

**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

**REPLY TO ENFORCEMENT BUREAUS OPPOSITION TO MOTION TO
STRIKE**

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

(AES) by their attorney here reply to the Enforcement Bureau's Opposition to our Motion to Strike. The opposition deftly describes our motion to strike as “nothing more than a thinly disguised sur-reply,” p. 3. It is difficult to dispute that, but we could not think of what else to do. We were confronted with a reply, the final stage of a pleading cycle, that the proponents knew, or should have known, insisted on a dispositive legal conclusion that is simply wrong. The requested issue is not merely the foundation for a factual inquiry at an evidentiary hearing. Rather it is a legal assumption that, if accepted, would result in the summary dismissal of this permittee's authorizations, and derivatively would terminate their rights in the hearing. Even if our time had run out, lodging a protest against a faulty legal argument seemed to us far preferable to running the risk of the presiding judge crediting the argument of these fine Enforcement Bureau attorneys -- as routinely he should -- issuing an adverse decision, terminating our rights, and our having to obtain the reversal of a bad legal conclusion on appeal.¹

These permittees made application in the non-reserved band. They are in compliance with 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.” *Licensed*. Not at initial application. There will be time enough to examine the non-commercial qualification issue when license applications are being considered.

The proponents have never addressed our claim that the issue of post-application incorporation comes too late because these are old facts that were expressly set forth in the old

¹ Section 1.301 of the Rules. “Appeal from presiding officer's interlocutory ruling; effective date of ruling.

(a) Interlocutory rulings which are appealable as a matter of right. Rulings listed in this paragraph are appealable as a matter of right. An appeal from such a ruling may not be deferred and raised as an exception to the initial decision.

(1) If the presiding officer's ruling denies or terminates the right of any person to participate as a party to a hearing proceeding, such person, as a matter of right, may file an appeal from that ruling.”

HDO here. They seek to avoid this by citations to subsequent evolving decisional law. We are objecting to the wholesale importation of this law from another service, Low Power FM, without even candidly acknowledging the sleight of hand. In the fn. 25 that we asked to be stricken all the cases refer to LPFM and yet are referred to by the proponents as NCE cases. The present opposition to our motion to strike, incredibly, doubles down on that mistake, repeating these faulty legal claims in fn. 13.

Does the LPFM versus non-reserved band NCE difference matter? The Commission when it adopted the rules for LPFM has this to say:

As discussed below we will license LPFM stations to operate in both reserved and non-reserved portions of the FM band. Nevertheless, the same basic eligibility and noncommercial service restrictions will apply to all LPFM stations, regardless of the portion of the FM band in which they are licensed to operate. In this regard, LPFM NCE stations *will be different from full-service NCE stations that operate in the non-reserved band. The latter can convert from NCE status to commercial status at will* by filing a notification letter with the Commission, but LPFM stations will not be permitted to change their noncommercial status.²

Given this, the absolute requirement of incorporation from LPFM, imported anew by the proponents here to NCE's in the non-reserved band, has no basis in law or logic. If this status is freely changeable, why do we need to make up a shiny new rule requiring full pre-filing documentation for the choice of a particular status?

The opposition to motion to strike states that the fact that these stations have not converted to commercial means that their ability to do so at whim does not matter. This is sophistry. As non-reserved band permittees they have always possessed different regulatory status from LPFM's. That was true equally when they made initial application and it is true today. Why is this so difficult?³

2 Creation of a Low Power Radio Service, Report and Order, 15 FCC Rcd. 2205 at 2014 fn. 33 (2000), emphasis added.

3 NCE Mx Group No., 409, DA 15-717 (MB, rel. June 19, 2015, citing at fn. 35 *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 17 FCC Rcd 13133-34 (2002): (“Stations operating with noncommercial formats on commercially available channels do so at the discretion of the licensee and can easily convert to commercial

It is understood that the role of the attorney is to make the best argument for the client. Certainly the work of the private bar is rife with examples of zealousness going to excess. One need only look within the four corners of this Docket to see certificated private attorneys presenting work product that is outlandish. But high government officials and, especially, government attorneys should be able to stay within somewhat different guideposts. They have no need to “win” any case provided justice is served. If the rules, policies and cases do not support their position, it is entirely appropriate for them to urge that policy be changed. But it crosses a line to persist in a legal contention after it is shown to be wrong.

Because fn. 25 is nothing but a compendium of badly mischaracterized and mis-stated cases, it should be stricken. In the new Opposition, the proponents are just repeating their errors of law one more time. The Movant bears the burden or proof on the new issue of summary dismissal. The argument, based this false comparison, fails.

Dated: July 17, 2015



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operations by filing a minor change application. In contrast, noncommercial educational operations are mandatory on the channels reserved for that purpose.”); and *see Hope Radio of Rolla, Inc.*, 27 FCC Rcd 7754, rel. May 14, 2013, where the full Commission distinguished a case in which a non-reserved band licensee was permitted to assign its license despite lapses of status, holding that *by contrast*, “an LPFM applicant's status as a valid non-profit organization at the time it files its application is fundamental to our determination. . . .” *Id* at para. 3. The *Rolla* case, which is fatal to the proponents' legal argument, was cited in the their motion for the proposition that all NCE's (in whatever frequency band) must be incorporated prior to initial application.

CERTIFICATE OF SERVICE

I, Michael Couzens, do hereby certify that on this 17th day of July, 2015, I sent copies of the foregoing document "MOTION TO STRIKE" by First Class Mail, with postage prepaid, to the following:

The Honorable Judge Richard L. Sippel
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