

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

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| In re Matter of Application of |) | |
| |) | |
| CLARK COUNTY SCHOOL DISTRICT |) | File No. BPLIF-931230HK |
| |) | |
| For Authority to Construct and Operate a Station |) | |
| in the Instructional Television Fixed Service on |) | |
| the A Group Channels at Las Vegas, Nevada |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 2003

Released: September 11, 2003

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by the North American Catholic Educational Programming Foundation, Inc. (NACEPF) on April 17, 2002.¹ On May 13, 1992, NACEPF filed an application seeking a construction permit and a license in the Instructional Television Fixed Service (ITFS) on the A Channel Group in Henderson, Nevada.² The AFR contests the April 18, 1997 grant by the Video Services Division (Division) of the former Mass Media Bureau³ of a mutually exclusive application filed by the Clark County School District (Clark County) to construct and operate an ITFS station on the A Channel Group in Las Vegas, Nevada.⁴ For the reasons discussed below, we deny the AFR.

II. BACKGROUND

2. Clark County is responsible for providing public education from kindergarten through twelfth grade for students in the Las Vegas, Nevada area.⁵ On August 28, 1978, Clark County filed an application for authority to construct and operate an ITFS station on the C Group Channels in Las Vegas, Nevada.⁶ On July 1, 1979, the application was granted under call sign KZH32. On June 16, 1981, Clark County filed an application for authority to construct and operate its second ITFS station in the Las Vegas

¹ Application for Review (Apr. 17, 2002) (AFR).

² See FCC File No. BPIF-920513DB (May 13, 1992) (NACEPF Application).

³ North American Catholic Educational Programming Foundations, Inc. *et al*, *Memorandum Opinion and Order*, 12 FCC Rcd 24449 (1997) (*1997 MO&O*). On reconsideration, the Division affirmed the action taken in the *1997 MO&O*. See Clark County School District, *Memorandum Opinion and Order*, 17 FCC Rcd 5325 (2002) (*2002 MO&O*).

⁴ See FCC File No. BPLIF-931230HK (Dec. 30, 1993) (Clark County Application).

⁵ In 1993, Clark County served a student population of about 145,000. Clark County School District, *Opposition to Application for Review* (May 2, 2002) (*Opposition*). When the Division released the *1997 MO&O*, Clark County had become the tenth largest school district in the nation with an estimated 186,000 students. As of May of 2002, Clark County was the sixth largest school district in the nation with nearly 245,000 students.

⁶ File No. BPIF-7980828MA.

area.⁷ The application was granted on July 7, 1981, and Clark County was issued a license to construct and operate ITFS Station KZH33 on the E Group Channels in Las Vegas, Nevada.

3. NACEPF is a non-profit educational organization accredited by and in the State of Rhode Island. On May 13, 1992, NACEPF filed an application for authority to construct and operate an ITFS station on the A Group Channels in Henderson, Nevada. At that time, NACEPF did not hold an ITFS license in the Las Vegas area.

4. On December 30, 1993, Clark County filed an application that was mutually exclusive to NACEPF's application.⁸ In so doing, Clark County sought a waiver of the Commission's rule⁹ limiting the assignment of no more than four channels to a licensee for use in a single area of operation.¹⁰ On April 21, 1997, the Division granted the waiver request upon its finding that "the requested channels are necessary to provide the wide range of educational and instructional programming proposed."¹¹ The Division noted that Clark County was responsible for educating 145,000 students in the Las Vegas area that were enrolled in kindergarten through twelfth grade at 181 schools.¹² The Division relied on Clark County's statements that it was providing educational programming to students at over 150 schools in the Las Vegas area and that the assignment of eight ITFS channels was "wholly inadequate" to meet its educational needs in doing so.¹³ The Division took notice of Clark County's proposal to use the A Group Channels to provide sixty-eight new ITFS programs, fifty-two of which were formal educational and twenty-five of which were to be locally produced, and to shift some of the instructional programming from non-commercial educational Television Station KLVX(TV).¹⁴ The Division made a finding that "Clark County's comprehensive schedule for providing programming directed to almost 150,000 students enrolled in kindergarten through 12th grade would not be possible on the channels presently assigned to Clark County."¹⁵ The Division therefore concluded that grant of the waiver was warranted.

5. At that time, in cases of mutually exclusive applications - where applicants were competing for the same or adjacent channels in the same geographic area, each application was reviewed pursuant to the Commission's comparative process. This procedure awarded a maximum of twelve merit points based on five criteria deemed to have been most relevant to predicting the applicant best qualified

⁷ File No. BLIF-810616MF.

⁸ At the time NACEPF filed its application, ITFS applications could be filed at any time. *See* Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 FCC 2d 49, 65-72 (1985) (*Second Report and Order*); 47 C.F.R. § 74.913 (1993). Once NACEPF application was filed and found to be acceptable for filing, the application was placed on an "A" cut-off list, which established a deadline for filing mutually exclusive applications. In this case, a considerable period of time passed before NACEPF's application was placed on an "A" cut-off list. Although Clark County's application was filed over nineteen months after NACEPF's application, it was timely filed under the deadline established by the "A" cut-off list.

⁹ 47 C.F.R. § 74.902(d)(1) (1993).

¹⁰ The waiver request was necessary because, as noted above, Clark County had already been assigned eight channels for use in the Las Vegas area under call-signs KZH32 and KZH33.

¹¹ 1997 MO&O, 12 FCC Rcd at 24450 ¶ 4.

¹² *See id.* The Division further noted that Clark County expected its enrollment to increase by the end of 2003 to over 270,000 students, thereby requiring the construction of one hundred new schools. *See id.*

¹³ *See id.* at 24450-24451 ¶ 4. For example, Clark County explained that it had provided more than forty-five hours of ITFS programming per channel per week in 1993. *See id.* at 24451 ¶ 4. However, Clark County stated that, in order to do so, it had to cancel over fifty hours of scheduled programming due to a lack of channel capacity. *See id.*

¹⁴ *See id.*

¹⁵ *Id.*

to provide the service for which the ITFS spectrum had been allocated.¹⁶ First, four points were awarded to local applicants. Second, three points were awarded to applicants which were accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points were awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may have been awarded to applicants for specified levels of proposed ITFS programming.¹⁷ Fifth, one point was awarded to applicants which were existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants showed an established need for an expanded service that could not have been accommodated on their grandfathered E or F channel facilities. The tentative selectee was the applicant with the highest score.

6. In this instance, the Division found Clark County to be the tentative selectee.¹⁸ Whereas NACEPF was awarded a total of two points for observing the four-channel limitation, Clark County was awarded a total of eight points - four points for being local; three points for being accredited; and one point for proposing at least twenty-one hours of formal educational programming per channel per week.¹⁹ The Division further found that grant of Clark County's application would serve the public interest, convenience, and necessity.²⁰ As a result, NACEPF's application was dismissed.²¹

7. NACEPF timely sought reconsideration.²² On March 22, 2002, the Division denied the PFR. The Division found that there were no errors of law or new facts that warranted reversal of the staff's action in granting the waiver.²³ The Division rejected NACEPF's contention that the staff failed to apply the "excessively high" standard applicable to such requests for waiver and granted the waiver requested based on "speculative" information.²⁴ Rather, the Division cited to the "well-documented and detailed proposed educational uses of the A channel group provided by [Clark County]" in affirming the 1997 MO&O's finding that the requested channels were necessary for Clark County to provide the wide range of instructional programming proposed.²⁵ For example, the Division specifically noted Clark County's intent to "use the A channels to offer live interactive French classes, additional math programming, expanded science courses, adult continuing education courses, live and interactive professional development courses, expanded G.E.D. courses and live, interactive support staff programs."²⁶ In addition, the Division further rejected NACEPF's argument that Clark County did not

¹⁶ See Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. § 74.913 (1993).

¹⁷ One point was awarded for a proposed weekly schedule of at least twenty-one average hours per channel of formal educational programming or of at least forty-one average hours per channel of other ITFS programming. See 47 C.F.R. § 74.913(b)(4) (1993). Two points were awarded for a proposed weekly schedule of at least forty-one average hours per channel of formal educational programming or at least sixty-one hours per channel of ITFS programming where at least twenty-one of those hours were formal educational programming. See 47 C.F.R. § 74.913(b)(4) (1993).

¹⁸ 1997 MO&O, 12 FCC Rcd at 24453 ¶ 6.

¹⁹ 1997 MO&O, 12 FCC Rcd at 24452-24453 ¶ 6. Neither NACEPF nor Clark County were awarded one point for the being the current licensee of an E or F channel seeking to relocate on other channels. See *id.*

²⁰ *Id.* at 24453 ¶ 8.

²¹ *Id.* at 24453 ¶ 9.

²² Petition for Reconsideration (PFR).

²³ 2002 MO&O, 17 FCC Rcd at 5325 ¶ 3.

²⁴ See *id.* at 5326 ¶ 5.

²⁵ *Id.* at 5327 ¶ 5.

²⁶ *Id.* at 5326 ¶ 5.

need additional capacity because its C Group and E Group channels distributed the same programming.²⁷ The Division stated that “the Commission has held in the past that full utilization of the currently assigned channels is not a prerequisite to an applicant's request for additional channels.”²⁸ The Division found that Clark County “has shown adequately that it uses its ITFS channels to provide educational and instructional programming to school children up through twelfth grade and serves the needs of children in the district by planning innovative and essential educational programming.”²⁹ The Division therefore concluded that “the public interest is best served by granting [Clark County] a waiver of the four-channel rule.”³⁰ NACEPF filed the instant AFR on April 17, 2002.

III. DISCUSSION

8. Section 74.902(d)(1) of the Commission’s Rules limits a licensee “to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same [channel] Group . . .”³¹ Applicants shall not apply for more channels than they intend to construct within a reasonable time, simply for the purpose of reserving additional channels.³² Rather, the number of channels authorized to an applicant will be based on the demonstration of need for the number of channels requested.³³ The Commission will take into consideration such factors as the amount of use of any currently assigned channels and the amount or proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community.³⁴

9. NACEPF contends that the staff’s grant of a waiver in this matter “is an unexplained departure from Commission precedent and standards for 4-channel rule waivers.”³⁵ NACEPF alleges that any request for waiver of the four channel limitation must include a complete description of how additional channels will be used for traditional ITFS purposes and an explanation of why the present channel capacity is insufficient to accommodate the additional needs.³⁶ The AFR asserts that the information submitted by Clark County never approached the “exceedingly high burden” necessary to justify a waiver of the four channel limitation.³⁷ Specifically, for example, NACEPF argues that “[t]here is no relationship between the number of students or the number of schools in an area, and the need for channels.”³⁸ Rather, according to NACEPF, “the proponent of the waiver must demonstrate a compelling educational need for the programming for which the additional channels is requested, and the inability to

²⁷ See *id.* at 5327 ¶ 6.

²⁸ *Id.* (citing Northern Arizona University Foundation, *Memorandum Opinion and Order*, 7 FCC Rcd 5943, 5945 n.7 (1992) (*Northern Arizona*)).

²⁹ *Id.* at 5327 ¶ 6.

³⁰ *Id.*

³¹ 47 C.F.R. § 74.902(d)(1) (1993).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ AFR at 8. According to the AFR, Clark County was required to surmount an “exceedingly high” burden to demonstrate that a waiver was warranted. AFR at 2.

³⁶ *Id.* at 4 (citing Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, *Report and Order*, 98 FCC 2d 925, 933 (1984)).

³⁷ *Id.*

³⁸ *Id.*; see also *id.* at 4 (“the burden would require, at a minimum, that the applicant demonstrate that a substantial body of students would fail to receive the core educational curriculum in the absence of the requested channels”).

satisfy that need via other means.”³⁹ NACEPF contends that, “given the uncontested fact that Clark [County] duplicated programming on its E and C Group channels, it is not possible for Clark [County] to make such a showing unless Clark [County] also shows that there are no technical solutions to this waste of scarce channel capacity.”⁴⁰

10. We disagree. We find that the Division’s action in granting Clark County a waiver of the four-channel limitation is consistent with the Commission’s Rules and precedent.⁴¹ In particular, we find that Clark County made a showing at least as strong as the showing made in *Eastern New Mexico University*, where the Commission waived the four-channel limitation.⁴² In that case, the Commission explained that an applicant “must demonstrate how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs.”⁴³ The applicant in *Eastern New Mexico University* demonstrated that it could not provide programming to each grade level with only four channels.⁴⁴ In this case, Clark County also demonstrated that it needed additional channels to meet its core educational mission. Clark County is responsible for educating 145,000 students in the Las Vegas area enrolled in kindergarten through twelfth grade at 181 schools.⁴⁵ The Division relied on Clark County’s statements that it was providing educational programming to students at over 150 schools in the Las Vegas area and that the limited allocation of eight ITFS channels was “wholly inadequate” to meet its educational needs in doing so.⁴⁶ Clark County proposed to use the A Group channels to provide sixty-eight new ITFS programs, fifty-two of which were formal educational programs, and twenty-five of which were to be locally produced.⁴⁷ For example, the Division specifically noted Clark County’s intent to “use the A channels to offer live interactive French classes, additional math programming, expanded science courses, adult continuing education courses, live and interactive professional development courses, expanded G.E.D. courses and live, interactive support staff programs.”⁴⁸ The Division also made a finding that “Clark County’s comprehensive schedule for providing programming directed to almost 150,000 students enrolled in kindergarten through 12th grade would not be possible on the channels presently assigned to Clark County.”⁴⁹ NACEPF provides no basis for overturning the Division’s findings.

³⁹ *Id.* at 4-5

⁴⁰ *Id.* at 6.

⁴¹ See Shekinah Network, *Memorandum Opinion and Order*, 11 FCC Rcd 21533 (MMB VSD 1996).

⁴² See Board of Regents, Eastern New Mexico University, *Memorandum Opinion and Order*, 10 FCC Rcd 3162 (1995) (*Eastern New Mexico University*).

⁴³ *Id.* at 3162 ¶ 4.

⁴⁴ *Id.*

⁴⁵ See 1997 *MO&O*, 12 FCC Rcd at 24450 ¶ 4. The Division further noted that Clark County expected its enrollment to increase by the end of 2003 to over 270,000 students, thereby requiring the construction of one hundred new schools. See *id.*

⁴⁶ See *id.* at 24450-24451 ¶ 4. For example, Clark County explained that it had provided more than forty-five hours of ITFS programming per channel per week in 1993. See *id.* at 24451 ¶ 4. However, Clark County stated that, in order to do so, it had to cancel over fifty hours of scheduled programming due to a lack of channel capacity. See *id.*

⁴⁷ See *id.*

⁴⁸ 2002 *MO&O*, 17 FCC Rcd at 5326 ¶ 5.

⁴⁹ 1997 *MO&O*, 12 FCC Rcd at 24451 ¶ 4.

11. NACEPF contends that the staff's grant of a waiver in this matter "is an unexplained departure from Commission precedent and standards for 4-channel rule waivers."⁵⁰ The only precedent NACEPF cites in the AFR, however, is Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Report and Order*, 98 FCC 2d 925, 932-933 (1984) (which NACEPF cites for the general proposition that Clark County had an "exceedingly high" burden of demonstrating a waiver) and Northern Arizona University Foundation, *Memorandum Opinion and Order*, 7 FCC Rcd 5943, 5945 n.7 (1992), which the Division discussed in its ruling. Indeed, while NACEPF argues that Clark County should have been required to make various showings to justify a waiver, it fails to cite any authority to support its assertions. In the absence of supporting precedent for NACEPF's contentions, we conclude that the Division's action was consistent with precedent.

12. We reject NACEPF's contention that Clark County's waiver request should be denied because it is not efficiently using its eight channels. NACEPF contends that Clark County did not need additional capacity because its C Group and E Group channels distributed the same programming.⁵¹ Specifically, NACEPF took issue with the fact that Clark County simulcasts its two ITFS stations because its E Group transmitter did not have line-of-sight to all of its receive sites. Rather, according to NACEPF, Clark County should be required to reconfigure its system so that all of the receive sites can be served by one transmitter, thereby eliminating the need to duplicate programming.⁵² In this respect, we note that the AFR cites no authority or precedent to support its assertions. The Division explained that full utilization of the currently assigned channels is not a prerequisite to an applicant's request for additional channels.⁵³ In this regard, NACEPF contends that the Division's reliance on *Northern Arizona* "misses the point."⁵⁴ Specifically, NACEPF argues that, pursuant to *Northern Arizona*, the Division failed to consider "the amount of channel utilization and 'simultaneous use of the channels for a substantial portion of the day, and justified repetitiousness of the programming' . . . [as] wholly-distinct factors" in evaluating the waiver request.⁵⁵

13. We disagree. The Division, Clark County, and, of course, NACEPF all recognized throughout this proceeding that Clark County "replicated program schedules so that all schools could

⁵⁰ AFR at 8. According to the AFR, Clark County was required to surmount an "exceedingly high" burden to demonstrate that a waiver was warranted. AFR at 2.

⁵¹ See AFR at 6-8.

⁵² See *id.* We note that, Clark County has since resolved the line of sight issues. Clark County explains that it has invested substantial capital to collocate its stations and construct receive antennas at receive sites so that it could program the two stations independently. Opposition at 4. However, Clark County notes that, because some of its schools lack certain decoding equipment, "two . . . channels carry the same schedule programming so that each school . . . can continue to enjoy access to all program services needed by that school." *Id.* n.8. In reply, NACEPF criticizes Clark County for not exploring "digital compression" as an alternative. See North American Catholic Educational Programming Foundations, Inc., Reply to Opposition" as an alternative. See *id.* at 7. NACEPF further concedes that digital compression was not widely available at the time that Clark County filed its waiver request and application in 1993. See *id.* at 6-7. NACEPF further concedes that it is not aware of any "cases in which the Commission has considered whether the availability of digital compression technology should be rejected to deny a 4-channel rule waiver." *Id.* at 6-7. We therefore find that it would be inappropriate to consider such a requirement in this matter. Moreover, the "erection" of such a requirement is more appropriately the subject of a rulemaking proceeding in which the Commission would benefit from the input of all affected parties.

⁵³ See 1997 MO&O, 12 FCC Rcd at 24451 n.2 (quoting *Northern Arizona*, 7 FCC Rcd at 5945 n.7); 2002 MO&O, 17 FCC Rcd at 5327 ¶ 6 (same).

⁵⁴ AFR at 7-8.

⁵⁵ *Id.*

receive needed programming.”⁵⁶ In full consideration of this fact, the Division, twice reached the determination that, given all of the circumstances surrounding the request and weighing all of the factors, granting a waiver of the four-channel limitation was fully warranted and in the public interest. Given the specific circumstances of this matter, we believe that Clark County’s use of the channels at issue was reasonable and consistent with both precedent and furtherance of the public interest.⁵⁷ NACEPF’s contention that Clark County, under the circumstances, cannot demonstrate that waiver of the four-channel limitation is warranted unless Clark County can show that there are *no* alternative technical solutions available is an unprecedented standard because the Commission has not adopted it previously. Further, we do not believe it should be applied here.

14. In addition, we reject NACEPF’s assertion that Clark County’s “evidence of need is either irrelevant, meaningless or conclusory hyperbole not tied to any demonstration of an objective need.”⁵⁸ Once again, NACEPF fails to provide any authority or precedent to support its position. We find that the form and the content of Clark County’s submissions as to the demonstration of need are consistent with those previously accepted by the Commission.⁵⁹ While we recognize that Commission staff may request that the applicant provide additional material if the information presented is deficient, we find nothing in the record to suggest that staff should have done so in this matter.

IV. CONCLUSION

15. We therefore find the AFR to be without merit. The *1997 MO&O* and the *2002 MO&O* appropriately explained the Division’s basis for granting Clark County a waiver of Section 74.902(d)(1) of the Commission’s Rules. We therefore conclude that grant of the waiver is consistent with the Commission’s Rules and precedent and furthers the public interest.

V. ORDERING CLAUSE

16. Accordingly, **IT IS ORDERED** that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, the Application for Review filed by the North American Catholic Educational Programming Foundation, Inc. on April 17, 2002 **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁶ Opposition at 4; *see also, e.g., 1997 MO&O*, 12 FCC Rcd at 24451 n.2; *2002 MO&O*, 17 FCC Rcd at 5327 ¶ 6.

⁵⁷ Opposition at 4.

⁵⁸ *See* AFR at 2.

⁵⁹ It is unclear what submissions, if any, could satisfy the “exceedingly high burden” that NACEPF seeks for the Commission to impose on Clark County. *Cf.* AFR at 4 (“the burden would require, at a minimum, that the applicant demonstrate that *a substantial body of students would fail to receive the core educational curriculum in the absence of the requested channels*”) (emphasis added).