

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Threshold Fair Distribution Analysis of Mutually) MX Group 29
Exclusive Applications of the Southern California)
Tribal Chairmen’s Association and the Foundation) File No. 0000167741
for Economic Justice d/b/a Center for Economic) File No. 0000167868
Justice for Permits to Construct New)
Noncommercial Educational FM Stations Filed in)
November 2021 Window)

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 2022

Released: April 19, 2022

By the Commission:

I. BACKGROUND

1. We have before us for comparative consideration two mutually exclusive (MX) applications for new noncommercial educational (NCE) FM station construction permits.1 By this Memorandum Opinion and Order (Order), we perform a threshold Tribal Priority analysis, including granting a requested waiver, and identify the Southern California Tribal Chairmen’s Association (SCTCA), proposing a new NCE FM station at Warner Springs, California,2 as the tentative selectee in MX Group 29.3 Petitions to deny the application of this tentative selectee must be filed within 30 days of the date of release of this Order.4

2. The Commission accepts applications for new NCE stations during specified filing windows announced by public notice. Due to the finite nature of and high demand for spectrum, the Commission cannot authorize an NCE station to every qualified applicant. Accordingly, after the close of an NCE filing window, the Commission examines all timely and complete applications to determine

1 On November 29, 2021, the Media Bureau (Bureau) issued a public notice identifying 231 groups of mutually exclusive NCE FM applications. See Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Educational Stations, MB Docket No. 20-343, Public Notice, DA 21-1476 (MB rel. Nov. 29, 2021) (NCE MX Public Notice). MX Group 29 was included in the NCE MX Public Notice.

2 File No. 0000167741.

3 The other mutually exclusive applicant in MX Group 29 originally filed its application on November 9, 2021, as the Center for Economic Justice (CEJ). File No. 0000167868. On January 25, 2022, SCTCA filed an Informal Objection against CEJ’s original application. Pleading File No. 0000181229, Application File No. 0000167868. On April 12, 2022, CEJ filed an Opposition, Pleading File No. 000189307, and also amended its application to, among other things, correct its name to Foundation for Economic Justice d/b/a Center for Economic Justice. Because CEJ is not the tentative selectee in MX Group 29, the Informal Objection is moot, and we therefore direct the Bureau to dismiss both the Informal Objection and the Opposition without prejudice. To the extent CEJ in its Opposition raises any issues with SCTCA’s application, which we herein designate as tentative selectee, its recourse is to file a petition to deny or informal objection within 30 days of this Order, as discussed in para. <18>, infra.

4 See 47 CFR § 73.7004(b).

whether any two or more proposals are mutually exclusive.⁵ Due to the noncommercial nature of the NCE service, mutually exclusive applications for new station licenses are not subject to auction, but are resolved by applying comparative procedures.⁶ Specifically, when applicants in an MX group propose to serve different communities, the Commission first performs a threshold “fair distribution” analysis⁷ to ascertain whether grant of any of the applications would best further the objectives set forth in section 307(b) of the Communications Act of 1934, as amended (Section 307(b)), to “provide a fair, efficient, and equitable distribution” of broadcast service among the states and communities.⁸ If no MX applicant prevails under the fair distribution analysis,⁹ the Commission uses a point system to select among the MX applications.¹⁰

3. MX Group 29 consists of applications that were filed in November 2021, during the filing window for NCE FM applications.¹¹ In addition to SCTCA, MX Group 29 includes CEJ, which proposes a new NCE FM station at Ramona, California.¹² These applicants have had an opportunity to settle among themselves,¹³ and are now subject to the simplified, comparative process codified in Part 73, Subpart K, of the Commission’s rules.¹⁴ During the first step of this process the Commission uses Tribal Priority criteria, service area population data, and certifications provided by the applicants to perform a threshold fair distribution analysis.

⁵ Conflicting NCE applications, which cannot all be granted consistent with the Commission’s technical rules, are considered mutually exclusive. An MX group consists of all applications which are MX to at least one other application in the group.

⁶ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001), *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002). 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 (2019) (amending the comparative rules and procedures), *aff’d*, Order on Reconsideration, FCC 20-121, 35 FCC Rcd 10180 (2020).

