

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

**FCC 16M-23
10636**

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 SERVICES, 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)	

MEMORANDUM OPINION & ORDER

Issued: July 25, 2016

Released: July 25, 2016

I. Procedural Background

1. On January 14, 2016, Mr. Michael Couzens, on behalf of Avenal Educational Services, Inc. (“Avenal”) and Central Valley Educational Services, Inc. (“Central Valley”), filed

a Request for Permission to File Appeal of the Presiding Judge’s *Memorandum Opinion and Order*, FCC 16M-01 (rel. Jan. 12, 2016) (“*MO&O*”).

2. In the *MO&O*, the Presiding Judge instructed the parties that he would add issues to the *HDO*¹ regarding “whether Avenal and/or Central Valley were or were not qualified to hold permits for Stations KAAX (FM) or KYAF (FM) at the time they submitted their respective applications.” *MO&O* at 3, para. 5. Subsequently, in *Order*, FCC 16M-02 (rel. Feb. 2, 2016), the Presiding Judge directed Avenal and Central Valley to show cause “why the construction permits for Stations KAAX(FM) and KYAF(FM) . . . should not be REVOKED . . . and the pending applications for licenses to cover these permits DISMISSED,” as part of the effort to determine:

(d) . . . whether Avenal Educational Services, Inc. was a qualified applicant pursuant to Section 73.703(a) of the Commission’s rules at the time it filed its application for the construction permit for Station KAAX([F]M); . . . [and]

(g) . . . whether Central Valley Educational Services, Inc. was a qualified applicant pursuant to Section 73.703(a) of the Commission’s rules at the time it filed its application for the construction permit for Station KYAF (FM)

Id. at 2-3.²

II. Factual Background

3. Avenal and Central Valley filed construction permit applications for NCE stations in the non-reserved band. Yet only the first page of Avenal’s construction permit application is currently in the record.³ *See* Ex. 5 to Zawila’s Second Objection to Evidence Regarding Ownership Submitted by Verne J. White (June 1, 2015).⁴ Central Valley’s construction permit application appears as Exhibit 1 to the Bureau’s brief filed on April 14, 2016 in accordance with *Order for Further Briefing*, FCC 16M-12 (requesting further briefing on whether the NCE

¹ *Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order*, FCC 03-158, 18 FCC Rcd 14938 (July 16, 2003).

² The issues added to the *HDO* also include whether Avenal and/or Central Valley “misrepresented facts to and/or lacked candor with the Commission,” *id.*, but those questions are rendered moot by the resolution of Avenal and Central Valley’s lack of qualifications on the date(s) of application. The same is true for the questions regarding who owns and/or controls Avenal and Central Valley. *Id.* at 2.

³ Here, the record includes all documents entered into the Commission’s Electronic Comment Filing System (ECFS) for this matter, as well as other documents related to this litigation submitted to or by OALJ, including correspondence.

⁴ White’s declaration was in response to *Order*, FCC 15M-11 (rel. March 19, 2015), requiring him and Zawila to each submit evidence establishing the identities of the owners, officers, and any other individuals who controlled the operations of Avenal and Central Valley.

licensing requirements of Section 73.503 apply to NCEs choosing to operate in the non-reserved band).

4. The HDO avers that Avenal's construction permit application was signed on **March 16, 1989**. See HDO at 7, para. 23. The HDO also indicates that Central Valley's permit application was signed on **October 14, 1988**, *id.* at 9, para. 32, which accords with the aforementioned Exhibit 1. Without objection from Mr. Couzens, the Enforcement Bureau noted at the March 29, 2016 Status Conference, and in its supplementary brief filed on April 14, 2016, the fact that Central Valley checked the box on the application form reading "a nonprofit organization." It is further noted that there was another option to check entitled "Other (*specify*)." The applicant name also had been written with the abbreviation "Inc." after "Central Valley."

5. The Presiding Judge accepts as a fact that Avenal's construction permit application substantially mirrored Central Valley's. See *MO&O* at 3-4, paras. 5-8. No party has shown or indicated otherwise, and a cursory review of the first page of Avenal's construction permit application supports this conclusion. See Ex. 5 to Zawila's Second Objection to Evidence Regarding Ownership Submitted by Verne J. White (June 1, 2015). On the case-determinant fact issue of when Avenal and Central Valley were incorporated, Mr. Couzens filed a brief dated May 4, 2015, entitled "Evidence Regarding Ownership." The brief included a declaration by Mr. Verne J. White, dated May 1, 2015 (see footnote 5). Included as attachments to Mr. White's declaration are printouts from the California Secretary of State's website showing that Avenal was incorporated on **March 5, 1999**, and that Central Valley was incorporated on **January 29, 2001**.⁵ And there is no dispute that a 10-year gap exists between permit application and incorporation for Avenal, and a 12-plus-year gap between permit application and incorporation for Central Valley. There is no explanation for each respective hiatus offered by either Avenal or Central Valley as parties, nor by Mr. Verne J. White as an interested person and witness to certain of the operative events.

III. Legal Standard for Interlocutory Appeal

6. Section 1.301(b) of the Commission's Rules sets the standard for discretionary appeals, to wit:

[A]ppeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer. Any party desiring to file an appeal shall first file a request [with the Presiding Judge] for permission to file appeal . . . The request shall contain a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The

⁵ Evidence Regarding Ownership (May 4, 2015), Declaration of Verne J. White at Attachments C and G.

presiding officer shall determine whether the showing is such as to justify an interlocutory appeal and . . . his ruling is final

47 C.F.R. § 1.301(b). As stated below, the Presiding Judge denies Mr. Couzens' request to appeal for failure to meet this standard.

IV. License Eligibility for NCE Stations in the Non-Reserved Band

7. Mr. Couzens' request to appeal on behalf of Avenal and Central Valley argues that the eligibility issues should not have been added because Avenal's and Central Valley's "facilities were applied for and granted in the non-reserved band." Couzens Motion to Appeal at 2. Mr. Couzens' initial argument questioned whether "[a]n applicant for an NCE [noncommercial educational] FM station must certify its eligibility to own and operate such station *at the time it files its application*"⁶ if the NCE applicant applies in the non-reserved band instead of the band reserved for NCEs. *In other words, do the NCE licensing requirements of Section 73.503 apply to NCEs choosing to operate in the non-reserved band? Or better yet, if an NCE applicant is not qualified to do business on the date of application, can the applicant nonetheless be issued a Commission license in the non-reserved band?* Needing answers, the Presiding Judge ordered further briefing. *See Order for Further Briefing*, FCC 16M-12 (rel. March 23, 2016). Avenal and Central Valley, each represented by Mr. Couzens, filed a common supplemental brief on April 1, 2016. The Bureau filed a response on April 14, 2016.

A. Assignment of Burden(s) of Persuasion

8. As movants seeking discretionary relief, the burden of persuasion was assigned to Avenal and Central Valley.⁷ For "[i]t is well established that an applicant has the burden of demonstrating that it possesses the qualifications to be a Commission licensee in accordance with the [Communications] Act," pursuant to 47 U.S.C. § 308(b). *In re Evelyn Ray Rogers*, 8 FCC Rcd 391 (1993) (citing *Midwest Radio–Television, Inc.*, 24 FCC2d 625, 626 ¶ 4 (1970)). While the question of qualifications usually arises with regard to an applicant's financial ability, there is nothing to suggest that it does not apply with equal force here. Mr. Couzens states generally that "we are not entirely in accord with the judge' [*sic*] statement that our parties 'have the burden of persuasion' on these questions," but provides no case law or other authority to support this assertion. *See* Brief in Response to Order: FCC 16M-12 at 2 (March 25, 2016). Moreover, it goes against all logic and common sense to assign to the Bureau the burden to show the *absence* of qualification for a broadcasting license when Mr. Couzens' clients, as applicants,

⁶ *Hammock Envtl. & Educ. Cmty. Servs.*, 25 FCC Rcd 12804, 12807 (2010) (emphasis added) (footnote omitted). *See also* MO&O at 3 n.12.

⁷ Case law in other areas supports the proposition that the burden of persuasion is on the movant for discretionary relief. *See, e.g., Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the court's] discretion.") (emphasis added); *Houston Baptist Univ. v. ACE Am. Ins. Co.*, No. CIV. A. H-09-3914, 2010 WL 376325, at *1 (S.D. Tex. Jan. 26, 2010) ("The decision to transfer a pending case is within the sound discretion of the district court. . . . The burden rests with the movant to *demonstrate* that transfer is proper.") (emphasis added).

are reasonably expected to have relevant documents and recollective fact information, regardless of time passage. Avenal and Central Valley fail to make any showing or proffer which might arguably shift their burden to persuade. Accordingly, they have failed to meet their burden to show or persuade that the question of whether NCE stations in the non-reserved bands are subject to the same eligibility criteria as NCE stations in the reserved band is a “new or novel question of law” where “error [in the ruling] would be likely to require remand.”

B. NCE Stations in the Non-Reserved Band Are Subject to the Same Eligibility Criteria As Other NCE Stations

9. Mr. Couzens places great weight on the following Commission quote:

[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 [like Avenal and Central Valley] 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.*

In Re Creation of Low Power Radio Serv., 15 F.C.C. Rcd. 2205, 2284 n.33 (2000) (emphasis added). Mr. Couzens interprets the quote to “imply[] that in the non-reserved band that [operating as an NCE station] is not necessary, not necessary at day one, not necessary at day 1,001.” Status Conference Tr. 50:22-51:2 (March 29, 2016) (hereinafter, “Tr.”).

10. However, that quote does not get Mr. Couzens all the way there.⁸ While it differentiates between LPFM and full-service NCE stations with regard to whether they can convert to commercial status, that’s the *only* distinction, indicating that all *other* qualification requirements are the same for LPFM and full-service NCE stations – including being qualified at the time of application as was held in the *Hammock* case. And there is further support for this conclusion in the Second Report and Order in *In Re Reexamination of Comparative Standard for Noncommercial Educ. Applicants*, 18 F.C.C. Rcd. 6691 (2003). *First*, the Commission implicitly acknowledged that all NCE stations are subject to the same eligibility criteria, regardless of the part of the spectrum in which it operates. In discussing how to treat applications for NCE stations in the non-reserved band, the Commission stated that “[t]he substance of the eligibility rules for NCE stations has not changed since [November 2, 1978].”

⁸ It must also be noted that at the March 29, 2016 Status Conference, Mr. Couzens answered in the affirmative when the Presiding Judge asked Mr. Couzens whether he was “satisfied that [his] position has been stated as best as [he] can reasonably state it in” his brief. Tr. 52:9-15.

Id. at 6695. **Second**, the D.C. Circuit held that the Commission could not use competitive bidding for NCE stations in the non-reserved band “because section 309(j)(2) [of the Communications Act] denied the Commission the authority to use competitive bidding ‘based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates.’” *NPR v. FCC*, 254 F.3d 226, 229 (D.C. Cir. 2001) (cited by the Commission in *In re Reexamination of Comparative Standard for Noncommercial Educ. Applicants*, 18 FCC Rcd 6691, 6693 (2003)) (emphases added).

11. In other words, the D.C. Circuit recognized the principle that legal requirements may be determined based on the “nature of the station,” rather than which “part of the spectrum [reserved vs. non-reserved] in which the station operates.” The Commission’s later citation of the Court’s principle in *Comparative Standard*, *supra*, gives ample support to the proposition that choosing the non-reserved band did not excuse Avenal or Central Valley as applicants from completing their respective business formations.

C. The FCC Must Rely on Truth and Accuracy of Applications

12. In order for the FCC’s application process to function as a reliable system, the FCC must be able to rely on an application’s veracity. Thus, the form must be signed by an individual on behalf of the applicant-entity under penalty of perjury. Central Valley’s application was signed under penalty by a Linda Ross as President/Secretary.⁹ The HDO alleges that Avenal’s application was so signed by a George Sullivan as President. *See HDO* at 7, para. 23. And the Presiding Judge noted at the Status Conference, “[If] the box was checked that was incorporated [*sic*] and the application was filed [and signed], why should anybody go beyond what was checked off at that point to test the verity of that[?]” Tr. 12:15-18; *see also* Tr. 13:5-11. In other words, an application that is signed by an authorized signatory is assumed to be truthful on matters therein, unless shown otherwise. Moreover, the construction permit application form submitted by Central Valley and Avenal is entitled “Application for Construction Permit for *Noncommercial Educational Broadcast Station*” (emphasis added), indicating that there is a different application for commercial stations and that Avenal and Central Valley, being assisted by qualified legal counsel, should have been knowledgeable of the difference.

⁹ Mr. Couzens stated in Central Valley’s responses to the Enforcement Bureau’s interrogatories, “It is my understanding that Linda Ross and Linda Ware are the same person,” though it is unclear what the basis is for that understanding. *See Responses to Enforcement Bureau’s Second Set of Interrogatories to Central Valley Educational Services, Inc.* at 3 (March 26, 2016). Ms. Ware remains a mystery lady.

