

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

In the Matter of	)	
	)	
Clear Creek Radio, Inc. for a New NCE(FM) Station, Idaho Springs, Colorado	)	Facility ID No. 172792 File No. BNPED-20071019AIY
	)	
Fraser Valley Community Media, Inc. for a New NCE(FM) Station, Winter Park, Colorado	)	Facility ID No. 175799 File No. BNPED-20071018BDM
	)	
RV Ministries, Inc. for a New NCE(FM) Station, Fraser, Colorado	)	Facility ID No. 174839 File No. BNPED-20071017AHY
	)	
The North Fork Angling Society for a New NCE(FM) Station, Pine, Colorado	)	Facility ID No. 174815 File No. BNPED-20071022AZK
	)	
NCE October 2007 Window MX Group 324	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 23, 2014**

**Released: April 23, 2014**

By the Commission: Commissioner Pai issuing a statement.

**I. INTRODUCTION**

1. The Commission has before it an Application for Review<sup>1</sup> filed by Clear Creek Radio, Inc. (“Clear Creek”), Fraser Valley Community Media, Inc. (“Fraser Valley”), The North Fork Angling Society (“North Fork”), and RV Ministries, Inc. (“RV Ministries”), noncommercial educational (“NCE”) FM radio station applicants (collectively, “Applicants”), seeking review of the Media Bureau’s (“Bureau”) denial of their request for waiver of Section 73.509 of the Commission’s Rules (“Rules”).<sup>2</sup> For the reasons set forth below, we dismiss in part and otherwise deny the Application for Review and dismiss the applications of Clear Creek, North Fork, and RV Ministries.<sup>3</sup>

<sup>1</sup> Filed Jan. 16, 2009, titled “Application for Review of Denial of Joint Waiver Request.”

<sup>2</sup> 47 C.F.R. § 73.509. The relevant portion of this provision reads: “An application for a new...NCE-FM station...will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station licensed by the Commission and operating in the reserved band...”

<sup>3</sup> In August 2012, Clear Creek, Fraser Valley, RV Ministries, the Clear Creek Board of County Commissioners, and area mayors wrote to several Members of Congress urging them to support the instant waiver request. In turn, Senator Michael F. Bennet, Senator Mark Udall, and U.S. Representative Jared Polis urged the Commission, by letter on October 17, 2012, “to strongly consider granting” the waiver request. We accordingly include as part of the record the August 2012, letter to the Congressmen, the October 17, 2012, letter to the Commission, and our response, dated December 21, 2012.

2. The Applicants applied individually for new NCE FM stations during the October 2007 filing window.<sup>4</sup> The Commission grouped their mutually exclusive (“MX”) proposals into MX Group 324.<sup>5</sup> On December 1, 2008, Applicants jointly requested a waiver of Section 73.509 of the Rules<sup>6</sup> to treat MX Group 324 as three separate groups based on terrain shielding.<sup>7</sup> Due to the terrain and topography around the proposed transmitter sites, they argued that no interference would occur among these proposed stations except between the facilities proposed by Fraser Valley and RV Ministries.<sup>8</sup>

3. In an order released December 17, 2008, the Bureau ruled that Applicants did not make the compelling showing required for a waiver grant.<sup>9</sup> Accordingly, the Bureau denied Applicants’ waiver request, applied the traditional fair distribution analysis to MX Group 324, and designated Fraser Valley as the tentative selectee.<sup>10</sup> Applicants subsequently filed the Application for Review, alleging that the Bureau incorrectly applied the waiver standard and improperly discounted the unique circumstances and public interest issues involved in this case.<sup>11</sup> Applicants argue for the first time that the situation here of four applicants agreeing that no actual interference would occur among the proposed groups is a unique circumstance that supports a waiver.<sup>12</sup>

4. As to the uniqueness of the broadcasters’ agreement, Applicants did not make this argument in its original waiver request and the Bureau therefore had no opportunity to address it. The Commission will not grant an application for review if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.<sup>13</sup> Accordingly, we will dismiss this portion of the Application for Review. Upon consideration of the remaining portion of the Application

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<sup>4</sup> See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (MB 2007).

<sup>5</sup> See *Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 9508 (MB 2008). The fifth applicant in MX Group 324 voluntarily withdrew its application (See File No. BNPED-20071018ABF, dismissed Aug. 7, 2008).

<sup>6</sup> 47 C.F.R. § 73.509.

<sup>7</sup> See “Joint Request for Waiver” at 1. Specifically, Applicants requested that the Bureau treat Clear Creek and North Fork as singleton applications and Fraser Valley and RV Ministries as a two-application group.

<sup>8</sup> *Id.* at 2-3.

<sup>9</sup> *Threshold Fair Distribution Analysis of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 23 FCC Rcd 17983, 17986 (MB 2008) (“*Fair Distribution Order*”) (finding that terrain shielding is a common aspect of FM signal propagation affecting hundreds of stations and a grant would have far reaching consequences in terms of the Commission’s enforcement of Section 73.509 of the Rules).

<sup>10</sup> *Id.* at 17986. On April 24, 2012, the Commission granted Fraser Valley’s application. Public Notice of the grant was issued on April 27, 2012. See *Broadcast Actions*, Public Notice, Report No. 47726 (Apr. 27, 2012).

<sup>11</sup> Application for Review at 6.

<sup>12</sup> *Id.* at 7-9. The Application for Review bases this argument on *Educational Info. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 6917, 6921 (1997), *recon denied*, 13 FCC Rcd 23746 (1998). The *Fair Distribution Order* cited another portion of that case to make a different point. See 23 FCC Rcd at 17987 n. 22. However, the Applicants’ citation to and reliance on that case with respect to the allegedly unique agreement among the Applicants is a legal argument that the Applicants failed to make previously. Notably, the Commission denied the Section 73.509 waiver request in that case, notwithstanding the support of the affected stations. See *Educational Info. Corp.*, 12 FCC Rcd at 6924.

<sup>13</sup> See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”).

for Review and the entire record, we conclude that Applicants have failed to demonstrate that the Bureau erred. We are not without sympathy for the arguments presented by Applicants. Nevertheless, we agree with the Bureau that the concerns raised here would be more appropriately addressed in a notice and comment rulemaking proceeding given the complex engineering considerations involved and an absence of an approved alternative propagation methodology for predicting FM interference. The Bureau properly decided the matters raised, and we uphold its decision.

5. Accordingly, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and sections 1.115(c) and (g) of the Commission's Rules, 47 C.F.R. §§ 1.115(c),(g), the January 16, 2009, Application for Review filed by Clear Creek Radio, Inc., Fraser Valley Community Media, Inc., The North Fork Angling Society, and RV Ministries, Inc. IS DISMISSED TO THE EXTENT STATED ABOVE, and IS OTHERWISE DENIED.

6. IT IS FURTHER ORDERED, that the mutually exclusive applications of RV Ministries, Inc. (File No. BNPED-20071017AHY), The North Fork Angling Society (File No. BNPED-20071022AZK), and Clear Creek Radio, Inc. (File No. BNPED-20071019AIY), ARE DISMISSED.<sup>14</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>14</sup> See *Fair Distribution Order*, 23 FCC Rcd at 17999.

**STATEMENT OF  
COMMISSIONER AJIT PAI**

Re: *Applications of Clear Creek Radio, Inc. for a New NCE(FM) Station, Idaho Springs, Colorado, Facility ID No. 172792, File No. BNPED-20071019AIY; Fraser Valley Community Media, Inc. for a New NCE(FM) Station, Winter Park, Colorado, Facility ID No. 175799 File No. BNPED-20071018BDM; RV Ministries, Inc. for a New NCE(FM) Station, Fraser, Colorado, Facility ID No. 174839, File No. BNPED-20071017AHY; The North Fork Angling Society for a New NCE(FM) Station, Pine, Colorado, Facility ID No. 174815, File No. BNPED-20071022AZK*

On rare occasions, judges have issued *dubitante* opinions because they “doubted a legal point but w[ere] unwilling to state that it was wrong.”<sup>1</sup> Here, I find myself in a somewhat similar predicament. If we were writing on a blank slate, I likely would have voted to grant this application for review. Were we to approve the Applicants’ waiver request, the result probably would be more radio service for more residents of the Rocky Mountain region. Three new stations would be added to the airwaves instead of one. Moreover, all of the competing applicants have agreed that granting this waiver request would not lead to harmful interference.

Unfortunately, this case is not so simple. The Commission has adopted rules to prevent non-commercial FM stations from interfering with each other. These rules are not perfect. They can produce questionable outcomes when applied to certain terrain, such as the tall mountains of Colorado. Applicants argue that we should waive our rules under these circumstances. The Bureau responded below that this could result in a flood of waiver requests.

Ultimately, I am persuaded that this problem would be more appropriately addressed through a notice-and-comment rulemaking proceeding, and I hope that we will soon seek comment on how to fix it. This would be more efficient than requiring the Bureau to decide on a case-by-case basis whether our rules accurately predict interference in light of particular terrain. Indeed, we have bright-line rules precisely to avoid having to make such determinations on an ad-hoc basis.

The prospect of a Notice of Proposed Rulemaking, of course, provides cold comfort to the Applicants in this case. They maintain that because their circumstances are unique, granting them a waiver would not undermine enforcement of our rules. In other words, they are the proverbial purple cow.

The question then becomes how purple this particular cow is. It seems rather plum from my perspective, but this is a subjective assessment about which reasonable minds can disagree. Accordingly, I have decided to support this item, albeit *dubitante*.

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<sup>1</sup> BLACK’S LAW DICTIONARY 515 (7<sup>th</sup> ed. 1999). *See, e.g., United States v. Jeffries*, 692 F.3d 473, 483-86 (6<sup>th</sup> Cir. 2012) (Sutton, J., *dubitante*). Others do so in deed, if not with that precise word. *See, e.g., Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7<sup>th</sup> Cir. 1996) (Posner, C.J.) (applying decades-old Supreme Court antitrust precedent “despite all its infirmities, its increasingly wobbly, moth-eaten foundations”).