

**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 KBGS,
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. 71936

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

TO: Chief Administrative Law Judge

REQUEST FOR PERMISSION TO FILE APPEAL (47 C.F.R. Sec. 1.301(b))

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

Avenal Educational Services, Inc., (AES or Avenal) by their attorney (collectively, “Movants”) here request permission to file an appeal to the full Commission of the judge's Memorandum Opinion and Order FCC 16M-01 released on January 12 (“MO&O”). This request is made pursuant to Section 1.301(b) of the Commission's Rules and Regulations, 47 C.F.R. Sec. 1.301(b). The appeal would be limited to the so-called eligibility issue, paras. 5 to 8, and to the intended new issues (b), (c), and (d) in para. 9. If permitted, the appeal will leave undisturbed issue (a) in para. 9, regarding ownership and control of Movants during the events described in the original Hearing Designation Order.

As grounds for appeal, Movants will show that the MO&O failed to take into consideration the dispositive fact that Movants' facilities were applied for and granted in the non-reserved band. As such, every scrap of legal authority relied on in the decision was immaterial to the result. The result is dead wrong. Indeed the term “non-reserved” was not even mentioned in the MO&O. As a corollary, a remand will be required to instruct the judge to make no inquiry into character issues, based on the untimely reporting of immaterial fact.

Movants are the permittees of two noncommercial educational FM stations in the non-reserved band, KAAX and KYAF. Their participation in this case is limited to an interest in having these stations fully licensed. Other issues here with respect to other stations, and allegations of numerous derelictions by William L. Zawila are of no interest to Movants one way or the other.

The MO&O promises future action to terminate our authorizations, but with no good grounds to do so. As stated in MO&O para. 8, the record is considered complete and it only remains to add issues and then terminate these authorizations as a matter of law. Because the cited law lends no support to this result, the decision must be vacated, either by judge or by the Commission on appeal.

AES applied for and was granted a construction permit for a full service (not LPFM) station in the non-reserved band, on Channel 295 (106.9 MHz). CVES applied for and was granted a construction permit for a full service (not LPFM) station in the non-reserved band, on Channel 234 (94.7 MHz). The MO&O recognizes that CVES has on file articles of incorporation as a non-profit entity, and is presumptively qualified to become a non-commercial licensee, para. 6. The MO&O recognizes that AES has on file articles of incorporation as a non-profit entity, and is presumptively qualified to become a non-commercial licensee, para 7. The only question in this recent order is whether articles were required to be filed with the State prior to the submission of these applications to the Commission, for frequencies in the non-reserved band. Commission policy statements and cases definitively say this is not required. The MO&O concludes the opposite.

A. LICENSING POLICIES IN THE RESERVED BAND AND THE NON-RESERVED BAND ARE NOT THE SAME.

The FM band has been designated as that portion of the radio frequency spectrum between 88 MHz and 108 MHz. It is divided into 100 channels of 200 kHz each, Subpart B of Part 73, beginning with Sec. 73.201 of the Rules. Of those

channels the first 20, from 87.9 MHz to 91.9 MHz are set aside for noncommercial educational FM broadcasting, Subpart C of Part 73, beginning with Sec. 73.501 of the Rules.

Subpart C eligibility is strictly limited:

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. (47 C.F.R. Sec. 503(a)).

Use of the noncommercial band is considered a privilege, limited only to those entities who meet the qualification standard set forth in Section 73.503 of the Rules as well as in the Public Broadcasting Act, 47 U.S.C. Sec. 397(6)(a). In the non-reserved band, however, individuals, unincorporated associations, for-profit entities and non-profit entities alike may apply. An entity may choose non-profit status. Or it can change its designation from for-profit to non-profit or vice versa, except in the rare case where the channel was reserved for noncommercial service (with an asterisk), or where the licensee had met the strict standards to have its specified channel reserved as noncommercial, Sec. 73.202(a)(1).

