

Before the
Federal Communications Commission
Washington, DC 20554

In re Applications of

BIBLE BROADCASTING NETWORK

GRAND FORKS BIBLE STUDY GROUP

)
) **NCE MX Group 122**
)
) **File No. 0000167299**
) **Facility No. 762237**
)
) **File No. 0000167114**
) **Facility No. 766460**

For New Noncommercial Educational FM Stations
Grand Forks, ND

Filed with: **Office of the Secretary**
Directed to: **The Commission**

APPLICATION FOR REVIEW

Grand Forks Bible Study Group (“GFBSG”), by its attorney, pursuant to Section 1.115 of the Commission’s Rules¹, hereby submits its “Application for Review” (“AFR”) of the *Letter Decision*, DA 23-666 (MB, Aug. 8, 2023), issued with respect to the applications of Bible Broadcasting Network (“BBN”) and GFBSG for a new NCE broadcast stations to serve Grand Forks, North Dakota. GFBSG and BBN were competing applicants in MX Group 122. The Bureau determined that BBN was the prevailing party in the proceeding. The BBN Application was chosen as the selectee after it was determined that GFBSG was not entitled to points as an established local applicant or for diversity.

This AFR involves questions of law and policy which has not previously been resolved by the Commission, namely (i) whether, in the processing of applications, the Media Bureau should ignore totally Certifications made within timely filed Exhibits to applications, the result of which

¹ 47 C.F.R. § 1.115.

would be contrary to the public interest; and (ii) whether all resolution of discrepancies within an application should be considered “upgrades” to applications, especially where such resolution would be in furtherance of the public interest.

With respect thereto, the following is stated:

Background

BBN and GFBSG were applicants for a new NCE FM broadcast station to serve Grand Forks, North Dakota on Channel 202. At the end, MX Group 122 consisted of two competing mutually-exclusive applications for operation on Channel 202A to serve Grand Forks, North Dakota – BBN and GFBSG. The BBN Application for Grand Forks and the GFBSG Application for Grand Forks are mutually-exclusive.

As the Commission’s own database demonstrates, GFBSG, the party submitting this AFR, *already* is licensee of LPFM Station KEQQ-LP, Grand Forks, North Dakota, Facility No. 195984, which *already* operates on Channel 202 and *already* has served Grand Forks, North Dakota. GFBSG has operated Station KEQQ-LP on a consistent basis on that channel, serving the community of Grand Forks, since May 21, 2014.

On November 9, 2021, GFBSG timely filed to expand its service to operate as a full NCE station on Channel 202, which would replace its existing LPFM operation from its current transmitter site. GFBSG filed its application for the **same** channel as GFBSG’s current channel of LPFM operation, at the **same** tower location, but with a power of 500 watts in lieu of KEQQ-LP’s existing 100 watts ERP. BBN also filed an application for Grand Forks, filing also on Channel 202. Because LPFM stations are secondary services, a grant of the BBN application will force KEQQ-LP off the air on Channel 202.

As a part of its original application, GFBSG submitted documentation certifying that it was entitled to Points as a qualified local applicant and for diversity. That Certification was contained

in the ORIGINAL application filed during the NCE Filing Window. An Amendment that the GFBSG Application was filed on January 28, 2022 (the “GFBSG Amendment”). The GFBSG Amendment was filed when it was realized after the close of the window that an inconsistency existed in the GFBSG Application insofar as boxes in the body of the GFBSG Application certifying to the entitlement for the Points reflected in the Exhibits had not been checked. The GFBSG Amendment was filed to correct that discrepancy. As a part of that Amendment, a showing was made which specifically demonstrated that because the required proper Certification was timely submitted as a part of the original Exhibits, no impermissible “upgrade” to the application was being requested. No objection to the GFBSG Amendment was filed by BBN, and the GFBSG Amendment was accepted for filing. Accordingly, the GFBSG Application was initially named the “tentative selectee” in Group 122.²

BBN filed a Petition to Deny the GFBSG Application on November 22, 2022. In that Petition, BBN asserted simply that because boxes were not checked in the original GFBSG Application, the Amendment was an impermissible upgrade and should not be allowed, and that Points for GFBSG’s status as a Qualified Local Applicant and for Diversity should be denied. In so arguing, BBN totally ignored the Certifications contained in the timely-filed Exhibits demonstrating GFBSG’s entitlement for Points.

A *Memorandum Opinion and Order* was issued naming BBN as the new tentative selectee.³ A Petition for Reconsideration of the *Memorandum Opinion and Order* was filed by GFBSG, which was denied in the *Letter Decision*, DA 23-666 (MB, Aug. 8, 2023). It is that *Letter Decision* that is the subject of this Application for Review.

² *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, FCC 22-78, at 18, ¶¶ 74-75 (Oct. 25, 2022).

³ *Comparative Consideration of 10 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, FCC 23-45, at 23-25, ¶¶ 67-72 (Jun. 5, 2023).

I. GFBSG Was Incorrectly Denied Points for Being a Qualified Local Applicant and for Local Diversity of Ownership.

This Petition poses the unique question of whether the information contained in an application should be examined as a whole to determine the proper outcome of a proceeding. When this is done, it would be clear that the determination by the Bureau that the BBN Application should be the selectee in MX Group 122 was in error.

GFBSG filed an Amendment to its pending GFBSG Application on January 28, 2022, to conform the checked boxes in the FCC Form 340 to the Certifications already on file in the timely-filed exhibits. Therefore, contrary to the Bureau's conclusions in the *Letter Decision*, there was no "upgrade" involved in the GFBSG Amendment. As a part of its **ORIGINAL** Application, GFBSG timely certified in its exhibits to the GFBSG Application that GFBSG was entitled to Points as an "established local applicant," and that status continued to be maintained in the GFBSG Amendment. The GFBSG Amendment filed on January 28, 2022, specifically stated:

These revised responses do not represent an upgrade to the Application. The Applicant is also a Low Power FM licensee of Station KEQQ-LP, Facility No. 195984. Therefore, it is an established local broadcaster. An Exhibit entitled "Established Local Applicant" was submitted with the original Application. In that Exhibit, the Applicant timely claimed and therefore qualifies for credit as an established local applicant. See "Established Local Applicant" Exhibit, in which it the Applicant stated:

The applicant is the current licensee of Station KEQQ-LP, Facility No. 195984, which is an NCE LPFM station, that operates from its current studio located at 1191 South Columbia Rd., Grand Forks, North Dakota. The proposed licensee, Grand Forks Bible Study Group, is registered with the state at that address as its headquarters. The station's current transmitter site also is located at that studio. See Attachment A. The applicant has been in existence at that location since 2012. Attachment B. The applicant's currently proposed transmitter site is at that same location, and is located within the community of Grand Forks, North Dakota, and is therefore located "within 25 miles of the reference coordinates of the proposed community of license." Therefore, the applicant qualifies as an "established local applicant."

Therefore, the Applicant is permitted to amend the Application to certify and receive points as an "Established Local Applicant."

Additionally, the Applicant timely qualified for points for Diversity of Ownership. An Exhibit entitled “Diversity” was timely filed as a part of the Application. As the Exhibit submitted with the original Application stated:

FCC Form 2100-340, Exhibit (“Amendment.20220128.pdf”).

It is in this crucial respect that the cases in the *Letter Decision* cited by the Bureau⁴ are inapposite. None of those cases involved a situation as is presented in this case, and therefore a grant of BBN’s Application would be an erroneous decision.

