

June 30, 1992

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Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: GC Docket No. 92-52
Comparative Broadcast Hearings
Reply Comments

Dear Ms. Searcy:

Enclosed are the originals for filing, and (14) copies each of a Motion For Acceptance of Reply Comments After Filing Date and the Reply Comments filed jointly by America's Public Television Stations (APTS) and National Public Radio (NPR), in the above referenced matter.

Please date stamp one of each of the enclosed copies and return to APTS with our messenger today.

Sincerely,



Karen Christensen
Assistant General Counsel, NPR



Marilyn Mohrman-Gillis
General Counsel, APTS

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of the Secretary

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

MOTION FOR ACCEPTANCE OF REPLY COMMENTS AFTER FILING DATE

The Association of America's Public Television Stations("APTS") and National Public Radio ("NPR") respectfully request that the attached Joint Reply Comments of the Association of America's Public Television Stations and National Public Radio("Joint Reply Comments") be filed outside the June 22, 1992 time limit set for the filing of reply comments. APTS and NPR had previously requested a general extension of the reply comment filing deadline until July 3, 1992, which was denied by the Commission.¹ While APTS and NPR understand that a general extension of the filing deadline may not have been justified, a limited exception for the APTS and NPR reply comments would not create a burden for the Commission; would allow the Commission the benefit of the expertise of both organizations, which represent the largest number of public television and radio stations in the country, on issues of particular concern to noncommercial broadcasters; and, would further the public interest.

¹ See Order, GC Docket 92-52, Released June 16, 1992.

As noted in the APTS and NPR request for extension of time, timely filing of these coordinated joint reply comments was not possible due to a series of conflicting, time-sensitive professional matters, including the participation of counsel for APTS at the annual public television meeting held outside Washington, D.C. from June 20 through June 24, 1992. Counsel for APTS and NPR have made special efforts to complete reply comments within the shortest period of time possible and are submitting this motion within eight days of the reply comment deadline. Consideration of these reply comments in this relatively close proximity to the filing deadline should not create any administrative or other burden for the Commission.

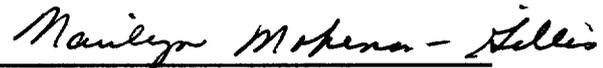
Moreover, counsel for APTS and NPR have not reviewed or read the reply comments submitted by the filing deadline by any other party. Therefore in preparing the Joint Reply Comments, counsel did not enjoy any special advantage over other parties participating in this proceeding. Therefore, no party will be prejudiced by the Commission's receipt of these comments.

Furthermore, the expertise of APTS and NPR in this area is of special significance for the Commission's consideration of issues affecting noncommercial broadcasters. APTS represents virtually all of the nation's 345 public television stations. NPR represents 445 full service public radio stations, including community, college and university, state, and local authority licensees in almost every state. Together these organizations speak for the largest and most broadly representative group of public broadcast stations in this country.

Finally, by acceptance of these reply comments, the public interest would be furthered by a full elucidation of the issues raised in comments concerning comparative broadcast criteria in the noncommercial context.

For these reasons, APTS and NPR respectfully request that the Commission accept the attached Joint Reply Comments and treat them as timely-filed.

Respectfully submitted,



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To: The Commission

REPLY COMMENTS OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
AND NATIONAL PUBLIC RADIO

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June 30, 1992

SUMMARY

In reply comments, The Association of America's Public Television Stations (APTS) and National Public Radio (NPR) (jointly Public Broadcasters) note that there is general agreement among those who filed comments on a number of noncommercial comparative issues. All commentors agree that:

- Time sharing should be eliminated from consideration in noncommercial comparative cases because it is contrary to the public interest;
- Auxiliary power should be eliminated as a criterion;
- Some type of comparative coverage factor should be adopted; and
- A finders' preference in the noncommercial context will not serve the public interest and therefore should be eliminated or its use restricted.

Public Broadcasters urge the Commission to eliminate each of these factors from consideration in noncommercial comparative hearings.

With the exception of the National Federation of Community Broadcasters ("NFCB"), there was also general agreement among the commentors that the traditional commercial criteria -- integration of ownership and management and diversification of ownership -- continue to be meaningless in noncommercial cases. The Public Broadcasters urge the Commission to affirm its decisions in *New York University* and *Real Life Educational Foundation of Baton Rouge* that these commercial criteria are simply inappropriate for comparing noncommercial applicants.

