

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

FCC 16M-26

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 KAAK, 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)	

CLARIFICATION OF *MEMORANDUM ORDER & OPINION*, FCC 16M-23

Issued: September 26, 2016

Released: September 26, 2016

On July 25, 2016, the Presiding Judge issued *Memorandum Opinion & Order*, FCC 16M-25 (“*MO&O*”), dismissing Avenal Educational Services, Inc. (“Avenal”) and Central Valley Educational Services, Inc. (“Central Valley”) as parties after finding that they “did not qualify as entities entitled to apply for NCE [noncommercial educational] stations on the dates that [they filed] applications . . . with the Commission.” *Id.* at 9. In a brief dated July 30, 2016, Mr. William L. Zawila appealed the *MO&O*. It must be noted once again that Mr. Zawila and

another attorney, Michael Couzens, both purport to represent Avenal and Central Valley, but neither has been able to definitively prove their representation.

Mr. Couzens has not filed an appeal on behalf of Avenal and Central Valley. Instead, on August 11, 2016, Mr. Couzens sent the Presiding Judge and counsel for the remaining parties a letter “thanking” the Presiding Judge for the ruling and noting the “wisdom of the approach.” Letter from Michael Couzens to Hon. Richard L. Sippel (August 11, 2016) at 1 (hereinafter, “Couzens Letter”). The Couzens Letter went on to point out that “we suggested in lieu of revocation [of the construction permits] that our permittees [i.e., Avenal and Central Valley] might simply lose their right to NCE status, remaining free to operate as commercial entities... Your decision did not discuss, and thus did not accept or reject that alternative.” *Id.* Mr. Couzens also attached two letters to the Secretary of the Commission indicating that Avenal and Central Valley, as represented by Mr. Couzens, elected to change their stations from NCE to commercial status.

In light of this update from Mr. Couzens, it is worthwhile to clarify that Avenal and Central Valley were dismissed without prejudice. *Cf.* Fed. R. Civ. Pro. 41(a)(2) (providing that, unless the court specifies otherwise in the order, a voluntary dismissal must be considered a dismissal without prejudice); *Premiere Network Servs., Inc.*, 18 FCC Rcd 11474, 11475 (2003) (“Although the Commission does not have a specific rule relating to the dismissal of formal complaints, . . . Rule 41(a)(2) of the Federal Rules of Civil Procedure, although not controlling, is instructive.”) (footnotes omitted).

Black’s Law Dictionary (10th ed. 2014) defines “dismissed without prejudice” as “removed from the court’s docket in such a way that the plaintiff may refile the same suit on the same claim.” *See also Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (“The primary meaning of ‘dismissal without prejudice,’ we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.”). Thus, the agency may bring the same claims against Avenal and Central Valley, based on the same set of facts, in another proceeding.

Moreover, *In re Allegan Cnty. Broadcasters, Inc.*, 83 FCC 2d 371 (1980), makes clear that the unresolved character issues can be raised in a later proceeding even if Avenal and Central Valley had been dismissed with prejudice:

We believe the public interest can be adequately protected by other Commission procedures where unresolved substantial and material character allegations remain against a dismissing applicant. If the dismissing applicant is an existing Commission licensee, those allegations can be revisited in a license renewal, transfer or assignment proceeding. If the dismissing applicant is not an existing Commission licensee, the allegations can be revisited in a future

proceeding should the applicant again seek to obtain a Commission license.

Id. at 373 (dismissing applicant with prejudice).

The Presiding Judge also rules that the Couzens Letter’s presumption that Avenal and Central Valley can change their stations from NCE to commercial at will is incorrect. Mr. Couzens’ reading appears to rely entirely on a footnote in *In re Creation of Low Power Radio Serv.*, 15 FCC Rcd 2205, which states in pertinent part:

In this regard, LPFM NCE stations will be different from full-service NCE stations 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.

Id. at 2284 n.33. However, Mr. Couzens’ interpretation of this lone footnote is not complete. Commission rules and precedent that more directly address the issue in non-footnoted holdings make it abundantly clear that *permission must first be granted by the Commission.*

The Commission’s rule 47 CFR § 73.1690(c)(9) states in relevant part that “a noncommercial . . . FM licensee on Channels 221 to 300 . . . on a channel not reserved for noncommercial educational use, may *apply* to change from educational to commercial via a modification of license application *The change will become effective upon grant of the license application.*” *Id.* (emphases added). According to their applications, Avenal had applied for FM channel 289-A,¹ and Central Valley had applied for FM channel 276-A.² Moreover, the Commission has already stated that Section 73.1690 applies to permittees as well as licensees. *In re High I-Q Radio, Inc.*, 19 FCC Rcd 7225, 7235 (April 21, 2004). Thus, Avenal and Central Valley clearly fall within this Commission rule, which has not been met.

High I-Q Radio, Inc. had applied for a construction permit to build an NCE FM station on a non-reserved channel, similar to Avenal and Central Valley. *Id.* at 7225. Shortly after commencing operations as an NCE station, High I-Q submitted a license application stating that, “due to a change in circumstances,” it would operate as a commercial station. *Id.* at 7228. While the Commission chose not to take action, it noted that, by commencing commercial operations prior to grant of the license application proposing conversion to commercial operation, High I-Q “violated the terms of its authorization and Section 73.503.” *Id.* at 7234-35. The Commission made clear that “Section 73.1690(c) *requires prior Commission approval – i.e., a finding that a*

¹ See Ex. 5 to Zawila’s Second Objection to Evidence Regarding Ownership Submitted by Verne J. White (June 1, 2015).

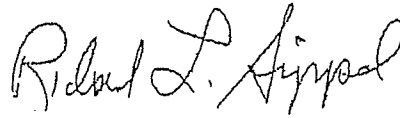
² See Exhibit 1 to Enforcement Bureau’s Opp. to Central Valley and Avenal’s Brief in Response to *Order*, FCC 16M-12 (April 14, 2016).

conversion to commercial operations would further the public interest – *prior to effectuation of the change.*” *Id.* at 7235 (emphases added).

Conclusions

Thus, the *MO&O* is clarified in three respects: (1) that Avenal and Central Valley were dismissed *without prejudice*, (2) even if it were with prejudice, the same character issues could still be raised in another proceeding under *Allegan*,³ and (3) Avenal and Central Valley have not eroded all issues with their respective statuses simply by attempting to convert to commercial status.

FEDERAL COMMUNICATIONS COMMISSION⁴



Richard L. Sippel
Chief Administrative Law Judge

³ Procedurally, the Media Bureau would issue a new hearing designation order re-setting the issues dismissed without prejudice for determination by adjudication before an Administrative Law Judge.

⁴ Courtesy copies of this Order will be sent by email on issuance to all counsel, and additionally by First Class Mail to: Mr. Zawla.