

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

In the Matter of	)	
	)	
Comparative Consideration of Six Groups of	)	NCE MX Group Numbers 51, 54, 76, 122,
Mutually Exclusive Applications for Permits to	)	152, 200
Construct New Noncommercial Educational FM	)	
Stations	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 23, 2024**

**Released: January 23, 2024**

By the Commission:

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**I. INTRODUCTION**

1. The Commission has before it for comparative consideration and review six groups of mutually exclusive (MX) applications for new noncommercial educational (NCE) FM station construction permits.<sup>1</sup> By this Memorandum Opinion and Order (Order), we use a point system to

<sup>1</sup> 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* (continued....)

tentatively select a new application for grant in several groups. Petitions to deny the application of any of these tentative selectees must be filed within 30 days of the date of release of this Order.<sup>2</sup>

2. In each group addressed in this Order, the Bureau or Commission previously resolved the conflicting NCE proposals by applying the comparative procedures codified in Part 73, Subpart K, of the Commission's rules (rules)<sup>3</sup> and tentatively selected applications for grant. These actions now require additional analysis as a result of subsequent challenges, filings, or events.

## II. BACKGROUND

3. The applications addressed in this Order were filed in November 2021, during the most recent filing window for new NCE FM applications.<sup>4</sup> Each application was MX with at least one other application, and the applicants had an opportunity to enter into settlement agreements among themselves to resolve mutual exclusivity.<sup>5</sup> The Bureau and the Commission subsequently resolved all of the MX groups addressed herein, along with over 165 other MX groups, comprising hundreds of NCE FM applications,<sup>6</sup> by applying the NCE comparative procedures, which include (1) threshold fair distribution criteria for applications proposing to serve different communities,<sup>7</sup> and (2) an NCE point system,<sup>8</sup> which is a simplified, "paper hearing" process for selecting among mutually exclusive NCE applications.<sup>9</sup> The Commission's comparative review of MX applications is based on applicant-provided information. To expedite the licensing of new NCE FM stations, the Bureau and the Commission rely on applicant certifications and documentation and do not independently confirm their accuracy during the review process. Rather, the Bureau and the Commission rely on the petition to deny process to verify the accuracy of the points claimed and certifications.<sup>10</sup>

(Continued from previous page) \_\_\_\_\_  
in the November 2021, Filing Window for New Noncommercial Educational Stations, Public Notice, 36 FCC Rcd 16452 (MB rel. Nov. 29, 2021) (*NCE MX Public Notice*). Each of the groups analyzed herein was included in the *NCE MX Public Notice*.

<sup>2</sup> See 47 CFR § 73.7004(b).

<sup>3</sup> 47 CFR §§ 73.7000 – 73.7005.

<sup>4</sup> 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 rel. April 21, 2021). The window was available for FM reserved band (channels 201-220) proposals. See 47 CFR § 73.501.

<sup>5</sup> See *NCE MX Public Notice*, 34 FCC Rcd at 16452. The NCE FM applicants had an opportunity to enter into and file settlement agreements and to submit technical amendments to resolve conflicts and expedite the grant of applications filed in the NCE FM window.

<sup>6</sup> See, e.g., *Threshold Fair Distribution Analysis of 13 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 37 FCC Rcd 5702 (MB May 2, 2022); *Comparative Consideration of 27 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 37 FCC Rcd 9869 (Aug. 2, 2022) (*First Comparative Order*).

<sup>7</sup> See 47 U.S.C. § 307(b); 47 CFR § 73.7002(a).

<sup>8</sup> See 47 CFR § 73.7003 (point system selection procedures).

<sup>9</sup> See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (*2000 NCE Order*), clarified, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) (*2001 NCE MO&O*), 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) (*NCE LPFM Order*) (amending the comparative rules and procedures), *aff'd*, Order on Reconsideration, FCC 20-121, 35 FCC Rcd 10180 (2020) (*NCE Order on Reconsideration*).

<sup>10</sup> See *2001 NCE MO&O*, 16 FCC Rcd at 5104, para. 87.

4. After applying these procedures, the Bureau or Commission tentatively selected applications for grant from each MX group and initiated a 30-day period for filing petitions to deny against the applicants tentatively selected.<sup>11</sup> In this Order, we address several outstanding, unresolved challenges from the November 2021, NCE FM window. The pleadings addressed herein include multiple petitions to deny<sup>12</sup> the tentative selectee applications from prior Commission decisions regarding the subject MX groups, several petitions for reconsideration, and an application for review. In many of the petitions to deny, a petitioner has challenged the inclusion or exclusion of claimed points, thus potentially altering the outcome of the particular NCE MX group. Accordingly, the Bureau has referred these groups to the Commission.<sup>13</sup> Although the groups we resolve in this Order involve a broad range of fact patterns, they also involve many common issues arising from our NCE comparative process. We therefore believe that organizing this Order primarily by topic and consolidating these decisions as a single order will provide guidance on the application of many of the NCE comparative criteria.

5. Section III of this Order provides an introductory overview of each NCE comparative criterion. In Section IV we use the point system to re-analyze one MX group. Section V is devoted to challenges to the Commission's prior best technical proposal analyses in three MX groups. In Section VI we address a challenge to our tie-breaker criteria. Finally, in Section VII we address an application for review regarding whether the Commission should award points to an applicant that initially certified it did not qualify for localism and diversity points, but submitted exhibits to support affirmative certifications.

### III. GENERAL NCE COMPARATIVE PROCEDURES

6. Given the finite nature of and high demand for spectrum, the Commission cannot grant a construction permit to every qualified NCE applicant. Due to the noncommercial nature of the NCE service, MX<sup>14</sup> applications for new station construction permits are not subject to auction, but are resolved by applying comparative procedures.<sup>15</sup> Specifically, the Commission's comparative analysis of MX NCE applications generally consists of three main components. First, when NCE FM applicants in an MX group propose service to different communities, the Commission performs a threshold fair distribution analysis under section 307(b) of the Communications Act of 1934, as amended (the Act).<sup>16</sup> Second, application conflicts that are not resolved under this "fair distribution" analysis are compared by the Commission under an NCE point system,<sup>17</sup> which is a simplified, "paper hearing" process.<sup>18</sup> Third, if

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<sup>11</sup> See 47 CFR § 73.7004(b).

<sup>12</sup> In cases involving a petition to deny, the Commission applies a two-step analysis under the public interest standard. The Commission must first determine whether the petition contains specific allegations of fact sufficient to show that granting the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1); *Astroline Communications Co., Ltd. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*). If the petition meets this first step, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has raised a substantial and material question of fact as to whether the application would serve the public interest. *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

<sup>13</sup> The Commission directed the Bureau to refer only those issues where the exclusion or inclusion of challenged or claimed points could alter the outcome of a particular NCE MX group, or where a new or novel question exists. See, e.g., *First Comparative Order*, *supra* note 6, at para.87 (standards for staff evaluation of petitions).

<sup>14</sup> 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.

<sup>15</sup> See *supra* note 9.

<sup>16</sup> 47 U.S.C. § 307(b) (Section 307(b)).

<sup>17</sup> See 47 CFR § 73.7003 (point system selection procedures).

<sup>18</sup> See *supra* note 9.

necessary, the Commission makes a tie-breaker determination, based on applicant-provided data and certifications. Each of these steps is described in greater detail below.<sup>19</sup>

**A. 307(b) --Threshold Fair Distribution Study.**

7. Section 307(b) states that the Commission must “provide a fair, efficient, and equitable distribution” of broadcast service among the states and communities.<sup>20</sup> In accordance with this directive, the Commission considers the fair distribution of service as a first, or threshold, issue in its NCE FM comparative review process<sup>21</sup> in order to ascertain whether grant of any of the applications would best further the Section 307(b) objective.<sup>22</sup> The first step of the Section 307(b), or fair distribution, analysis, is to determine 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<sup>23</sup> and claims the Tribal Priority.<sup>24</sup>

8. If there is no Tribal Applicant in the MX group,<sup>25</sup> the second step in the Section 307(b) analysis is to determine 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) by comparing population coverage totals.<sup>26</sup> Specifically, during this step, an NCE FM applicant is eligible to receive a fair distribution preference (or Section 307(b) preference)<sup>27</sup> if it would provide a first or second reserved band channel NCE aural service to at least 10% of the population (in the aggregate), within the proposed station’s service area, provided that the population served is at least 2,000 people. If only one applicant in

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<sup>19</sup> In advance of the November 2021 filing window, the Commission amended its rules and procedures for filing NCE FM applications and selecting and licensing competing NCE FM applications. *See NCE LPFM Order, supra note 9*. The changes were designed to improve the comparative selection procedures, reduce confusion among future applicants, expedite the initiation of new service to the public, and eliminate unnecessary applicant burdens. *See also Media Bureau Announces October 30, 2020, Effective Date of New NCE and LPFM Rules*, Public Notice, 35 FCC Rcd 12694 (Nov. 2, 2020).

<sup>20</sup> 47 U.S.C. § 307(b).

<sup>21</sup> *See* 47 CFR § 73.7002; 2000 *NCE Order*, 15 FCC Rcd at 7396 (2000) (concluding that “fair distribution of stations to communities should remain a threshold issue”); 2001 *NCE MO&O*, 16 FCC Rcd at 5077 (“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”).

<sup>22</sup> *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). Applicants’ Form 2100, Schedule 340, Fair Distribution of Service certifications enable the Commission to consider whether service to one community over the other would best achieve the Commission’s directive to distribute radio service fairly among communities.

<sup>23</sup> *See* 47 CFR §§ 73.7000, 73.7002(b).

<sup>24</sup> An NCE FM applicant is eligible to receive a fair distribution preference, and ultimately be awarded the construction permit, if it identifies itself as a Tribal Applicant, proposes Tribal Coverage, 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). *See* 47 CFR § 73.7000 (defining a “Tribal Applicant” and “Tribal Coverage”); *see also* 47 CFR § 73.7002(b).

<sup>25</sup> None of the MX groups addressed in this Order contain a Tribal Applicant. Accordingly, the first step of the Section 307(b) analysis, the Tribal Priority analysis, is inapplicable herein.

<sup>26</sup> *See* 47 CFR § 73.7002(b).

<sup>27</sup> 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).



an MX group qualifies for the First or Second NCE Service Preference, its “fair distribution” (Section 307(b)) preference is dispositive,<sup>28</sup> and that applicant will be awarded the construction permit.

9. If more than one applicant in the MX group claims a First or Second NCE Service Preference, the applicant proposing to provide the greatest number of people with the highest level of service will be awarded a construction permit, if it will provide such service to at least 10% of the people within the station's 60 dBu contour *and* to at least 5,000 more people than the next best applicant.<sup>29</sup> First service will be preferred over second service.<sup>30</sup> Accordingly, the Commission first examines the applicants' first service levels alone to determine whether one of the proposals is superior and should receive a decisive preference. If such applicants are equivalent with respect to first service, or no applicant qualifies for a first service preference, the Commission considers combined first and second NCE aural service population totals. At each stage of the Section 307(b) analysis, any applicant that is comparatively disfavored in terms of Section 307(b) eligibility or service totals is eliminated. The process ends when the Commission determines that one applicant is entitled to a Section 307(b) preference, or that either (1) none of the remaining applicants can be selected or eliminated based on a Section 307(b) preference, or (2) each remaining applicant proposes to serve the same community. Any remaining MX applicants proposing equivalent service overall, or proposing the same community, proceed to a point system analysis.<sup>31</sup>

10. Each applicant claiming a First or Second NCE Service Preference must support its fair distribution claim with an exhibit identifying the population residing within the proposed station's 60 dBu service contour and the number of people that would receive a new first or second NCE aural service.<sup>32</sup> Further, any applicant which receives a 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.<sup>33</sup>

## **B. Point System Selection Process.**

11. The Commission compares mutually exclusive groups of NCE FM applications, which cannot be decided pursuant to the Section 307(b) analysis, under the point system set forth in section 73.7003 of the rules.<sup>34</sup> The NCE point system awards a maximum of seven merit points, based on four

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<sup>28</sup> As noted, in the case of 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.

<sup>29</sup> 47 CFR § 73.7002(b).

<sup>30</sup> *Id.*

<sup>31</sup> See 47 CFR § 73.7003 (point system selection procedures).

<sup>32</sup> See *id.* § 73.7002(b). Applicants were required to use the most recently available, *i.e.*, 2010 Census, population data. See *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window*, DA 21-885, 36 FCC Rcd 11458, 11463, n.24 (MB rel. July 23, 2021) (*NCE Filing Procedures Public Notice*); FCC Form 2100, Schedule 340, Instructions for Fair Distribution of Service at 12-14. An applicant's fair distribution showing must be computed as of the time of filing (close of the filing window for applications filed prior to the window) and cannot be enhanced thereafter. See 47 CFR § 73.7003(e) and (f)(3); *NCE Filing Procedures Public Notice* at 11468; 2001 *NCE MO&O*, 16 FCC Rcd at 5082-83. However, an applicant that subsequently makes engineering changes that would diminish its fair distribution position must amend its application to reflect that diminished position. See 47 CFR §§ 1.65 and 73.7003(e).

<sup>33</sup> See 47 CFR § 73.7005(b); see also 47 CFR § 73.7002(c). During this period, such applicant may make minor modifications to its authorized facilities, provided that “(i) the modification does not downgrade service to the area on which the preference was based, or (ii) any potential loss of first and second NCE service is offset by at least equal first and, separately, combined first and second NCE service population gain(s), and the applicant would continue to qualify for a decisive Section 307(b) preference.”) *Id.*

<sup>34</sup> See 47 CFR § 73.7003. Unlike the 307(b) analysis, the point system selection process cannot be performed by the Bureau on delegated authority. See 2000 *NCE Order*, 15 FCC Rcd at 7420.

distinct criteria, described below.<sup>35</sup> When MX NCE FM applications proceed to a point system analysis, the Commission reviews the applicants' point submissions<sup>36</sup> to compare the MX applications and tentatively select the application with the highest point total from each MX group for grant.<sup>37</sup>

12. First, we award three points to applicants certifying that they have been local and established for at least two years. To qualify for the three points as an "established local applicant"<sup>38</sup> an applicant must certify that it has been local and established in the community to be served continuously for at least two years immediately prior to the application filing.<sup>39</sup> To be considered local, a non-governmental applicant must have a physical headquarters, campus, or 75% of its governing board members residing within 25 miles of the reference coordinates of the proposed community of license.<sup>40</sup> A governmental unit is considered local within its jurisdictional boundaries.<sup>41</sup>

13. If an applicant certifies that it is an "established local applicant" it must submit substantiating documentation with its application to illustrate how it qualifies as local and established.<sup>42</sup> Examples of acceptable documentation include corporate material from the secretary of state, lists of names, addresses, and length of residence of board members and copies of governing documents requiring a 75% local governing board, or course brochures indicating that classes have been offered at a local campus for the preceding two years.<sup>43</sup> Any applicant awarded localism points in this Order has provided support for its certification.

14. Second, we award two points for local diversity of ownership if no party to the application holds an attributable interest in any other station or authorized construction permit whose principal community (city grade) contour overlaps that of the applicant's proposed station.<sup>44</sup> To qualify

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<sup>35</sup> See 47 CFR § 73.7003(b).

<sup>36</sup> Each NCE FM applicant was required to complete the "Point System Factors/Tie Breakers" Section of FCC Form 2100, Schedule 340, Noncommercial Educational Station for Reserved Channel Construction Permit Application (Schedule 340) in the Bureau's Licensing and Management System (LMS) by the November 9, 2021, filing deadline.

<sup>37</sup> The Commission has reaffirmed its longstanding one-grant policy. See *NCE Order on Reconsideration*, *supra* note 9. The one-grant policy provides that only one application should be granted out of each mutually exclusive group, while providing the remaining competing applicants the opportunity to file again in the next filing window. *Id.* The Commission will not authorize "secondary grants" in MX NCE FM groups after the initial resolution of the MX applications. A secondary grant process would allow non-winning applicants that are not mutually exclusive with the tentative selectee to proceed to a second round of analysis by the Commission. *Id.* See also *NCE LPFM Order*, 34 FCC Rcd at 12528, n.68 (reaffirming the established one-grant policy and declining to pursue a secondary application grant practice).

<sup>38</sup> See 47 CFR § 73.7000.

<sup>39</sup> See *id.* § 73.7003(b)(1).

<sup>40</sup> A local headquarters or residence must be a primary place of business or residence and not, for example, a post office box, lawyer's office, branch office, or vacation home, which are more easily feigned and/or present less of an opportunity for meaningful contact with the community. See *2000 Order*, 15 FCC Rcd at 7410, para. 54.

<sup>41</sup> For example, a state government is considered local throughout the state; a City Board of Education is considered local throughout the city; a state university is considered local throughout the state.

<sup>42</sup> An applicant claiming points as an established local applicant must also pledge to maintain localism characteristics during the period from grant of the construction permit until the station has achieved at least four years of on-air operations. See 47 CFR § 73.7005(c); see also *NCE LPFM Order*, 34 FCC Rcd at 12523, para. 8.

<sup>43</sup> See *NCE Filing Procedures Public Notice*, 36 FCC Rcd at 11465.

<sup>44</sup> See 47 CFR § 73.7003(b)(2). Parties with attributable interests are defined as the applicant, its parent, subsidiaries, their officers, and members of their governing boards. See 47 CFR § 73.7000. Interests of certain entities providing more than 33% of the applicant's equity and/or debt are also attributable. *Id.*

for the diversity of ownership points, an applicant must submit either a contour map showing no overlap with the proposed NCE FM station, a statement that the applicant holds no attributable interests in any nearby radio stations, or a certification that it holds no attributable interests in any broadcast stations.<sup>45</sup> Any applicant awarded diversity of ownership points in this Order has either satisfied this requirement or submitted a divestiture pledge, as detailed below.

15. We note that an NCE FM applicant with an overlapping attributable interest, however, can still qualify for diversity of ownership points if it commits to divest the broadcast interest or resign from the attributable positional interest.<sup>46</sup> The applicant must submit the divestiture pledge with the application by the close of the filing window. We do not require the applicant to divest or resign by the close of the filing window. Rather, if we award that applicant a construction permit based on points, the applicant must complete the actual divestiture or resignation by the time the new NCE FM station commences program test operations.<sup>47</sup>

16. Third, we award two points for certain state-wide networks providing programming to accredited schools. These points are available only to applicants that cannot claim a credit for local diversity of ownership.<sup>48</sup> The state-wide network credit is an alternative for applicants that use multiple stations to serve large numbers of schools and, therefore, do not qualify for the local diversity of ownership credit. Applicants claiming points as a state-wide network must submit supporting documentation as an application exhibit.<sup>49</sup>

17. Fourth, an applicant that proposes the best technical proposal in the group (*i.e.*, proposes service to the largest population and area, excluding substantial areas of water) may receive up to two points. The applicant receives one point if its proposed service area *and* population are 10% greater than those of the next best area and population proposals, or two points if both are 25% greater than those of the next best area and population proposals, as measured by each proposed station's predicted 60 dBu signal strength contour.<sup>50</sup> If the best technical proposal does not meet the 10% threshold, no applicant is awarded points under this criterion. In considering this criterion, we have accepted applicants' coverage and population claims.<sup>51</sup>

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<sup>45</sup> See Attributable Interests, Other Authorizations, of Schedule 340. An applicant claiming points for diversity of ownership must also pledge to comply with the restrictions on station modifications and acquisitions during the period from grant of the construction permit until the station has achieved at least four years of on-air operations. See 47 CFR § 73.7005(c); *see also* NCE LPFM Order, 34 FCC Rcd at 12524, para. 12.

<sup>46</sup> See NCE LPFM Order, 34 FCC Rcd at 12525, para. 13 (expanding the Commission's divestiture policy by recognizing full-service station divestiture pledges for comparative purposes and crediting all contingent divestiture pledges that are made and submitted by the close of the filing window).

<sup>47</sup> *Id.*

<sup>48</sup> See 47 CFR § 73.7003(b)(3).

<sup>49</sup> See Form 2100, Schedule 340 Instructions at page 16 (detailing preferred documentation to support this point claim).

<sup>50</sup> *Id.* § 73.7003(b)(4). See NCE Omnibus, 22 FCC Rcd at 6121-22, paras. 50-51. If there is one top applicant in terms of area and population, that applicant will receive one point even if there is no single next best applicant for both factors. The Commission will compare the top applicant's proposed area to the proposed area of the applicant with the next best area proposal and the top applicant's population to the proposed population of the applicant with the next best population proposal.

<sup>51</sup> Our procedures for this November 2021 NCE FM filing window required applicants to measure area in square kilometers and exclude significant areas of water, *e.g.*, oceans and lakes, and measure population using the 2010 Census Block Data available from the Census Bureau. See Form 2100, Schedule 340 Instructions at page 16.

18. Finally, the Commission tallies the total number of points awarded to each applicant. The applicant with the highest score in a group is designated the “tentative selectee.” All other applicants are eliminated.

**C. Tie-Breakers.**

19. In the event MX applicants are tied with the highest number of points, the tied applicants proceed to a tie-breaker round.<sup>52</sup> The first tie-breaker for NCE FM applicants is the number of radio station authorizations attributable to each applicant.<sup>53</sup> The applicant with the fewest attributable authorizations prevails and becomes the tentative selectee. If the tie is not broken by this first factor, we apply a second tie-breaker: the number of pending radio station applications attributable to each applicant.<sup>54</sup> The tentative selectee will be the applicant with the fewest pending new and major change applications in the same service.

20. If a tie remains after the second tie-breaker, applicants are considered under a third and final tie-breaker criterion – prior NCE applications.<sup>55</sup> The tentative selectee will be the applicant that can demonstrate that: (1) it applied in a previous filing window, and had its application accepted for filing and processed, but subsequently dismissed in favor of an applicant possessing superior points or a tie-breaker showing; (2) it was in continuous existence as a legal entity at all times from the date of the previous NCE window filing until the present; and (3) it does not hold any NCE construction permit or license.<sup>56</sup> If this third factor fails to break the tie, we use time-sharing as the tie-breaker of last resort. Specifically, we designate the remaining tied applicants in the MX group as the tentative selectees and direct the tentative selectees to submit, within 90 days of the release of the Order identifying the tentative selectees, a voluntary time-sharing agreement.<sup>57</sup>

**D. Timely Documentation of Comparative Qualifications.**

21. The NCE FM application, Schedule 340, is certification-based, but requires applicants to document certain of their claims by submitting supporting information.<sup>58</sup> Applicants must submit timely-filed exhibits supporting their point claims. We will not give credit to certifications which require the applicant to submit documentation, but which are not supported with any such timely submitted documentation. While there is some flexibility in the type of documentation an applicant may provide, an applicant that does not submit timely support cannot have made a valid certification and will not receive

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<sup>52</sup> See 47 CFR § 73.7003(c).

<sup>53</sup> *Id.* § 73.7003(c)(1). Applicants are required to count all attributable full service commercial and NCE radio stations (licenses and construction permits) and any FM translator stations providing non-fill-in service. An applicant may exclude fill-in translators, any translator which the applicant seeks to replace with its applied for full-service NCE FM station, and any station, which it pledges to divest. See *2001 NCE MO&O*, 16 FCC Rcd at 5102-03, para. 85; see also Form 2100, Schedule 340 Instructions at page 17.

<sup>54</sup> See 47 CFR § 73.7003(c)(2). When reporting pending applications, applicants were required to include new and major change radio applications, including the subject application and all other applications filed in the window by the November 9, 2021 deadline. Applicants should not have included any requests to participate in an auction filed on Schedule 175 and other applications such as voluntary assignment of license, license renewal, and minor change in existing facilities. See *NCE Filing Procedures Public Notice*, 36 FCC Rcd at 11467.

<sup>55</sup> See *NCE LPFM Order*, 34 FCC Rcd at 12527-28, para. 19; 47 CFR § 73.7003(c)(3).

<sup>56</sup> *Id.* Applicants were required to submit an attachment demonstrating their qualifications under this third tie-breaker criterion.

<sup>57</sup> See 47 CFR § 73.7003(c)(4). If the tentative selectees do not agree on a voluntary time sharing arrangement within 90 days, we will impose mandatory time sharing, granting all tentative selectees “equal, concurrent, non-renewable” licenses. 47 CFR § 73.7003(c)(5).

<sup>58</sup> See *2000 NCE Report and Order*, 15 FCC Rcd at 7423, para. 89.

the claimed points.<sup>59</sup> Similarly, we will not consider documentation to support a claimed comparative point if it was submitted in an amendment after the November 2021, filing deadline. In such cases, we adjust the points of such applicants downward.

22. Finally, the NCE FM applicant's qualifications for points are initially determined “as of the closing of the filing window” *i.e.*, the November 9, 2021, filing deadline.<sup>60</sup> For example, NCE organizations are considered “established” if they have operated as local entities since November 9, 2019, *i.e.*, for at least two years prior to the November 9, 2021, Application Deadline. These “snap shot” applicant characteristics establish an applicant's maximum points and its maximum position in the event of a tie-breaker. This common reference date ensures a level competitive field for applicants, with their qualifications all compared as of the same time.<sup>61</sup> In order to prevent gamesmanship, any changes made after the filing deadline may potentially diminish, but cannot enhance, an applicant’s comparative position and point total. Therefore, we have taken into account any amendments that adversely affect an applicant’s point total and comparative position. We have not considered any amendments, filed after the filing deadline, which improve an applicant’s comparative position.<sup>62</sup>

#### IV. NEW POINT SYSTEM ANALYSIS

23. This Section contains our new point system analysis for NCE MX Group 152. The Commission previously considered the group and named a tentative selectee, but subsequent filings ensued, which now necessitate a new analysis. Every component of the analysis is based on information provided by each of the respective applicants.<sup>63</sup> The applicants were required to report their qualifications as of the filing window closing date.<sup>64</sup> Any changes made thereafter may potentially have diminished, but could not enhance, an applicant’s comparative position.

##### A. NCE MX Group 152

24. This group originally consisted of three applications to serve different communities in Arizona and New Mexico. Good News Broadcasting Network, Inc. (Good News) and New Hope Baptist Church – Gallup (New Hope) each proposed to serve Gallup, New Mexico.<sup>65</sup> Gallup Public Radio (GPR)

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<sup>59</sup> See, e.g., *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 5013, 5017, para. 11 (2010) (“applicant submitting no timely documentation at all cannot be found to have made a valid certification”).

<sup>60</sup> See 47 CFR § 73.7003(e).

<sup>61</sup> See, e.g., 2001 NCE MO&O, 16 FCC Rcd at 5082-83, paras. 23-26; see also *id.* at 5083, para. 26 (“Of overall concern to us in this area is that we are comparing applications that use the same data. Reliance on information as of the close of the window will ensure that applicants have essentially a common reference date. With a common reference date and a common method of calculating population, the staff will analyze applicants on a similar basis.”).

<sup>62</sup> See 47 CFR § 73.7003(e). For example, an applicant may lose claimed points, such as the diversity of ownership points, as a result of acquiring an overlapping station after the November 2021, filing deadline. In contrast, if an applicant certifies that it does not qualify for one of the point factors, it cannot later amend its application to claim such points. This is the case even if the applicant actually would have qualified for the point it is seeking at the time it filed the application.

<sup>63</sup> See FCC Form 2100, Schedule 340, Fair Distribution of Service certifications and Point System Factors/Tiebreakers certifications.

<sup>64</sup> See *NCE Filing Procedures Public Notice*, 36 FCC Rcd at 11467-68.

<sup>65</sup> Application File Nos. 0000167858 and 0000167524. The Good News application was dismissed due to a violation of section 73.509 of the Commission’s rules, 47 CFR § 73.509. See *Actions, Public Notice, Report No. 2-231010-01* (MB Oct. 10, 2023). Good News subsequently amended its application to address the deficiency, and the application was reinstated on November 9, 2023. See Application File No. 0000167858 (amended Nov. 8, 2023).

proposed to serve Saint Michaels, Arizona.<sup>66</sup> In the *Second Comparative Order*,<sup>67</sup> because no applicant claimed eligibility for a fair distribution preference, the Commission conducted a point system analysis, and identified the GPR Application as the tentative selectee.<sup>68</sup> On October 3, 2023, the Bureau granted a petition to deny the GPR Application filed by Good News, rescinded the tentative selection of the GPR Application, dismissed the GPR Application, and referred the two remaining applicants—Good News and New Hope—to the Commission for a new point system analysis.<sup>69</sup>

25. Neither Good News nor New Hope claims points as an established local applicant or state-wide network. Each applicant claims two points for diversity of ownership. However, because Good News did not timely submit a contour map to support this claim or a statement that it holds no attributable interests in any nearby radio stations,<sup>70</sup> we cannot award Good News diversity points. With respect to technical parameters, Good News's proposed 60 dBu contour would encompass 1,306 square kilometers with a population of 35,351.<sup>71</sup> New Hope's proposed 60 dBu contour would encompass 499 square kilometers with a population of 28,903. Good News qualifies for one point for the best technical proposal because it proposes to serve at least 10% more area and population than New Hope.

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<sup>66</sup> Application File No. 0000166062 (GPR Application).

<sup>67</sup> *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 22-78 (Oct. 25, 2022) (*Second Comparative Order*).

<sup>68</sup> *Id.* at 18, paras. 76-77. As noted in the *Second Comparative Order*, GPR was previously identified as the tentative selectee of the group, based on a fair distribution analysis, but GPR filed a technical amendment on May 31, 2022, withdrawing its fair distribution of service claim. See GPR Application. See also *Threshold Fair Distribution Analysis of 13 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 37 FCC Rcd 5702, para. 18 (MB May 2, 2022) (identifying GPR as the tentative selectee of NCE MX Group 152 based on a fair distribution analysis).

<sup>69</sup> *NCE MX Group 152*, Letter Order, DA 23-924 (MB Oct. 3, 2023). The Bureau dismissed the GPR Application due to a violation of the Signature Rule. 47 CFR § 73.3513(a)(3). This dismissal was not challenged, and the decision is now final.

<sup>70</sup> In its original application, Good News provided a list of its attributable interests in other broadcast stations. Good News, however, neglected to submit a contour map demonstrating that there is no overlap with the proposed NCE FM station or a statement that it holds no attributable interests in any nearby radio stations. See *NCE Filing Procedures Public Notice*, 36 FCC Rcd at 11465 (“[t]o qualify for the diversity of ownership points, an applicant must submit either a contour map showing no overlap with the proposed NCE FM station, or a statement that the applicant holds no attributable interests in any nearby radio stations.”); *NCE MX Group 60*, Letter Order, 37 FCC Rcd 12269 (MB 2022) (*NCE MX Group 60 Letter*) (finding applicant's documentation insufficient to justify awarding diversity points where the applicant provided only a listing of its attributable interests in other broadcast stations). Good News amended its application on March 24, 2022, over four months after the filing deadline, to include the required contour map. Good News's amendment enhanced its comparative points position after the filing deadline, and therefore is not considered. See 47 CFR § 73.7003(e); see also *First Comparative Order*, 37 FCC Rcd at 9875, para. 18 (“Applicants must submit timely filed exhibits supporting their point claims.”); *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, 30 FCC Rcd 5135, 5144, para. 22 (2015) (“it is well established that an NCE applicant's qualifications for points are established at the close of the filing window and cannot be enhanced after that time.”) (*Seven Group Comparative Order*); *NCE MX Group 60 Letter*, 37 FCC Rcd at 12271 (contour map submitted after close of filing window was a prohibited attempt at enhancing comparative position). We note that on November 17, 2023, Albert Adam David filed an Informal Objection (Objection) to the Good News application. See Pleading No. 0000226852. Based on our finding herein, we dismiss the Objection as moot.

<sup>71</sup> Good News amended its Application on November 8, 2023, to increase its proposed area from 1,306 to 1,314 square kilometers, and decrease its population from 35,351 to 35,231. This amendment does not alter the outcome of the technical points analysis.

Accordingly, Good News is credited with one point, and New Hope is credited with two points. New Hope is, therefore, the new tentative selectee in Group 152.

## V. BEST TECHNICAL PROPOSAL CHALLENGES

26. As noted previously, an applicant receives one point if its proposed service area *and* population are 10% greater than those of the next best area and population proposals, or two points if both are 25% greater than those of the next best area and population proposals, as measured by each proposed station's predicted 60 dBu signal strength contour.<sup>72</sup> If the best technical proposal does not meet the 10% threshold, no applicant is awarded points under this criterion. In considering this criterion, the Commission has accepted applicants' coverage and population claims.<sup>73</sup> In NCE MX Groups 54 and 76, applications contained population and coverage area calculation errors, which resulted in inaccurate best technical proposal comparisons, therefore impacting the outcome of the point system analysis. Accordingly, we rescind the Commission's initial tentative selections and conduct new point system analyses. In NCE MX Group 200, we affirm the grant of the initial tentative selectee.

### A. NCE MX Group 54

27. *Background.* This group initially consisted of four applications filed by Call Communications Group, Inc. (CCGI), Ethree Group, Inc. (EGI), New Media Humanity Association Inc. (NMHA), and Central Baptist Church of Ocala Inc. (CBCO) to serve the community of Weeki Wachee, Florida.<sup>74</sup> In the *Third Comparative Order*,<sup>75</sup> the Commission analyzed the applications under the point system.<sup>76</sup> Each applicant received a total of two points, and therefore, proceeded to a tie-breaker analysis.<sup>77</sup> CCGI and CBCO were eliminated under the first tie-breaker, and NMHA prevailed over EGI under the second tie-breaker.<sup>78</sup> Thus, the Commission identified NMHA as the tentative selectee.<sup>79</sup>

28. On February 16, 2023, CCGI filed a Petition to Deny the NMHA Application,<sup>80</sup> asserting that the Group 54 comparative points analysis was based on inaccurate and unsupported information due

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<sup>72</sup> 47 CFR § 73.7003(b)(4). *See also supra* note 50.