The Commission highlighted these differences in the Report and Order, *Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000), in its discussion of the choice to make all LPFM noncommercial:

[W]e will license LPFM stations to operate in both reserved and non-reserved portions of the FM band. Nevertheless, the same 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 on 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,** 15 FCC Rcd. At 2213, fn. 33. [Emphasis supplied]

The Commission had occasion to revisit this language in the adjudicatory context in 2013, *Application for Review of Decisions Regarding Six Applications for New Low Power FM Stations*, 128 FCC Rcd 13390 (August 23, 2013) (“*Six Applications*”). Appellants had argued that dismissal of their applications was contrary to precedent, citing *Fatima Response, Inc.*, 14 FCC Rcd 18543 (1999). In that case a noncommercial licensee was permitted to assign its license even though it had not continuously maintained its corporate existence. The Commission stated that *Fatima* was distinguishable, because the LPFM applicants could only qualify for an LPFM authorization by being valid non-profit educational organizations at the time of application filing and at all times, citing Sec. 73.853 off the Rules. In contrast, the Commission said, was the assignor in *Fatima*, seeking consent to assignment of a *non-reserved band NCE station license* (Id. At para. 14). **“Unlike a non-reserved band FM station,** an LPFM station must operate as an NCE station, and thus an LPFM licensee must maintain eligibility at all times. LPFM R&O, 15 FCC Rcd at 2213 and n.33” *Six Applications, supra*, note 45. [Emphasis added.]

Here the MO&O cites *Six Applications* (at 13394) for the proposition that NCE applicants and LPFM applicants must demonstrate their legal existence under pertinent state law at the time the application is filed. This ignores the fact that *Six*

Applications itself recognizes (at 13395) that the policy is inapplicable to non-reserved band applicants. Another decision cited in the MO&O at fn. 11 is no help either, because it involved an applicant for a reserved NCE channel, Channel 207 (89.3 MHz), *Hammond Environmental and Educational Community Services*, 25 FCC Rcd 12804 (September 10, 2010).

B. LPFM QUALIFICATION CASES HAVE NO APPLICABILITY TO THE NON-RESERVED BAND.

Commission rules require of an LPFM applicant that it be able to certify its eligibility “at the time of application” under the criteria for a local organization, Sec. 73.853(b).¹ In LPFM timely preparation and submission of organizational documents prior to making application is necessary because of that express rule. Additionally competing applications in LPFM are resolved through a “paper hearing” using a point system, Sec. 73.7001. (Non-reserved band channel conflicts, on the other hand, are sent to an auction.) In the point system local existence, as confirmed by corporate documents, is an important comparative factor, Sec. 73.7003. This regulatory scheme would not work if applicants' position were subject to upgrading after the initial filing. In LPFM, applicants must submit complete copies of documents establishing their non profit status, such as corporate charters or articles. “Applicants that fail to provide these materials are subject to dismissal,” Instruction to Form No. 318, Section II, Question 2. In conclusion,

¹ Sec. 73.853(b): “Only local organizations will be permitted to submit applications and to hold authorizations in the LPFM service. For 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.”

precedents in LPFM regarding the timeliness of legal structure documentation fall under a different express rule and different policies and have no applicability to applicants in the non-reserved band.

The MO&O here pervasively confuses LPFM with NCE. In fn. 12 it cites *Hope Radio of Rolla, Inc.* 28 FCC Rcd 7754 (2013) , but paraphrases. The decision states: “[T]o be eligible to hold such an authorization, an LPFM applicant. . .” This is paraphrased in the MO&O as “to be eligible to hold an authorization for an NCE service.” The MO&O cites *WTL Communications, Inc.*, 23 FCC Rcd 2575 (2008) as “dismissing application for a NCE station because the applicant was not incorporated” – yet the case only concerned LPFM, not NCE. Finally, the MO&O cites *Sonido International Cristiano, Inc.*, 23 FCC Rcd 2444 (2008) “dismissing application for NCE station because the applicant was not incorporated” again substituting NCE when the case concerned LPFM only.²

No case exists holding that, in the non-reserved band, a noncommercial applicant must have its organizational form completed and shown prior to initial filing. The MO&O here has adapted and implemented this policy from other areas without justification, and masked the extension with word games. No such policy or precedent is cited here and no such policy or precedent exists.

² This issue was briefed after the Enforcement Bureau sought an enlargement of issues on this documentation point. The confusion between LPFM and NCE has its provenance in Enforcement Bureau briefing that willfully persisted in the error, even after the discrepancy was pointed out. While this may tend to mitigate blame for the judge's mechanical repetition of these mistakes, it does not explain his abject failure in the MO&O to so much as mention the non-reserved band.

C. NO GOOD POLICY REASON EXISTS TO CREATE A TIMELY DOCUMENTATION REQUIREMENT FOR NON-RESERVED BAND APPLICANTS.

Unlike an applicant in the reserved band, or on a reserved channel, or in LPFM, an applicant choosing in the non-reserved band to be a noncommercial entity receives no special preference or benefit of any kind. If its application is mutually exclusive, it is referred for an auction, and not for point-system comparison. Movants' construction permits can be modified by simple notification to the Commission from commercial to noncommercial, and may be assigned upon application to any qualified individual, or unincorporated association, to another non-profit corporation or to a for-profit corporation. The pre-filing documentation requirement, essential for good reason in other services, has no purpose here. In any case, should it be thought for any reason that early documentation ought to be required, the change is best implemented through notice-and-comment rule making, and not by the misapplication of case law in an adjudicatory proceeding.

D. NO GROUNDS ARE STATED FOR ADDING A MISREPRESENTATION ISSUE.

The MO&O states that “there remain questions of demeanor and affirmative misrepresentation to be heard [for Central Valley] as in the case of Avenal, para. 7.”³ For many reasons this assessment is ridiculous.

First, actionable misrepresentation must involve either an intent to deceive

³ The reference to “demeanor” is puzzling. Generally it is a term with respect to a live witness, and “relates to physical appearance, outward bearing or behavior.” Black's Law Dictionary, 6th Ed. It is not a recognized basis for any Commission sanction or forfeiture. Here the MO&O has stated (para. 8) that the further adduction of evidence is not necessary.

or the submission of “material” information that is incorrect, see Section 1.17(a) of the Rules. As we have seen, the untimely submission of incorporation materials was not material to any issue. It is obvious that there was no intent to deceive, because no benefit ensued from the statement being inaccurate at the inception.

Second, in the non-reserved band timely document submission and perfection of a non-profit form are not required. An applicant cannot be sanctioned for a reporting violation that falls within a policy that does not exist.

Third, apparently, the timeliness of document submission in the non-reserved band is not a simple matter. Indeed, in this case, it appears that the Enforcement Bureau staff does not understand it. Even if the rule were otherwise, to hold an applicant to full understanding and assume “intent to deceive” would be ridiculous.

Fourth, Commission cases in no way support such a harsh result as a misrepresentation finding. In one recent case, an applicant for LPFM certified its qualifications, and placed an “Inc” beside its name, even though it was not incorporated. In LPFM this statement was considered material and misleading. But the staff determined that the appropriate course was to “admonish the applicant for providing misleading information,” *Space Coast Community Voice Radio, Inc.* (MB, rel. August 5, 2015).⁴

Fifth, the supposed “misrepresentation” as to Avenal ended with its

⁴ Also see *Abundant Life Inc.* (FCC 01-61, rel. February 26, 2001) another LPFM case where timing of corporate actions was critical [Applicant “should have been more punctilious in verifying its corporate status.” However, incorrect claim as to date of incorporation did not indicate intent to deceive.]

incorporation in 1999 (MO&O, para. 6). The supposed “misrepresentation” by Central Valley ended with its incorporation in 2001. The entirety of the alleged misconduct took place more than ten years ago, indeed 15 years ago or more. The Commission's established policy is that FCC-related conduct which has occurred more than ten years ago should not be considered, *Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order and Policy Statement*, 102 FCC 2d 1179 (1986) at 1229 (the “*Character Policy Statement*”). The chief administrative law judge lacks authority to make findings or conclusions based on these ancient alleged misdeeds.

D. CONCLUSION

For the reasons stated, the chief administrative law judge should vacate the MO&O, FCC 16M-01. If he does not do so, permission is sought to appeal the action to the full Commission, so that they may provide such guidance as they consider appropriate, under the fact and argument to be presented.

Respectfully submitted,



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CERTIFICATE OF SERVICE

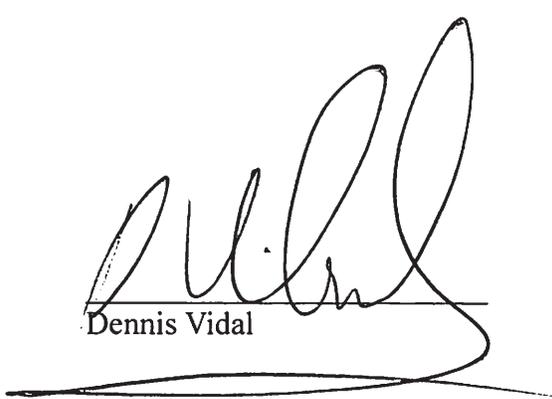
I, Dennis Vidal, a paralegal at Michael Couzens Law Office, certify that on this 14th day of January, 2016, I sent copies of the foregoing "REQUEST FOR PERMISSION TO FILE APPEAL (47 C.F.R. Sec. 1.301(b))" via first-class mail to:

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