⁷ The Bureau has delegated authority to analyze service population data, and to perform threshold fair distribution analyses of NCE FM proposals. See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 22 FCC Rcd 6101, n.16 (2007). See also 47 CFR §§ 0.61 and 0.283. The Commission expects that the Bureau will continue to issue fair distribution orders under delegated authority. See, e.g., *Threshold Fair Distribution Analysis of 20 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-314 (MB Mar. 24, 2022); *Threshold Fair Distribution Analysis of 15 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, DA 22-238 (MB Mar. 9, 2022); *Threshold Fair Distribution Analysis of Mutually Exclusive Applications of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana and Holy Spirit Radio, Inc., for Permits to Construct New Noncommercial Educational FM Stations Filed in November 2021 Window*, Memorandum Opinion and Order, DA 22-210 (MB Mar. 2, 2022).

⁸ See 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 CFR § 73.7002(a).

⁹ 47 CFR § 73.7002(a), (b).

¹⁰ 47 CFR § 73.7003.

¹¹ See *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). The window was available for FM reserved band (channels 201-220) proposals. See 47 CFR § 73.501.

¹² File No. 0000167868.

¹³ See *NCE MX Public Notice* at 2-5.

¹⁴ 47 CFR §§ 73.7000 – 7005.

II. THRESHOLD FAIR DISTRIBUTION PROCEDURES

4. As discussed above,¹⁵ we consider the fair distribution of service as a first, or threshold, issue in the NCE FM comparative review process.¹⁶ Accordingly, when applicants in a mutually exclusive NCE FM group propose to serve different communities, the Commission first performs a threshold “fair distribution” analysis to ascertain whether grant of any of the applications would best further the Section 307(b) objective.¹⁷ In the first step of the Section 307(b), or fair distribution, analysis, the Commission determines whether any of the applicants in the MX group is a federally recognized Native American Tribe or Alaska Native Village proposing to serve Tribal Lands.¹⁸ Specifically, an NCE FM applicant is eligible to receive a fair distribution preference (or Section 307(b) preference),¹⁹ and ultimately be awarded the construction permit, if it identifies itself as a Tribal Applicant,²⁰ proposes Tribal Coverage,²¹ and proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands (the Tribal Priority).²² If only one applicant in an MX group qualifies for the Tribal Priority, its “fair distribution” (Section 307(b)) preference is dispositive,²³

¹⁵ See *supra* para. 2.

¹⁶ See 47 CFR § 73.7002; *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7396 (2000) (*NCE Order*) (concluding that “fair distribution of stations to communities should remain a threshold issue”), Memorandum Opinion and Order, 16 FCC Rcd 5074, 5077 (2001) (*NCE MO&O*) (“when competing FM applications propose to serve different communities, a proposal would be considered best, as a threshold matter, if it would provide service to a significant unserved or underserved population”).

¹⁷ See 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 CFR § 73.7002(a).

¹⁸ See 47 CFR §§ 73.7000, 73.7002(b).

¹⁹ The terms “fair distribution preference” and “Section 307(b) preference” are used interchangeably to refer to the preference given to an MX application that is deemed to substantially further the fair distribution of service goals enunciated in Section 307(b) of the Act.

²⁰ See 47 CFR § 73.7000 (defining a “Tribal Applicant” as “(1) a Tribe or consortium of Tribes, or (2) an entity that is 50 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal Coverage.”).

²¹ *Id.* (defining “Tribal Coverage” as “(1) Coverage of a Tribal Applicant’s or Tribal Applicants’ Tribal Lands by at least 50 percent of a facility’s 60 dB μ (1 mV/m) contour, or (2) The facility’s 60 dB μ (1 mV/m) contour (i) Covers 50 percent or more of a Tribal Applicant’s or Tribal Applicants’ Tribal Lands, (ii) Serves at least 2,000 people living on Tribal Lands, and (iii) The total population on Tribal Lands residing within the station’s service contour constitutes at least 50 percent of the total covered population.”).

²² 47 CFR § 73.7002(b). If there is no Tribal Applicant in an MX group, the Commission proceeds to the second step in the Section 307(b) analysis and determines whether any applicant would provide a first or second reserved band channel NCE aural service to a substantial population (the First or Second NCE Service Preference) and compares population coverage totals. *Id.* In an MX group with a Tribal Applicant, an applicant qualifying for a Tribal Priority, however, will prevail over any MX applicant claiming a First or Second NCE Service Preference. In such cases, this second step (First and Second NCE Service Preference analysis) is moot.