<sup>73</sup> Applicants were required to measure area in square kilometers and exclude significant areas of water, *e.g.*, oceans and lakes, and measure population using the 2010 Census Block Data available from the Census Bureau. *See* Form 2100, Schedule 340 Instructions at page 16.

<sup>74</sup> *See* Application File Nos. 0000166731 (NMHA Application); 0000166338 (CBCO Application); 0000167753 (CCGI Application); and 0000167131 (EGI Application).

<sup>75</sup> *Comparative Consideration of 34 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 23-5, at 12-13, paras. 39-41 (Jan. 24, 2023) (*Third Comparative Order*).

<sup>76</sup> *Id.* at 12, para. 39.

<sup>77</sup> *Id.* at 12, para. 40. The Commission awarded each applicant two points for diversity of ownership; no applicant received points under the best technical proposal criterion.

<sup>78</sup> *Id.* at 12-13, para. 41. CCGI certified that it has attributable interests in nine radio authorizations, and CBCO certified that it has attributable interests in two radio authorizations. EGI and NMHA each certified that it has no attributable interest in any radio authorization. CCGI and CBCO were therefore eliminated, and EGI and NMHA proceeded to the second tie-breaker – the number of pending radio applications attributable to each applicant. EGI certified it has no pending applications, and NMHA certified it has one pending application. EGI's count, however, was inaccurate because it did not include the instant application and its six other pending applications. After accounting for this error and adjustment, NMHA prevailed on the basis of this second tie-breaker and was identified as the tentative selectee in Group 54.

<sup>79</sup> *Id.*

<sup>80</sup> *See* Petition to Deny, Pleading File No. 0000210915 (CCGI Group 54 Petition). NMHA did not file an opposition to the CCGI Group 54 Petition.

to CBCO's improper inclusion of significant areas of water in its coverage area calculation.<sup>81</sup> Specifically, CCGI stated that it estimates the actual CBCO coverage area is approximately 715.7 square kilometers, or 32% less than the 944.8 square kilometers CBCO claimed in its application.<sup>82</sup> CCGI also asserted that by excluding the CBCO Application from the Group 54 comparative analysis, CCGI is eligible for one point under the best technical proposal criterion because it would serve 10% more area and population than the next best application, that of NMHA. Thus, CCGI claimed that with this additional point, it should be the new tentative selectee.<sup>83</sup>

29. On March 28, 2023, the Bureau released a decision<sup>84</sup> in which it granted in part and denied in part the CCGI Petition.<sup>85</sup> Specifically, the Bureau held that since no party refuted CCGI's claims that CBCO had erroneously calculated its proposed new coverage area, and Bureau staff independently verified that the CBCO Application incorrectly included significant areas of water in its calculation, it granted the CCGI Petition in part. However, the Bureau clarified that accepting CCGI's calculation would not automatically render the CCGI Application the new tentative selectee, as CCGI proclaimed, nor would it exclude CBCO altogether from the best technical proposal calculation. Rather, the Bureau reanalyzed the four applicants' technical proposals using CCGI's revised figures.<sup>86</sup> Accepting CCGI's undisputed figures regarding CBCO's actual coverage area, the Bureau found that there was still no applicant eligible for points under the best technical proposal criterion because no applicant proposed to serve 10% more area *and* population than the next best application.<sup>87</sup> CCGI did not challenge any other points claim or calculation. Accordingly, the points total was unchanged, NMHA remained the tentative selectee, and the Bureau granted the NMHA Application and dismissed the CCGI, EGI, and CBCO Applications.<sup>88</sup>

30. In the CCGI Petition for Reconsideration,<sup>89</sup> filed on April 18, 2023, CCGI repeats a number of the arguments from its previous CCGI Group 54 Petition.<sup>90</sup> CCGI also argues that its proposal

<sup>81</sup> CCGI Group 54 Petition at 1-2 and attached map.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 2.

<sup>84</sup> See *NCE MX Group 54*, Letter Order, DA 23-260 (MB Mar. 28, 2023) (*MX Group 54 Letter*).

<sup>85</sup> In the *Third Comparative Order*, the Commission directed Bureau staff to "consider any petitions, comments, and objections to determine whether there is any substantial and material question of fact concerning whether grant of the tentatively selected application would serve the public interest." *Third Comparative Order* at 26, para. 108. The Commission delegated authority to the Bureau staff "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." *Id.* at 26, para. 108.

<sup>86</sup> See, e.g., *Comparative Consideration of 18 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 803, 809, para. 16 (2011) (*18 Group Comparative Order*) (using objector's population figures where it claims a competing applicant's application had incorrect area figures because it erroneously included large area of water and applicant did not provide corrected figures).

<sup>87</sup> *Third Comparative Order* at 12, para. 40. CCGI's proposed 60 dBu contour would encompass 847 square kilometers with a population of 110,411; EGI's proposed 60 dBu contour would encompass 693 square kilometers with a population of 88,689; and NMHA's proposed 60 dBu contour would encompass 668 square kilometers with a population of 97,594. Using CCGI's calculations, CBCO's proposed 60 dBu contour would encompass 715.7 square kilometers with a population of 105,470.

<sup>88</sup> See *MX Group 54 Letter* at 3.

<sup>89</sup> Pleading File No. 0000213997 (CCGI Group 54 Recon Petition). Pursuant to Section 1.106(a)(1) of the Commission's rules, 47 CFR § 1.106(a)(1), the Media Bureau has referred the Petition for Reconsideration to the Commission. As of the date of this Order, neither NMHA nor CBCO has filed an opposition to the CCGI Group 54 Recon Petition.



exceeds the other applicants' proposals by more than 10% in area coverage and population because CBCO's claimed population figure of 105,470 people is also overstated and is actually only 99,581.<sup>91</sup>

31. *Discussion.* The Commission will consider a petition for reconsideration when the petitioner shows either a material error in the Commission's original order, or raises additional facts or arguments, not known or existing at the time of the petitioner's last opportunity to present such matters.<sup>92</sup> Petitions for reconsideration which rely on facts or arguments not previously presented to the Commission but which were known or existing at the time of the petitioner's last opportunity to present such matters may nonetheless be granted if the Commission determines that consideration of the facts and arguments relied on is required in the public interest.<sup>93</sup> Here, CBCO's population figure was ascertainable prior to the filing of CCGI's Group 54 Petition, and therefore, should have been raised in the initial CCGI Group 54 Petition. However, due to the important public interest in ensuring that our comparative point system is administered efficiently, accurately, and fairly, rather than dismissing the CCGI Group 54 Recon Petition to the extent it relies on the argument for the first time on reconsideration, we find it would serve the public interest to consider the merits of the argument.<sup>94</sup>

32. CCGI has now provided undisputed evidence that CBCO's population claim was erroneous and overstated, just as it had previously demonstrated that CBCO's coverage area claims were erroneous.<sup>95</sup> CCGI's allegations regarding CBCO's population and area claims are uncontested, and Bureau staff has also independently verified CBCO's calculations and determined that both its coverage area and population claims were significantly overstated. The miscalculated numbers, utilized in our original point analysis, led to an inaccurate award of points and ultimate designation of the tentative selectee. Accordingly, we find that it is in the public interest to re-analyze the group using the revised figures CCGI provided.<sup>96</sup> Accordingly, we grant the CCGI Group 54 Recon Petition and conduct a new point system analysis.<sup>97</sup>

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<sup>90</sup> These arguments are now moot as CCGI is the new tentative selectee.

<sup>91</sup> CCGI Group 54 Recon Petition at 7-8.

<sup>92</sup> See 47 CFR § 1.106(c) and (d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

<sup>93</sup> See 47 CFR § 1.106(c)(2). See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Memorandum Opinion and Order, 4 FCC Rcd 2366 (MB 1989).

<sup>94</sup> See 47 CFR § 1.106(c)(2).

<sup>95</sup> See *MX Group 54 Letter*.

<sup>96</sup> CCGI continues to argue that CBCO should be excluded completely from the best technical proposal analysis. We disagree. The Commission has excluded applicants from the MX group's best technical proposal analysis when an applicant neglected to provide any, or provided incomplete, technical data, thus making the comparison impossible. See, e.g., *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101, 6121, para. 49 (2007) (excluding applicant, which submitted no technical data, from the best technical proposal analysis); *Third Comparative Order* at para. 28 (excluding applicant, which neglected to specify its proposed area, from the best technical proposal comparison). In contrast, in cases where an applicant has timely provided area and population data, but the data is subsequently found to be inaccurate, the Commission has not excluded the application from the best technical proposal analysis because of the error. Rather, the Commission re-analyzes the applicant's technical proposal using corrected data, independently verified by Bureau staff. See, e.g., *18 Group Comparative Order*, 26 FCC Rcd at 809, para. 16 (using objector's population figures where it claims a competing applicant specified incorrect area figures because it erroneously included large area of water and applicant did not provide corrected figures).

<sup>97</sup> At the time of the *Third Comparative Order*, NCE MX Group 54 consisted of four applications. The CBCO Application, EGI Application and CCGI Application were subsequently dismissed as non-tentative selectees in the *MX Group 54 Letter*. CCGI sought reconsideration of its dismissal and reconsideration of the Group 54 point

(continued....)

33. As noted in the *Third Comparative Order*, no applicant claims that it qualifies for points as an established local applicant or state-wide network. Each applicant claims two points for diversity of ownership, with NMHA's claim based on a pledge to divest its LPFM station, WYPW-LP, Brandon, Florida. With respect to technical parameters, CCGI's proposed 60 dBu contour would encompass 847 square kilometers with a population of 110,411; EGI's proposed 60 dBu contour would encompass 693 square kilometers with a population of 88,689; and NMHA's proposed 60 dBu contour would encompass 668 square kilometers with a population of 97,594.<sup>98</sup> Using CCGI's calculations (verified by Bureau staff), CBCO's proposed 60 dBu contour would encompass 715.7 square kilometers with a population of 99,581. Thus, CCGI proposes to serve at least 10% more area and population than CBCO, and receives one point under the best technical proposal criterion. Accordingly, NMHA, EGI, and CBCO are each credited with a total of two points, and CCGI with a total of three points. CCGI becomes the new tentative selectee in Group 54.

#### **B. NCE MX Group 76**

34. *Background.* This group consists of two applications filed by Heritage Baptist Church (HBC) and Sound in Spirit Broadcasting, Inc. (SSBI) to serve the community of Burlington, Iowa.<sup>99</sup> In the *Second Comparative Order*,<sup>100</sup> the Commission analyzed the HBC and SSBI Applications under the point system.<sup>101</sup> The Commission awarded HBC a total of five points — three points as an established local applicant and two points for diversity of ownership.<sup>102</sup> It awarded SSBI a total of three points—two points for diversity of ownership and one point for the best technical proposal.<sup>103</sup> Thus, the Commission identified HBC, the applicant with the most points, as the tentative selectee.<sup>104</sup> SSBI subsequently filed a Petition to Deny the HBC Application (SSBI Petition), arguing that HBC was not entitled to three points as an established local applicant.<sup>105</sup>

35. In the *Fourth Comparative Order*, the Commission found that HBC was not entitled to points as an established local applicant and granted the SSBI Petition.<sup>106</sup> Accordingly, the Commission rescinded the three localism points awarded to HBC and identified SSBI as the new tentative selectee in NCE MX Group 76.<sup>107</sup>

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system analysis. Although CBCO and EGI did not seek reconsideration of their respective dismissals, we will include the CBCO Application and the EGI Application in our new point analysis in order to allow a complete and accurate new analysis of the entire MX group.

<sup>98</sup> *Third Comparative Order* at 12, para. 40.

<sup>99</sup> See Application File Nos. 0000167422 (HBC Application) and 0000166214 (SSBI Application). HBC amended its application on August 19, 2022 (Amended HBC Application).

<sup>100</sup> See *Second Comparative Order* at 14-15, paras. 55-56.

<sup>101</sup> *Id.* at 14, para. 55.

<sup>102</sup> *Id.* at 15, para. 56.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Pleading File No. 0000203828 (filed Nov. 21, 2022). SSBI did not file an opposition to the HBC Petition.

<sup>106</sup> See *Comparative Consideration of 10 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 23-45 at 14-16, paras. 39-43 (Jun. 5, 2023) (*Fourth Comparative Order*) (finding that HBC failed to timely and sufficiently document its eligibility for points as an established local applicant).

<sup>107</sup> *Fourth Comparative Order* at 15-16, paras. 42-43.

36. On June 19, 2023, HBC filed a Petition to Deny the SSBI Application (HBC Petition),<sup>108</sup> arguing that the Group 76 best technical proposal comparative analysis was based on inaccurate technical information because SSBI claimed inflated population totals, which are not at least 10% greater than HBC's population total.<sup>109</sup> HBC, therefore, asserts that no applicant should be awarded points under the best technical proposal criterion, and the HBC Application and the SSBI Application should proceed to a tie-breaker analysis, under which HBC would prevail because it has fewer existing radio authorizations.<sup>110</sup>

37. *Discussion.* HBC submits four technical studies using various software methods, each of which concludes that SSBI's proposal does not serve at least a 10% greater population than HBC.<sup>111</sup> Based on the evidence submitted, and our independent verification,<sup>112</sup> and absent any opposition from SSBI, we find HBC's claim to have merit. Accordingly, we find that SSBI was not entitled to one point under the best technical proposal criterion and grant the HBC Petition.

38. Our finding that SSBI should not have been awarded one point for the best technical proposal alters the outcome of the point system analysis for this MX Group. Specifically, without the one best technical proposal point, SSBI's total points are reduced from three to two. Because HBC's points were also previously reduced to two,<sup>113</sup> SSBI and HBC proceed to a tie-breaker analysis.

39. The first tie-breaker for NCE FM applicants is the number of radio station authorizations attributable to each applicant.<sup>114</sup> The applicant with the fewest attributable authorizations prevails. SSBI certifies that it has attributable interests in three radio authorizations, and HBC certifies that it does not have an attributable interest in any existing radio authorization. Accordingly, HBC prevails on the first tie-breaker and is the new tentative selectee in Group 76.

### C. NCE MX Group 200

40. This group originally consisted of four applications filed by Vida Ministry Inc. (VMI), CCGI, Christian Ministries of the Valley, Inc. (CMV), and CCS Radio, Inc. (CCSR) to serve different communities in Texas.<sup>115</sup> In the *Third Comparative Order*,<sup>116</sup> the Commission analyzed the applications under the point system.<sup>117</sup> Neither CMV nor CCSR received any points.<sup>118</sup> CCGI and VMI received a

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<sup>108</sup> See HBC Petition to Deny, Pleading File No. 0000216870.

<sup>109</sup> *Id.* at 1-2, 3-4. HBC submitted four technical studies to support its claim. *Id.* at Attachs.

<sup>110</sup> *Id.* at 4.

<sup>111</sup> Using its own software, Broadcast Technical Partners concludes SSBI would serve 55,301 people, or 4.7% greater than HBC; using V-soft Commander software, it concludes SSBI would serve 55,772 people, or 2.3% greater than HBC. Using V-Soft Probe 5 software, Doug Vernier concludes SSBI would serve 55,295 people, or 3.7% greater than HBC. Using RadioSoft Commstudy 2.0, RadioSoft concludes SSBI would serve 55,703, or 2.8% greater than HBC.

<sup>112</sup> Bureau staff independently verified that SSBI's population totals were overstated.

<sup>113</sup> *Fourth Comparative Order* at 16, para. 43.

<sup>114</sup> 47 CFR § 73.7003(c)(1).

<sup>115</sup> See Application File Nos. 0000167104 (VMI Application), 0000167747 (CCGI Application); 0000166728 (CMV Application); and 0000166698 (CCSR Application).

<sup>116</sup> *Third Comparative Order* at 22, paras. 89-91.

<sup>117</sup> *Id.* at 22, paras. 90-91. No applicant claimed a fair distribution of service preference.

<sup>118</sup> *Id.* at para. 90.

total of two points each,<sup>119</sup> and therefore, proceeded to a tie-breaker analysis. VMI prevailed on the first tie-breaker,<sup>120</sup> and the Commission identified VMI as the tentative selectee.

41. On February 16, 2023, CCGI filed a Petition to Deny (CCGI Group 200 Petition) the VMI Application.<sup>121</sup> CCGI argued that the Group 200 comparative analysis was based on inaccurate and unsupported calculations, due to CMV and CCSR's improper inclusion of areas of water in their coverage area calculations.<sup>122</sup> Specifically, CCGI stated that the coverage area of CMV's proposal is approximately 1,321 square kilometers, or 42.6% less than the 1,881.6 square kilometers it originally claimed,<sup>123</sup> and CCSR's proposal is approximately 806.23 square kilometers, or 73.2% less than the 1,402.2 square kilometers it originally claimed.<sup>124</sup> CCGI asserted that excluding the CMV and CCSR Applications, CCGI is eligible for two points for the best technical proposal because it would serve 25% more area and population than the remaining application, that of VMI, and thus CCGI should be the new tentative selectee.<sup>125</sup>

42. On April 27, 2023, the Bureau released a decision<sup>126</sup> in which it granted in part and denied in part the CCGI Group 200 Petition, granted the VMI Application, and dismissed the CCGI, CMV, and CCSR Applications. The Bureau held that because no party refuted CCGI's claims that CMV and CCSR each erroneously calculated its proposed new area, and Bureau staff independently verified that the CMV and CCSR Applications incorrectly included significant areas of water in the calculations, it granted the CCGI Group 200 Petition in part.<sup>127</sup> However, the Bureau clarified that accepting CCGI's new calculation would not automatically render the CCGI application the new tentative selectee, as CCGI proposed, nor would it result in dismissal of the CMV and CCSR Applications.<sup>128</sup> Rather, the Bureau reanalyzed the applicants' technical proposals using CCGI's revised figures.<sup>129</sup> Accepting CCGI's undisputed new calculations, the Bureau found that there was still no applicant eligible for points under the best technical proposal criterion.<sup>130</sup> CCGI did not challenge any other points claim or calculation. Accordingly, the points total was unchanged, with VMI remaining the tentative selectee.<sup>131</sup>

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<sup>119</sup> *Id.* at paras. 90-91. The Commission awarded CCGI and VMI two points each for diversity of ownership; no applicant received points under the best technical proposal criterion.

<sup>120</sup> *Id.* at para. 91. VMI certified that it had no attributable interests in any radio authorization, and CCGI certified that it had attributable interests in nine radio authorizations.

<sup>121</sup> See Pleading File No. 0000210918. See also Motion for Extension of Time, Pleading File No. 0000212271 (filed Mar. 8, 2023); Opposition to CCGI Group 200 Petition, Pleading File No. 0000212563 (filed Mar. 15, 2023); Reply to Opposition to CCGI Group 200 Petition, Pleading File No. 0000212735 (filed Mar. 20, 2023).

<sup>122</sup> CCGI Group 200 Petition at 1-2. The CCGI Group 200 Petition included two maps explaining CCGI's analysis.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2.

<sup>126</sup> See *NCE MX Group 200*, Letter Order, DA 23-358 (MB Apr. 27, 2023) (*MX Group 200 Letter*).

<sup>127</sup> *MX Group 200 Letter* at 4.

<sup>128</sup> *Id.* at 4.

<sup>129</sup> See, e.g., *18 Group Comparative Order*, 26 FCC Rcd at 809, para. 16 (using objector's coverage area calculations for a competing applicant in the best technical proposal analysis after determining applicant erroneously included large area of water and did not provide corrected figures).

<sup>130</sup> *Third Comparative Order* at 22, para. 90. CCGI's proposed 60 dBu contour would encompass 1,157 square kilometers with a population of 218,225, and VMI, 539 square kilometers and 114,876 people. Using CCGI's calculations, CMV's proposed 60 dBu contour would encompass 1,321 square kilometers with a population of 221,770, and CCSR, 806.23 square kilometers and 108,218 people.

43. In the CCGI Group 200 Recon Petition,<sup>132</sup> CCGI repeats a number of arguments from the CCGI Group 200 Petition, and related new claims. CCGI also alleges, for the first time, that CMV and CCSR's population claims are likely inaccurate because CMV and CCSR's area coverage claims were overstated, and their population claims are unsupported.<sup>133</sup>

44. In its Opposition to the CCGI Group 200 Recon Petition, VMI states that while CCGI correctly established that the CMV and CCSR coverage calculations were overstated, even accepting CCGI's new calculations, it remains the applicant with the highest points total, and therefore, the *MX Group 200 Letter* should be affirmed.<sup>134</sup>

45. In its Reply to the Opposition to the CCGI Group 200 Recon Petition, CCGI claims that it has never provided revised population data calculations, and VMI does not otherwise dispute the arguments in its Petition.<sup>135</sup>

46. Also before us is a Supplemental Petition for Reconsideration (CCGI Supplement),<sup>136</sup> filed by CCGI on July 6, 2023, and related responsive pleadings.<sup>137</sup> We dismiss the supplement as untimely.<sup>138</sup>

47. *Discussion.* CCGI repeats a number of the arguments already addressed in the *MX Group 200 Letter*, but challenges CMV and CCSR's population claims for the first time.<sup>139</sup> The allegedly inaccurate population calculations were ascertainable prior to the filing of the CCGI Group 200 Recon Petition, and therefore, should have been raised in the initial CCGI Group 200 Petition.<sup>140</sup> However, due to the important public interest in ensuring that our comparative point system is administered efficiently, accurately, and fairly, rather than dismissing the CCGI Group 200 Recon Petition to the extent it relies on the argument for the first time on reconsideration, we find it would serve the public interest to consider the merits of the argument.<sup>141</sup>

48. CCGI now alleges that CMV's and CCSR's population claims are likely erroneous and overstated. CCGI, however, does not provide any concrete data or adjusted population calculations to support its supposition. Rather, CCGI infers that because it previously demonstrated that CMV's and

(Continued from previous page)

<sup>131</sup> *MX Group 200 Letter* at 4.

<sup>132</sup> Pleading File No. 0000215256 (filed May 26, 2023) (CCGI Group 200 Recon Petition). Pursuant to section 1.106(a)(1) of the Commission's rules, 47 CFR § 1.106(a)(1), the Media Bureau has referred the Petition for Reconsideration to the Commission.

