

May 26, 2023

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

PETITION FOR RECONSIDERATION

RE: FCC File No. 167104 Vida Ministry Inc. (FCC MX Group 200)

Dear Ms. Dortch:

Call Communications Group, Inc. (“Call”), applicant for a new noncommercial FM broadcast station at Beaumont, Texas (File Number 167747), respectfully requests reconsideration of the Commission’s grant of the above-captioned application by Vida Ministry Inc. (“VMI”) for a new noncommercial FM broadcast station at Central Gardens, Texas.

Background. VMI was declared the tentative selectee of FCC MX Group 200 ultimately because the Commission arbitrarily accepted the erroneous and unsupported coverage and population claims made in the applications filed by Christian Ministries of the Valley, Inc. (“CMV”) (File Number 166728) and CCS Radio, Inc. (“CCSR”) (File Number 166698).¹ Call subsequently filed a Petition to Deny (“Petition”) establishing that the “technical parameters” claims made in both the CMV and CCS applications were egregiously erroneous and were not supported by any documentation as specifically required by the Commission and were therefore not eligible to receive points for their claims. Neither applicant disputes Call’s facts raised in the Petition. In its letter decision DA 23-358 the Commission granted the Petition in part, agreeing with Call that both the CMV and CCSR new proposed area calculations were egregiously erroneous.² However, instead of excluding the CMV and CCSR applications from “the best technical proposal calculation” the Commission then “reanalyzed” the MX group

¹ *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 (January 24, 2023).

² *NCE MX Group 200*, Letter, DA 23-358, 1800B3-ARR (April 27, 2023)

applicants' technical proposals using Call's accurate calculations of CMV's and CCSR's proposed "New area served" calculations but paired these corrected values with CMV's and CCSR's original unsupported population claim based on unspecified census data (unknown census year, unknown geographic tract/group/block unit, and unknown methodology).³ Using this "hybrid" analysis, the Commission concluded that the "points total has not changed" and summarily denied the remaining part of Call's Petition.

Justification for Petition for Reconsideration. The Commission erred by overstepping its hearing procedures (47 CFR § 1.254) by correcting the claims of an applicant in its comparative analysis in its letter decision DA 23-358. The Commission erred by ignoring essential facts raised by Call in its Petition about missing documentation (proper exhibits) which are an assured "safeguard" built into "points system" comparative analysis of the *2000 NCE Order*. This precluded the fair analysis by Call and other competing applicants, which is a reasonably assured right specified in the *2000 NCE Order*. In similar cases, the Commission has properly excluded applicants' technical claims from comparative points consideration when no correct answer is given for "New area served." However, the Commission erred by considering CMV's and CCSR's technical claims again in its letter decision DA 23-358 "hybrid"⁴ analysis and, in doing so, further complicates the matter by wrongly and arbitrarily (without required supporting exhibits) assuming that CMV's and CCSR's population claims are accurate. Like CMV's and CCSR's "New area served" claims that the Commission agrees were both overstated, both applicant's population claims may be incorrect as well. However, the paired population claims cannot be verified or challenged because neither applicant provided the required supporting documentation. Therefore, the blind acceptance of and reliance upon the unsupported population claims, and their use for the basis of subsequent decisions, is in fact an arbitrary

³ Although the Commission agreed with Call in the Letter that both CMV's and CCSR's "New area served" were erroneous, the Commission continued to rely on both applicants' unsupported population claims that were paired with the erroneous coverage values.

⁴ Use of the term "hybrid" is to say that the Commission analyzed both applicants' technical claims by using Call's accurate calculations of "New area served" from the Petition paired along with each applicant's unsupported population tabulation. The effective result is two new technical proposals (that did not exist at the close of the NCE window) that the Commission then compares in a new technical points analysis against the two other competing applicants' original (at the close of the NCE window) technical proposals. **The Commission is essentially relying on Call (a competing applicant) to provide supported technical claims for 3 out of 4 applications (its own application, the CMV application, and the CCSR application) in what is a hearing proceeding (a comparative analysis). An applicant is only burdened with supporting its own claims in a hearing proceeding (See 47 CFR § 1.254).**

action by the Commission. The Commission must reconsider its decision of the tentative selectee of MX Group 200 by properly excluding CMV's and CSSR applications from the technical parameters stage of the points analysis hearing.

1. The Commission has excluded applicants from comparative consideration in cases identical to MX Group 200 (FCC-23-5).

1. In MX Group 32 (FCC-23-5) an applicant ("IDV," File No. 165739) certified "Yes" in the Technical Parameters section of Form 340 and supplied only a population figure but did not supply a value for "New area served." **In this case the Commission rightly excluded IDV's application from technical parameters comparative consideration.** The Commission did not rely on a competing applicant (an objector) to supply a "New area served" estimate for IDV (as it did in letter decision DA 23-358), nor did the Commission calculate a "New area served" estimate on behalf of the applicant.⁵ Had the Commission supplied the IDV application with any "New area served" value (right or wrong) to pair with its population figure, then no applicant in MX Group 32 would have received points for the "best technical proposal" and the outcome of the comparative points analysis would have been a two-way tie.⁶
2. The only difference between the "New area served" decisions of MX Group 200 (FCC-23-5) and MX Group 32 (FCC-23-5) (both decided in the same *Third Comparative Order*) is that the two flawed "New area served" answers in MX Group 200 were erroneous (no more valid than random numbers) while the flawed "New

⁵ "IDV's application is incomplete because it only lists the proposed population, and we, therefore, cannot consider IDV's technical parameters in our analysis." See *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 (January 24, 2023).

⁶ Had IDV supplied even a random number value for its "New area served" (e.g., 12345) on Form 340, its application would have been no more valid than CMV's and CSSR's applications in MX Group 200 which both had invalid "New area served" values. In MX Group 200, the Commission's different treatment of the same situation resulted in a tie at the end of the comparative analysis. Like CMV and CSSR, IDV did not supply the required documentation to support its technical claims. If one follows the Commission's line of reasoning in the two examples of MX Group 32 and MX Group 200, then the Commission excludes technical claims from the analysis when an applicant leaves the "New area served" answer blank, but when an applicant claims an erroneous value for the same question, the Commission changes the applicant's answer to "what they meant to say" and includes the applicant in the comparative analysis. This is unreasonable and the Commission has clearly erred. See paragraph 28 in *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 (January 24, 2023).

area served” answer in MX Group 32 was a “blank” non-answer. The Commission has clearly treated these cases in an inconsistent and arbitrary manner by removing the MX Group 32 application from technical points consideration while in MX Group 200 “correcting” both flawed values with another applicant’s calculations and then using the “corrected” technical proposals in a new comparative analysis.

3. In MX Group 980616 (FCC-07-40) an applicant claimed “No” for “technical parameters” and provided no “explanatory data.” Instead of tabulating “New area served” and population figures for the applicant, and without relying on competing applicants to supply technical figures (as it did in letter decision DA 23-358), the Commission rightly excluded that applicant from the technical comparative analysis.⁷

2. The Commission cannot conduct a comparative points analysis using information that was NOT provided within an application.

1. § 73.7003(b) Point system selection procedures:
 - i. **“Based on information provided in each application, each applicant will be awarded a predetermined number of points under the criteria listed”**
2. Using an “objector’s” values is not consistent with § 73.7003(b).
3. The Commission has acted inconsistently in the handful of instances where technical claims have been erroneous or missing (See MX Group 32 (FCC-23-5)).

3. The Commission may not alter an applicant’s points claims in a hearing.

1. The NCE point system is a simplified “paper hearing” process.⁸ The burden of making claims and the burden of proof for such claims is that of the applicant alone.⁹ In this case, only CMV and CCSR may make claims pertaining to their own

⁷ “In order to prevent one applicant from denying another applicant points for superior technical parameters, we will comparatively consider only those applications which submitted data.” See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC-07-40, 22 FCC Rcd 6101 (8) (March 27, 2007).

⁸ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (2000 NCE Order)

⁹ (See 47 CFR § 1.254 Nature of the hearing proceeding; burden of proof) “Any hearing upon an application shall be a full hearing proceeding in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, **shall be upon the applicant** except as otherwise provided in the order of designation.”

applications and they are solely responsible for validating and supporting their own claims.¹⁰ However, in its letter decision DA 23-358, the Commission “corrected” the CMV claim of proposed “New area served” from 1,881.6 km² to 1,321 km² and “corrected” the CCSR claim of proposed “New area served” from 1,402.2 km² to 806.23 km². Neither applicant amended its application. The Commission tries to justify its alteration of two applicant’s claimed values by referencing a prior proceeding.¹¹ However, the Commission’s hearing rules do not support this change and allow only the applicant to make and support claims pertaining to its own application. Nowhere in the Rules does it suggest that the Commission may insert itself into the hearing proceeding by essentially representing an applicant as de facto counsel to change an applicant’s certified claims. After concluding that both applicants’ technical claims were incorrect and unsupported, the Commission’s only valid action should have been to reject and dismiss both applicants’ technical claims, excluding the applicants from the “best technical proposal calculation” stage of the points hearing as it has done in similar cases.¹² Therefore, the Commission did not conduct the comparative hearing consistent with the Rules and must reconsider and conduct a new comparative points analysis hearing.

4. There is no past example where the Commission has used an objector’s population figures in a comparative points analysis hearing.

1. Footnote 27 in the Commission’s letter decision DA 23-358 implies that the Commission is now using the “*objector’s population figures.*” However, the Commission then conducts the new analysis using CMV’s and CSSR’s original population figures (which are unsupported).

¹⁰ “Each **applicant bears full responsibility** for submitting an accurate, complete, and timely application.” (See *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window; Limited Application Filing Freeze to Commence on October 5, 2021*, Public Notice, DA-21-885 (July 23, 2021)).

¹¹ In this case the Commission also conducted the points hearing after altering an applicant’s original, erroneous claims with revised figures provided by another party other than the applicant making the original claims. Per § 1.254 (“Nature of the hearing proceeding; burden of proof.”) the burden of both making and proving a claim “shall be upon the applicant.” See para. 16 in *Comparative Consideration of 18 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC-11-9, 26 FCC Rcd 803 (1) (January 26, 2011).

¹² See paragraph 28 in *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 (January 24, 2023).

2. In the single case cited in the footnote by the Commission, the Commission actually used the subject applicant’s original purported population figures, not population figures provided by the objector. Call can find no case where the Commission has relied on any objector’s population figure.

5. The Form 340 “Yes” certification supported by a false value meant “No.”

1. The Instructions to Form 340 clearly state: “Each certification constitutes a material representation. Applicants may only mark the "Yes" certification when they are certain that the response is correct.”¹³
2. Form 340 requires **one certification** dependent upon the accuracy of **both** technical parameters claims. Therefore, both the “New area served” and population tabulations must be accurate for the applicant to have made a valid certification.
3. Once the Commission confirmed that just one technical claim was incorrect, the applicant’s “Point System Factors” / “Technical Parameters” certification must be considered invalid (“No”) for both the “New area” and “Population” served figures.
4. The Commission cannot “split” the single certification to essentially “half Yes” and “half No” and then arbitrarily consider uncertified or half-certified claims within a comparative points hearing.

6. The Commission improperly included CMV’s and CCSR’s technical claims in the comparative points analysis hearing.

1. Applicants were required to calculate technical parameters according to a specific protocol and were to submit required documentation supporting those claims.^{14,15} The

¹³ *Form 2100, Schedule 340 Instructions, Noncommercial Educational Station for Reserved Channel Construction Permit Application*, OMB: 3060-0029 (October 2020).

¹⁴ “The applicant should submit to the Commission as **attachments** copies of this information. See “Technical Parameters” paragraph, pg. 16 in *Form 2100, Schedule 340 Instructions, Noncommercial Educational Station for Reserved Channel Construction Permit Application*, OMB: 3060-0029 (October 2020).

¹⁵ “Each applicant must include an application exhibit explaining how it calculated the technical parameters. The applicant should specify the year and blocks of census information used and the method used to determine area. Area must be measured in square kilometers and exclude significant areas of water, e.g., ocean and lakes. Population should be measured using the 2010 Census Block Data available from the Census Bureau.” See page 9 in *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window; Limited Application Filing Freeze to Commence on October 5, 2021*, Public Notice, DA-21-885 (July 23, 2021) (*2021 Window Notice*).

Commission's use of the word "must" in the public notice made it clear that omitting the exhibit and census data source information was not optional.

2. The online Licensing and Management System ("LMS") Form 340 has a hyperlink labeled "Attachments" for the purpose of submitting this required information and the submitted documentation is then "available for public review" as intended in the *2000 NCE Order*.
3. The CMV application did not contain a single exhibit containing the words "census," "block," "population," "people," "2010," "area," or "square kilometers."
4. The CSSR application did not contain a single exhibit containing the words "census," "block," "2010," or "square kilometers."
5. The Commission cannot know how CMV and CSSR calculated their proposed area coverage (although the Commission agrees that it was erroneous) because both applicants omit that required explanation and map from their applications.
6. The Commission cannot know which year census data CMV and CSSR used to derive their population tabulations because both applicants omit that required information from their applications.
7. The Commission cannot know which census geographic level unit CMV and CSSR used to tabulate their respective population values because both applicants omitted that required information from their applications. The Commission's relied on these population values and proceeded to make an arbitrary decision.
8. Therefore, the Commission improperly included CMV's and CSSR's unsupported technical claims in the comparative analysis hearing and must reconsider and conduct a new comparative points analysis hearing.

7. The Commission precluded the fair analysis intended by the 2000 NCE Order.

1. The Commission included CMV's and CSSR's technical parameters claims within the comparative points analysis (twice) even though both applicants clearly did not provide any of the required documentation to support its technical claims.¹⁶

¹⁶ "We also agree with commenters that all applicants must use the same standards so that they can be meaningfully compared." "Population should be based on the most recent census block data made available by the Census Bureau." "Area will be measured by the number of square kilometers within the 60 dBu service contour of FM stations."

2. Without any reasonable transparency as to how CMV and CSSR arrived at their “New area served” and population values, competing applicants in MX Group 200 were denied their opportunity to verify and challenge both applicants’ technical claims.”¹⁷
3. The opportunity to verify and challenge a competing applicant’s technical claims is fundamentally assured in the *2000 NCE Order*¹⁸ which was intended to replace an unpredictable and vague comparative system with a new point system.¹⁹

CONCLUSION

The Commission incorrectly determined the tentative selectee of MX Group 200. The Commission must conduct a new points system comparative analysis hearing in a manner consistent with the *2000 NCE Order*, the *2021 Window Notice*, the *Form 340 Instructions*, and 47 CFR §1.254. The Commission must exclude any application from Technical Parameters points comparison when the applicant’s Technical Parameters certification is shown to be invalid either due to obvious error by the applicant or the absence of required supporting documentation. The Commission must not act in an arbitrary fashion by inconsistently and subjectively choosing between altering, correcting, or excluding applicants’ technical claims – it must always exclude claims that are unsupported, missing, or wrong. The Commission gives no reasonable

“These contours will be calculated using the standard predicted contours established in our rules.”

See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (*2000 NCE Order*)

¹⁷ “We clarify that the applicant’s documentation, as specified and submitted in accordance with the instructions to the NCE application, Form 340, will be available for public review. Interested parties can provide useful analysis of such information in the context of petitions to deny or informal objections filed in response to public notices announcing our choice of tentative selectees.” See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (*2000 NCE Order*)

¹⁸ “We agree with the commenters that, while the application should be a simple one in which the Commission can rely on certifications, competing applicants should be able to verify that competing applicants qualify for the points claimed, and that the Commission should have access to the documentation for purposes of random audits.”

A new application form was designed: “The form should identify appropriate documentation that must be made available for the different points claimed.”

“This information will also assist parties in determining whether it is appropriate to file Petitions to Deny.”

“Future applicants will submit documentation concurrently with filing.” See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (*2000 NCE Order*)

¹⁹ “Through a point system, we can eliminate the vagueness and unpredictability of the current system, clearly express the public interest factors that the Commission finds important in NCE broadcasters....” See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (*2000 NCE Order*)

explanation as to why it has published clear application preparation instructions²⁰ yet states “...we have never dismissed an application, and excluded an applicant from our comparative analysis, due to incomplete documentation.”²¹ Applicants invest a great amount of time and resources (thousands of dollars) into carefully preparing applications according to the best available information and instructions from the Commission. Applicants have a reasonable expectation that the Commission’s instructions have weight, authority, and meaning and that there will be little ambiguity in how the Commission will fairly evaluate each application with a “high bar” consistent with the instructions given by the Commission. The Commission must reconsider MX Group 200 and exclude the CMV and CSSR applications from the technical parameters comparison of remaining applicants.

Sincerely,



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²⁰ “Each applicant must include an application exhibit explaining how it calculated the technical parameters. The applicant should specify the year and blocks of census information used and the method used to determine area. Area must be measured in square kilometers and exclude significant areas of water, e.g., ocean and lakes. Population should be measured using the 2010 Census Block Data available from the Census Bureau.” See page 9 in *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window; Limited Application Filing Freeze to Commence on October 5, 2021*, Public Notice, DA-21-885 (July 23, 2021) (*2021 Window Notice*).

²¹ “CCGI also asserts that the CMV and CCSR Applications should not be considered because they did not provide documentation explaining their area and population calculations. CCGI, however, cites to no instance where we have dismissed an application on this basis. Moreover, although we have denied applicants their claimed points based on insufficient supporting documentation, we have never dismissed an application, and excluded an applicant from our comparative analysis, due to incomplete documentation.”

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