While there is general agreement on a number of issues, Public Broadcasters disagree with a proposal by the NFCB that selects a few very

narrow comparative criteria and assigns an all-or-nothing point value to each.

NFCB's proposed comparative criteria suffer a number of serious flaws. The criteria are too narrowly focused. Some apply only to radio stations and would offer no basis for comparing television applicants. Some would operate to consistently favor small community-based broadcasters and consistently disadvantage state network licensees without regard for the noncommercial educational service offered by the respective applicant. Not one of the NFCB criteria would permit any consideration of the educational service proposed by the applicant, which is fundamental to the grant of a noncommercial license. Finally, the point system proposed by NFCB unduly enhances the weight of already narrow and skewed criteria.

Public Broadcasters urge the Commission to adopt the criteria proposed in the Public Broadcasters Comments. These are intended to (1) be used to evaluate fairly the diverse types of radio and television applicants; (2) reflect the purpose behind the grant of a noncommercial license; and (3) provide the Commission with sufficient flexibility to select the applicant that will best serve the educational needs of the community.

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JOINT REPLY COMMENTS OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
AND NATIONAL PUBLIC RADIO

INTRODUCTION

The Association of America's Public Television Stations (APTS) and National Public Radio (NPR) Reply Comments will focus on the issues related to noncommercial educational broadcast applications and the comments which address those issues (hereinafter "NCE Comments").¹

There is general agreement among the NCE Commentors on a number of factors affecting noncommercial applicants. These include time-sharing;

¹ In addition to the Joint Comments filed by APTS and NPR ("Public Broadcasters"), comments addressing one or more aspects of the noncommercial educational broadcast comparative criteria were filed by: Valley Public Television; National Federation of Community Broadcasters (NFCB); Joint Comments of NCE Licensees (Arizona Board of Regents for Benefit of the University of Arizona, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Central Michigan University, Columbia College, Iowa Public Broadcasting Board, Kent State University, KVIE, Inc., Nevada Public Radio Corporation, the Ohio State University, State of Wisconsin-Educational Communications Board and WAMC); Georgia Public Television; and Harry M. Plotkin. These will be collectively referred to throughout as the "NCE Commentors."

auxiliary power; finder's preference; efficient use of spectrum; and service continuity preference. There is also general consensus that the commercial comparative criteria should not be applied to noncommercial applicants.

There is one substantial area of disagreement between two noncommercial commentors. It is whether the existing noncommercial criteria can be salvaged (with modifications as suggested in the Public Broadcasters' Joint Comments) or whether new noncommercial criteria should be adopted as proposed by the NFCB. As described below, Public Broadcasters believe that the criteria proposed by NFCB are too narrowly focused and do not serve the public interest.² Public Broadcasters urge that the Commission adopt the noncommercial criteria as proposed in their Joint Comments.

**I. THERE IS LITTLE OR NO DISAGREEMENT AMONG
NONCOMMERCIAL COMMENTORS ON CERTAIN COMPARATIVE
FACTORS**

On a variety of issues, there is no significant disagreement among the NCE Commentors.

² NFCB represents a subset of community-based noncommercial radio stations. Generally, NFCB draws its membership (62 participating members and 115 affiliate members) from the smaller community licensees, independent producers, and other organizations involved in public radio.

In contrast, APTS and NPR together represent the majority of noncommercial television and radio licensees. APTS represents virtually all of the 345 public television stations. NPR represents 445 full service public radio stations. APTS and NPR's membership consist of all licensee types, including community based, college and university, local authority and state licensed radio and television stations. Over 25% of NPR's membership consists of community licensees. NPR represents 26 stations that are also members of NFCB.

A. Time Sharing, Auxiliary Power and A Finder's Preference Should Be Rejected as Noncommercial Comparative Factors

Time Sharing

Public Broadcasters argue that the concept of time sharing should be eliminated from consideration in noncommercial comparative cases since time-share arrangements do not result in better service to the public and are contrary to the public interest. The NCE Licensees: (1) specifically support the argument that share-time arrangements are too often used as a means to avoid careful comparative decision making; and (2) present data showing that forced time-share arrangements have not resulted in any clear benefit to the public. NFCB points out that time-sharing is an anachronism, dating back to when noncommercial frequencies were abundant and channels were used by schools only during classroom hours.

In the absence of any rational basis for the time-share concept, Public Broadcasters urge the Commission to eliminate this factor from all pending and future noncommercial comparative cases.

Auxiliary Power

NFCB supports the elimination of auxiliary power as proposed in the Commission's Notice.³ None of the other noncommercial commentors, including Public Broadcasters, addressed this issue directly in their comments. Public Broadcasters concur with NFCB's basic argument that auxiliary power is a technical matter, not a comparative criterion with relevance for noncommercial service. Therefore, Public Broadcasters join NFCB in urging

³ See Notice of Proposed Rule Making, GC Docket No. 92-52, 7 FCC Rcd 2664 (April 10, 1992) [hereinafter "Notice"].

the Commission to eliminate auxiliary power as a comparative factor in noncommercial comparative cases.

Finder's Preference

There is general agreement that an overall "finder's preference" would be generally inappropriate in the context of noncommercial applications. Both the Public Broadcasters and NFCB predict that a "finder's preference" could result in a "land rush" or "first-come, first-serve" allocation process rather than careful decision-making directed at public interest considerations. The Public Broadcasters' comments suggest that a "finder's preference" be granted to noncommercial applicants seeking commercial frequencies, if such a preference is to be available to commercial applicants. NFCB suggests that a "finder's preference" be limited to a "tie-breaker" in noncommercial contests.

Public Broadcasters prefer their proposal for very limited application of a "finder's preference" to comparative contests for commercial channels. Any use of a "finder's preference" for noncommercial frequencies, even if restricted to a tie-breaking function, threatens to trigger the "land-rush" phenomena that both Public Broadcasters and NFCB believe should be avoided. In a close comparative contest, the decision-maker would be forced to use the earlier filing date rather than more principled criteria as the determinative factor, if the NFCB tie-breaker proposal was adopted. Furthermore, the concept of a tie-breaker makes sense only in the context of a point system, as NFCB has also proposed. As discussed in Part IV below, Public Broadcasters believe a point system is wholly inappropriate for selecting the noncommercial applicant that will best serve the public interest.

Therefore, Public Broadcasters urge the Commission to reject the NFCB's concept of using a "finder's preference" as a tie-breaker.

B. Comparative Coverage and Service Expansion/Efficient Use of Spectrum Should be Adopted as a Noncommercial Comparative Criterion

Public Broadcasters and NFCB each urge that the noncommercial criteria include a consideration of spectrum usage. The Public Broadcasters urge the Commission to grant a preference, in accordance with its well established case law, to applicants who propose to extend noncommercial educational service to unserved or underserved areas and populations.⁴ NFCB would assign a three-point credit to an applicant that provides a first, second or third noncommercial service to an area or population at least 10% greater than the area or population served by a competing applicant.⁵

There is general agreement that such a credit, in whatever form it is applied, will help implement the congressional and Commission policy of expanding public broadcasting service to all Americans.⁶ NFCB points out that the Public Telecommunications Facilities Program (PTFP) of the National Telecommunications and Information Administration (NTIA), which awards federally-appropriated monies for the construction of public radio and television stations, gives its highest priority to applications seeking to extend service to unserved areas.⁷

⁴ See Public Broadcasters Comments of at 29-30 & n. 33 ("Comparative Coverage and Service Expansion").

⁵ See NFCB Comments at 12-14, 18 ("Efficient Use of Spectrum").

⁶ See Public Broadcasters Comments at 29-30; NFCB Comments at 13.

⁷ See NFCB Comments at 13.

The only slight divergence in positions is how the criterion should be applied. Public broadcasters advocate that the Commission, based on well-established case law, apply a sliding scale to determine if an applicant merits a preference ranging from slight to substantial depending on the type of service (first, second, third etc.) and on the area and population covered. NFCB would grant an all or nothing three-point credit if an applicant exceeds the area and population served by its opponent by a fixed percentage (10%). We submit that the factor, as proposed by the Public Broadcasters, would afford the Commission greater flexibility in selecting the applicant that will most effectively extend public broadcast service to unserved and underserved areas and populations. The NFCB proposal is too restrictive in its application and may force anomalous results. For example, the Commission would be required to grant a three-point credit to an applicant who proposes a third service to a 10% greater area and population than its opponent, while the Commission would be unable to grant any preference to an applicant who proposes a first service that is 9% greater (just below the cutoff) than its opponent. In contrast, the Public Broadcasters' proposal would permit the Commission to adjust the preference granted based on the type of service and the actual population served.

In sum, we urge that a comparative coverage factor be included in the noncommercial comparative criteria as proposed by the Public Broadcasters.

C. Use of A Service Continuity Preference Would Not Be of Decisional Significance in the Noncommercial Context

NFCB and Public Broadcasters agree that public radio and television licenses are generally held for long periods of time and that actual transfers of station control are infrequent in the noncommercial context. The

commercial license "trafficking" problem, which the Commission seeks to resolve with a "service continuity preference," is simply not an issue for public broadcasters.⁸ Because it is not an issue in the noncommercial context, how the Commission treats it is not significant. NFCB concludes that a "service continuity preference" should not be adopted as a noncommercial criterion. Public Broadcasters conclude that, although use of such a preference would not be a decisional aid to the Commission, imposition of such a preference to noncommercial applicants would not be objectionable as long as the Commission took into consideration the unique governance arrangements of public broadcasting. Public Broadcasters have no objection to either treatment of the service continuity preference.

II THERE IS GENERAL CONSENSUS THAT THE COMMERCIAL CRITERIA ARE NOT RELEVANT TO NONCOMMERCIAL APPLICANTS

Generally, the NCE Commentors oppose the use of the existing commercial comparative criteria for noncommercial applications.⁹ The Public Broadcasters outline a series of reasons supporting the Commission's 1967 decision in *New York University* that the standard commercial comparative criteria are inapplicable.¹⁰ The NCE Licensees urge the

⁸ See, e.g., Georgia Public Television Comments at 6 ("the role of Georgia Public is to maintain and develop broadcast properties and services, and in the past 32 years dating back to 1959, Georgia Public has never sold any broadcast station.").

⁹ NFCB endorses a "modified diversification criterion." See pp. 15-18 *infra* and NFCB Comments at 11-12.

¹⁰ See *New York University*, 10 RR2d 215, 217 (1967) and APTS/NPR Comments at 7-15. APTS/NPR describe at length why the Commission's decision to reject the commercial criteria for noncommercial applicants are clearly correct. The diversification criterion is not relevant to the educational objectives of the noncommercial service and is not necessary to achieve

Commission to retain and to clarify the existing noncommercial comparative criteria. Valley Public Television urges that the Commission not apply commercial criteria to noncommercial applicants simply out of convenience. Valley argues that the Commission should consider revision of the current noncommercial criteria in a separate proceeding. NFCB apparently agrees that the general commercial criteria are "virtually meaningless" when applied to NCE applicants, and describes new noncommercial criteria to replace the existing NCE comparative factors.¹¹

1. **Integration.** The traditional commercial integration criterion was seriously challenged by the majority of commentors.¹² It was generally argued that there is no proof that an integrated owner will provide better service to its community.¹³ All of the NCE Commentors agreed that, because of the unique governance and operating structure of noncommercial stations, integration of ownership is even less meaningful in the noncommercial context. The Public Broadcasters argue that, since public broadcast stations are licensed to nonprofit organizations, there are no "owners" that can be integrated into the day-to-day operations of a station. Rather, boards of the nonprofit licensees set policy while the governing and funding structures of

diversity of programming. The commercial integration criterion is meaningless in the noncommercial context in light of the fact that noncommercial licenses are granted only to nonprofit entities which are governed by boards of directors.

¹¹ See NFCB Comments at 2-3.

¹² See e.g., Comments of the National Association of Broadcasters (NAB); Comments of Capital Cities, ABC; Comments of CBS, Inc.; Comments of NBC, Inc. in Gen. Docket 92-52 (filed June 2, 1992).

¹³ See NAB Comments at 5-9; Capital Cities/ABC Comments at 3-6; CBS Comments at 2-4; NBC Comments at 4-6.

the licensees assure community responsiveness.¹⁴ NFCB argues that application of an integration criterion would be "inappropriate" and urges the Commission "not [to] adopt a policy which deters NCE stations from drawing upon the time and talents of their community leaders."¹⁵ Georgia Public Television criticizes integration as an "invalid measure of likelihood of program service in the public interest."¹⁶

There is thus no basis in the record to support the imposition of an integration comparative factor on noncommercial applicants.

2. Diversity of Ownership. Public Broadcasters in their Joint Comments discussed at length why the Commission's recent determination in *Real Life Educational Foundation of Baton Rouge*¹⁷ was correct. In *Real Life*, the Commission concluded that "the number of stations owned by an applicant . . . is irrelevant to the determination of which applicant would best service [its educational] purpose."¹⁸ We argued further that consideration of ownership of noncommercial stations would be inconsistent with the Commission's exemption of noncommercial licensees from its multiple ownership rules, and would be inconsistent with the Commission's recognition of the efficiencies inherent in common management and

¹⁴ The NCE Licensees "concur in and support the positions put forth by APTS and NPR which, they believe, have broad acceptance by NCE broadcasters across the country." NCE Licensee Comments at 2; *see also* Georgia Public Television Comments at 6, 15.

¹⁵ NFCB Comments at 6.

¹⁶ Georgia Public Television Comments at 8.

¹⁷ 6 FCC Rcd 259 (1991) ("*Real Life I*")

¹⁸ *Real Life I* at 260.

operation of noncommercial facilities.¹⁹ This view is supported by the NCE Licensees, Valley Public Television, and Georgia Public Television.

NFCB also rejects the classic diversification criterion for noncommercial broadcasters. It offers instead what it calls a "modified diversification criterion," designed to foster diversity of programming in public broadcasting. As the Public Broadcasters discuss below, this factor, as applied in the noncommercial context, may not achieve this desired goal, and may prevent the Commission from selecting the applicant that may, in fact, be most likely to provide diverse programming services.

In short, there is ample support in the record for the Commission's determinations in *New York University* and *Real Life I* that the commercial criteria are meaningless in noncommercial cases.

III. CERTAIN CRITERIA PROPOSED BY NFCB FOR EVALUATING NONCOMMERCIAL APPLICANTS WILL NOT SERVE THE PUBLIC INTEREST

While there is substantial agreement among the NCE Commentors, Public Broadcasters believe that the application of certain NFCB criteria (local program origination, local residence, modified diversification, and minority and gender preference), in the manner proposed by NFCB, will not result in the selection of the noncommercial applicant that will best serve the public interest.

As discussed below, the NFCB proposal suffers from a number of serious flaws. First, the criteria are too narrowly focused. They single out,

¹⁹ See Public Broadcasters Comments at 11-13.

and give great prominence to (particularly through the point system) only a narrow subset of the broad range of criteria that are important for the Commission to consider in the noncommercial context. As a result, the NFCB proposal will generally favor one subset of the many diverse types of noncommercial broadcasters—the small community radio station—without a corresponding increase in the likelihood that these stations will better serve the Commission's objectives for the noncommercial service. Second, the criteria are geared primarily toward radio stations. A number of factors proposed by the NFCB have no or little application to television licensees. Accordingly, the NFCB criteria are inappropriate for both television and radio applicants. Third, the NFCB criteria are not related to the purpose behind granting noncommercial licensees—to select the applicant best able to provide noncommercial educational program service for the community. Not one of the NFCB criteria permits any consideration of the educational objectives of the applicants or how those objectives meet the needs of the community to be served. Finally, the point system proposed by NFCB is unworkable and unnecessary in noncommercial comparative proceedings. Such a rigid point system gives greater prominence to factors that are too narrowly drawn, severely restricts the Commission's discretion to choose the applicant that will best serve the public interest, and is unnecessary for administrative convenience given the small number of noncommercial comparative hearings.

A more detailed discussion of the difficulties inherent in certain factors proposed by NFCB follows.

1. Program Origination. NFCB proposes a two-point credit for the applicant that proposes to originate more than 50% of its programming.

NFCB identifies program origination as the only factor under the general heading of "superior services to the community."²⁰ This factor is not a meaningful measure of "superior service" for a variety of reasons. First, it is completely inapplicable to television. Because of the costs involved in television program production, no noncommercial television station can afford to—or actually does—produce more than 50% of its broadcast day schedule.²¹

Second, program origination is not a critical factor in evaluating service to the community. Both public television and radio stations devise a program schedule responsive to community needs from a variety of national, regional, and syndicated as well as local sources. Community responsiveness, not production locale, is the critical factor in judging an applicant's ability to serve the community.

It is not axiomatic, for example, that a radio station that originates 75% of its program schedule through an announcer "spinning records" is providing superior service in comparison to a station that offers a mixture of award-winning national and regional programming along with its local fare. Yet, under the NFCB criteria, the Commission would be forced to give the station "spinning records" the comparative preference.

NFCB claims that its proposed program origination criterion will be indicative of "a program service which is likely to provide an 'alternative' to available programming."²² Yet, a locally originated music format will not necessarily result in a "alternative program format."

²⁰ NFCB Comments at 14.

²¹ Use of a radio-only criterion would depart from the Commission's practice of using general comparative criteria for all broadcast services.

²² NFCB comments at 14.

Public Broadcasters have suggested a more direct approach aimed at the fundamental goal of public broadcasters—to serve diverse audiences. We advocate giving credit “to any applicant that proposes diverse alternative noncommercial services.”²³

2. Local Residence. The NFCB recommends adoption of a criterion that would award a two-point credit to any applicant if more than half of its “principals” reside in the proposed service area. By “principals” NFCB appears to be referring to a noncommercial applicant's governing board.

This proposed criterion is based on the premise that if the governing board of the applicant resides in the service area, it “will be better attuned to the interests and needs of that community.”²⁴ This premise is simply unproven. Many of the commentors in this docket advocated the elimination of the integration criterion for commercial broadcasters, including the local residence enhancement.²⁵ A key reason is that there is no empirical evidence to support the assertion that local residency leads to superior public service.²⁶

23 Public Broadcasters Comments at 28.

24 NFCB Comments at 16.

25 See Comments of NAB at 8-9; CBS at 10-11; ABC at 7-8.

26 See *e.g.*, Comments of CBS at 10 (“more important than the residence of the local owner, is the skill and commitment the the owner and local station management bring to identify and serve local concerns and interest.”); and ABC at 7-8 (“to the extent local residence is relevant, a professional manager is no less likely to live in the community served . . . than is his owner/manager.”).

This is particularly the case in public broadcasting. In its *1984 Public Broadcasting Deregulation Order*,²⁷ the Commission looked at the diverse types of governing boards and determined that the control structure of noncommercial stations—even those without local boards—encouraged community responsiveness.²⁸

Adoption of the local residence credit would consistently disfavor applicants licensed to a state or regional network. It is simply not true, as NFCB suggests, that an applicant who resides in the community should always be preferred to “another ‘outlet’ for national or regional service.”²⁹ The Commission may find, for example, that a proposal by a state educational network to extend its educational services to the last community in the state unserved by the network may better serve the needs of the community than an applicant whose board resides in the community.

The Commission has repeatedly recognized the value of efficiencies of operation, derived from multiple ownership, particularly of noncommercial broadcast facilities.³⁰ Under the NFCB’s proposed formulation, the Commission is precluded from considering efficiencies of operation that may result in superior, more reliable service to the community. By singling out local residence and locally originated programming, the NFCB proposal affirmatively disadvantages state and regional networks that may be able—because of common management, studio facilities, and production and

²⁷ “*Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*,” 98 FCC 2d 746 (1984) (“*1984 Public Broadcasting Deregulation Order*”).

²⁸ *Id.* at 752; see Public Broadcasters Comments at 14, n.20.

²⁹ NFCB Comments at 16.

³⁰ See Public Broadcasters Comments at 11-12 and nn 13 & 14.

engineering staff—to deliver more diverse and better quality program services.

Finally, unlike an owner-resident in the commercial context, boards of noncommercial stations are continually changing. Depending on the licensee type, boards are elected by the members of the stations or by the board members, or are appointed through a political process.³¹ There is no guarantee that an applicant composed of a majority of community residents at the time of a comparative hearing will retain that same board composition after receiving a construction permit.

In sum, NFCB's proposal would give undue prominence to a factor of questionable predictive value to the exclusion of other factors, recognized by the Commission to be important.

3. Diversification. NFCB endorses what it calls a "modified diversification criterion." Under the NFCB proposal, an applicant "would receive three points if it was not the licensee of any other stations, or if it was the licensee of stations which did not overlap with its proposed station."³² More simply stated, an applicant receives a three-point credit if it is not the licensee of a station that overlaps with the proposed station. NFCB describes its proposal as "a criterion that would, on a comparative basis, favor the new voice over the applicant seeking an additional outlet for the same market;"and is intended to foster diversity of programming.³³

³¹ See, for example, Comments of Georgia Public Television at 3.

³² NFCB Comments at 18.

³³ NFCB Comments at 12.

In fact, the criterion, as applied in the noncommercial context, would be relevant to only a few situations, would not necessarily achieve its intended goal of promoting diversity, and may, in the few circumstances in which it would be applicable, limit the Commission's flexibility to chose the best noncommercial applicant.

The NFCB's proposed diversification criterion would appear to disadvantage two types of applicants. The first is the applicant that already holds one license for a community and seeks "an additional outlet for the same market." Noncommercial licensees that operate two stations in the same market are fairly unique in the noncommercial world; and those that do exist generally serve a fairly distinct audience, and provide diverse program services through their second outlet.³⁴ This is not surprising given that providing diverse programming for different target audiences is a bedrock congressional mandate for public broadcasters. Furthermore, there are significant financial incentives within the industry to provide diverse program services.³⁵

The second type of applicant disadvantaged by the NFCB criterion is a one who plans to serve an area that overlaps to even a small degree the service area of an existing station already licensed to that applicant. As with the local residence factor, this criterion is likely to specifically and consistently

³⁴ In television, only eight licensees operate two stations in the same market. In each case, the two stations offer diverse program formats designed to serve diverse audiences. In radio, ten NPR member stations operate AM/FM combinations in the same market. The formats of the two commonly-owned stations differ significantly. The FM stations generally concentrate on musical programming, such as classical and jazz, that demands a high quality transmission medium designed for stereo reception. The AM stations are used primarily for a variety of news, public affairs, and other spoken-word programs.

³⁵ For example, a licensee may only obtain a separate Community Service Grant ("CSG") from the Corporation for Public Broadcasting ("CPB") for additional stations (in the same or different markets) if it provides separate and distinct programming services on each station.

disadvantage state broadcast networks. When a state educational network seeks to extend its services into a community that is unserved by the network, its proposed signal often will overlap with network signals serving surrounding communities. Because of the likelihood of such overlap, state networks would generally be disadvantaged by the three-point diversification credit proposed by NFCB.

The Commission should not be precluded, because of the limited focus and application of the criteria it adopts, from considering, along with the other applicants, state network applicants. State networks, as noted in the comments filed by Georgia Public Broadcasting, are dedicated to extending public telecommunications services to all citizens of the state, and to assure program diversity designed to meet unserved community needs. Moreover, state networks, through efficiencies of operation, may, in fact, be able to offer more diverse services to a community than a "new voice" which may have limited resources.³⁶

In short, awarding such a significant credit to a non-overlapping licensee does not necessarily serve NFCB's intended purpose of fostering diversity. As the Commission itself recognized in *Real Life I*, the number of licenses held by an applicant "is irrelevant" to a determination of which applicant will best be able to provide community-responsive noncommercial educational programming.³⁷ The focus should be on the unmet community

³⁶ For example, WCBB in Lewiston, Maine recently consolidated with Maine Public Broadcasting Network in a completely new not-for-profit organization that will provide coordinated public radio and television services statewide. Each licensee contributed substantial resources to produce programs about Maine affairs. Consolidation of the stations will result in increased quality and variety of programs about Maine and its people. NFCB's local residence and "new voice" factors would disadvantage a new applicant proposing such a service.

³⁷ *Real Life I*, *supra* at 260.