<sup>133</sup> CCGI Group 200 Recon Petition at 2.

<sup>134</sup> Opposition to the CCGI Group 200 Recon Petition at 1-2.

<sup>135</sup> Reply to the Opposition to the CCGI Group 200 Recon Petition at 1-2.

<sup>136</sup> Pleading File No. 0000217627 (filed July 6, 2023).

<sup>137</sup> Opposition to CCGI Supplement, Pleading File No. 0000217639 (filed July 7, 2023); Reply to Opposition to CCGI Supplement, Pleading File No. 0000217695 (filed July 7, 2023); Second Supplemental Petition for Reconsideration, Pleading No. 0000219106 (filed Aug. 9, 2023).

<sup>138</sup> "[T]he petition for reconsideration *and any supplement thereto* shall be filed within thirty days from the date of public notice of the final Commission action." See 47 CFR § 1.106(f) (emphasis added). Here, the *MX Group 200 Letter* was issued on April 27, 2023, the 30 day period ran until Saturday, May 27, 2023, and the supplement was due on the next business day, which, because of the Memorial Day holiday, was Tuesday, May 30, 2023. 47 CFR § 1.4(e); see also *Holy Family Communications, Inc.*, Letter Order, 28 FCC Rcd 15687, 15687, n.5 (MB, 2013) (dismissing untimely filed supplement to petition for reconsideration).

<sup>139</sup> See *supra* para. 31 (articulating the standard of review for petitions for reconsideration).

<sup>140</sup> See 47 CFR § 1.106.

<sup>141</sup> See 47 CFR § 1.106(c)(2).

CCSR's area calculations were incorrect, "applicant's population claims may be overstated as well."<sup>142</sup> We find no basis to re-analyze Group 200,<sup>143</sup> based on CCGI's unsupported claim of a hypothetical error. Accordingly, we deny the CCGI Group 200 Recon Petition.<sup>144</sup>

## VI. TIE-BREAKER CHALLENGE

49. As noted earlier, our rules provide for a system of tie-breakers if more than one application receives the same number of points.<sup>145</sup> With regard to applications for NCE radio facilities, the applicant with the fewest existing radio authorizations (licenses and construction permits, commercial and NCE) prevails on the first tie-breaker. The applicant with the fewest pending new and major change radio applications prevails on the second tie-breaker.<sup>146</sup> Finally, if a tie remains after the second tie-breaker, the Commission analyzes the applications under the third and final tie-breaker – prior NCE applications.<sup>147</sup>

50. After the close of the filing window, each applicant must continue to maintain the accuracy and completeness of the information in its application and notify the Commission of any substantial changes that may be of decisional significance to the application.<sup>148</sup> Specifically, an NCE FM applicant is required, pursuant to section 1.65 of the rules, to update its number of authorizations within the Tiebreaker Section of its application if/when one of its pending applications is granted.<sup>149</sup> In NCE MX Group 51, the tentative selectee did not update its number of authorizations to reflect a recent grant. Accordingly, we conduct a new tie-breaker analysis based on each applicant's current and accurate number of authorizations.

### A. NCE MX Group 51

51. *Background.* This group consists of two applications proposing service to the same community in Florida. Teleamerica Communications West Palm Beach Corp. (TCW) and Newland Broadcasters Incorporated (NBI) each proposes service to Key West.<sup>150</sup> In the *Third Comparative Order*, the Commission analyzed the two applications under the point system.<sup>151</sup>

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<sup>142</sup> CCGI Group 200 Recon Petition at 2.

<sup>143</sup> In contrast, if CCGI had provided tangible data to support its allegation, we would independently verify the revised calculations, and re-analyze the entire MX Group, including the CMV and CCSR Applications. *See supra* MX Group 54 at paras. 32-33.

<sup>144</sup> CCGI continues to argue that the CMV and CCSR Applications should have been excluded from the best technical proposal analysis because they did not provide sufficient documentation explaining their population calculations. CCGI, however, again cites to no instance where we have dismissed an application on this basis. Moreover, although the Commission has denied applicants their claimed points based on insufficient supporting documentation, it has not dismissed an application, thus excluding an applicant from our comparative analysis, due to incomplete documentation. Further, although, unlike CCGI, CMV and CCSR did not include the label "2010 Census Block Centroids" on their accompanying maps to explain their population calculations, each applicant certified in their respective applications that they calculated their populations to be served based on the most recent Census block data, as directed. *See* Application File Nos. 0000166728 and 0000166698.

<sup>145</sup> *See supra* paras. 19-20.

<sup>146</sup> *See* 47 CFR § 73.7003(c)(1),(2).

<sup>147</sup> *Id.* at § 73.7003(c)(3).

<sup>148</sup> *See* 47 CFR § 1.65; *NCE Filing Procedures Public Notice*, 36 FCC Rcd at 11468-69.

<sup>149</sup> *Id.*; *see, e.g., 2001 NCE MO&O*, 16 FCC Rcd at 5083, para. 25.

<sup>150</sup> *See* File Nos. 0000167478 (TCW Application) and 0000166303 (NBI Application).

<sup>151</sup> *See Third Comparative Order, supra* note 75, at paras. 36-38.

52. The Commission awarded two points to TCW and NBI,<sup>152</sup> and the applicants proceeded to the tie-breaker analysis. TCW certified that it has no attributable interests in any radio authorization; NBI certified that it has an attributable interest in one radio authorization. TCW, therefore, prevailed based on the first tie-breaker criterion, and the Commission identified TCW as the tentative selectee of Group 51, accepted the application for filing, and established a 30-day period for filing petitions to deny.<sup>153</sup>

53. NBI subsequently filed a Petition for Reconsideration (Objection)<sup>154</sup> of the TCW Application.<sup>155</sup> In its Objection, NBI argues that the tentative selection of TCW, based on TCW's certification that it has no attributable radio authorizations, was made in error. Specifically, NBI asserts that TCW's application for a construction permit for a new NCE FM station in Deming, New Mexico, granted on December 9, 2022, should have been considered in the Commission's tie-breaker analysis, "thus creating parity between the two MX applicants."<sup>156</sup> NBI, therefore, urges the Commission to reconsider its tentative selection of the TCW Application.<sup>157</sup>

54. In its Opposition, TCW argues that section 73.7003(c) of the Commission's rules specifies that tied applicants' number of attributable authorizations are compared "as of the time of application."<sup>158</sup> Accordingly, TCW asserts that its Deming Authorization, granted a year after filing the TCW Application, was properly not considered or counted in the Commission's tie-breaker analysis.<sup>159</sup>

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<sup>152</sup> *Id.* at para. 37. TCW and NBI each received two points for diversity of ownership.

<sup>153</sup> *Id.* at paras. 38, 117.

<sup>154</sup> Section 1.106(a)(1) of the Commission's rules prohibits petitions for reconsideration of interlocutory orders. 47 CFR § 1.106(a)(1). In the *Third Comparative Order* the Commission explained that "a disappointed applicant that believes the tentative selectee should have received fewer points would make such an argument in a petition to deny. Parties should not raise such matters as petitions for reconsideration of the instant Order because the point hearings herein take no final action on any application, and petitions for reconsideration do not lie against such interlocutory decisions." *Third Comparative Order* at para. 106. We, therefore, dismiss the NBI Petition for Reconsideration as premature and procedurally improper. We will, however, treat the NBI Petition for Reconsideration as an informal objection and consider the merits. *See* 47 CFR § 73.3587.

<sup>155</sup> Pleading File No. 0000208923 (filed January 23, 2023). On March 20, 2023, TCW filed an Opposition. *See* Pleading File No. 0000212718 (Opposition). Between December 20, 2021, and November 15, 2022, prior to the tentative selection of the TCW Application, NBI also filed several petitions to deny the TCW Application, arguing that TCW failed to inform the Commission of negative character issues. *See* Pleading File Nos. 0000177507, 0000186288, 0000190458, and 0000199943. TCW filed an opposition to these petitions on November 21, 2022, and a supplement to this opposition on July 3, 2023. *See* Pleading File Nos. 0000204136 and 0000217518. In the *Third Comparative Order*, the Commission explained that because the TCW Application had not yet been accepted for filing, the NBI petitions were premature and would not be considered at this preliminary stage. The Commission stated that it would review the merits of the NBI petitions after the TCW application is accepted for filing. In light of our action on NBI's January 23, 2023, Objection, we dismiss these earlier petitions as moot. Finally, on August 15, 2023, NBI filed a "Petition to Dismiss," reiterating arguments from its previous pleadings. *See* Pleading No. 0000219339. We also dismiss this pleading as moot.

<sup>156</sup> Objection at 1. *See also* File No. 0000167859 (Deming Authorization). In its Objection, NBI also argues that TCW specified an inconsistent channel and coordinates in its Application and subsequent amendments. In light of our action herein, we need not consider these technical allegations.

<sup>157</sup> On October 13, 2023, Albert Adam David (David) filed an Informal Objection to the TCW Application. *See* Pleading File No. 0000223003 (David Objection). David similarly argues that TCW neglected to amend its application to reflect its recent grants of new NCE FM radio authorizations, as required, and that NBI should be the tentative selectee. *Id.* at 1-2.

<sup>158</sup> Opposition at 3 (*citing* 47 CFR § 73.7003(c)(1)).

<sup>159</sup> *Id.* at 4.

55. *Discussion.* We find that TCW was improperly favored in the first tie-breaker analysis. FCC Form 2100, Schedule 340, requires an applicant to certify the number of attributable interests it holds in broadcast station authorizations “as of the date of filing.”<sup>160</sup> The Commission, however, has repeatedly clarified that although an applicant’s maximum point eligibility and tie-breaker standing is established as of the close of the filing window, it can be reduced by subsequent events.<sup>161</sup> Specifically, in the context of the tie-breaker process, the Commission explained that “the applicant’s best position is established at the time of application, but can be reduced. . . . Thus, an applicant with no existing stations at the time of application will benefit from its ‘zero’ stations in tie breakers *only until such time as it receives a first authorization*. It will be required, pursuant to 47 CFR § 1.65, to update its pending applications and so will not be able to continue claiming zero authorizations, when it has, in fact, already had applications granted in several proceedings, perhaps now surpassing a tied competing applicant in terms of stations authorized.”<sup>162</sup>

56. At the time TCW filed its Application, TCW certified that it had no attributable interests in any broadcast authorization. TCW’s status under the first tie-breaker, however, changed upon receipt of its Deming Authorization. TCW was obligated to update its number of authorizations, but neglected to do so. We, therefore, grant the NBI Objection and David Objection, rescind our tentative selection of the TCW Application, and conduct a new tie-breaker analysis considering each applicant’s correct and current attributable interests in radio authorizations.

57. The first issue considered in a tie-breaker for NCE FM applicants is the number of radio station authorizations attributable to each applicant. TCW certifies that it has no attributable interests in any radio authorization, and NBI certifies that it has an attributable interest in two radio authorizations.<sup>163</sup> As noted, TCW’s count is inaccurate because it does not include its Deming Authorization. Further, TCW’s count does not reflect its recently granted application for a new NCE FM station at Alamogordo, New Mexico.<sup>164</sup> After accounting for this error and adjustment, TCW and NBI are tied with two attributable radio authorizations and proceed to the second tie-breaker – the number of pending radio applications attributable to each applicant. The applicant with the fewest applications prevails. NBI certifies it has two pending applications, and TCW certifies it has 10 pending applications. Accordingly, NBI is the new tentative selectee in group 51.

## VII. GENERAL POINT CLAIM CHALLENGE

### A. NCE MX Group 122

58. *Background.* This group consists of two applications filed by Bible Broadcasting Network, Inc. (BBNI) and Grand Forks Bible Study Group (GFBS) to serve the community of Grand Forks, North Dakota.<sup>165</sup> In the *Second Comparative Order*,<sup>166</sup> the Commission analyzed the BBNI and

<sup>160</sup> Form 2100, Schedule 340, “Existing Authorizations.”

<sup>161</sup> See, e.g., *2001 NCE MO&O*, 16 FCC Rcd at 5082-5083; *Third Comparative Order* at para. 19. Our rules require applicants to inform us of material changes in their applications after the time of filing. 47 CFR § 1.65. An applicant’s maximum points, and its standing in a tie breaker, can go down, but not up, as a result of changes made after filing. See also 47 CFR § 73.7003(e) (explaining that an applicant’s maximum qualifications “will be reduced for any post-application changes that negatively affect any evaluation criterion.”).

<sup>162</sup> *2001 NCE MO&O*, 16 FCC Rcd at 5083 (emphasis added).

<sup>163</sup> NBI initially certified it had an attributable interest in one radio authorization. On August 17, 2023, NBI amended its application to reflect its attributable interest in two existing radio authorizations. See Application File No. 0000166303 at “Amendment Exhibit Attributable Interest 2023.doc.”

<sup>164</sup> See Application File No. 0000167835 (granted September 19, 2023).

<sup>165</sup> See Application File Nos. 0000167299 (BBNI Application) and 0000167114 (GFBS Application). GFBS amended its application on January 28, 2022 (Amended GFBS Application).

<sup>166</sup> *Second Comparative Order*, *supra* note 67, at 18, paras. 74-75.



GFBS Applications under the point system.<sup>167</sup> The Commission awarded GFBS a total of five points — three points as an established local applicant and two points for diversity of ownership.<sup>168</sup> It awarded BBNI a total of two points for diversity of ownership.<sup>169</sup> Thus, the Commission identified GFBS as the tentative selectee.<sup>170</sup>

59. In the *Fourth Comparative Order*,<sup>171</sup> however, the Commission granted a Petition to Deny the GFBS Application, filed by BBNI (BBNI Petition),<sup>172</sup> and designated BBNI as the new tentative selectee. Specifically, the Commission found that because GFBS did not certify that it qualified for established local applicant or diversity of ownership points by the close of the filing window, it was improperly awarded points under those criteria.<sup>173</sup> The Commission reiterated the previous directive that every NCE FM applicant claiming points must certify, *at the time it files its application*, that it qualifies for those points.<sup>174</sup> Lastly, the Commission rejected GFBS's attempt to enhance its comparative position with its post-filing window amendment.<sup>175</sup> Without the points awarded to GFBS under those criteria, GFBS's awarded points were reduced from five to zero, and BBNI, with two points, prevailed as the new tentative selectee.<sup>176</sup>

60. GFBS subsequently filed a Petition to Deny the BBNI Application (GFBS Petition),<sup>177</sup> arguing that: 1) it was improperly denied localism and diversity of ownership points because, despite initially certifying that it was ineligible for those points, it included supporting exhibits in its original application;<sup>178</sup> 2) its amended application with updated certifications should be considered because none of the cases the Commission relied on to demonstrate comparative position enhancement involved applicants, such as GFBS, that timely-filed supporting exhibits;<sup>179</sup> 3) BBNI was improperly awarded points for diversity of ownership because its contour map exhibit includes a statement that the “contour of the proposed station overlaps the principal community contour of another authorized station;”<sup>180</sup> and 4) once BBNI's diversity of ownership points are rescinded, even if GFBS is not awarded any points, the parties, each with zero points, proceed to a tie breaker in which GFBS would prevail.<sup>181</sup>

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<sup>167</sup> *Id.* at 18, para. 74.

<sup>168</sup> *Id.* at para. 75.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Fourth Comparative Order*, *supra* note 106, at 23-25, paras. 67-72.

<sup>172</sup> Pleading File No. 0000204160 (filed Nov. 22, 2022). BBNI argued that GFBS was not entitled to either localism or diversity points because it certified in the original GFBS Application that it did not qualify for points under either criterion, and the Amended GFBS Application, in which GFBS first claimed those points, cannot be considered because it was filed after the close of the filing window and enhanced GFBS's comparative status.

<sup>173</sup> *Id.* GFBS answered the certification questions for Established Local Applicant and Diversity of Ownership on its initial Application with “No”. See GFBS Application at Point System Factors/Tie Breakers.

<sup>174</sup> *Id.* at para 71 (citing *NCE Filing Procedures Public Notice*, 36 FCC Rcd 11458).

<sup>175</sup> See *Fourth Comparative Order* at 23-25, paras. 67-72.

<sup>176</sup> *Id.*

<sup>177</sup> Pleading File No. 0000217583 (filed July 5, 2023).

<sup>178</sup> GFBS Petition at 2-4.

<sup>179</sup> *Id.* at 4-8.

<sup>180</sup> *Id.* at 8-9.

<sup>181</sup> *Id.* at 9.

61. On August 8, 2023, the Bureau released a decision,<sup>182</sup> in which it denied the GFBS Petition, granted the BBNI Application, and dismissed the GFBS Application. Specifically, the Bureau held that GFBS did not identify any case in which an applicant failed to timely certify that it qualified for points, despite submission of related exhibits, and was later allowed to amend its application to certify eligibility, thereby enhancing its comparative position.<sup>183</sup> The Bureau also reiterated that applicants are responsible for submitting accurate, complete, and timely applications, and affirmed the Commission's finding that even if the exhibits in the original GFBS Application demonstrated its eligibility for localism and diversity points, GFBS's conflicting certifications precluded reliance upon the exhibits.<sup>184</sup> The Bureau also held that BBNI timely and sufficiently demonstrated it qualified for diversity points.<sup>185</sup>

62. On September 7, 2023, GFBS filed an Application for Review<sup>186</sup> reiterating its arguments that: 1) it was incorrectly denied points for its claim as an established local applicant and for diversity of ownership because, although it failed to certify and claim the points in its application, it attached exhibits to support the claims,<sup>187</sup> 2) the Amended GFBS Application, which certified that it qualified for these points after the filing deadline, should have been accepted because it was not an enhancement of its application,<sup>188</sup> and 3) the Bureau should not have determined BBNI was eligible for points for its diversity of ownership claim because one of its three exhibits included an erroneous statement.<sup>189</sup> GFBS also claims that grant of the BBNI Application would force its current LPFM station, KEQQ-LP, off the air.<sup>190</sup>

63. The BBNI Opposition counters that: 1) the *NCE Filing Procedures Public Notice* clearly states that applicants which do not certify their eligibility for points cannot later claim such points, even if eligible, and therefore the GFBS late-filed amendment was an impermissible application enhancement;<sup>191</sup> 2) GFBS has not identified any error in the *MX Group 122 Letter*, and the cases GFBS relies on are inapposite to its position and consistent with the *MX Group 122 Letter*,<sup>192</sup> and 3) denial of the GFBS AFR would not force station KEQQ-LP off the air, as GFBS claims, because GFBS filed a modification application which would allow it to stay on the air via a new channel.<sup>193</sup>

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<sup>182</sup> See *NCE MX Group 122*, Letter Order, DA 23-666 (MB Aug. 8, 2023) (*MX Group 122 Letter*).

<sup>183</sup> *MX Group 122 Letter* at 5.

<sup>184</sup> *Id.*; *Fourth Comparative Order* at 24-25, paras. 71 and 72.

<sup>185</sup> *MX Group 122 Letter* at 5-6.

<sup>186</sup> Pleading File No. 0000220588 (filed Sept. 7, 2023) (GFBS AFR). BBNI filed an opposition on September 22, 2023. Pleading File No. 0000221271 (BBNI Opposition). GFBS filed a reply on October 5, 2023. Pleading File No. 0000222173 (GFBS Reply).

<sup>187</sup> GFBS AFR at 4-7.

<sup>188</sup> *Id.* at 7-10. GFBS also argues that this is a novel issue because it has not identified any case in which an applicant initially certified “No” as to whether it qualified for points under the Established Local Applicant and Diversity of Ownership criterion, despite submission of related exhibits, and subsequently amended to certify eligibility, as initially intended.

<sup>189</sup> *Id.* at 7.

<sup>190</sup> *Id.* at 2 and 9.

<sup>191</sup> BBNI Opposition at 3-4 and 6.

<sup>192</sup> *Id.* at 4-6.

<sup>193</sup> *Id.* at 6-7; see also Application File No. 0000220193 (filed Aug. 31, 2023). We dismiss this new GFBS argument on procedural grounds because it was not presented to the Bureau. See 47 CFR § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”).

64. The GFBS Reply repeats that the AFR involves novel questions of law and policy,<sup>194</sup> including whether the Commission should consider certifications made in timely-filed exhibits,<sup>195</sup> and whether the amendment of the application certifications after the close of the filing window should be considered an enhancement of GFBS's application.<sup>196</sup>

65. *Discussion.* We affirm the Commission's conclusion in the *Fourth Comparative Order*, and the Bureau's findings in the *MX Group 122 Letter*, and reject GFBS's arguments that it was incorrectly denied points for its claims as an established local applicant and for diversity of ownership, and that BBNI should not have received points for diversity of ownership.

66. We again reject GFBS's claim that its untimely certification and claim for diversity of ownership and established local applicant points should be considered. Certifications of point claims are not merely a cursory practice, as GFBS suggests. Rather, reliance on certifications is essential to the Commission's licensing process, and streamlines application review.<sup>197</sup> Further, we reiterate the Commission's previous finding that an applicant that fails to timely certify that it qualified for points, despite submission of related exhibits, cannot amend its application to certify eligibility after the filing deadline.<sup>198</sup> Any such amendment would constitute a prohibited enhancement to its comparative position. We also note GFBS had ample notice of the need to certify its eligibility for points prior to the close of the filing window. The Bureau's *NCE Filing Procedures Public Notice* explicitly stated that "if an applicant certifies that it does not qualify for one of the point factors, it cannot later amend its application to claim such points. This is the case even if the applicant actually would have qualified for the point it is seeking at the time it filed the application."<sup>199</sup> For the same reasons outlined in the *Fourth Comparative Order* and the *MX Group 122 Letter*, we affirm that GFBS is not entitled to established local applicant or diversity of ownership points.

67. We also affirm the Bureau's conclusion in the *MX Group 122 Letter* that BBNI's diversity of ownership claim was timely and sufficient because: 1) its contour map refuted the erroneous statement and illustrated no overlap, 2) BBNI submitted a declaration signed under penalty of perjury from its technical consultant, which confirmed the statement was an error, and 3) BBNI's two affirmative statements included with its application eliminate any ambiguity and support its claim for diversity of ownership.<sup>200</sup> BBNI's claim for diversity of ownership points was never ambiguous, because—unlike GFBS—it certified that it was eligible for such points in its initial application, and submitted three supporting exhibits, only one of which included an inadvertent, erroneous statement. Accordingly, we deny the GFBS AFR.

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<sup>194</sup> GFBS Reply at 1-2.

<sup>195</sup> *Id.* at 2.