²³ The Tribal Priority, however, will not prevail over a proposal for a first overall aural reception service to a significant population. See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order, 25 FCC Rcd 1583, 1594 (2010) (*Rural Radio First R&O*). We only review and consider a claim that an applicant will provide a first overall aural reception service (see FCC Form 2100, Schedule 340, Fair Distribution of Service Section, Question 1) if the application is mutually exclusive with an application claiming a Tribal Priority. See FCC Form 2100, Schedule 340, Instructions for Fair Distribution of Service at 12-13.

and the applicant will be awarded the construction permit.²⁴ Each Tribal Applicant must support its fair distribution claim with an exhibit demonstrating its qualifications to claim a Tribal Priority. Any applicant that receives a Tribal Priority and decisive Section 307(b) preference is required to construct and operate technical facilities substantially as proposed, and cannot downgrade service to the area on which the preference was based for a period of four years of on-air operations.²⁵

III. ANALYSIS

5. In the *Rural Radio* proceeding,²⁶ the Commission concluded that establishing a Tribal Priority for Native American Tribes and Tribal-owned entities would advance its Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.²⁷ The Tribal Priority is available to Tribes proposing, among other things, the assignment of reserved band NCE FM radio stations to serve Tribal Lands.²⁸ Applicant SCTCA states that its proposal generally meets the requirements established in *Rural Radio*, and codified in the rules,²⁹ for a Tribal Priority, but that it requires waiver of one of two rules regarding Tribal Coverage.³⁰ Specifically, SCTCA maintains that it is a consortium of Tribal chairmen of a number of Southern California Tribes,³¹ and its proposed 60 dB μ contour would cover over 50% of Tribal Lands belonging to Tribes that are members of the consortium.³² The proposed community of license, Warner Springs, California, is located adjacent to the reservation (Los Coyotes Reservation) of the Los Coyotes Band of Cahuilla and Cupeño Indians (Los Coyotes

²⁴ 47 CFR § 73.7002(b).

²⁵ See 47 CFR § 73.7005(b); see also 47 CFR § 73.7002(c). In particular, during this period, any Tribal Applicant, which receives a decisive Section 307(b) preference, cannot “(i) assign or transfer the authorization except to another party that qualifies as a Tribal Applicant; (ii) change the facility’s community of license; or (iii) effect a technical change that would cause the facility to provide less than full Tribal Coverage.” *Id.* § 73.7002(c)(2).

²⁶ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (*Rural Radio NPRM*); First Report and Order, 25 FCC Rcd 1583 (2010) (*Rural Radio First R&O*); Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556 (*Rural Radio Second R&O; Rural Radio First Order on Reconsideration*); and Third Report and Order, 26 FCC Rcd 17642 (2011) (collectively, *Rural Radio*).

²⁷ *Rural Radio First R&O*, 25 FCC Rcd at 1587, para. 8.

²⁸ *Id.* at 1596-97, paras. 26-27. See also *Rural Radio NPRM*, 24 FCC Rcd at 5248, n.29 (defining “Indian Tribe[s]” and “Federally-Recognized Indian Tribes”), and n.30 (defining “Tribal Lands”); 47 CFR § 73.7000 (defining “Tribe,” “Tribal applicant,” “Tribal coverage,” and “Tribal lands”).

²⁹ See 47 CFR §§ 73.7000, 73.7002. To receive a Tribal Priority, the applicant (1) must be a federally recognized Native American Tribe or Alaska Native Village (Tribe), a consortium of Tribes, or an entity 51% or more owned by a Tribe or Tribes; (2) must propose Tribal Coverage, that is, either (a) 50% or more of the proposed facility’s 60 dB μ contour is comprised of Tribal Lands or (b) the proposed 60 dB μ contour must cover 50% or more of Tribal Lands, a minimum of 2,000 persons living on Tribal Lands, and the population living on Tribal Lands must constitute at least 50% of the total covered population, and in neither case may the proposed facility’s 60 dB μ contour cover more than 50% of a non-applicant Tribe’s Tribal Lands; (3) must propose a community of license located on Tribal Lands; and (4) must propose the first local NCE Tribal-owned transmission service at the designated community of license. *Id.* 47 CFR § 73.7000 defines the terms used here, including “Tribe,” “Tribal Lands,” and “Tribal Coverage.”

³⁰ See File No. 0000167741, Attachment, “Request_for_Waiver_of_Criteria_for_Tribal_Priority.pdf” (Waiver Attachment). See also 47 CFR § 73.7000 (defining Tribal Coverage).

³¹ Waiver Attachment at 1.

³² *Id.*

Band),³³ which are Tribal Lands belonging to an SCTCA member Tribe,³⁴ and is the first Tribal-owned NCE service at Warner Springs.³⁵ However, with regard to the Tribal Coverage criterion, SCTCA requests waiver of the requirement that at least 50% of the proposed 60 dB μ contour be comprised of the applicant's Tribal Lands,³⁶ or of the alternative requirement that the proposed 60 dB μ contour cover 50% or more of the applicant's Tribal Lands, and that it meet population coverage requirements.³⁷ The proposed 60 dB μ contour would not serve at least 2,000 people living on Tribal Lands, nor would the total population on Tribal Lands residing within the station's service contour constitute at least 50% of the total covered population. According to SCTCA, although there are more than 30 Tribal reservations in San Diego and Riverside Counties, California—more than in any state in the United States—even assuming the most restrictive signal, none of the California reservations could meet the population standards in section 73.7000 for the Tribal Coverage criterion, owing to “small size and native population dilution within surrounding areas.”³⁸

6. A waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.³⁹ Generally, the Commission may waive any rule for good cause shown⁴⁰ and, in making this determination, may take into account considerations such as hardship, equity, or more effective implementation of overall policy on an individual basis.⁴¹ The Tribal Coverage criteria, requiring that the total population on Tribal Lands residing within the station's service contour constitute at least 50% of the total covered population is designed “to ensure that a facility qualifying for the Tribal Priority is primarily used for its intended purpose, namely, to assist Tribes in their mission of promulgating Tribal language and culture, promoting self-governance, and serving the specific needs of Tribal communities.”⁴² Additionally, the Commission established that a station claiming the Tribal Priority must be located on Tribal Lands, in order to tie the preference to the needs of Tribal communities.⁴³

³³ See File No. 0000167741, Attachment, “Tribal_Priority.pdf” (Tribal Priority Attachment).

³⁴ See File No. 0000167741, Attachment, “SCTCA_Articles_of_Incorporation_1975-1.pdf.”

³⁵ See Tribal Priority Attachment at 1.

³⁶ 47 CFR § 73.7000 (definition of Tribal coverage).

³⁷ *Id.* To meet this requirement, the 60 dB μ contour must not only cover over 50% of the applicant's Tribal Lands, but must also cover a minimum of 2,000 people living on Tribal Lands, and the covered population living on Tribal Lands must constitute at least 50% of the total covered population. *Id.*

³⁸ Waiver Attachment at 1. SCTCA further notes that an estimated 1.6-1.9% of California's population is Native American, and that that population is “thoroughly blended” with the non-Native population, such that no reservation in California could meet the “50% of total covered population” standard. *Id.*

³⁹ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)).

⁴⁰ 47 CFR § 1.3.

⁴¹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (“The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”). See also 47 CFR § 1.3 (waiver for good cause shown).

⁴² *Rural Radio Second R&O*, 26 FCC Rcd at 2559-60, para. 6. This criterion is also “designed to avoid applying the Tribal Priority to regions and populations that are largely non-Native in character or location, in keeping with the priority's goals.” *Rural Radio First Order on Reconsideration*, 26 FCC Rcd at 2586-87, para. 59.

⁴³ *Rural Radio First R&O*, 25 FCC Rcd at 1591, para. 13.

7. In creating the Tribal Priority, the Commission endorsed the formation of tribal consortia for applicant Tribes in the same geographic area, stating that limiting the Tribal Priority to applications proposing facilities that would not cover more than 50% of a non-applicant Tribe's Tribal lands would have "the salutary effect of encouraging different Tribes whose lands are in close proximity to each other to form consortia to establish radio service serving the various Tribes' needs, as well as share the expense of starting new radio service."⁴⁴ The Commission also stated that it would "entertain waiver requests from applicants proposing Tribal service to service areas in which the population on Tribal Lands is less than 50 percent of the covered population, in appropriate situations."⁴⁵ The Commission set forth some of the criteria that may be used in considering whether such a waiver is appropriate:

