

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

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|-------------------------------------|---|-----------------------------|
| In re Applications of               | ) |                             |
|                                     | ) |                             |
| Hawaii Public Radio, Inc.           | ) | File No. BNPED-20071018ANN  |
| for a New Noncommercial Educational | ) | Facility ID No. 173751      |
| FM Station at Kailua, Hawaii        | ) |                             |
|                                     | ) |                             |
| Wren Communications, Inc.           | ) | File No. BNPED-20071022ATU  |
| for a New Noncommercial Educational | ) | Facility ID No. 176576      |
| FM Station at Mountain View, Hawaii | ) |                             |
|                                     | ) |                             |
| Wren Communications, Inc.           | ) | File No. BNPED-20071022ATS  |
| for a New Noncommercial Educational | ) | Facility ID No. 176511      |
| FM Station at Lahaina, Hawaii       | ) |                             |
|                                     | ) |                             |
| Cedar Cove Broadcasting, Inc.       | ) | File No. BNPED-20071018AAQ- |
| for a New Noncommercial Educational | ) | Facility ID No. 175368      |
| FM Station at Kailua Kona, Hawaii   | ) |                             |
|                                     | ) |                             |
| Kanu O Ka Aina Learning Ohana       | ) | File No. BNPED-20071022AAI  |
| for a New Noncommercial Educational | ) | Facility ID No. 176738      |
| FM Station at Waimea, Hawaii        | ) |                             |

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 2015**

**Released: November 18, 2015**

By the Commission:

1. We have before us Applications for Review filed by Wren Communications, Inc. (“Wren”), Cedar Cove Broadcasting, Inc. (“Cedar Cove”) and Kanu O Ka Aina Learning Ohana (“Kanu”).<sup>1</sup> Wren and Cedar Cove challenge the Media Bureau’s (“Bureau”) dismissal of their applications for new noncommercial educational FM stations at Mountain View and Lahaina, and Kailua Kona, Hawaii, respectively.<sup>2</sup> Cedar Cove also challenges the Bureau’s grant of an application (“HPR Application”) filed by Hawaii Public Radio, Inc. (“HPR”) for a new NCE FM station at Kailua, Hawaii.<sup>3</sup> Finally, Kanu seeks review of the Bureau’s denial of its request for waiver of the Commission’s policy of granting only one application per group of mutually exclusive applications.<sup>4</sup>

2. Wren, Cedar Cove, Kanu and HPR are four of the applicants that filed a total of 57 mutually exclusive applications for new NCE FM stations at different communities in Hawaii. These 57

<sup>1</sup> HPR opposed the Cedar Cove AFR on May 24, 2010. Cedar Cove filed a Reply to Opposition to Application for Review (“Reply”) on June 9, 2010. HPR then filed a Motion to Strike (“Motion”) portions of the Reply on July 6, 2010.

<sup>2</sup> *Broadcast Actions*, Public Notice, Report No. 47112 (MB Nov. 16, 2009).

<sup>3</sup> *Hawaii Public Radio, Inc.*, Letter, 25 FCC Rcd 3697 (MB 2010) (“*Letter Decision*”).

<sup>4</sup> *Kanu O Ka Aina Learning Ohana*, Letter (MB Aug. 5, 2015) (“*Waiver Decision*”).

applications were designated NCE MX Group 510 (“Group 510”).<sup>5</sup> Pursuant to established procedures,<sup>6</sup> the Bureau determined the HPR Application was entitled to a dispositive fair distribution preference under Section 307(b) of the Communications Act of 1934, as amended (“Act”).<sup>7</sup> The Bureau designated HPR as the tentative selectee in Group 510.<sup>8</sup> It later granted the HPR Application, after rejecting as moot Cedar Cove’s argument that the HPR Application failed to comply with Section 73.525 of the Commission’s Rules (“Rules”).<sup>9</sup> Pursuant to the Commission’s policy of granting only one application per group of mutually exclusive applications,<sup>10</sup> the Bureau dismissed the other 56 applications in Group 510.<sup>11</sup>

3. On review, Cedar Cove asserts that the Bureau erred in finding its Section 73.525 argument moot and failing to articulate a satisfactory explanation for its actions.<sup>12</sup> Cedar Cove maintains that the HPR Application should have been dismissed for its failure to comply with Section 73.525 TV Channel 6 requirements.<sup>13</sup> The Commission previously rejected this same argument.<sup>14</sup> As the Bureau noted, the affected television Channel 6 station had terminated analog broadcasts on that channel during the pendency of HPR’s application and prior to its grant.<sup>15</sup> In addition, starting October 27, 2009, a new processing policy became effective under which NCE FM applicants were no longer required to “demonstrate compliance with Section 73.525 of the Commission’s Rules, with regard to an ‘affected’ TV Channel 6 station which has ceased analog transmissions and which has a new DTV channel

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<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 14730 (MB 2008).

<sup>6</sup> See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities).

<sup>7</sup> 47 U.S.C. § 307(b).

<sup>8</sup> *Threshold Fair Distribution Analysis of 28 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, 24 FCC Rcd 12390, 12414-15 ¶¶ 34-38 (MB 2009) (“*Tentative Selectee Order*”).

<sup>9</sup> 47 C.F.R. § 73.525 (requiring that applications for a new or modified NCE stations in the FM reserved band protect nearby television Channel 6 broadcast stations).

<sup>10</sup> See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5104-05 ¶ 90 (2001). See also *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 ¶ 139 (2010).

<sup>11</sup> *Broadcast Actions*, Public Notice, Report No. 47112 (MB Nov. 16, 2009); *Broadcast Actions*, Public Notice, Report No. 47218 (MB April 20, 2010).

<sup>12</sup> Cedar Cove AFR at 3-6.

<sup>13</sup> Cedar Cove AFR at 2-3.

<sup>14</sup> See *BVM Helping Hands, Antioch, IL*, Memorandum Opinion and Order, 29 FCC Rcd 6464, 6465 (2014) (rejecting argument that Bureau erred in granting application when TV6 station ceased analog transmissions after close of window but prior to grant).

<sup>15</sup> *Letter Decision*, 25 FCC Rcd 3703 n.29. It is for this reason that we also dismiss HPR’s Motion as moot. The Motion urges us to strike portions of Cedar Cove’s Reply that contain new technical data related to the HPR Application’s compliance with Section 73.525(d). We reject Cedar Cove’s arguments here without reaching the technical allegations it makes. Thus, we do not consider the “Technical Statement” that Cedar Cove submitted with its Reply and also do not need to address whether that material should be stricken from the record. See Motion at 1 (*citing* Section 1.115(c) of the Commission’s rules).

assignment.<sup>16</sup> Accordingly, even if the Application had been dismissed, HPR could have cured the defect by requesting reconsideration and reinstatement *nunc pro tunc* within 30 days of dismissal.<sup>17</sup> It is reasonable to decline to take adverse action based solely on an application's earlier acceptability, when subsequent events--*i.e.*, a change in applicable law and the relevant TV Channel 6 station's termination of analog operations on Channel 6 --resulted in a fully acceptable application at the time of processing.<sup>18</sup>

4. In addition, Cedar Cove and Wren both urge us to reverse the Commission policy barring the grant of more than one application per group of mutually exclusive applications and to grant their applications for noncommercial educational stations as secondary grantees.<sup>19</sup> Specifically, they argue that failure to allow additional grants conflicts with the Commission's mandate under Section 307(b) of the Act and is inconsistent with the Commission's practice of allowing settlement agreements that can result in multiple grants.<sup>20</sup> They further argue that allowing additional grants would place only a "minor burden" on agency staff.<sup>21</sup> We recently considered a number of challenges to this policy, including arguments almost identical to those raised by Wren and Cedar Cove.<sup>22</sup> For the same reasons the Commission previously rejected those arguments, we are again rejecting them here.<sup>23</sup> The One Grant policy was adopted pursuant to notice and comment procedures.<sup>24</sup> Thus, any suggested revisions to that

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<sup>16</sup> *Media Bureau Establishes October 27, 2009, Initial Filing Date for Acceptance of Certain Noncommercial Educational FM Station Minor Change Applications*, Public Notice, 24 FCC Rcd 12598 (MB 2009) ("*Minor Change Public Notice*"). Cedar Cove acknowledges the release of this notice.

<sup>17</sup> *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984) (as subsequently published in the Federal Register, 49 Fed. Reg. 47331, 47332 (Dec. 3, 1984)).

<sup>18</sup> *WKVE, Semora, North Carolina*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 23411, 23423 (2003). We note that a number of cases cited by Cedar Cove are distinguishable on this ground. See Cedar Cove AFR at 4-5 and n. 13, citing *Heartland Ministries, Inc.*, Letter, 25 FCC Rcd 3572 (MB 2010); *School Board of Broward County*, Letter, 24 FCC Rcd 5390 (MB 2009); *Family Life Educational Foundation*, Letter, 23 FCC Rcd 4779 (MB 2008); *Serendipity Educational Broadcasting, Inc.*, Letter, 23 FCC Rcd 15392 (2008). In each of these cases, the affected TV Channel 6 stations remained on air both when the Commission dismissed the applications for violating Section 73.525 of the rules and when the Bureau considered any petitions for reconsideration of those dismissals. And, in three of these cases (*Broward County*, *Family Life*, and *Serendipity*), the new processing policy was not effective at the time the Bureau acted on the applications or any petitions for reconsideration of those applications. Accordingly, these cases did not involve the combination of subsequent events present here.

<sup>19</sup> Cedar Cove AFR at 7-8; Wren AFR at 1.

<sup>20</sup> Cedar Cove AFR at 7-8; Wren AFR at 2-3.

<sup>21</sup> Cedar Cove AFR at 8; Wren AFR at 4.

<sup>22</sup> See *Greene/Sumter Enterprise Community, etc.*, Memorandum Opinion and Order, FCC 15-87 (rel. Jul. 16, 2015) ("The Commission instead concluded that the One Grant Policy would be preferable as the most "administratively efficient" approach and one likely to lead to the selection of the best qualified applicants"); *Radio Training Network*, Memorandum Opinion and Order, FCC 15-120 (rel. Sept. 17, 2015).

<sup>23</sup> See *Greene/Sumter Enterprise Community*, Memorandum Opinion and Order, 30 FCC Rcd at 7695-99.

<sup>24</sup> See, e.g., *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 (2010) ("only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window"). See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001); *vacated in part on other grounds, NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

policy are more appropriately considered in the context of a notice and comment rulemaking proceeding rather than in a fact-specific adjudicatory proceeding such as this.<sup>25</sup>

5. Finally, Kanu seeks review of the Bureau's denial of its request for waiver of that policy.<sup>26</sup> Specifically, Kanu argues that the Bureau erred in finding that concerns about administrative efficiency weighed against grant of its waiver request and in concluding that Kanu had not demonstrated the existence of any unique circumstances which might justify grant of its request. Upon review of Kanu's arguments and the entire record, we conclude that Kanu has failed to demonstrate that the Bureau erred.<sup>27</sup> We thus uphold the Bureau's decision for the reasons stated in the *Waiver Letter*.<sup>28</sup>

6. 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) and (g), the Applications for Review filed by Wren Communications, Inc. and Cedar Cove Broadcasting, Inc. on May 14, 2010, ARE DENIED, and the Application for Review filed by Kanu O Ka Aina Learning Ohana on September 9, 2015, IS DISMISSED IN PART AND OTHERWISE DENIED. IT IS FURTHER ORDERED that the Motion to Strike filed by Hawaii Public Radio, Inc. on July 6, 2010, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>25</sup> See, e.g., *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1984) (citation omitted) ("rulemaking is generally a 'better, fairer and more effective' method of implementing a new industry-wide policy"); *Sunburst Media L.P.*, Memorandum Opinion and Order, 17 FCC Rcd 1366, 1368 ¶ 6 (2001) (stating "it has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications"); *Great Empire Broadcasting, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 ¶ 8 (1999) (it is generally inappropriate to address arguments for a change in rules "where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record"), citing *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5888 ¶ 87 (1996). Likewise, we also decline to revise our "policy for making determinations concerning misrepresentations." See Cedar Cove AFR at 8 n.26.

<sup>26</sup> Kanu AFR at 1.

<sup>27</sup> Contrary to Kanu's argument regarding the absence of "complexities" in granting its waiver request, see Kanu AFR at 4, we note the filing of Cedar Cove's Opposition to Kanu's Request for Waiver. See Cedar Cove Opposition to Request for Waiver. In its Opposition, Cedar Cove claims that its application would prevail over Kanu's in a point analysis and further argues that Kanu's application is "fatally flawed and, therefore should be dismissed." See Cedar Cove Opposition to Request for Waiver at 2. This dispute highlights our concern about administrative efficiency and the potential for undue delay associated with further processing of secondary applications.

<sup>28</sup> We note that Kanu seeks to introduce new information regarding the unique circumstances of applicants for NCE FM stations serving the Hawaiian Islands in its Application for Review. See Kanu AFR at 4-5. We dismiss this portion of the AFR as procedurally defective. Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(c) of the Rules, 47 C.F.R. § 1.115(c), bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass."