

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

EB Docket No. 03-152

WILLIAM L. ZAWILA

Facility ID No. 72672

Permittee of FM Station JBGS,
Coalinga, California

AVENAL EDUCATIONAL SERVICE, INC.

Facility ID No. 3365

Permittee of FM Station KAAX,
Avenal, California

**CENTRAL VALLEY EDUCATIONAL
SERVICES, INC.**

Facility ID No. 9993

Permittee of FM Station KYAF,
Firebaugh, California

**H. L. CHARLES d/b/a FORD CITY
BROADCASTING**

Facility ID No. 22030

Permittee of FM Station KZPE,
Ford City, California

**LINDA WARE d/b/a LINDSAY
BROADCASTING**

Facility ID No. 37725

Licensee of FM Station KZPO,
Lindsay, California

**WESTERN PACIFIC
BROADCASTING, INC.**

File BR-19970804YJ
Facility ID No. 71836

For Renewal of License for AM
Station KKFO, Coalinga, CA

TO: Marlene H. Dortch, Secretary
Attn: Richard L. Sippel, Chief Administrative Law Judge

OPPOSITION TO ENFORCEMENT BUREAU'S

SUPPLEMENTAL MOTION TO ADD ISSUES WITH PROPOSED ORDER

Central Valley Educational Services, Inc. (CVES) and Avenal Educational Services, Inc.,

(AES) by their attorney here lodge their opposition to the motion to add issues, submitted by the Enforcement Bureau (“EB”) on June 18, 2015. In brief summary, (1) the Motion is based on an incorrect legal assertion that noncommercial applicants filing in the non-reserved band must be incorporated at the time of filing. (2) The motion is procedurally defective, because it is filed more than 30 days after the issuance of the designation order, without any statement of good cause for late filing, Sec. 1.229(3) of the Rules and Regulations. (3) The Motion is procedurally defective, because it fails to set forth specific allegations of fact sufficient to support the action requested, Section 1.229(d) of the Rules.¹ Finally, the issues may not be added because the Commission lacks any authority to impose sanctions in the matter, given the passage of time and the statute of limitations, 28 U.S.C. Section 2462. We begin with the eligibility issue, which occupies the bulk of the motion, and is based on a core legal proposition that is not correct.

THE COMMISSION NEVER HAS REQUIRED A NONCOMMERCIAL APPLICANT IN THE NONRESERVED BAND TO BE INCORPORATED AT THE TIME OF FILING.

The privilege of being licensed as a noncommercial entity, either in the reserved noncommercial band or as a low power FM (all of them noncommercial) is limited to “eligible” entities, as provided in Section 397(6)(A) and (B) of the Communications Act, 47 U.S.C. Sec. 398(6). But here, AES applied for and was granted a construction permit in the non-reserved band, on Channel 295 (106.9 MHz). CVES applied for and was granted a construction permit in the non-reserved band on Channel 234 (94.7 MHz).

In low power FM the requirement that an entity be organized under state law at the time of filing is codified in the Rules, Sec. 73.853(a) of the Rules². All of the cases cited in the Motion,

¹ The moving papers note that these parties and Mr. William L. Zawila have been engaged in settlement talks. More recently, we presented M. Zawila with a written outline of points toward a settlement. In the compressed timetable imposed here, it has not been possible to determine whether or not such contacts might be productive. They are ongoing.

² Sec. 73.854(b) Only local organizations will be permitted to submit applications and to hold authorizations in the LPFM service. For the purposes of this paragraph, an organization will be deemed local if it can certify, at the time of application, that it meets the criteria listed below and if it continues to satisfy the criteria at all times thereafter. * * *

fn 11, concern LPFM and thus are not on point. For the general proposition that noncommercial applicants must have their corporate existence confirmed prior to filing, the Motion cites on case, *Hammock Environmental and Educational Community Services*, 25 FCC Rcd 12804 (2010). That case is weak authority because the applicant there was an unincorporated association at the time of initial filing, and the staff action relied, in part, on the recognition that Florida law recognizes non-profit unincorporated associations (see fn. 19), as California law does here.

The essential difference, however, is that the Hammock application was for Channel 207 (89.3 MHz) in the reserved educational band. The present applications were not. As such their status could be changed by minor amendment from non-commercial to commercial, from unincorporated to incorporated, with no violation of Commission rules or policy. This issue was analyzed in 2013 by the full Commission, in consideration of six LPFM applications, *Applications for Review of Decisions Regarding Six Applications for New Low Power FM Stations*, FCC 13-116 released on August 23, 2013. An LPFM applicant had cited precedent for the idea that “lapses in an applicant’s formal existence” had no impact upon an applicant’s qualifications to become or continue to be a Commission licensee. The Commission stated:

The cases involving lapses in formal existence cited by [Applicant A and Applicant B] are not on point, however, because they relate to commercial frequencies and accordingly do not involve the issue of statutory eligibility to operate as an NCE station, including an LPFM facility, under Section 397(6)(A) of the Act. [Id. Para. 13]³

The motion cites Section 73.503 of the Rules, to the effect that “a noncommercial educational FM broadcast station will be licensed only to a non-profit educational organization and upon a showing that the station will be used for the advancement of an educational program.” If these applicants choose to continue as noncommercial stations, and not switch over to commercial, the

3 Noting in footnote (fn. 45): “Unlike a non-reserved band FM station, an LPFM station must operate as an NCE station, and thus an LPFM station must maintain NCE eligibility at all times. LPFM R&O, 15 FCC Rcd. [2205] at 2213 and n.33.”

issue of qualification under Section 73.503 can be reached upon an application *for license*, as the rule says. Under Commission rules and policies, their initial applications were properly accepted for filing.⁴ Section 73.503 also must be read in its proper context, adjacent to Sec. 73.501, which created a dedicated noncommercial educational band.

In summary, the argument in the Motion regarding basic eligibility ignores the fact that these applications were in the non-reserved band. The Commission has made the distinction explicit for initial application purposes, and there is no precedent to support the approach taken in the Motion. The cited LPFM cases are triply inapposite, involving a different service, with different rules, much later in time. This factor disposes of approximately two thirds of the Motion, paras. 5 through 8 at pages 4 – 6. The revocation issue at p. 10, with its subparts (a) through (d) should not be added.

THE MOTION IS PROCEDURALLY DEFECTIVE, BECAUSE IT IS FILED MORE THAN 30 DAYS AFTER THE ISSUANCE OF THE DESIGNATION ORDER, WITHOUT ANY STATEMENT OF GOOD CAUSE FOR LATE FILING, SEC. 1.229(3) OF THE RULES AND REGULATIONS.

The Commission's rules provide that a motion to enlarge issues may be filed by any party, but such motion must be filed within 15 days after the full text or summary of the order designating the case for hearing has been published in the Federal Register, Sec. 1.229(a) of the Rules. The HDO herein was adopted by the Commission on July 1, 2003, released July 16, 2003, and presumably appeared in the Register shortly thereafter. The present motion should have been filed in 2003 and would appear to be approximately twelve years late.

The rules provide that a late motion must be accompanied by a showing of good cause for

⁴ On February 20, 1990, CVES submitted an amendment that included a detailed statement of educational purpose, as requested by the staff. Thereafter the construction permit application was granted, on November 4, 1994.

late filing, and the motion will be granted only if good cause is shown, Sec. 1.229(b)(3).⁵ In the case of newly discovered facts, the motion is to be filed within 15 days after such facts are discovered by the moving party. The present motion does not contain any good cause showing.

With respect to the issue of corporate existence prior to the original applications by CVES and AES, we have shown that the entire issue is founded upon a mistaken conclusion of law, and cannot be justified. But if it were justified, it comes too late. The original HDO at fn. 19 noted that AES was not incorporated until March 5, 1999. At fn. 29 it noted that CVES was not incorporated until January 29, 2001. So because there are no newly discovered facts as to this issue the Motion comes twelve years too late.

THE MOTION IS PROCEDURALLY DEFECTIVE, BECAUSE IT FAILS TO SET FORTH SPECIFIC ALLEGATIONS OF FACT SUFFICIENT TO SUPPORT THE ACTION REQUESTED, SECTION 1.229(D) OF THE RULES.

With respect to the proposed order to show cause (p. 9) directed to Zawila, to show cause that he was an owner, etc. of the applicants, we merely state that the allegations of misconduct by Zawila throughout the HDO can stand alone, to determine according to evidence adduced at hearing whether or not he can be a Commission licensee, without the need for an ownership issue.

With respect to the proposed order to show cause directed to AES (p. 9) and to CVES (p. 10), to show cause why Zawila was not an owner, etc., the motion is procedurally defective because it is not based on "specific allegations of fact sufficient to support the action requested," Section 1.229(d). Instead it is based exclusively on a single paragraph, para. 4 at p. 3, devoid of fact and rife with speculation and surmise:

⁵ "(3) Any person desiring to file a motion to modify the issues after the expiration of periods specified in paragraphs (a), (b)(1), and (b)(2) of this section shall set forth the reason why it was not possible to file the motion within the prescribed period. Except as provided in paragraph (c) of this section, the motion will be granted only if good cause is shown for the delay in filing. Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party."

If, for example, someone other than Mr. Zawila controlled Avenal and Central Valley, and/or was responsible for operating Stations KAAX (FM) and KYAF (FM), then there is a question as to whether Mr. Zawila was properly named in these issues and whether additional individuals or entities should participate as parties.

This is putting the cart before the horse. During the course of hearing on the present HDO, without new issues, the judge will determine whether the numerous allegations of misconduct by Zawila are true or false, in whole or in part. In that process, it will be determined whether any of the items of misconduct were done with the knowledge, consent or ratification of the owners of AES and CVES separately, whoever they may be. Only if so would issues possibly be warranted against others.⁶

We do not agree that the ownership and control of AES and CVES are “central to the issues designated in this proceeding,” para. 4. While it may ultimately be determined that Zawila is unfit to be a Commission licensee, AES and CVES have long since sought to divest themselves of his interests and roles, if any. If it is adjudged that they have not succeeded in such disassociation, the judge and the Commission can do that for them. Note that to this date, neither in the HDO nor in the Motion is there any issue of specified misconduct against anyone but Zawila. The question of licensee culpability is wholly derivative of what may turn up in the evidence against Zawila, and need not be added by a new Motion.

The proposed ordering clauses are problematic, and not in compliance with Sec. 1.229(d). AES and CVES are “DIRECTED TO SHOW CAUSE why Mr. Zawila was not an owner, officer, or individual who controlled the operations . . . and/or was not authorized to serve as counsel for,

⁶ As a practical matter the quest for true ownership, as proposed in the Motion, is likely to be a fool's errand, all but impossible to positively conclude. The key witness with respect to the AES allegations, other than Zawila himself, would be Ray Knight, HDO paras. 37 – 48. No issues were specified against Mr. Knight but now Mr. Knight is deceased. The original signatory of the application for the station that became KYAF (FM), was Linda Ross, President/Secretary and now, deceased. Zawila himself is nothing if not a grand master of the self-serving utterance. Motion, p. 3: “With a number of discovery tools at its disposal, the Bureau is uniquely positioned to investigate the question of Avenal and Central Valley's ownership and control.” With all due respect, we doubt this is true.

or otherwise represent. . . .” Initially the operative “why” renders the ordering clause nonsensical. Why Zawila was in any of these roles is immaterial. Second, it places the burden on these entities to prove a negative regarding matters occurring fifteen years ago – an all but impossible task. Nor is it stated what the adverse consequences would be if, as is likely, the proof cannot be made. Third, it seeks an issue of control during the time periods of the HDO “and at all times thereafter.” If this is relevant, its relevancy is not explained. The pervasive flaw in this formulation is that, in disregard of Sec. 1.229(d), it is not moored to any allegation of fact.

THE NEW ISSUES WITH RESPECT TO CVES AND AES ARE BARRED AS THE RESULT OF THE PASSAGE OF TIME AND THE STATUTE OF LIMITATIONS, 28 U.S.C. SECTION 2462.

Commission proceedings resulting in sanctions are governed by two statutes of limitations. Under Section 503 of the Communications Act, 47 U.S.C. Sec. 503, the Commission may levy forfeitures going back to the beginning of the current license term, or for one year, whichever is earlier. Because AES and CES are permittees and their stations never have been licensed, proceedings are not cut off by this limitation.

The other limitation is 28 U.S.C. Section 2462, which provides:

Except as otherwise provided by an Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender and the property is found within the United States in order that proper service may be made thereon.

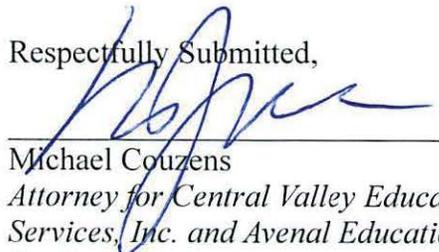
In the communications practice, this statute generally has been held only to limit the ability of the Agency to secure the help of the Justice Department and the Federal Courts to enforce a previously imposed forfeiture amount where the offender has refused to pay. Cases precedent are all but unknown because the Commission and staff have done everything they could to assure that no case comes before the court that could confirm the statute's plain meaning and sweep away a mountain of pending forfeiture proceedings. To avoid this result, a finding of continuing violations and, if need be, settlements and consent decrees are commonly employed.

The present case is an appropriate test for the applicability of this statute. By its terms the statute reaches sanctions“pecuniary or otherwise.” The Motion proposes to add issues at least twelve years after the occurrences that would give rise to them. The impracticality and unfairness of the approach is evident, and there is no need to guess as to reasons that a statute of limitations makes eminent sense. The question to be resolved is whether, given Statute 2462, any ultimate disqualification of AES or CVES in this proceeding would be held on appeal to the Circuit Court of Appeal to be null and void. In this case, the statutory limitation probably is not reached because the proposed issues are improper because they are not based on any adverse allegations of fact, and so they cannot be added in the first place. But if they were, a valid question is posed whether or not they would be voided on appeal.

For these reasons, the Motion, with its grossly untimely addition of proposed issues, should be denied.

Dated: June 24, 2015

Respectfully Submitted,



Michael Couzens
Attorney for Central Valley Educational Services, Inc. and Avenal Educational Services, Inc.

Michael Couzens, Attorney at Law
6536 Telegraph Avenue, Suite B201
Oakland, CA 94609
Telephone (510) 658-7654
Fax (510) 654-6741
E-mail: cuz@well.com

CERTIFICATE OF SERVICE

I, Dennis Vidal, a paralegal at Michael Couzens Law Office, do hereby certify that on this 24th day of June, 2015, I sent copies of the foregoing document "OPPOSITION TO ENFORCEMENT BUREAU'S SUPPLEMENTAL MOTION TO ADD ISSUES WITH PROPOSED ORDER" to the following:

The Honorable Judge Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street Southwest
Washington, D.C. 20554

Austin Randazzo
Office of Administrative Law Judge
Federal Communications Commission
445 12th Street Southwest
Washington, D.C. 20554

William Zawila, Esq.
12600 Brookhurst Street, Suite 105
Garden Grove, CA 92804

Pamela S. Kane
Special Counsel
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street Southwest, Room 4-C366
Washington, D.C. 20554

Judy Lancaster
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street Southwest
Washington, D.C. 20554

Date: June 24th, 2015


Dennis Vidal