National Federation of Community Broadcasters

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FEDERAL COMMUNICATIONS COMMISSION
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92-52

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Ms. Searcy:

The National Federation of Community Broadcasters hereby transmits the original and four copies of its Reply Comments in the above-captioned proceeding.

Sincerely yours,

Lynn Chadwick
President

cc: Office of General Counsel
Downtown Copy Center

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of	)	GC Docket No. 92-52
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	RM-7739 RM-7740 RM-7741

REPLY COMMENTS OF THE NATIONAL
FEDERATION OF COMMUNITY BROADCASTERS

Dated: June 19, 1992

SUMMARY

The National Federation of Community Broadcasters ("NFCB") agrees with many of the premises and some of the specific recommendations of the Joint Comments of the Association of America's Public Television Station and National Public Radio. It differs, however, with the Joint Comments proposals: (1) that the Commission retain and refine the current NCE criteria; and (2) that the Commission not adopt a point system.

Twenty-five years of failure are enough. The Comission may reasonably conclude that NCE criteria which have not worked for a quarter century will not work in the future. It need not fear that abandonment of the current NCE criteria would be "premature."

Nor should it attempt to "refine" the current NCE criteria. The confusion endemic to those criteria cannot be refined away. It is time to start over, and do better.

The point system proposed by NFCB efficiently achieves the special mission of NCE broadcasting by rewarding objective indicia of diverse programming and public service. In addition to the criteria proposed in its initial Comments, NFCB joins other commenters in urging the Commission to conduct an inquiry which could establish a constitutional foundation for a gender preference.

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REPLY COMMENTS OF THE NATIONAL
FEDERATION OF COMMUNITY BROADCASTERS

The National Federation of Community Broadcasters ("NFCB") hereby submits its Reply Comments in response to the above-captioned Notice of Proposed Rulemaking ("NPRM").[1] These Reply Comments are directed principally to the Joint Comments of The Association of America's Public Television Stations and National Public Radio ("Joint Comments").

I. *INTRODUCTION*

NFCB is in substantial agreement with most of the premises of the Joint Comments. It agrees that the noncommercial educational ("NCE") criteria, as currently applied, are unsatisfactory. Joint Comments, p. 16. It agrees that many of the current and proposed commercial criteria are inappropriate to NCE broadcasting and that the NCE service is "markedly different," Joint Comments, p. 4, from the commercial service. It agrees that the NCE criteria should reflect "public broadcasting's mission" of providing diversity of programming which addresses the needs of

[1] FCC 92-98, released April 10, 1992, 57 Fed. Reg. 14683 (April 22, 1992).

unserved and underserved audiences. Joint Comments, pp. 9, 28. And it agrees that the policies of other federal organizations such as the Corporation for Public Broadcasting ("CPB") and the National Telecommunications and Information Administration ("NTIA") are relevant to the comparative criteria which the FCC adopts.

NFCB also agrees with many of the specific conclusions reached by the Joint Comments. It agrees, for example, that the integration of ownership and management criterion, applied in commercial hearings, is irrelevant to NCE hearings; that the NCE "time-share" issue should be eliminated; that comparative coverage is an important consideration; and that a "service continuity" criterion would not be a useful means of comparing NCE applicants.

NFCB, however, differs with the Joint Comments on two fundamental points: (1) NFCB recommends that the current NCE comparative criteria be scrapped, while the Joint Comments recommend these criteria be retained and refined; and (2) NFCB recommends adoption of a point system, while the Joint Comments recommend continuation of the highly subjective system now in use.

II. THE CURRENT NCE CRITERIA CANNOT BE SALVAGED.

The NPRM concludes that the NCE criteria now in use are so "vague as to make rational choices among noncommercial applicants difficult if not impossible." NPRM, ¶ 39. In response, the Joint Comments contend that abandonment of these criteria would be "premature," Joint Comments, p. 16, and undertake to "refine" the criteria. *Id.*, p. 18 While NFCB applauds any attempt to improve upon the current

criteria, it does not believe these criteria can themselves be redeemed through minor refinements.

Twenty-five years of failure is enough. The Commission can hardly be accused of acting prematurely in concluding that the NCE criteria which have not worked for the past quarter of a century will not work in the future. Despite valiant efforts to refine these criteria, the Joint Comments fail to formulate guidelines which give applicants, or Administrative Law Judges, a clear and objective method of evaluating the comparative merit of competing applications.

A. The Integration Criterion.

The Joint Comments propose that the Commission continue to compare applicants based on the issue of which applicant "will best integrate its proposed operations into its overall educational and cultural objectives." As refined, such a comparison would include an analysis of the applicant's educational and cultural objectives, its anticipated program format, and its plans for program promotion, audience development and financial support. Credit would be awarded to an applicant "to the extent it has established objectives and the objectives are clearly defined as educational and cultural." Joint Comments, p. 21.

Although the Joint Comments note that the suggested analysis "should be distinguished from an applicant's initial satisfaction of the noncommercial eligibility criteria," Joint Comments, p. 21, n. 28, they do not explain the basis for this distinction. It therefore remains unclear how the proposed criteria differ from an eligibility test, or why the Commission should undertake to review an applicant's

eligibility qualifications *twice*, once in accepting the application for filing, and again in the context of a comparative hearing.

More fundamentally, the standard proposed does not answer the question raised in *Black Television Workshop of Santa Rosa,* 65 Rad. Reg. 2d (P & F) 34, 36 (Rev. Bd. 1984): "If the 'overall cultural and educational objectives' of applicants are to be compared, what criteria should be used?" Put more bluntly, the question is how an administrative agency can presume to say that a college is somehow *better* than a church, that a church is *better* than a fine arts organization, or that a fine arts organization is *better* than an eclectic community group. [2]

The issue is not made more palatable by shifting the focus from organizational purposes to "anticipated program formats." NCE applicants should not be put in the position of proving, nor ALJs of deciding, whether classical music is intrinsically superior to jazz, jazz to folk, or folk to Christian rock.[3] The Commission long ago abandoned the effort to prefer applicants based upon proposed program formats. As the Review Board noted in *Seattle Public Schools,* 4 F.C.C.R. 625, 640 and 630 (1989):

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[2] The instructive history of one proposal to distinguish between NCE applicants based upon their organizational objectives and institutional affiliation is described in *The Petition Against God, The Full Story of the Lansmans-Milam Petition* (1976). The FCC reports that it has received "millions" of calls and letters concerning this petition, and seething updates continue to be received even though the proceeding was terminated almost twenty years ago. For more information, call 632-7000, Option 3.

[3] Comparison of program promotion or audience development plans present similar issues. By what standard is the Commission to decide which development plan – or which targeted audience – is better? And how would such a preference be enforced? Would a grant be forfeited if a development plan or format were changed?

> [T]he Commission has formally recognized that non-commercial broadcasters come in a legion of shapes and sizes, and it has refused to straitjacket such an entity into specific types of programming, once it finds that entity basically eligible . . . .
>
> In fact, following the Supreme Court's decision in *WNCN Listeners Guild, supra* [450 U.S. 582 (1981)], we are aware of no case in which the Commission or the Courts have paid the slightest attention to the entertainment component of a licensee's programming.

The integration standard proposed by the Joint Comments would entangle the Commission in the harrowing, ultimately unconstitutional, attempt to prefer certain types of speakers based upon the proposed content of their speech. NFCB opposes adoption of any such standard.

B. *"Other Factors"Relevant to Integration*

The Joint Comments maintain that "other factors" relevant to the issue of "whether the applicant's service will support its objectives" are the composition of the applicant's board and the applicant's ability to effectuate its proposal. The first factor appears to be largely illusory. Although the Joint Comments urge examination of the applicant's board to determine whether it is "composed of people that are in a position to support the stated educational and cultural goals of the applicant," the Joint Comments also urge that "the ALJ should not engage in a detailed comparison of which applicant may have more, or more renowned, community, educational, civic or cultural leaders on its board." Joint Comments, p. 23. Comparative inquiry would end with a determination that the board is "generally representative of the educational, community and cultural organizations in the community that are most closely aligned with its stated objectives."

Except in cases of fraud, where an applicant is not who it says it is, every NCE applicant would presumably garner full comparative credit under this criterion. It is difficult to understand how one eligible applicant could be preferred over another eligible applicant based upon the extent to which the applicants' board members reflect the respective goals of the applicants. Is an ALJ better qualified than the applicant to say that a particular board member will or will not advance the applicant's goals? How would an ALJ make such judgments in practice? Does the mayor of the community of license reflect the applicant's goals better than the mayor's spouse? What if the mayor's spouse is the conductor of the local symphony? What if the spouse is a retired conductor, now unemployed, who will volunteer 40 hours a week at the station? Would the credit differ if the station proposed a folk rather than classical format? Are the goals of NCE broadcasting advanced one whit by the answers to such questions?

The second factor, the applicant's ability to effectuate its proposal, is of comparable inutility. The Joint Comments suggest that, under this factor, the Commission consider the applicant's commitment of existing resources, staffing plans, funding qualifications, and use of both broadcast and non-broadcast services which support the applicant's objectives.[4]

NFCB believes there are two reasons that the Commission should not adopt an "ability to effectuate" factor. The first is that it is difficult to distinguish this factor

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[4] As the Joint Comments correctly note, ALJs in two cases have considered an applicant's ability to effectuate its proposal as a factor which suggests it will provide a superior NCE service. *See Maricopa County Community College District,* 5 F.C.C.R. 4081 (ALJ 1990) and *East Tennessee Communications Corp.*, 2 F.C.C.R. 685 (ALJ 1987). The decisions cited do not, however, offer any legal basis for the preference, and neither decision has been affirmed by higher authority.

from an applicant's basic financial qualifications and to evaluate such qualifications on a comparative basis. Is one applicant to be preferred to another solely because it has a larger endowment, or has budgeted more funds to the development of a broadcast station or proposes to hire eight rather than seven full-time employees? The suggestion that the eligibility guidelines of other state and federal organizations be used as an FCC comparative criterion is especially troubling since it would involve the FCC in making determinations which should be left exclusively to the jurisdiction of other agencies. It would, at the very least, be impolitic for the FCC to make "determinations" that particular entities are or are not qualified to receive grants from those funding agencies. *See* Joint Comments, pp. 24-25. CPB, NTIA and the states may rightly reserve such judgments to themselves.

The second reason not to adopt an "ability to effectuate" criterion is that the factor would give undue weight to the established broadcaster or institutional applicant over the newcomer or independent community or minority group. Under the proposed criterion, the Commission would always award a preference to the larger, more established applicant, since the larger applicant is more likely to have "existing resources" and other "facilities and personnel," which can be shared with the proposed station. Such a criterion would shut the door on the very applicants who have the greatest promise for advancing the goal of diversity of programming.

III. THE COMMISSION SHOULD NOT RESURRECT THE ASCERTAINMENT ISSUE.

The Joint Comments recommend that the Commission restore an issue to consider the manner in which proposed services will meet the needs of the com-

munity of license. As discussed in NFCB Comments, pp. 14-15, this issue was deleted in light of deregulated ascertainment requirements.

NFCB continues to believe that the ascertainment issue cannot be resurrected without resurrecting endless arguments about ascertainment methodology. Absent now abandoned uniform ascertainment procedures, there is no basis for determining which of the competing applicants will do a better job of addressing the needs ascertained. The Joint Comments attempt to finesse this point by arguing that "formal ascertainment" is unnecessary and that "any reasonable method" will suffice. But the Joint Comments cast no light on the question of what ascertainment methods are "reasonable." While a "reasonable" ascertainment standard makes great sense as a test of every licensee's duty to ascertain and address community needs, it makes no sense as a *comparative* standard. The question of whether one ascertainment technique is more or less reasonable than another devolves into absurdity. The Commission has apparently foreseen the folly of litigating over such trivia and has wisely deleted this issue.

Before leaving this issue, NFCB would like to note that the proposed indicia of an applicant's ability to meet community needs are virtually identical to the indicia proposed for determining whether the applicant's goals will be effectuated. The Joint Comments suggest that facts such as the representative nature of the applicant's board and its past broadcast and nonbroadcast record are relevant to both criteria. The proposal to weigh the same facts under both the "integration" and "ascertainment" issues again suggests the hopeless confusion between the two issues. The truth is that where applicants have different objectives, the traditional issues do not readily allow a "stable comparison." *See Seattle Public Schools*, 4

F.C.C.R. at 641. What two different non-profit organizations wish to accomplish, and what they see as the needs of the community may be radically different. Issues to determine which applicant will better achieve its own objectives, or which applicant states objectives that better reflect its view of the need of the communities, are inherently circular. The Joint Comments' refinement of these issues cannot eliminate the endemic confusion.