For example, if all the tribes in a densely populated area were to form a consortium to provide service covering all of their Tribal Lands, and the collective population still does not constitute 50 percent of the total covered population, we would be receptive to a showing that the proposed facility is designed to minimize non-Tribal coverage while still providing needed service to Tribal Lands. We would also consider other factors, such as: the abundance of non-Tribal radio service in the area; the absence of Tribal radio service in the area; and the absence of other Tribal-owned or Tribal-oriented media of mass communications in the area, or a showing that other such Tribal-directed media are inadequate to serve the needs of Tribal communities.⁴⁶

The Commission further noted that "[a] tribal proposal that covers 50 percent of Tribal Lands but does not meet the 2,000 population threshold may be able to make a persuasive waiver showing if it can demonstrate that it would provide needed service to Tribal Lands and populations that are isolated and sparse."⁴⁷ SCTCA's waiver request makes such a showing.

8. In support of its waiver request, SCTCA points to the above-cited *Rural Radio First Order on Reconsideration*, in which the Commission specifically recognized the difficulties inherent in applying the Tribal Priority in San Diego County, California.⁴⁸ SCTCA goes on to make several arguments in favor of waiver grant in this case. We find the following facts asserted by SCTCA to be particularly germane to our consideration for the reasons stated below:

- a) Depending on the Tribe, anywhere from 30-80% of SCTCA Tribal members live off-reservation, with the majority of these living on near-reservation lands.⁴⁹ This indicates that the Tribal population to be served by the proposed station is larger than the number that would be obtained merely by the population living on reservations.
- b) In viewing population figures for the census tract in which the proposed transmitter site is situated, and those census tracts immediately adjacent to and surrounding the transmitter site's tract, anywhere from 11.1% (Rincon tract) to 35.4% (La Jolla/Palomar tract) of the populations are Native American.⁵⁰ This, again, strongly suggests that a large number of Tribal citizens live in the area covered by the proposed station's service contour, but that is not reflected by a simple count of citizens living on Tribal reservations.

⁴⁴ *Rural Radio First Order on Reconsideration*, 26 FCC Rcd at 2587, para. 59.

⁴⁵ *Id.* at 2587, para. 59 and n.156.

⁴⁶ *Id.* at 2587 n.156.

⁴⁷ *Id.* at 2587 n.155.

⁴⁸ *Id.* at 2585-87, paras. 56-59.

⁴⁹ Waiver Attachment at 1.

⁵⁰ *Id.* at 1-2. These figures are for individuals identifying as American Indian/Alaska Native. Including those identifying as American Indian/Alaska Native plus another race increases these figures by approximately three percentage points. *Id.*

- c) No other transmitter site can reach as many reservations, as many Tribal persons, or as high a percentage of Tribal population in Southern California as the one proposed.⁵¹ SCTCA shows that it has maximized the Tribal coverage it is able to obtain, within the constraints of geography and spectrum availability.
- d) The proposed station will serve, within its 60 dB μ contour, six member reservations, and could be heard by other reservations just outside the contour. Additionally, the proposed facility could serve as a primary FM station, feeding additional FM translators serving surrounding Tribal Lands.⁵² As with showing (c), above, this demonstrates that SCTCA has chosen a site for its proposed stations designed to serve the maximum number of Tribal lands and citizens.
- e) The only other Tribal-owned radio station in Southern California, KPRI(FM), Pala, California, licensed to the Pala Band of Mission Indians, operates with 0.1 kW Effective Radiated Power (ERP), has an antenna Height Above Average Terrain (HAAT) of - 325 meters, and has a contour that does not overlap that of SCTCA's proposed station.⁵³ Thus, the only other Tribal-owned radio service in Southern California does not duplicate SCTCA's proposed service; SCTCA seeks to expand Tribal service in the region.

9. We believe that, given the circumstances, it would be extremely difficult for a Tribe or Tribal consortium to claim a Tribal Priority in this area without a waiver of the Tribal Coverage criterion. In creating the Tribal Priority, the Commission indicated a willingness to entertain waiver requests in circumstances similar to those presented by SCTCA.⁵⁴ As SCTCA notes, the Commission singled out the very area proposed to be covered by this application as an example of the circumstances in which grant of Tribal Priority would be appropriate even though Tribes' actual situations may not conform with the Tribal Priority rule regime.⁵⁵ We also observe that, while the proposed station's coverage area includes reservations belonging to SCTCA member Tribes, as SCTCA notes these reservations are of "small size" and are subject to native population dilution,⁵⁶ with members living in the near- and off-reservation areas surrounding these reservations that may not be considered "Tribal Lands."⁵⁷