D. The Record Does Not Indicate That Avenal and Central Valley Were Unincorporated Associations at the Time of Application

13. There has been no citation or showing made to support Mr. Couzens' argument that Avenal and Central Valley chose to do business as unincorporated associations at the time of application. *See* Brief in Response to Order: FCC 16M-12 at 2-3. An argument made without factual or legal support cannot be accepted as convincing, reliable, or probative on this case-determinative issue.

14. Mr. Couzens takes care not to state that Avenal and Central Valley *in fact were* legally organized as unincorporated nonprofit associations. He merely makes the assertion that unincorporated nonprofit associations are entities recognized under California law. From this, he argues that the Bureau has therefore failed to show that Avenal and Central Valley were *not* applying for permits as unincorporated nonprofit associations. *See* Brief in Response to Order: FCC 16M-12 at 2-3 (March 25, 2016). To gain advantage, Mr. Couzens uses cleverly concocted *legerdemain* to spin the burden to the Bureau. But an alert Bureau has duly parried and refused to take the bait. For reasons discussed above, the burdens of persuasion were assigned to Avenal and Central Valley. These parties must convince the factfinder by reliable, credible evidence that each was organized under California law as an unincorporated nonprofit association on the respective dates of their applications. As Bureau counsel noted at the Status Conference (and which OALJ staff independently confirmed), "a cursory research [*sic*] on the California Secretary of State website reveals that there are registration forms for unincorporated associations." Tr. 10:6-8. So there exists an official form that could have been provided if Avenal and Central Valley had actually been unincorporated nonprofit associations on the date(s) of application. According to the Bureau, Avenal and Central Valley have not produced any documentation or other evidence to support a finding that either Avenal or Central Valley was an "unincorporated association." Enforcement Bureau's Opposition to Central Valley and Avenal's Brief in Response to *Order*, FCC 16M-12 at 3 (April 14, 2016). While Mr. Couzens made a dazzling declaration during the Status Conference that "[t]he entity is recognized even if there's no registration," Tr. 11:9-10, he did not cite any source during the conference or in his brief in support of that proposition.

15. To the contrary, the Bureau made the point in their brief: "An NCE applicant cannot be just a group of individuals with no articulated educational purpose. ... [T]he Commission requires more than just an after-the-fact self-serving statement to conclude that an applicant was an unincorporated nonprofit association" Enforcement Bureau's Opp. at 2-3. The Presiding Judge agrees with the Bureau's characterization of Mr. Couzens' pronouncement as an "eleventh hour argument." *See* Tr. 16:19. This is evident, as it appears nowhere in Mr. Couzens' papers prior to his supplemental brief.

16. Therefore, the Presiding Judge finds, as matters of law and fact, that Avenal and Central Valley were not unincorporated nonprofit associations – or otherwise organized entities

recognized by state or federal law – at the time of filing their respective applications. Accordingly, Avenal and Central Valley were not eligible applicants for license at the time they filed their applications. They have not offered a scintilla of proof that they were unincorporated non-profits on the respective dates that they filed their applications. As a result, the Presiding Judge finds that Avenal and Central Valley’s license applications are invalid, and should have been denied *ab initio*, or not accepted for filing.

V. Added Misrepresentation Issue(s)

17. Mr. Couzens’ final argument asserts that the Presiding Judge’s assessment that “there remain questions of demeanor and affirmative misrepresentation to be heard [for Central Valley], as in the case of Avenal,” *see MO&O* at 4, para. 7, is “ridiculous.” Motion to Appeal at 8-10. Mr. Couzens makes five arguments in support of this conclusion. His *first* and *second* arguments rely on his prior arguments that NCE stations in the non-reserved band are not subject to the same eligibility requirements as NCE stations in the reserved band or LPFM stations. *See id.* at 8-9. Given that the Presiding Judge has determined Mr. Couzens’ position to be incorrect (but not ridiculous), his first two arguments are deemed to be without merit. His *third* and *fourth* arguments are also in error. He argues the merits of the added issues rather than whether the issues were properly added. Since there has been no evidence introduced and thus no affirmative findings of misrepresentation, such arguments are premature, outside the scope of the rulings that Mr. Couzens seeks permission to appeal, and a waste of Commission time and resources. Mr. Couzens’ *fifth* and final argument asserts that Avenal and Central Valley’s alleged misrepresentations took place over 10 years ago and thus should not be considered under the Commission’s *Character Policy Statement*, 102 FCC 2d 1179, 1229 (1986). This argument has already been addressed, discussed, and dismissed in previous orders, and it will not be revisited here. *See, e.g., Order*, FCC 16M-10 at 2-3 (rel. March 21, 2016); *Order*, FCC 16M-05 at 2 (rel. Feb. 29, 2016).