IV. AN "EFFICIENCIES" TEST IS CONTRARY TO THE GOALS OF THE NCE SERVICE.

The confusion between the advancement of an applicant's self-interest and the advancement of the public interest is also reflected in the Joint Comments' proposal that comparative credit be given to applicants who achieve "significant efficiencies" by owning and operating more than one station. NFCB does not deny that the integration of a proposed station into an applicant's ongoing operations may result in economic efficiencies of great benefit to the applicant. NFCB does not, however, understand how such efficiencies benefit the public. Such "efficiencies" appear to be inherently opposed to "diversity."[5] If efficiency is the goal to be achieved by the comparative process, that goal can be achieved by licensing the *fewest* voices possible and thus maximizing the "economies of scale." Such a result would, however, be antithetical to the fundamental goal of establishing a public broadcasting system which will provide "diversity of programming" as an "alternative" to programming which is already available. Public Broadcasting Act, 49 U.S.C. § 396(a).

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[5] For this reason, NFCB does not believe that state owned broadcast networks should be given a comparative preference over other public broadcasters. See NPRM, ¶ 40. The Joint Comments, (p. 35) and the Comments of Arizona Board of Regents, *et al* (p. 8), concur in this recommendation.

V. *A POINT SYSTEM IS DESIRABLE.*

The Joint Comments oppose adoption of a point system on grounds that such a system would work against "careful consideration" of the "special mission of public broadcasters to serve the public interest." Joint Comments, p. 40. They contend that while a point system may be feasible in light of "the years of experience and literally hundreds of comparative decisions interpreting the commercial criteria," it is not feasible in an NCE context where "there is no significant body of case law and the number of comparative cases is few." *Ibid.*

This argument is self-defeating. The lack of a significant body of NCE case law is one of the clearest indictments of the case-by-case system which the Joint Comments seek to preserve. As the Joint Comments recognize, NCE applicants, ALJs and the Review Board have long shared frustration with the vagueness of the NCE criteria. Joint Comments, p. 16. More often than not, this frustration is expressed in a judicial disinclination to construe the NCE issues, and a strong inclination to order time-share arrangements.

Data presented by the comments of Arizona Board of Regents for Benefit of the University of Arizona, *et al* ("NCE Licensees"), corroborate the conclusion that the ALJs and Review Board "have often chosen to avoid comparative decisions by imposing time-share arrangements or by making conclusive findings on alternative grounds (such as disqualification, renewal expectancy or coverage)." Comments of NCE Licensees, p. 5. Those data show that of the ninety-one NCE cases designated for hearing since 1980, only ten resulted in Initial Decisions, and only three in decisions by the Review Board. *Id.* at p. 4. Of the ten Initial Decisions rendered, only

four turned on the comparative issues. *Id.* at p. 4. Except for an interlocutory ruling on the applicability of the diversification criterion, *See Real Life Education Foundation,* 6 F.C.C.R. 259 (1991), the Commission has not considered the NCE criteria since establishing them. These data not only confirm the conclusion that the Commission has avoided construction of the NCE criteria, but that NCE applicants have avoided litigation of the issues. It is a fair inference that cost played a role in this decision. Non-profit entities tend to husband their limited resources jealously and to avoid litigation over hopelessly vague criteria.

The "refinements" proposed by the Joint Comments are rife with issues which are costly to litigate: the "integration" of proposed operations into stated objectives; the "representative" nature of a Board; the "qualifications" of FCC applicants to receive funding grants from state or federal organizations; the "reasonableness" of ascertainment efforts; the feasibility of format selection and audience development plans. Not the least of the virtues of the point system proposed by NFCB is its cost-effectiveness. The criteria proposed are sharply defined, scrubbed of sedimentary deposits from past litigation, and designed to produce streamlined Initial Decisions which award construction permits to applicants who will best advance the goals of NCE broadcasting.

Fear that a point system will degenerate into a lottery, *See, e.g.*, Comments of American Women in Radio and Television, Inc., are unjustified with respect to NCE frequencies. As NFCB pointed out in its Comments, p. 9, there is generally no "market" for NCE construction permits, and no reason to believe that one will develop. Absent such a market, there is no realistic possibility that NCE proceedings

will become plagued by speculative trafficking in NCE permits or speculative filings by parties who are not the real party in interest.