10. We further believe it would serve the goals of the Tribal Priority to grant waiver of Tribal Coverage in this instance. The proposed station would serve six Tribes' reservations in its 60 dB μ contour, and according to the maps provided another six reservations lie just outside the proposed 60 dB μ contour.⁵⁸ The station proposed by the SCTCA consortium would thus serve from a half-dozen to a dozen Tribal Lands directly, not counting any potential future FM translators rebroadcasting the proposed station's signal. As noted by SCTCA, there is only one Tribal-owned station in Southern California, the

⁵¹ Waiver Attachment at 2.

⁵² *Id.*

⁵³ *Id.* ERP and HAAT figures were obtained from the FM Query database.

⁵⁴ *See supra* note 46.

⁵⁵ *See Rural Radio First Order on Reconsideration*, 26 FCC Rcd at 2585-87, paras. 56-59.

⁵⁶ Waiver Attachment at 1.

⁵⁷ 47 CFR § 73.7000 (definition of Tribal Lands). The Commission noted in the *Rural Radio First Order on Reconsideration* that "approximately two-thirds of all Tribal citizens do not live on Tribal Lands." *Rural Radio First Order on Reconsideration*, 26 FCC Rcd at 2561, para. 8. In the context of Tribes that lack Tribal Lands, the Commission said it would be receptive to waivers of the coverage requirement where "a majority of the proposed service would cover the functional equivalent of Tribal Lands" provided that the applicant could demonstrate that a waiver would "enable the Tribe to provide radio service uniquely devoted to the needs, language, and culture of the Tribal community . . ." *Id.*

⁵⁸ Waiver Attachment at 3-4.

service contour of which does not overlap the proposed Warner Springs station, and no other Tribal applicants have sought stations in Southern California in this NCE filing window. Additionally, staff engineering analysis, plotting the contours of radio stations obtained from the Media Bureau's Licensing and Management System (LMS) database, shows that the area covered by SCTCA's proposed service contour is already well-served by at least seven non-Tribal radio stations. Finally, a staff channel study, again based on LMS radio station coverage data, shows there are currently no spectrum openings for even a minimum Class A FM NCE facility in the area covered by the two MX Group 29 applicants. The proposed station represents the only current opportunity for Tribal-owned NCE service to an area of the country that is home to many different Native Nations.

11. SCTCA notes that the proposed community of license is "adjacent" to the Los Coyotes Reservation,⁵⁹ although it does not specifically seek waiver of the Tribal Priority requirement that the community of license be located on Tribal Lands. We nonetheless find good cause to waive this requirement. We take official notice that the 2020 U.S. Census map of the Los Coyotes Reservation does not show any Census Designated Places, nor any cities, towns, or villages.⁶⁰ We further note that the Los Coyotes Band of Cahuilla and Cupeño Indians have their tribal headquarters in Warner Springs, California.⁶¹ Given the lack of geographically recognizable population groupings on the Los Coyotes Reservation, the fact that Warner Springs is adjacent to that reservation and serves as the Tribe's headquarters, and Warner Springs's central location among the various Tribal Lands covered by SCTCA's proposed 60 dBμ contour, we find that waiving this requirement would further the goals of the Tribal Priority for the reasons set forth above. Accordingly, we waive the requirement that the community of license be located on Tribal Lands.⁶²

12. For these reasons, we believe that the special circumstances demonstrated by SCTCA are compelling and support waiver of the population coverage requirement in section 73.7000 and community of license requirements in section 73.7002(b). As SCTCA has met the other Tribal Priority criteria, we therefore grant the requested waiver and on our own motion grant waiver of the community of license location criterion, and find that SCTCA's application qualifies under our Tribal Priority.

13. CEJ, the only other applicant in MX Group 29, is not and does not claim to be a Tribe as defined in section 73.7000.⁶³ Pursuant to section 73.7002(b) of the rules, "a full-service FM applicant that identifies itself as a Tribal Applicant, that proposes Tribal Coverage, and that proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands, will be awarded a construction permit."⁶⁴ Thus, under our rules, SCTCA is the tentative selectee in MX Group 29.

⁵⁹ Tribal Priority Attachment at 1.

