

needs that the applicant proposes to serve, not on the number of noncommercial licenses held by the applicant. For this reason, Public Broadcasters propose to give credit to an applicant that proposes diverse and alternative noncommercial educational services. This criterion more directly advances NFCB's laudable goal of identifying the applicant most likely to provide diverse program services.

4. Minority Preference. NFCB proposes to award an applicant three points if its board is entitled to claim minority status. Public Broadcasters strongly support the involvement of minorities (as well as women) in public broadcasting. It is a fundamental tenet of public broadcasting to provide programming that "addresses the needs of unserved and underserved audiences, particularly children and minorities."³⁸ We do not believe, however, that a three-point preference for a minority-controlled board is the most appropriate way to foster diverse programming in the noncommercial context.

Public Broadcasters submit that this factor is too rigid and inflexible for application in the noncommercial context. First, it is inconsistent with an FCC requirement for noncommercial television applicants. Television applicants are required to submit "evidence that officers, directors, and members of the governing board are broadly representative of the educational, cultural and civic groups in the community."³⁹ A three-point

³⁸ *Public Broadcasting Act*, 47 U.S.C. § 396(a)(6).

³⁹ *See* FCC Form 340, Section II, Item 3 (May 1989).

credit for a minority-controlled board would be directly inconsistent with this FCC requirement in most markets in the country.⁴⁰

In contrast, the criteria proposed by Public Broadcasters are more direct and meaningful indicators of minority representation and diversity of programming. We urge the Commission to give an applicant credit if its governing board is broadly representative of the community to be served, and further credit if it proposes diverse and alternative noncommercial educational services. These criteria embody a requirement for minority representation on the governing board that is consistent with the minority composition of the community to be served.

Furthermore, a minority credit is not consistent with the governance structure or operation of noncommercial stations. An important theoretical underpinning of the minority preference—the integrated minority owner—is not present in the noncommercial context. As explained in our original comments, stations are not “owned” in the commercial sense; rather they are licensed to noncommercial educational organizations and governed by boards of the licensee organization. While these boards are involved in setting the overall policy of the station, they do not own or manage the station, and are not typically involved in the day-to-day operation. Thus, the presumed nexus between a minority program format and a minority-owned licensee who is integrated into the station management that underlies application of

⁴⁰ Only one television market in the country (Hawaii) contains a minority population over 50%. See Nielsen's Designated Market Areas. The remaining markets, on average, are well below 50% minority composition. Three-fourths of all television and radio stations are in markets with less than a 20% minority population.

the minority preference policy in the commercial context, is simply not as strong or direct in the noncommercial context.⁴¹

Moreover, unlike in the commercial context, there is an incentive for the production and dissemination of minority programming in public broadcasting that is wholly unrelated to board composition. As noted earlier, Congress has directed public broadcast licensees to provide programming to serve its unserved and underserved audiences, including minorities. Public broadcasters, regardless of board composition, strive to achieve this goal. It is therefore not surprising to note that a number of stations, with less than minority-controlled boards, have a significant program format geared toward serving minority audiences in their respective communities of license.⁴²

Finally, unlike minority-controlled licensees in the commercial context, which remain minority-controlled unless the Commission approves a transfer of control, there is no guarantee that a minority-controlled board of a public broadcast licensee will remain minority-controlled once the construction permit is granted. As noted above, the composition of the boards of most licensees is continually changing.⁴³

⁴¹ For this reason, the legal basis for the current minority enhancement approved by the Supreme Court in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) may not be as strong in the noncommercial context. *See also* NAB Comment at 6.

⁴² For example, WJSU-FM in Jackson, Mississippi serves its 85% minority audience with a mix of jazz, gospel, blues, and world music, along with public affairs programs like "Community Express," which provides information on local nonprofit services and organizations. Yet, WJSU-FM has only a 31% minority board composition. KTEP-FM in El Paso, Texas serves an 33% Hispanic audience with national news and public affairs programs and classical, jazz and salsa music. KTEP also produces a weekly Spanish language public affairs program focusing on border issues, as well as other information programs addressing community issues. It does this with a 11% minority board composition.

⁴³ This does not mean that the overall objectives and purposes of the noncommercial licensee change with the changes in the board composition. A noncommercial licensee's statement of objectives is usually contained in its organizing document and serves as a blueprint for the evolving board.

In sum, Public Broadcasters believe that the Commission should consider the minority composition of the boards of noncommercial applicants in its comparative process, but submit that it should do so by giving credit for boards that are broadly representative of the community to be served. By using this broader criterion, the Commission will have the needed flexibility to select the licensee best suited to serve its community and to offer diverse program services.

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The flaws in NFCB's suggested comparative criteria are also apparent when one examines relevant criteria that the Commission would be precluded from considering in selecting a noncommercial licensee. Critical factors excluded by the NFCB proposal, that are included in Public Broadcasters' proposal, are: (1) the educational and cultural objectives of the applicant, (2) whether the proposed program services are related to the applicant's educational objectives, (3) the applicant's ability to effectuate its proposal, (4) whether the applicant has determined the educational and cultural needs of the community, (5) whether the applicant has a proven record of serving the needs of the community, (6) whether the applicant's proposed method of operation contains efficiencies that will expand noncommercial programming services to the community, and (7) an applicant's proposed use of technology for educational and cultural needs of the community.

Moreover, as discussed above, additional Public Broadcasters' factors more broadly encompass the narrow criteria suggested by the NFCB. These include: (1) a broadly representative governing board and (2) a proposal to provide diverse and alternative noncommercial educational services.

IV. THE NFCB POINT SYSTEM WOULD NOT SERVE THE PUBLIC INTEREST

At first blush, the NFCB proposal seems sensible and workable. It isolates a few very narrow criteria, sets up quantifiable measures within each, and assigns an all-or-nothing point value to each. While such a proposal may have superficial appeal, it will not necessarily lead to the selection of a licensee that will best serve the public interest.

First, as illustrated above, the proposed point system unduly enhances the weight of already narrow criteria.

Second, it seems that the desire to quantify the comparative criteria has dictated the criteria selected. NFCB apparently chose structural criteria that could more easily be quantified, rather than criteria that go to the heart of selecting the best noncommercial licensee. For example, NFCB claims that its 50% program origination criterion is a valid indicator of “alternative” programming and programming that will provide “superior service to the community.”⁴⁴ However, as Public Broadcasters have demonstrated, program orientation—while it may be easily quantifiable—does not necessarily lead to either alternative programming or superior service.

Public Broadcasters submit that the most direct indicators of a noncommercial licensee that will provide superior educational service to the community—factors such as the educational and cultural objectives of the applicant, the applicant’s ability to determine community needs, proposed

⁴⁴ NFCB Comments at 14.

diverse and alternative services, and proposed operational efficiencies—are enormously important and not easily quantifiable.

Moreover, the rigid point system proposed by NFCB affords the Commission no flexibility to choose from among competing applicants. In fact, it can easily force the Commission to select what it may believe is the inferior applicant. For example, the Commission may be forced to select a licensee with a majority-controlled African-American board and foreclosed from considering a licensee with a 49% Hispanic board to serve a community that has a larger Hispanic vs African-American population.

Furthermore, while an objective point system may be desirable in the commercial context to enable the Commission to handle the high volume of commercial license applications,⁴⁵ it is neither necessary nor appropriate in the noncommercial context. Only 91 noncommercial new and renewal cases have been designated for a hearing since January 1980. Out of that very small number of cases, only 14 cases involved an Administrative Law Judge (ALJ), Review Board or Commission decision.⁴⁶ The Commission need not adopt an objective, quantifiable comparative system to handle this small number of noncommercial comparative cases. It is not an administrative burden for the Commission to handle the few noncommercial cases it will face by examining well-defined, pertinent, qualitative criteria on a case-by-case basis. The Commission simply cannot quantify criteria that will be meaningful and

⁴⁵ Initiation of a point system does not necessarily result in efficiency in processing comparative cases. The Commission has adopted a point system to select from among competing applicants for instructional television fixed service (ITFS) licenses. Since 1986, the Commission has only decided two of the many pending cases using the point system. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472 (1987); and *Instructional Telecommunications Foundation*, 2 FCC Rcd 5269 (1987).

⁴⁶ See Joint Comments of NCE Licensees at 4.

effective in selecting a noncommercial licensee. Any attempt to do so, akin to the proposal offered by the NFCB, will preclude the Commission from utilizing criteria that are related to the educational purpose of noncommercial licenses and from applying them to each set of facts in a meaningful way.

CONCLUSION

In contrast to the NFCB factors, the factors proposed Public Broadcasters relate directly to the educational purpose for granting a noncommercial license; are broadly applicable to both television and radio licensees, as well as to all noncommercial licensee types (community, college/university, state, and local authority); are designed to permit a balanced and fair comparison of all licensee types rather than to favor just one type of licensee; and provide the Commission with the needed flexibility to make a valid public interest selection, rather than locking it into the rigid application of a restrictive formula.

Public Broadcasters strongly advocate that the Commission, in selecting noncommercial comparative criteria, draw from the broader, more flexible and theoretically sound criteria advocated in our proposed comments.

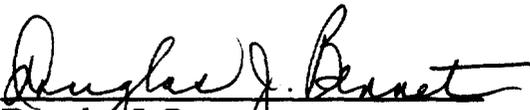
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