VI. NFCB ENDORSES ADOPTION OF A GENDER PREFERENCE

NFCB'S initial Comments were silent on the issue of a gender preference because it understands that such a preference was invalidated as a comparative criterion for commercial applicants in *Lamprecht v. FCC,* 958 F. 2d 382 (D.C. Cir. 1992). NFCB, however, wishes to join with the comments of Women's in Communications, Inc. *et al* ("WIC") and American Women in Radio and Television, Inc. ("AWRT") in urging the Commission to undertake the efforts necessary to reinstitute a gender preference on constitutionally defensible grounds. It is well established that "public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience," *Metro Broadcasting v. FCC,* 497 U.S. ___, 110 S.Ct. 2997, 111 L.Ed. 445, 466 (1990), and that the "promotion of diversity of viewpoints in general qualifies as an 'important' objective within the government's power." *Lamprecht,* 958 F.2d at 391 (constructing *Metro*). NFCB agrees that the Commission need only "establish a factual record demonstrating that the [gender] credit bears a substantial relationship" to reaching that objective in order to satisfy *Lamprecht*. *See* WIC Comments, p. 8.

A "meaningful factual predicate," as required by *Lamprecht*, 958 F. 2d at 398, exists in a growing body of research that supports the "assumption that increasing female control over the broadcast media will help increase diversity." WIC, p. 16. Careful analysis of available information and further inquiry will establish that female participation in the ownership of commercial broadcast media and in the policy-making decisions of NCE stations has an impact on programming.

In determining whether ownership of broadcast entities by women is conducive to programming diversity, *Lamprecht* implies that the Commission need not identify such programming as "programming specifically targeted at women." 958 F. 2d at 395, n.4. NFCB agrees. The goal to be achieved by increasing female participation in the broadcast media is not the creation of some narrow category of "women's programs," slotted to some obscure daypart, but the creation of programming that is less dominated by stereotypes, open to the full range of issues with which all persons must deal. Diversity of broadcast views and information in general "serves important First Amendment values." *Metro*, 111 L.Ed.2d, at 465. The benefits of such diversity "redound to *all* members of the viewing and listening audience." Id. (emphasis added).

In order to maintain relative weight given to the gender, as distinct from minority, status of commercial applicants, NPRM ¶ 24, NFCB proposes that a female preference of two points be given to any applicant in which more than 50% of the voting members are female.

VII. CONCLUSION

As discussed above, the well-intentioned efforts of the Joint Comments have not, and NFCB believes cannot, "refine" the current NCE issues so as to eliminate

the vagueness which now makes "rational choices among noncommercial applicants difficult, if not impossible." NPRM, ¶ 39. So profound is that vagueness, that the issues, even as refined by the Joint Comments, confound basic and comparative criteria, redundantly weigh the same facts under different comparative criteria, and revive ancient ascertainment and format selection controversies which the Commission has long since put behind it. If the traditional NCE criteria can be retained only at the cost of reviving *The Petition Against God,* "reasonable" ascertainment procedures, FCC-preferred formats, and determinations as to the qualifications of FCC applicants to receive grants from state and other federal agencies, then NFCB believes that the cost of maintaining the *status quo* is too high. It is time to start over, and do better.

Like the Joint Commenters, NFCB believes that the correct starting point is the fundamental mandate of public broadcasting to provide "diversity of programming [through] freedom, imagination, and initiative on both local and national levels," and address the needs of "unserved and underserved audiences." *See* Joint Comments, p. 9, (citing Public Broadcasting Act, 47 U.S.C. at § 396(a)). Unlike the Joint Commenters, NFCB believes that the current NCE criteria are a snare and delusion, loathed by applicants and ALJ's alike, scorned by the Review Board and Commission, and well overdue for a dishonorable discharge. The Commission and the public broadcast industry have a unique opportunity to fashion criteria which stem from and are designed to advance the "unique mission" Joint Comments, p. 4, of the NCE service.

NFCB has attempted to propose such criteria in its Comments.*

Respectfully submitted,

THE NATIONAL FEDERATION OF
COMMUNITY BROADCASTERS

By: _____
Lynn Chadwick
President

Dated: June 12, 1992

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* NFCB would like to acknowledge the assistance of John Crigler, its Secretary, and Nina J. Falvello in preparing its Reply Comments. Ms. Falvello is a summer intern at NFCB and a student at the Columbus School of Law, The Catholic University of America Institute for Communications Law Studies.