⁶⁰ See https://www2.census.gov/geo/maps/DC2020/TribalTract/r1995_los_coyotes/DC20TT_FR1995.pdf.

⁶¹ See File No. 0000167741, Parties to the Application (indicating a mailing address in Warner Springs for the Los Coyotes Band). See also Bureau of Indian Affairs online database, https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes?field_us_state_s_value=CA&page=2 (giving address for Los Coyotes Band as 2300 Camino San Ignacio Road, Warner Springs, CA 92086).

⁶² See *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 352 (D.C. Cir. 1989) ("The FCC has broad discretion under section 307(b) to determine the public interest, and nothing in the Communications Act prevents the FCC from defining the term 'community' differently in different contexts, or from adopting an interpretation that strays considerably from political boundaries.") (citations omitted).

⁶³ 47 CFR § 73.7000. CEJ also does not claim to provide a first overall aural reception service, although it proposes a first NCE service to 5,563 persons, and second NCE service to 10,375 persons. File No. 0000167868, Attachment, "Consolidated_Engineering_Report_Ramona_Calif_(1).pdf."

⁶⁴ 47 CFR § 73.7002(b).

IV. ADDITIONAL MATTERS

14. **Acceptability Studies.** Once the Commission identifies a tentative selectee pursuant to the fair distribution analysis, the next step is to consider whether the selectee's application has defects.⁶⁵ If the Commission finds the application acceptable for filing, we announce acceptance by the release of this Order, and petitions to deny may be filed within 30 days following the release of the Order.⁶⁶

15. The Commission has reviewed SCTCA's application and has determined that it is acceptable for filing. SCTCA appears to be fully qualified to become the licensee of the new NCE FM station it has proposed. We tentatively conclude that the grant of its application would serve the public interest, convenience, and necessity. It is our intention to grant the application if, after the 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application. Such determinations of grantability may, of course, involve additional matters that may impact the timing or outcome of a decision. For example, a proposal to serve an area near the United States border with Canada or Mexico cannot become ripe for grant prior to the successful completion of international coordination.⁶⁷ Also, in addition to the standard constraints set forth in section 73.7002(c)(1), section 73.7002(c)(2) identifies the specific restrictions pertaining to a Tribal Applicant receiving a decisive preference through a fair distribution analysis.⁶⁸

16. The Media Bureau shall process the application according to our rules, and shall make any necessary determinations regarding pleadings filed against the SCTCA application. We direct the Bureau to act on any routine matter that may be raised, and to determine whether the tentatively selected application complies with all relevant Commission rules and policies.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the waiver requested by the Southern California Tribal Chairmen's Association IS GRANTED.

18. IT IS FURTHER ORDERED, that the Application filed by the Southern California Tribal Chairmen's Association (File No. 0000167741) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Warner Springs, California, and that its application is ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend, by public notice, TO DISMISS the mutually exclusive application of the Foundation for Economic Justice d/b/a Center for Economic Justice (File No. 0000167868) and TO GRANT the application of the Southern California Tribal Chairmen's Association (File No. 0000167741) CONDITIONED UPON that selectee's compliance with Section 73.7002(c) of the Commission's Rules,⁶⁹ which sets forth a four-year period of on-air operations substantially as proposed.

⁶⁵ If a tentative selectee's application is found unacceptable for filing, it is dismissed. The applicant then has one opportunity to submit a curative amendment and a petition for reconsideration requesting reinstatement *nunc pro tunc* within 30 days, provided that the amendment is minor and does not alter the fair distribution analysis. See 47 CFR § 73.3522(b)(1). A tentative selectee that is unable to cure the defect is disqualified. 47 CFR § 73.7004(d).

⁶⁶ 47 CFR § 73.7004.

⁶⁷ See generally 47 CFR § 73.1650.

⁶⁸ 47 CFR § 73.7002(c)(1)-(2). Section 73.7002(c)(2) states that, for a period beginning with award of the construction permit through four years of on-air operation, a Tribal Applicant receiving a decisive preference under 47 CFR § 73.7002 may not (i) assign or transfer the authorization except to another party that qualifies as a Tribal Applicant; (ii) change the facility's community of license; or (iii) effect a technical change that would cause the facility to provide less than full Tribal Coverage. 47 CFR § 73.7002(c)(2).

⁶⁹ 47 CFR § 73.7002(c).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary