the timing of VASC’s Permit Modification Application merits disqualification. Section 1.65 violations are potentially disqualifying only if an applicant has an intent to conceal information or if omissions of reportable information are so numerous and serious as to undermine the applicant’s basic qualifications.³⁰ AC has not provided any convincing evidence, and the record does not reflect, that VASC possessed an intent to conceal information from the Commission.³¹ Thus, we do not find VASC’s actions to be disqualifying.

²³ *Id.* at 3.

²⁴ *Id.* at 4.

²⁵ Reply at 2-3.

²⁶ See 47 CFR §1.106(c), (d); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

²⁷ See, e.g., *Radio Free Moscow, Inc.*, Letter Order, 25 FCC Rcd 10111, 10113 (MB 2010) (finding applicant’s reliance on a third party’s confirmation of site availability was reasonable, even though the third party assurance was later found to be in error); *NCE MX Group 338*, Letter Order, 26 FCC Rcd 10423, 10426 (MB 2011) (explaining that an applicant’s reliance on a third party’s assurance of site availability, even if it is later proven to be inaccurate, plays a role in our analysis where such reliance was in good faith and was obtained from “site owners or individuals in a position to provide confirmation that the site is available for the proposed use.”).

²⁸ Permit Modification Application; Opposition at 2.

²⁹ See *Eagles Nest Fellowship Church*, Letter Order, 23 FCC Rcd 862, 865 (MB 2008)..

³⁰ See 47 CFR § 1.65; *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (citing *Valley Broadcasting Co.*, Decision, 4 FCC Rcd 2611, 2618 (Rev. Bd. 1989)).

³¹ AC’s allegation that VASC’s motive in failing to timely amend its application was to conceal inferior technical parameters that would endanger VASC’s comparative position does not bear out. Based on VASC’s Permit Modification Application, its comparative position remains unchanged. Moreover, given that the matter of VASC’s proposed antenna height was public record, there is no logical basis to infer a motive to deceive. *Greater Muskegon Broadcasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15464, 15472, para. 22 (1996).

Finally, we find that, based on the revised service area and population figures provided in the Permit Modification Application, both VASC and AC remain ineligible for any points under the best technical proposal criterion because neither proposes to serve at least 10% more area and population than the other.³² Therefore, our points system analysis is unchanged, and VASC remains the tentative selectee of NCE MX Group 74. Accordingly, we need not refer this group to the Commission to conduct a new point system analysis.³³ We thus deny the Petition.

Conclusion/Action. Accordingly, IT IS ORDERED that the Petition for Reconsideration, filed on March 11, 2024, by Augustana College (Pleading File No. 0000240655), IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

³² VASC's amended proposed 60 dBU contour would encompass 1,600 square kilometers with a population of 93,770. Permit Modification Application. AC's proposed 60 dBU contour would encompass 1,886 square kilometers with a population of 96,809. AC Application.

³³ *Second Comparative Order* at *21, para 102 (“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.”).