VI. Resolution of Added Issues

18. Mr. Couzens argues in his supplementary brief that the Bureau “failed to justify its late addition of the issues” with regard to Avenal and Central Valley’s eligibility to file applications for permits to construct broadcasting stations. Motion to Appeal at 5. However, this argument is outside the scope of the Judge’s order requiring additional briefing. *See Order for Further Briefing*, FCC 16M-12 (rel. March 23, 2016). It also fails to pose “a new or novel question of law or policy,” as is mandated by Section 1.301(b) of the Commission’s rules. Lastly, it lacks any merit.

19. The added issues were submitted by the Bureau at the direction of Presiding Judge. The need for such issues became apparent in the course of this proceeding, and they were found to be of decisional significance requiring adequate notice. Since these issues required substantive proof, parties and counsel were entitled to notice. *See Order*, FCC 16M-01 (rel. Jan.

12, 2016). *See also Order*, FCC 15M-21 at 3, para. 6 (rel. June 4, 2015) (“If the parties are unable to reach a consent agreement by June 15, the Enforcement Bureau will be asked to immediately seek the addition of an issue to this proceeding regarding the ownership and control of Avenal and Central Valley.”) The addition of the misrepresentation issues followed as a matter of course and, as discussed below, need not be further considered.

VII. Other Considerations

20. The Communication Act of 1934, as amended, addresses Commission filings, including applications for licenses (§ 308), applications for construction permits (§ 319), and applications for transfer or assignment of licenses (§ 310). All applications shall set forth facts prescribed by the Commission as to such subjects as citizenship, financial and technical qualifications, and character, a term which is not defined but is determined on a case-by-case basis. *Character Policy Statement*, 102 FCC 2d at 1180. The Commission will consider all acts of misconduct which are relevant to character, but “only where there has been an adjudication.” *Id.* at 1204. And even if there is an adverse adjudication under added issues, the Commission most likely will not impose sanctions where offending applicants suffer the loss of a station or a construction permit, as is this case here. Suffering the loss of a broadcasting license or permit will likely serve to deter “all but the most unrepentant from serious future misconduct.” *Id.* at 1228. *Cf. In re A.S.D. Answer Service, Inc.*, 1 FCC Rcd 753 (1986), wherein to accommodate settlement, the Commission set aside a presiding judge’s adverse conclusions, noting mitigating factors, such as “a long and expensive proceeding,” “the wrongdoers have not benefited from their conduct,” and the loss of construction permits and licenses “represents a substantial setback for the parties.” *Id.* at 754. Similar factors prevail here, particularly the length of the proceeding, which offset any public interest to be gained, if any, from litigating the added character issues. *Id.* at *passim*. *Cf. also In re Frank Digesu, Sr.*, 9 FCC Rcd 7866, 7867 (1994) (“[I]t is the Commission’s customary practice to vacate an agency decision where matters become moot”) (internal quotations omitted).

CONCLUSION

For reasons of the delicts and failures to comply with standards for seeking permission to appeal the Presiding Judge’s interlocutory order, it is ORDERED that the Request to Appeal *Memorandum Opinion & Order*, FCC 16M-01, IS DENIED.

IT IS FURTHER ORDERED that, based on substantial findings and conclusions explicated above, Avenal Educational Services, Inc. and Central Valley Educational Services, Inc. did not qualify as entities entitled to apply for NCE stations on the dates that applications were filed by Avenal and Central Valley with the Commission.

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IT IS FURTHER ORDERED that Avenal Educational Services, Inc. and Central Valley Educational Services, Inc. ARE HEREBY DISMISSED as parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION¹⁰

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive style with a large initial "R".

Richard L. Sippel
Chief Administrative Law Judge

¹⁰ Courtesy copies of this Order will be sent by email on issuance to all counsel, and additionally by First Class Mail to Mr. Zawila.