

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

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: October 6, 2004

Released: October 8, 2004

By the Commission:

I. INTRODUCTION

1. We have before us a petition for reconsideration filed by the North American Catholic Educational Programming Foundation, Inc. (NACEPF) on October 10, 2003.¹ NACEPF seeks reconsideration of a *Memorandum Opinion and Order*² affirming the April 18, 1997 grant by the Video Services Division (Division) of the former Mass Media Bureau³ of an application filed by the Clark County School District (Clark County)⁴ to construct and operate an ITFS station on the A Channel Group in Las Vegas, Nevada and denying NACEPF's mutually exclusive application.⁵ For the reasons discussed below, we dismiss the Petition in part and deny the Petition in part.

II. BACKGROUND

2. Clark County is responsible for providing public education for kindergarten through twelfth grade students in the Las Vegas, Nevada area.⁶ 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,

¹ Petition for Reconsideration (filed Oct. 10, 2003) (Petition).

² Clark County School District, *Memorandum Opinion and Order*, 18 FCC Rcd 18815 (2003) (*Commission MO&O*).

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

⁶ 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.

Nevada.⁷ 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 area.⁸ 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.⁹ In so doing, Clark County sought a waiver of the Commission's rule¹⁰ limiting the assignment of no more than four channels to a licensee for use in a single area of operation.¹¹ 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."¹² 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.¹³ 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.¹⁴ 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).¹⁵ 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."¹⁶ The Division therefore concluded that grant of the waiver was warranted.

⁷ File No. BPIF-7980828MA.

⁸ File No. BLIF-810616MF.

⁹ 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's 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.

¹⁰ 47 C.F.R. § 74.902(d)(1) (1993).

¹¹ 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.

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

¹³ *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.*

¹⁴ *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.*

¹⁵ *See id.*

¹⁶ *Id.*

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 to provide the service for which the ITFS spectrum had been allocated.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ The Division further found that grant of Clark County's application would serve the public interest, convenience, and necessity.²¹ As a result, NACEPF's application was dismissed.²²

7. NACEPF timely sought reconsideration.²³ 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.²⁴ 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.²⁵ 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.²⁶ For example, the Division specifically noted Clark County's intent to "use the A channels to offer live interactive French classes, additional math

¹⁷ 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).

¹⁸ 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).

¹⁹ 1997 MO&O, 12 FCC Rcd at 24453 ¶ 6.

²⁰ 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.*

²¹ *Id.* at 24453 ¶ 8.

²² *Id.* at 24453 ¶ 9.

²³ Petition for Reconsideration filed by NACEPF (filed May 21, 1997).

²⁴ 2002 MO&O, 17 FCC Rcd at 5325 ¶ 3.

²⁵ See *id.* at 5326 ¶ 5.

²⁶ *Id.* at 5327 ¶ 5.

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.”²⁷ In addition, the Division further rejected NACEPF’s argument that Clark County did not need additional capacity because its C Group and E Group channels distributed the same programming.²⁸ 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.”²⁹ 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.”³⁰ The Division therefore concluded that “the public interest is best served by granting [Clark County] a waiver of the four-channel rule.”³¹

8. On April 17, 2002, NACEPF filed an application for review of the *2002 MO&O*.³² On September 11, 2003, we denied the AFR.³³ We held that the grant of Clark County’s waiver request was consistent with precedent and that Clark County had made an adequate showing justifying a waiver.³⁴ In that regard, we discussed and rejected NACEPF’s argument that Clark County had an “exceedingly high” burden of justifying a waiver.³⁵ We specifically rejected NACEPF’s arguments that Clark County should be required to reconfigure its system to eliminate duplication of programming on its channels³⁶ and that Clark County should be required to use digital compression before obtaining additional channels.³⁷

III. DISCUSSION

9. Section 1.106(b)(2) of the Commission’s Rules³⁸ provides:

Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

- (i) The petition relies on facts which relates to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
- (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise

²⁷ *Id.* at 5326 ¶ 5.

²⁸ *See id.* at 5327 ¶ 6.

²⁹ *Id.* (citing Northern Arizona University Foundation, *Memorandum Opinion and Order*, 7 FCC Rcd 5943, 5945 n.7 (1992) (*Northern Arizona*)).

³⁰ *Id.* at 5327 ¶ 6.

³¹ *Id.*

³² Application for Review (filed Apr. 17, 2002) (AFR).

³³ *Commission MO&O*.

³⁴ *Id.* at 18819 ¶ 10.

³⁵ *Id.* at 18818-19 ¶¶ 9-10.

³⁶ *Id.* at 18820 ¶ 12.

³⁷ *Id.* at 18820 n.52.

³⁸ 47 C.F.R. § 1.106(b)(2).

of ordinary diligence, have been learned prior to such opportunity.

A review of NACEPF's petition shows that NACEPF does not present any new facts or changed circumstances in its petition. Instead, NACEPF simply reargues matters that the Commission previously considered and rejected in ruling on its application for review or cites facts that it could have presented to the Bureau earlier. Accordingly, we summarily dismiss NACEPF's Petition to the extent that it rehashes arguments previously considered and rejected. In particular, we note that while NACEPF again argues that the Commission used the wrong standard and should hold Clark County to an "exceedingly high standard" in evaluating Clark County's waiver request,³⁹ we have previously considered and rejected that argument.⁴⁰ NACEPF also repeats its arguments concerning digital compression that we have previously rejected.⁴¹ It is well established that "rehearing will not be granted merely for the purpose of debating matters on which the tribunal has once deliberated and spoken."⁴²

10. To the extent NACEPF raises new arguments, we conclude that those arguments should not be considered because they are not based upon new facts or changed circumstances. For example, while NACEPF makes arguments concerning a prior construction permit Clark County held for these channels in the 1980s,⁴³ it had every opportunity to make those arguments before the Mass Media Bureau and in the AFR. Similarly, NACEPF's arguments concerning the Commission's goal of diversity⁴⁴ should have presented to the Mass Media Bureau in the first instance.⁴⁵ We therefore dismiss the Petition to the extent it makes arguments not presented in the AFR.

11. One issue raised by NACEPF warrants further discussion. NACEPF argues that Clark County should not have been allowed to supplement its waiver request in 1994 because such supplementation allegedly violates the Commission's policy of prohibiting amendments filed after the "B" cut-off date, which is the deadline for amendments that could improve an applicant's comparative position.⁴⁶ We reject this argument. The Commission has regularly allowed applicants to file supplements to requests for waiver of the four-channel rule after the "B" cut-off date, so long as the supplement is not used to improve the applicant's comparative position.⁴⁷ The former Mass Media Bureau's treatment of Clark County's supplemental filing was consistent with that policy.⁴⁸

³⁹ Petition at 5-6, 9-11.

⁴⁰ *Commission MO&O* at 18818-19 ¶¶ 9-10.

⁴¹ *Compare* Petition at 7-8 and *Commission MO&O* at 18820 n.52.

⁴² *WWIZ, Inc., Memorandum Opinion and Order*, 37 FCC 685, 686 ¶ 2 (1965), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

⁴³ Petition at 11-12.

⁴⁴ *Id.* at 12-13.

⁴⁵ *See* 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."); 47 C.F.R. § 1.106(b)(2).

⁴⁶ Petition at 4, *citing* Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, MM Docket No. 83-523, *Second Report and Order*, 101 FCC 2d 49, 74 ¶ 59 (1985).

⁴⁷ *See* Board of Regents, Eastern New Mexico University, *et al.*, *Memorandum Opinion and Order*, 10 FCC Rcd 3162 n.1 (1995); Northern Arizona University Foundation, *et al.*, *Memorandum Opinion and Order*, 7 FCC Rcd 5943, 5944 n.6 (1992).

⁴⁸ *1997 MO&O* at 24450 n.1.

IV. CONCLUSION AND ORDERING CLAUSE

12. We dismiss most of the Petition because it seeks to relitigate issues we have previously decided without presenting new facts or circumstances or because it presents new arguments that should have been presented earlier. We reject NACEPF's argument that Clark County should not have been allowed to supplement its waiver request. We therefore dismiss the Petition in part and deny the Petition in part.

13. Accordingly, **IT IS ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by the North American Catholic Educational Programming Foundation, Inc. on October 10, 2003 **IS DISMISSED IN PART AND DENIED IN PART**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary