

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of
ESTATE OF LINDA WARE, CYNTHIA
RAMAGE, EXECUTOR, Assignor
To Assign the License of Broadcast Station
KZPO(FM), Lindsay, California
ESTATE OF H.L. CHARLES, ROBERT
WILLING, EXECUTOR, Assignor
To Assign the Construction Permit of Broadcast
Station KZPE(FM), Ford City, California
WILLIAM L. ZAWILA, Assignor
To Assign the Construction Permit of Broadcast
Station KNGS(FM), Coalinga, California
AVENAL EDUCATIONAL SERVICES, INC.,
Assignor
To Assign the Construction Permit of
Broadcast Station KAAX(FM), Avenal, California
CENTRAL VALLEY EDUCATIONAL
SERVICES, INC., Assignor
To Assign the Construction Permit of
Broadcast Station KYAF(FM), Firebaugh,
California
BIG RADIO PRO, INC., Assignee

ORDER ON RECONSIDERATION

Adopted: August 4, 2016

Released: August 4, 2016

By the Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order on Reconsideration we dismiss the Petition for Reconsideration (PFR) filed July 19, 2016, by the Estate of Linda Ware, Cynthia Ramage, Executor (Ware Estate); the Estate of H.L. Charles, Robert Willing, Executor (Charles Estate); William L. Zawila (Zawila); Avenal Educational Services, Inc. (AES); and Central Valley Educational Services, Inc. (CVES) (collectively Applicants). Applicants seek reconsideration of the Commission's Memorandum Opinion and Order released June 17,

2016,¹ affirming the Media Bureau's (Bureau) dismissal of Applicants' applications to assign the license and construction permits of the above-captioned FM radio broadcast stations (Applications).

2. Applicants Charles Estate, Zawila, AES, and CVES are the permittees, and Ware Estate is the licensee, of five FM radio broadcast stations in California,² all of which were designated for revocation hearing by the Commission in order to resolve, *inter alia*, issues of lack of candor, misrepresentation, unauthorized transfer of control, and other violations of the Commission's rules.³ Applicants filed the Applications in March and April of 2015, claiming that they were being filed under the Commission's prior minority distress sale policy. Applicants argued that because a prior judge in the hearing proceeding had given them leave, in 2003, to file applications under the minority distress sale policy, that judge's order was the "law of the case,"⁴ and thus that Applicants could file such applications in perpetuity, notwithstanding that the Commission had suspended its prior distress sale policies.⁵

3. The Commission disagreed, holding that the minority distress sale had been replaced by an eligible entity distress sale policy following the Supreme Court's decision in *Adarand Constructors v. Peña*,⁶ and that the Commission suspended the eligible entity distress sale policy after the Court of Appeals for the Third Circuit remanded the eligible entity definition in *Prometheus Radio Project v. FCC*.⁷ Because of these court decisions, the Commission held that Applicants' "law of the case" theory was invalid, as law of the case does not apply when there is an intervening change in the applicable law.⁸

4. The PFR was received by the Commission on July 19, 2016. Applicants argue that Section 309(j) of the Communications Act of 1934, as amended (Act), "mandates that the FCC promote diversity of broadcast ownership,"⁹ and that the minority distress sale policy is the last Commission initiative promoting diversity of broadcast ownership.¹⁰ They thus urge the Commission to exercise its "inherent power" to promote diversity of broadcast ownership by reinstating the Applications and ordering the Bureau to process them.¹¹

II. DISCUSSION

5. Section 405(a) of the Act states that any party aggrieved by an order, decision, report, or action of the Commission may file a petition for reconsideration of that order, decision, report, or action within 30 days from the date upon which public notice of the order, decision, report, or action is given.¹²

¹ *Estate of Linda Ware, Cynthia Ramage, Executor, Assignor, et al.*, Memorandum Opinion and Order, FCC 16-75 (June 17, 2016) (*Ware II*).

² The stations are KZPO(FM), Lindsay, California (Ware Estate); KZPE(FM), Ford City, California (Charles Estate); KNGS(FM), Coalinga, California (Zawila); KAAX(FM), Avenal, California (AES); and KYAF(FM), Firebaugh, California (CVES) (collectively Stations).

³ *William L. Zawila, et al.*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938 (2003) (*Zawila HDO*). The hearing proceeding, EB Docket No. 03-152, remains pending before Chief Administrative Law Judge Richard L. Sippel.

⁴ *See, e.g.*, Exhibit 1 to PFR at 3.

⁵ *See Ware II* at 4 para. 6.

⁶ 515 U.S. 200 (1995).

⁷ 652 F.3d 431 (3d Cir. 2011). *See Ware II* at 3-4 para. 5.

⁸ *Id.* at 4 para. 6.

⁹ PFR at 2. *See* 47 U.S.C. § 309(j)(3)(B).

¹⁰ PFR at 2.

¹¹ *Id.* at 7.

¹² 47 U.S.C. § 405(a). *See also* 47 CFR § 1.106(f). Public notice of a Commission non-rulemaking document is given on the release date. *Id.*, § 1.4(a)(2).

This 30-day period is statutory and cannot be waived or extended by the Commission except in “extraordinary circumstances,” such as where the late filing is due to the Commission’s failure to give a party timely notice of the action for which reconsideration is sought.¹³ Public notice of *Ware II* was given on its June 17, 2016, release date; 30 days from that date was Sunday, July 17, 2016, thus the last day a petition for reconsideration of *Ware II* could be filed was Monday, July 18. Applicants mailed the PFR to the Commission, where it was received on Tuesday, July 19, 2016. Therefore, the PFR was untimely filed and must be dismissed.

6. Even if the PFR had been timely filed, it would have been subject to staff dismissal. First, the PFR did not rely on facts or arguments that relate to events that occurred, or circumstances that have changed since Applicants’ last opportunity to present such matters to the Commission,¹⁴ nor did the PFR rely on facts or arguments unknown to Applicants until after their last opportunity to present such matters to the Commission.¹⁵ Thus, the PFR would be dismissed under Section 1.106(b)(3) of the rules.¹⁶ Second, Applicants’ arguments plainly do not warrant consideration by the Commission: Applicants’ argument regarding the Commission’s “inherent power” to ignore Supreme Court and other legal precedent in order to grant their Applications in the name of “broadcast diversity” was not previously presented to the Commission; and to the extent Applicants recycle their argument that the administrative law judge’s 2003 order allowing Applicants to file a distress sale application insulates the 2015 Applications from subsequent changes in the law, this argument has been fully considered and rejected by the Commission. These circumstances would also warrant dismissal by the Bureau.¹⁷

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that, for the foregoing reasons and pursuant to Section 405(a) of the Communications Act of 1934, as amended,¹⁸ and Sections 1.106(f), 1.106(b)(3), and 1.106(p) of the Commission’s rules,¹⁹ the Petition for Reconsideration filed by the Applicants IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

¹³ See *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

¹⁴ 47 CFR § 1.106(b)(2)(i).

¹⁵ *Id.* § 1.106(b)(2)(ii).

¹⁶ *Id.* § 1.106(b)(3).

¹⁷ See *id.* §§ 1.106(p)(2), (p)(3).

¹⁸ 47 U.S.C. § 405(a).

¹⁹ 47 CFR §§ 1.106(f), (b)(3), (p).