Past Commission cases dealt solely with situations where post-window amendments attempted, on a wholesale basis to improve an applicant’s comparative standing. Specifically, in *Network of Glory*, 25 FCC Rcd 7311 (MB 2007), as affirmed in *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Station Filed in the February 2010 Window*, 30 FCC Rcd 5161, 5169-70, ¶¶ 26-27 and n.66 (2015), an applicant certified that its proposal did not provide (a) an aggregated first or second NCE service at least 10 percent of the people residing within the station’s 60 dBu service contour and (b) to a minimum of 2,000 people, and thus was not entitled to a fair distribution preference, and the relevant application contained no information that would support such a claim. Three months after the close of the application’s filing Window, the applicant amended its application to claim for the *first time* an affirmative certification with regard to the provision of first NCE service, and after the close of the Window, for the *first time*, provided an exhibit that would support such a claim. Thus, unlike the situation at issue in this case, that information in support of its claim for Points all was provided for the FIRST TIME after the close of the relevant Filing Window, and the amendment in that case was correctly treated by the Commission as an improper upgrade.

⁴ *Letter Decision* at 3 n.17.

Similarly, in *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, 25 FCC Rcd 8793, 8799 n.35 (2010), an applicant initially certified in its application's Window filing that it was ineligible for a second service preference, but *after* the close of the filing Window, the applicant filed an amendment to the application, and in that amendment, *for the first time* claimed a second service preference, and for the FIRST TIME filed the appropriate exhibits. Here again, that is not the situation presented in the present case.

The Bureau asserts that “[i]t is undisputed that GFBS neglected to claim points under localism or diversity of ownership *at the time it filed its application*, as required.” *Letter Decision* at 5. The Bureau misses the point that unlike the cases upon it relies, GFBSG clearly did Certify, in its Exhibits, to its entitlement to Points for being an Established Local Applicant and for Diversity at the time GFBSG filed its original Application.

Thus, this case presents a case of first impression – whether an applicant that provides exhibits, certifications, and solid documentation of an entitlement to Points should be credited with those Points, in cases such as presented here, despite the lack of original certifications in the body of the application form. Permitting such a result would be in the public interest, and would do no damage to the Commission's policies prohibiting true “upgrades” following the close of a filing Window.

In contrast, the Bureau's further claim 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”⁵ is unsupported by any prior precedent. Adoption of such a policy by the Commission would be contrary to the Public Interest, arbitrary

⁵ *Letter Decision* at 5.

and capricious, and in a case such as presented here, would result in an inequitable result. The far better approach, as has been utilized by the Commission in the past, is to look at the application as a whole, and to determine entitlement to Points based upon *all* information timely submitted in an application Window.

In fact, this is the very approach adopted by the Bureau in examining BBN's own application. In its original application, BBN submitted two exhibits with affirmative written statements, explaining that it holds no attributable interest in any radio station or pending application with overlap with its proposed NCE FM station. BBN also submitted a third diversity of ownership exhibit which stated that the proposed station did, in fact, overlap with an existing station. Thus, the BBN Exhibits literally "conflicted." Rather than adopting a position that because the certification in third exhibit literally "conflicted" with the certifications in the remainder of the BBN Application, that the certification was invalid, the Bureau instead looked at the application as a whole, and determined that the "two affirmative statements included with its application eliminate any ambiguity and support its claim for diversity of ownership." *Letter Decision* at 5-6.

The same sort of reasonable analysis should be applied to the GFBSG Application and Amendment, as well.

II. GFBSG Amendment Should Not Have Been Considered an Impermissible "Upgrade" to its Application, and Should Have Been Accepted.

The Commission also should consider what constitutes a cognizable "upgrade" in an application such as at issue in this case. In this case, the January 28, 2022 Amendment filed by GFBSG literally did not "improve" GFBSG's comparative position -- it simply *maintained* GFBSG's *existing* comparative status as claimed in exhibits filed with the *original* GFBSG Application -- namely that as a *bona fide* "qualified local applicant" that had no other attributable broadcast interests. Based upon the facts PRESENTED IN ITS INITIAL APPLICATION, *i.e.*, showing that

GFBSG has been in existence since 2012, the applicant’s headquarters is in Grand Forks, the proposed transmitter site is at a location *within* the community of Grand Forks, North Dakota “within 25 miles of the reference coordinates of the proposed community of license,” and GFBSG even currently operates an **existing NCE LPFM radio station** from that location, GFBSG provided information “in the four corners of the application” in the original GFBSG Application filed during the Window that was more than sufficient to establish its entitlement to the Points previously awarded to it under the Commission’s Point System Selection Process. This information also is a part of the Commission’s own databases, of which the Commission is permitted to take Official Notice.

An examination of “the four corners of [an] application” was the approach taken by the Commission in reaching its determination in MX Group 114 in the NCE Window.⁶ In MX Group 114, the question was whether sufficient information existed to support status as an established local applicant. After examining the application as a whole, the Commission determined “[t]here is not sufficient information in the four corners of the application to support the conclusion that [the applicant] qualifies as an established local application.”⁷

The same type of analysis must be adopted in this case. There can be no serious question that based upon the showings provided as a part of its original Application that GFBSG was factually qualified to be deemed an “Established Local Applicant,” and that it also was entitled to points for “Local Diversity of Ownership.” The January 28, 2022 Amendment did not in any manner “upgrade” the information contained in the Exhibits that were *already* present in the GFBSG Application at the time it first submitted its application during the 2021 Filing Window.

⁶ *Comparative Consideration of 10 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, FCC 23-45 (June 5, 2023).

⁷ *Id.* at ¶ 65.

In this case GFBSG obviously has already been faithfully serving the community of Grand Forks with NCE service (on KEQQ-LP) for the past nine years. It is an existing licensee in the community (which by definition essentially makes it on its face an “established local applicant”) that has no other cognizable broadcast interests, and provided clear Exhibits that were uploaded before the close of the requisite filing Window demonstrating in detail GFBSG’s entitlement to those statuses and Points. Unlike the situations in the cases cited by the Bureau, the January 28, 2022 GFBSG Amendment merely conformed the body of the Application to the information *already* contained in the GFBSG Application. Significantly, just as the Amendment was not timely opposed by BBN, the accuracy of those Exhibits and its status (as an established local applicant without any other local stations that will not automatically cease operations) also has not been disputed by BBN.

The Bureau literally applied form over substance in its analysis, the result of which will be not only to cause an existing local-service FM station (co-channel KEQQ-LP) to be forced off the air, but also to deny the application of a superior, minority-controlled licensee that seeks to *continue* to service the local community and area as a full-power facility for a prolonged period of time. This result would be contrary to the public interest, and should be rejected. The new NCE station that will be granted in MX Group 122 on Channel 202 will displace Station KEQQ-LP on Channel 202, insofar as Station KEQQ-LP is an LPFM station, and is a secondary service.

Grant of this Petition will permit KEQQ-LP to continue to provide service to the community of Grand Forks, North Dakota, with service from a new full-service NCE station as a replacement and continuation of service that has been provided by Station KEQQ-LP for over nine years. The Commission has long stated that it is in the public interest for there to be continuity of service to the public. See, e.g., Amendment of Section 202(b), 54 R.R.2d 213 ¶ 24 (MB 1983); *Susanville, California*, 23 FCC Rcd 1684 (MB 2008); *Reexamination of the Comparative*

Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations, FCC 19-127, ¶ 15 (2019).

Based on the forgoing, GFBSG should be awarded Points for “Local Diversity of Ownership” and for being a “Qualified Local Applicant,” and insofar as the GFBSG Application already has been accepted for filing previously, should be granted in this proceeding.

WHEREFORE, it is requested that this “Application for Review” be granted.

Respectfully submitted,

**GRAND FORKS BIBLE STUDY
GROUP**

By: ____/Dan J. Alpert/_____
Dan J. Alpert

Its Attorney

*The Law Office of Dan J. Alpert
2120 N. 21st Rd.
Arlington, VA 22201
703-243-8690*

September 7, 2023

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that a copy of the foregoing “Application for Review” is being sent by First Class Mail to the following:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Ave., N.W.
Suite 301
Washington, DC 20016

_____/Dan J. Alpert_____
Dan J. Alpert