



Federal Communications Commission
Washington, D.C. 20554

February 8, 2024

DA 24-119
In Reply Refer to:
1800B3-SDW
Released February 8, 2024

Vanguard Association of Sunbelt Colleges Corporation
c/o Donald E. Martin, Esq.
Law Office of Donald E. Martin
P.O. Box 8433
Falls Church, VA 22041
(sent by electronic email to dempc@prodigy.net)

Augustana College
c/o Derek H. Teslik, Esq.
Gray Miller Persh, LLP
2233 Wisconsin Ave., NW Ste. 226
Washington, DC 20007
(sent by electronic email to dteslik@graymillerpersh.com)

Kelly Edmister
Director, Iowa Public Radio, Inc.
2111 Grand Avenue
Des Moines, IA 50312
(sent by electronic email to: kedmister@iowapublicradio.org)

In re: **NCE MX Group 74**

**Vanguard Association of Sunbelt
Colleges Corporation**

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

Augustana College

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

**Petition to Deny
Informal Objection**

Dear Applicants, Counsel, and Objector:

We have before us two mutually exclusive (MX) applications filed by Vanguard Association of Sunbelt Colleges Corporation (VASC) and Augustana College (AC) for construction permits for new noncommercial educational (NCE) FM stations in different communities in Iowa, which the Media Bureau (Bureau) designated as NCE MX Group 74.¹ The Commission identified the VASC Application as the tentative selectee of the group.² Also before us are: (1) a Petition to Deny (Petition) filed on November 25, 2022, by AC, and related pleadings;³ and (2) an Informal Objection (Objection) filed on June 22, 2023, by Iowa Public Radio, Inc. (IPR).⁴ We also have before us VASC's response to a Letter of Inquiry (LOI) sent by the Bureau (LOI Response),⁵ and related responses filed by AC.⁶ For the reasons set forth below, we deny the Petition, deny the Objection, dismiss the AC Application, and grant the VASC Application.

Background. The subject applications were filed during the November 2021, NCE FM filing window.⁷ In the *Second Comparative Order*, the Commission compared the VASC Application and AC Application under the point system.⁸ In the point system analysis, VASC received two points for diversity of ownership, and AC did not receive any points.⁹ Accordingly, the Commission identified VASC as the tentative selectee of MX Group 74 and established a 30-day period for filing petitions to deny.¹⁰

In the Petition, AC questions the validity of VASC's financial certification.¹¹ Specifically, AC questions whether VASC possesses the financial assets needed to construct and operate each of the eight

¹ *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Educational Stations; Opens Window to Accept Settlements and Technical Amendments*, Public Notice, 36 FCC Rcd 16452 (MB 2021). See also Application File Nos. 0000167716 (VASC Application) and 0000166936 (AC Application).

² *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 37 FCC Rcd 12898, 12911, para. 53 (2022) (*Second Comparative Order*).

³ Pleading File No. 0000204282. On December 6, 2022, VASC filed an Opposition to the Petition (Opposition). Pleading File No. 0000204837. AC filed a Reply to the Opposition on December 9, 2022 (Reply). Pleading File No. 0000204982.

⁴ Pleading File No. 0000217055. VASC did not file an opposition to the Objection.

⁵ See E-Mail from Donald E. Martin, Esq., counsel to VASC, to Alexander Sanjenis, Audio Division, FCC Media Bureau (June 1, 2023); Letter from Albert Shuldiner, Chief, Audio Division, FCC Media Bureau, to Donald Martin, Esq., counsel to VASC (Apr. 25, 2023).

⁶ Pleading File No. 0000217059 (filed June 23, 2023) (AC LOI Reply). Pleading File No. 0000221124 (filed Sept. 19, 2023) (AC LOI Reply Supplement).

⁷ *Media Bureau Announces NCE FM New Station Application Filing Window; Window Open from November 2, 2021, to November 9, 2021*, MB Docket No. 20-343, Public Notice, 36 FCC Rcd 11458 (MB July 23, 2021).

⁸ *Second Comparative Order*, 37 FCC Rcd at 12911, para. 53. Neither applicant claimed eligibility for a fair distribution preference.

⁹ *Id.* AC did not claim points for diversity of ownership.