<sup>196</sup> *Id.* at 2-4.

<sup>197</sup> In eliminating governing documentation requirements for established local applicant and diversity of ownership claims, the Commission included additional questions and certifications to Form 2100, Schedule 340, as safeguards for accurate point claims. *See NCE LPFM Order*, 34 FCC Rcd at 12532 ("the clarifications we make to section 73.7005, along with the certification and application changes we will implement to further safeguard our localism and diversity goals, will ensure that our selection process is meaningful and that successful applicants live up to their promises").

<sup>198</sup> *Fourth Comparative Order* at 24-25, paras. 71-72 and *MX Group 122 Letter* at 4-5.

<sup>199</sup> *NCE Filing Procedures Public Notice*, 36 FCC Rcd at 11464-65 and 11468. We note that the Bureau also repeatedly reminded applicants to carefully review their applications before filing and that each applicant "bears full responsibility for submitting an accurate, complete, and timely application." *Id.* at 11460.

<sup>200</sup> *MX Group 122 Letter* at 5.

## VIII. NEXT STEPS

68. **Acceptability Studies and Filing of Petitions.** Once the Bureau or Commission identifies a tentative selectee pursuant to the fair distribution analysis or point system, the next step is to consider whether the selectee's application has defects.<sup>201</sup> The Commission has studied the application of each new tentative selectee identified herein for application defects. The tentative selectees identified in this Order appear to be fully qualified to become the licensee of the new NCE FM station it has proposed. We tentatively conclude that the grant of these applications would serve the public interest, convenience and necessity. Accordingly, upon the release of this Order, these tentative selectees are accepted for filing. This triggers a 30-day period for the filing of petitions to deny.<sup>202</sup>

69. Any argument that a specified tentatively selected application should not be granted should be raised in such a petition, even if the objection relates only indirectly to the tentative selectee's qualifications. For example, an applicant that concedes that the tentative selectee is qualified for the points received but believes its own proposal should have received a greater number of points than the tentative selectee's would make its argument in a petition to deny. Likewise a disappointed applicant that believes the tentative selectee should have received fewer points would make such an argument in a petition to deny. Parties should not raise such matters as petitions for reconsideration of the instant Order because the point system analyses herein take no final action on any application, and petitions for reconsideration do not lie against such interlocutory decisions.<sup>203</sup>

70. **Forthcoming Staff Action.** We direct the Bureau staff, once the petition to deny period has run, to conduct a final study of each tentatively selected application in accordance with its routine processing procedures. The staff studies should consider any petitions, comments, and objections to determine whether there is any substantial and material question of fact concerning whether grant of the tentatively selected application would serve the public interest. If the Bureau finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact, and that a grant of the application would be consistent with the public interest, convenience, and necessity, it shall make the grant on the basis of the point system determinations made herein, dismiss all competing applications, deny any petition to deny, and issue a concise statement of the reasons for denying such petition and disposing of all substantial issues raised by the petition.<sup>204</sup>

71. With the exception of issues that are novel or require Commission consideration as specified below, the staff shall act on the tentatively selected applications pursuant to delegated authority. 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.<sup>205</sup> The staff need not refer such matters to the full

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<sup>201</sup> 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 or point system 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).

<sup>202</sup> 47 CFR § 73.7004.

<sup>203</sup> See *NCE Order on Reconsideration*, 35 FCC Rcd 10180, para. 13 ("A tentative selection is not final until the entire administrative process of resolving petitions to deny, and any subsequent pleadings, is complete"); 47 CFR § 1.106 (a)(1). See also *Patrick J. Vaughn, Esq.*, Letter, 22 FCC Rcd 11165 (MB 2007).

<sup>204</sup> 47 U.S.C. § 309(d).

<sup>205</sup> See, e.g., *Central Florida Educational Foundation, Inc.*, Letter, 23 FCC Rcd 1695 (MB 2008) (staff dismissal of defective application tentatively selected in a point hearing, and staff award of permit on a non-comparative basis to only remaining acceptable applicant).

Commission unless the staff determines that the issues are new or novel, or raise a substantial and material question regarding the award of points. Generally, the staff should refer issues to the Commission where the exclusion or inclusion of challenged or claimed points could alter the outcome in the particular NCE group, or where a new or novel question or substantial and material question of fact otherwise exists.<sup>206</sup> In such cases, the staff would refer the mutually exclusive group to the Commission for resolution of the novel issue and/or the determination of a successor tentative selectee.

72. **Severance for Purposes of Petitions, Appeals and Finality.** We are including a provision in the ordering clauses herein that each decision involving a mutually exclusive group is to be considered distinct and separate for purposes of petitions to deny, petitions for reconsideration, review on the Commission's own motion, and appeals. The timing of any action disposing of a petition or appeal affecting a particular group will not delay the finality of our decision for purposes of administrative or judicial review under section 1.103(b) of our rules with respect to any other group.<sup>207</sup>

## IX. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED, that each decision involving a mutually exclusive group in this *Memorandum Opinion and Order* shall be deemed a distinct and separate decision for purposes of petitions to deny, subsequent petitions for reconsideration and reconsideration by the Commission or Bureau on its own motion, applications for review and review on the Commission's own motion, and appeals.<sup>208</sup> If any decision in this *Memorandum Opinion and Order* is declared invalid for any reason, the remaining portions shall be severable from the invalid part and SHALL REMAIN in full force and effect to the fullest extent permitted by law.

74. **NCE MX GROUP 152.** Accordingly, IT IS ORDERED, that the Application filed by New Hope Baptist Church – Gallup (Application File No. 0000167524) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Gallup, New Mexico, and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the petition to deny period has run, the Bureau finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there is no substantial and material question concerning the grantability of the tentative selectee's application, and it is determined that grant of the application serves the public interest, we direct the Media Bureau, by public notice, TO DISMISS the mutually exclusive application of Good News Broadcasting Network, Inc. (Application File No. 0000167858), and TO GRANT the application of New Hope Baptist Church – Gallup (Application File No. 0000167524) 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 acquisitions.

75. IT IS FURTHER ORDERED, that the Informal Objection, filed on November 17, 2023, by Albert Adam David (Pleading File No. 0000226852) IS DISMISSED AS MOOT.

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<sup>206</sup> See generally *NCE Omnibus*, 22 FCC Rcd at 6162, n.230 (2007) ("If the Bureau finds that there are no new or novel questions, or material questions that would cause the tentative selectee to have fewer than or the same number of points as another applicant in the group, the staff would act on the petition(s) to deny, and by public notice grant the application of the tentative selectee and dismiss the competing mutually exclusive application. This function is consistent with the Bureau's delegated authority. See 47 C.F.R. §§ 0.61(h), 0.283.").

<sup>207</sup> See 47 CFR § 1.103(b).

<sup>208</sup> See 5 U.S.C. §§ 702, 704, 706; 47 U.S.C. §§ 309(d), 402(b), 405; 47 CFR §§ 1.106-08, 1.113, 1.115, 1.117 73.7004. In cases that involve separate mutually exclusive groups, but present common issues, the petitions or appeals may be filed jointly or may be consolidated at the discretion of the Commission or the court. See, e.g., *FED. R. APP. P.* 3(b).

76. **NCE MX GROUP 54.** Accordingly, IT IS ORDERED, that the Petition for Reconsideration, filed on April 18, 2023, by Call Communications Group, Inc. (Pleading No. 0000213997) IS GRANTED. IT IS FURTHER ORDERED, that the tentative selection and subsequent grant of the application of New Media Humanity Association Inc. (Application File No. 0000166731), for a construction permit for a new NCE FM station at Weeki Wachee, Florida, ARE RESCINDED.

77. IT IS FURTHER ORDERED, that the Application filed by Call Communications Group, Inc. (Application File No. 0000167753) is REINSTATED and TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Weeki Wachee, Florida, and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the petition to deny period has run, the Bureau finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there is no substantial and material question concerning the grantability of the tentative selectee's application, and it is determined that grant of the application serves the public interest, we direct the Media Bureau, by public notice, TO DISMISS the mutually exclusive application of New Media Humanity Association Inc. (Application File No. 0000166731), and TO GRANT the application of Call Communications Group, Inc. (Application File No. 0000167753) CONDITIONED UPON the 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 acquisitions.

78. **NCE MX GROUP 76.** Accordingly, IT IS ORDERED, that the Petition to Deny, filed on June 19, 2023, by Heritage Baptist Church (Pleading File No. 0000216870), IS GRANTED.

79. IT IS FURTHER ORDERED, that the tentative selection of the application of Sound in Spirit Broadcasting, Inc. (Application File No. 0000166214), for a construction permit for a new NCE FM station in Burlington, Iowa, IS RESCINDED.

80. IT IS FURTHER ORDERED, that the Application filed by Heritage Baptist Church (Application File No. 0000167422) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Burlington, Iowa, and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the petition to deny period has run, the Bureau finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there is no substantial and material question concerning the grantability of the tentative selectee's application, and it is determined that grant of the application serves the public interest, we direct the Media Bureau, by public notice, TO DISMISS the mutually exclusive application of Sound in Spirit Broadcasting, Inc. (Application File No. 0000166214), and TO GRANT the application of Heritage Baptist Church (Application File No. 0000167422), CONDITIONED UPON the 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 acquisitions.

81. **NCE MX GROUP 200.** Accordingly, IT IS ORDERED, that the Petition for Reconsideration, filed on May 26, 2023, by Call Communications Group, Inc. (Pleading No. 0000215256) IS DENIED.

82. **NCE MX GROUP 51.** Accordingly, IT IS ORDERED, that the Petition for Reconsideration, filed on January 23, 2023, by Newland Broadcasters Incorporated (Pleading File No. 0000208923), IS DISMISSED as procedurally defective, and when considered as an Informal Objection, IS GRANTED. IT IS FURTHER ORDERED that the Petitions to Deny, filed between December 20, 2021, to August 15, 2023, by Newland Broadcasters Incorporated (Pleading File Nos. 0000177507, 0000186288, 0000190458, 0000199943, and 0000219339) ARE DISMISSED AS MOOT. IT IS FURTHER ORDERED that the Informal Objection, filed on October 13, 2023, by Albert Adam David (Pleading File No. 0000223003) IS GRANTED.

83. IT IS FURTHER ORDERED, that the tentative selection of the application of Teleamerica Communications West Palm Beach Corp. (Application File No. 0000167478) for a construction permit for a new NCE FM station in Key West, Florida, IS RESCINDED. IT IS FURTHER ORDERED, that the Application filed by Newland Broadcasters Incorporated (Application File No. 0000166303) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Key West, Florida, and its application IS ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the petition to deny period has run, the Bureau finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there is no substantial and material question concerning the grantability of the tentative selectee's application, and it is determined that grant of the application serves the public interest, we direct the Media Bureau, by public notice, TO DISMISS the mutually exclusive application of Teleamerica Communications West Palm Beach Corp. (Application File No. 0000167478), and TO GRANT the application of Newland Broadcasters Incorporated (Application File No. 0000166303), 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 acquisitions.

84. **NCE MX GROUP 122.** Accordingly, IT IS ORDERED, that, pursuant to section 1.115 of the Commission's rules,<sup>209</sup> the Application for Review filed on September 7, 2023, by Grand Forks Bible Study Group (Pleading File No. 0000220588), IS DISMISSED IN PART AND OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>209</sup> 47 CFR § 1.115.