¹⁰ *Id.*

¹¹ Petition at 2-5.

stations it applied for in the 2021 NCE FM filing window.¹² AC estimates the costs for the station proposed in the VASC Application (Station) to be over \$160,000, and the total financial commitment to construct all eight then-pending stations to be “more than one and a quarter million dollars.”¹³ AC also questions whether VASC received reasonable site assurance,¹⁴ and alleges that the VASC Application “may be part of a scheme” designed by Luke Rogers (Rogers), VASC’s technical consultant and president of Elijah Radio, Inc. (Elijah Radio), another NCE FM applicant, to circumvent the 2021 NCE FM filing window’s 10-application cap.¹⁵

In the Opposition, VASC provides a sworn declaration, under penalty of perjury, made by David Beihl (Beihl), its President, in which it “confirms and reiterates” its financial certification.¹⁶ VASC also provides a sworn declaration, under penalty of perjury, in which Rogers attests that neither he nor Elijah Radio has any attributable interests in VASC.¹⁷

In the Reply, AC argues that the Opposition and *David Beihl Declaration* provide no probative evidence to support VASC’s financial certification, and therefore, pursuant to *Alaska Educational Radio*, the VASC Application should be dismissed.¹⁸ AC also argues that VASC failed to provide evidence to support its reasonable site assurance certification,¹⁹ and urges the Commission to consider its allegations that VASC has an attributable relationship with Rogers, and therefore VASC has violated the 10-application cap.²⁰

In the LOI Response, VASC provided additional information to support its financial certification. VASC explained that, while it did not prepare a formal written construction budget prior to filing the VASC Application, Beihl estimated the construction and three-month operation costs for the Station to be \$50,000, and the total financial commitment to construct all eight then-pending stations, including the VASC Application, to be \$512,328.²¹ To finance the proposed Station, VASC stated that it simultaneously relied on two alternate sources of funding. Primarily, VASC stated that it had a financing option through a loan commitment from Adventist World Radio (AWR).²² For business reasons, VASC acknowledged that it “preferred and had planned to rely primarily on AWR to fund the station.”²³

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.* at 3 & n.9.

¹⁵ *Id.* at 5-8.

¹⁶ Declaration of David Beihl at 1, Attach. to Opposition (*David Beihl Declaration*).

¹⁷ Opposition at 2; *David Beihl Declaration*; Declaration of Luke Rogers at 1, Attach. to Opposition (*Luke Rogers Declaration*).

¹⁸ Reply at 4-5 (citing *Alaska Educ. Radio Sys., Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 9289, 9291-92, paras. 6-8 (2019) (*Alaska Educational Radio*)).

¹⁹ Reply at 5.

²⁰ See *FCC Adopts 10-Application Limit for NCE FM New Stations in Upcoming 2021 Filing Window*, Public Notice, MB Docket No. 20-343, 36 FCC Rcd 7754 (2021) (*NCE Cap Public Notice*); 47 CFR § 73.503(g).

²¹ LOI Response at 2.

²² *Id.*.

²³ *Id.*

Second, VASC relied on an oral agreement with David Beihl's father, Gary Beihl, to provide funding for certain projects, which they viewed as "an open line of credit."²⁴ As evidence, VASC provided a sworn declaration, under penalty of perjury, in which Gary Beihl attested that he: (1) was familiar with Beihl's intention to file applications for FM construction permits in November 2021; (2) was notified, by Beihl, of the cost estimates for building and operating the proposed stations; and (3) offered to provide funding for constructing and operating the proposed stations.²⁵ In the *Gary Beihl Declaration*, Gary Beihl attested that he possessed sufficient assets to fund the costs for the proposed stations, and as evidence, provided a copy of his IRA's "Statement Overview" page which reflected a value of \$512,840.70 for November 2021.²⁶

With regard to reasonable site assurance, VASC provided email correspondence between John Parle, VASC's consulting engineer, and Sarb Bassi, a marketing manager for the tower owner, Crown Castle.²⁷ In the *Crown Correspondence*, Ms. Bassi lists coordinate locations for three different towers and states that the "sites that [Mr. Parle] inquired about" were available.²⁸ The *Crown Correspondence* references an attached "reasonable assurance letter," but VASC did not produce the referenced letter.²⁹ The *Crown Correspondence* also reflects that Mr. Parle inquired about the "highest spot [VASC] could lease at the three tower locations"³⁰ and that Ms. Bassi confirmed the highest spots available on the three towers. Finally, the *Crown Correspondence* shows that, after VASC filed the Application, Mr. Parle informed Ms. Bassi of the VASC Application and VASC's intention to use the selected tower.

In the AC LOI Reply, AC alleges that a "single summary page from an IRA statement, with no disclosure of personal liabilities" does not meet the Commission's financial qualification requirements,³¹ and that VASC failed to provide a written commitment by Gary Beihl that provides the specific terms of the proposed personal loan.³² AC argues that the *Crown Correspondence* is insufficient to establish that space was available on the proposed tower at the height specified in the VASC Application.³³ AC also questions whether AWR is the real-party-in interest behind the VASC Application.³⁴

Finally, in the Objection, IPR alleges that VASC "cannot (or should not) have obtained reasonable assurance to use the tower with the parameters specified in the Application" because the tower

²⁴ *Id.*

²⁵ Declaration of Gary Beihl at 1, Attach. 2 to LOI Response (*Gary Beihl Declaration*).

²⁶ *Id.*

²⁷ LOI Response at Attach. 1 (*Crown Correspondence*).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ AC LOI Response at 5.

³² *Id.*

³³ *Id.* at 2-3.

³⁴ *Id.* at 6-10. AC submitted a supplement to the AC LOI Response in which it purports to provide "direct evidence . . . of an arrangement where by [Elijah Radio] has worked with a shell entity with no broadcast experience that prevailed in the Commission's comparative procedures to secure the benefit of an FM authorization over other local applicants." Pleading File No. 0000221124 (*AC LOI Response Supplement*).

location specified in the VASC Application is already occupied by IPR's NCE FM station, KNSY(FM), Dubuque, Iowa.³⁵

Discussion. Pursuant to section 309(d) of the Communications Act,³⁶ petitions to deny and informal objections must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest.³⁷

Financial Qualifications. Schedule 340 requires each applicant for a new NCE FM station to certify that, at the time it files its application, the applicant has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate it for three months, without additional funds.³⁸ Documentation supporting the attestation of financial qualifications need not be submitted with the application but must be available to the Commission upon request.³⁹ In order to prove financial qualifications at the time of certification, an applicant must provide "substantial and reliable evidence" of sufficient net liquid assets on hand, or committed sources of funds.⁴⁰ As used here, "net liquid assets" means the lesser amount of the net current assets or of the liquid assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.⁴¹ Also, where, as here, an applicant files multiple applications, it must be able to demonstrate that it is financially qualified as to all pending applications.⁴²

Under these standards, we find that VASC has adequately demonstrated its financial qualifications. VASC states that it initially intended to rely on funding through AWR, however, VASC provides no documentation from AWR in support of its argument, and it is unable to confirm whether AWR's financial commitment predated its filing of the VASC Application.⁴³ Accordingly, we do not consider AWR's alleged financial commitment in our analysis of VASC's financial qualifications. VASC, however, states that it had alternate funding through Gary Beihl's IRA. The Commission has

³⁵ Objection at 1. *See also* Application File No. BLED-20170503AAR (active license for Station KNSY(FM)).

³⁶ 47 U.S.C. § 309(d).

³⁷ *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197, n.10 (1990), *aff'd sub nom. Garden State Broad. L.P. v. FCC*, 996 F. 2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864, para. 6 (1986) (petitions to deny and informal objections must contain adequate and specific factual allegations sufficient to warrant the relief requested).

³⁸ *See* Schedule 340 at Legal Certification, Financial; Instructions – Schedule 340 at page 12 (*Schedule 340 Instructions*); *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, Public Notice, 2 FCC Rcd 2122 (1987) (*Financial Certification PN*).

³⁹ *See Schedule 340 Instructions* at page 12.

⁴⁰ *See, e.g., Northhampton Media Associates*, Order, 4 FCC Rcd 5517, 5519, para. 15 (1989) (*Northhampton Media*).

⁴¹ *See id.*; *Schedule 340 Instructions*.

⁴² *See Texas Communications Limited Partnership et. al.*, Decision, 5 FCC Rcd 5876, 5878, para. 11 (1990); *see also George Edward Gunter*, Memorandum Opinion and Order, 104 F.C.C.2d 1363 (Rev.Bd. 1986); *Financial Certification PN*, 2 FCC Rcd at 2122 (advising applicants that processing staff may question validity of the applicant's financial certification where applicant has large number of pending broadcast applications).

⁴³ VASC explains that the President of AWR was out of the country and unable to confirm the financial commitment. *See* LOI Response at 2.

made clear that where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at the time of certification.⁴⁴ Gary Beihl's IRA Statement Overview reflects a value of \$512,840.70, and the *Gary Beihl Declaration* demonstrates that Gary Beihl intended to loan the funds from the IRA to VASC in order to fund each of the proposed stations. AC has provided no evidence to refute this. We, therefore, find VASC sufficiently demonstrated that Gary Beihl had sufficient net liquid assets available to meet his financial commitment to VASC.⁴⁵ Accordingly, we find VASC financially qualified in this proceeding.

Reasonable Site Assurance. An NCE FM applicant must have reasonable assurance that its specified site will be available for the construction and operation of its proposed facilities at the time it files its application.⁴⁶ While the Commission affords some latitude regarding reasonable assurance, there must, at a minimum, be a "meeting of the minds resulting in some firm understanding as to the site's availability."⁴⁷ A mere possibility that the site will be available is not sufficient.⁴⁸ Schedule 340 requires an applicant to certify that it has such reasonable site assurance and instructs the applicant to specify the name of the person contacted to verify the site's availability, the person's telephone number, and whether the contact is the tower owner, agent, or authorized representative.⁴⁹

Based upon the record before us, we find that VASC has sufficiently demonstrated that it had reasonable assurance of site availability at the time it filed the VASC Application. The *Crown Correspondence* establishes that VASC contacted Ms. Bassi, a representative of the tower owner, prior to filing the VASC Application and inquired about available space on the tower listed in the VASC Application. The *Crown Correspondence* further establishes that Ms. Bassi indicated that space was available on the tower listed in the VASC Application and provided VASC with a reasonable assurance letter as an attachment to the *Crown Correspondence*.⁵⁰ VASC later provided confirmation to Ms. Bassi that it included the tower specified in the *Crown Correspondence* in the VASC Application. This

⁴⁴ *Northhampton Media*, 4 FCC Rcd at 5519, para. 16.

⁴⁵ See, e.g., *Armando Garcia*, Decision, 3 FCC Rcd 1065, 1066, para. 11 (Rev.Bd. 1988), review denied, 3 FCC Rcd 4767 (1988) (finding documentation of an applicant's spouse's retirement plan sufficient to demonstrate financial qualifications).

⁴⁶ See *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427, paras. 6-7 (1974) (*Wallace*); *South Florida Broad. Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842, para. 3 (1984). While applicants are not required to have a binding agreement or absolute assurance of a proposed site, a mere possibility that the site will be available is not sufficient.

⁴⁷ *NCE MX Group 337A*, Letter Order, 26 FCC Rcd 6020, 6024 (MB 2011) (*NCE MX Group 337A*).

⁴⁸ *Wallace*, 49 FCC 2d at 1427, para. 6.

⁴⁹ See *Schedule 340* at Technical Certifications, Reasonable Site Assurance; *Schedule 340 Instructions* at page 22; 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, 12542, para. 59 (2019).

⁵⁰ We note that VASC mentions that the "reasonable assurance letter" that was attached to the *Crown Correspondence* has "been lost in Mr. Parle's email files and is no longer available to Ms. Bassi." See LOI Response at 1. Notwithstanding VASC's inability to produce the reasonable assurance letter referenced in the *Crown Correspondence*, based on the preponderance of evidence, we find the *Crown Correspondence* sufficiently details the tower owner's assurance of site availability.

evidence sufficiently demonstrates VASC had reasonable site assurance at the time it filed the VASC Application.⁵¹

De Facto Control. Finally, we reject the remaining argument—that Elijah Radio, Luke Rogers, or AWR has exercised *de facto* control over the VASC and that either is the real party-in-interest behind the VASC Application—as unsupported.⁵² The pleadings posit that the VASC Application was designed by Luke Rogers, president of Elijah Radio, to circumvent the 10-application cap because Elijah Radio previously filed 10 applications in the 2021 NCE FM filing window.⁵³ The Commission analyzes *de facto* control issues on a case-by-case basis.⁵⁴ In determining whether an entity has *de facto* control of an applicant or a licensee, we examine the policies governing station programming, personnel, and finances.⁵⁵ A broadcast entity's surrender of control over any one of these indicia to another is sufficient to find that the other entity has *de facto* control.⁵⁶

The Petition bases its allegation of *de facto* control on the fact that (1) a familial relationship exists between Beihl and Elijah Radio's vice-president, Thomas Beihl, and (2) Luke Rogers, VASC's consulting engineer, is listed as a contact representative on the VASC Application and numerous other applications filed in this window. However, the Commission has long recognized that familial and business relationships, standing alone, are insufficient to create real-party-in-interest or unauthorized transfer of control problems.⁵⁷ Similarly, the Commission has been clear that similarities in applications prepared by a third-party, such as using the same consultant, do not demonstrate common control of applications.⁵⁸ We have previously noted that it is common for multiple applications to have the same consultants.⁵⁹ Moreover, Luke Rogers submitted a declaration to the Bureau, under penalty of perjury, stating that neither he nor Elijah Radio has any ownership interest in VASC, nor has he or Elijah Radio exercised “any de jure or de facto control over” VASC.⁶⁰ We similarly find that AC has presented no specific details or evidence to support its claims that AWR may be the real party in interest behind the VASC Application. Accordingly, we find that AC's allegations, absent any concrete indicia of common control or influence, is insufficient to establish that VASC has abdicated control to another person or

⁵¹ See *Eagles Nest Fellowship Church*, Letter Order, 23 FCC Rcd 862, 865 (MB 2008). The fact that IPR alleges in the Objection that its antenna is currently installed at the location specified in the VASC Application does not negate VASC's good faith reliance on the reasonable assurance that it received in the *Crown Correspondence* prior to filing the VASC Application.

⁵² See Petition at 5-7; AC LOI Reply at 6-10.

⁵³ *Id.* Pursuant to the cap, no party may have an attributable interest in more than ten applications. See 47 CFR § 73.503(g); *NCE Cap Public Notice*, 36 FCC Rcd at 7758, para. 12. An entity or party with *de facto* or *de jure* control over an applicant would necessarily have an attributable interest. See, e.g., *The Helpline*, Letter Order, 23 FCC Rcd 12665, 12670 (MB 2008).

⁵⁴ See *Shareholders of Hispanic Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18843 (2003); *Arnold L. Chase*, Initial Decision, 6 FCC Rcd 7387, 7409, para. 158 (ALJ 1991) (*Arnold Chase*).

⁵⁵ See, e.g., *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) (“Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.”).

⁵⁶ *Id.*

⁵⁷ *Arnold Chase*, 6 FCC Rcd at 7409, para. 160.

⁵⁸ See, e.g., *Mt. Zion Educ. Assoc.*, Letter Order, 25 FCC Rcd 15088, 15091-92 (MB 2010).

⁵⁹ *Eternal World Television Network, Inc.*, Letter Order 24 FCC Rcd 4691, 4692 (MB 2009).

⁶⁰ *Luke Rogers Declaration* at 1.

entity, or that the VASC Application is an attempt to circumvent the 10-application rule.

Conclusion/Actions. For the reasons set forth above, **IT IS ORDERED** that the Petition to Deny filed by Augustana College on November 25, 2022 (Pleading File No. 0000204282), IS **DENIED**.

IT IS FURTHER ORDERED that the Informal Objection filed by Iowa Public Radio, Inc. on June 22, 2022 (Pleading File No. 0000217055) IS **DENIED**.

IT IS FURTHER ORDERED that the application filed by Vanguard Association of Sunbelt Colleges Corporation (Application File No. 0000167716) IS **GRANTED 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.

IT IS FURTHER ORDERED that the mutually exclusive application of Augustana College (Application File No. 0000166936) IS **DISMISSED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau