

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

In the Matter of)	
)	
Reexamination of the Comparative)	MB Docket No. 19-3
Standards and Procedures for Licensing)	
Noncommercial Educational Broadcast)	
Stations and Low Power FM Stations)	

**COMMENTS OF AMERICA’S PUBLIC TELEVISION STATIONS,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL PUBLIC RADIO, INC., AND
PUBLIC BROADCASTING SERVICE**

America’s Public Television Stations (“APTS”)¹, Corporation for Public
Broadcasting (“CPB”)², National Public Radio, Inc. (“NPR”)³, and Public Broadcasting
Service (“PBS”)⁴ (collectively, “Public Broadcasting”) submit these comments in
response to the Federal Communications Commission’s (“Commission” or “FCC”)

¹ APTS is a non-profit organization whose membership comprises the licensees of nearly all of the nation’s CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American people.

² CPB is a private, non-profit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars in grant monies for support and development of public broadcasting stations and programming.

³ NPR is a non-profit membership corporation that produces and distributes noncommercial educational radio programs, including *All Things Considered*® and *Morning Edition*®, through more than 1000 radio stations nationwide. Each week, some 41 million Americans listen to public radio stations with millions more consuming programming on digital platforms and via podcasts. Monthly, 105 million users experience NPR across a full range of platforms, including broadcast, digital and podcasts. NPR’s member stations are themselves significant producers of local, regional and national news, information and cultural programming. NPR also operates the Public Radio Satellite Interconnection System and provides representation and other services to its member station licensees.

⁴ PBS, through its member stations across the country, offers all Americans the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches nearly 100 million people through television and nearly 30 million people online, inviting them to experience the worlds of science, history, nature and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances.

Notice of Proposed Rulemaking on rules and procedures for comparatively considering competing applications for new and major modifications to noncommercial educational (“NCE”) broadcast stations and low power FM (“LPFM”) stations (“NPRM”).⁵ The Commission’s objective is to “improve selection procedures, expedite the initiation of new service to the public, and eliminate unnecessary applicant burdens.”⁶

Public Broadcasting applauds the Commission for its initiative to improve the NCE broadcast comparative selection process and welcomes the opportunity to present its views. Generally, Public Broadcasting supports the proposed changes to the NCE comparative selection process as set forth in Section III of the NPRM. Public Broadcasting also agrees with the overall direction of Section V of the NPRM, but we disagree with the NPRM’s rationale for what constitutes a major or minor amendment to a pending NCE application as it relates to changes in governing board membership.⁷ These comments focus on changes in governing board membership for NCE applicants.

I. Changes in an NCE Applicant’s Governing Board Membership Should Not Result in a Major Amendment

In accordance with the NPRM, Public Broadcasting urges that, in general, changes in the membership of an NCE applicant’s governing board should not result in a “major” amendment to a pending application.

⁵ *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Notice of Proposed Rulemaking, MB Docket No. 19-3, FCC 19-9 (rel. February 15, 2019) [hereinafter “NPRM”].

⁶ *Id.* at 2.

⁷ Public Broadcasting takes no position with respect to Sections IV, V(D), and V(E) of the NPRM proposing changes to the LPFM comparative licensing process, and we generally support Section V, subsections B and C of the NPRM proposing changes to other licensing procedures.

For private nonprofit, non-stock entities, the FCC’s proposal is to classify as a minor change those “ownership board changes ... which occur gradually over time and have little or no effect on the organization’s mission, even when they result in a change in a majority of such organization’s governing board.”⁸ While Public Broadcasting believes this proposal moves in the right direction, by reducing the prospect of “major” amendments resulting from NCE governing board changes, the NPRM – by its very phraseology as well as in substance – ignores the reality that board members are *not* owners, are *not* analogous to owners, and should *not* be treated as such. This issue is addressed in more detail in Section II of these comments, below. Suffice it to say that the Commission’s rules should not be based on the fiction that NCE governing board members are owners, and the Commission should not describe NCE governing boards as “ownership boards.” Because board membership changes are not ownership changes, Public Broadcasting urges that changes in NCE board membership, regardless of the timing of such changes, should not be considered “major” ownership changes in application proceedings, including NCE comparative “point system” proceedings.

Furthermore, the concept of distinguishing between “gradual” and “sudden” changes in governing board membership for NCE applicants or licensees has never previously been adopted by the Commission, and Public Broadcasting urges that it should not be used here. The concept was floated in an FCC 1989 Notice of Inquiry, which sought comments on how to define when a transfer of control occurs in an NCE

⁸ NPRM at 27 (¶67) (emphasis added). Public Broadcasting notes with concern the Commission’s use of the term “ownership board changes” with reference to NCE governing boards – thus continuing to perpetuate, with its choice of terminology, the clearly incorrect notion that NCE board members are owners. NCE board members are not “owners” under any reasonable meaning of that term.

licensee.⁹ But the timing concept and others put forth in that proceeding were widely opposed in comments, and it was never even proposed to be incorporated into federal regulations, much less adopted by the Commission. The now-terminated Transfers of Control NOI as a matter of administrative law has no precedential effect, and it should not have any bearing or persuasive value here. There is not now and there never has been a legal basis for the FCC to accord significance to whether NCE applicant board changes occur over 366 days, 365 days, 364 days, or even 30 days. If the same nonprofit, non-stock entity is the applicant, then changes in the membership of the entity's governing board, regardless of the extent of the changes, or their timing, are irrelevant.

For governmental entities, the FCC's proposal is "to treat all ownership changes in a governmental applicant as minor, provided that the change has little or no effect on the applicant's mission."¹⁰ Public Broadcasting concurs that changes in membership of governing boards of governmental entities (such as school boards, university regents, state public broadcasting commissions, etc.) should always be treated as minor, but the NPRM's implication that a governmental entity is owned by its governing board members – elected or appointed officials – is simply incorrect, again providing an example of how equating governing board membership with ownership in the NCE context is conceptually misguided. To the extent that one can suggest that governmental entities are owned by anyone, ownership can only be perceived as lodging in the citizens of the jurisdiction of the governmental entity.

⁹ *Transfers of Control of Certain Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403 (1989), referred to in the NPRM as the "Transfers of Control NOI."

¹⁰ NPRM at 28 (¶67) (emphasis added).

In addition, the FCC’s proposal for governmental entities specifies a condition for treating board membership changes as minor – that the change has “little or no effect on the applicant’s mission.” Public Broadcasting seriously doubts that the Commission is or should be prepared to make determinations about changes in the mission of a school district, a public university, or a state public broadcasting commission, and about how any such changes in mission might affect a pending NCE application. Ultimately, the Commission must conclude that changes in membership of governing boards of governmental entities will simply not result in major amendments to pending NCE applications.

II. NCE Board Membership Cannot Reasonably be Deemed to be Ownership

The Commission’s analysis in the NPRM goes astray by improperly conflating nonprofit board membership with ownership in a misguided attempt to force the square peg of NCE governance into the round hole of commercial broadcast ownership.¹¹

Public Broadcasting has exhaustively addressed this conceptual problem on multiple occasions over the past decade in other FCC proceedings purporting to address the issue of “ownership” of NCE licensees.¹² The problem was then explicitly recognized by

¹¹ Although the FCC seeks to limit the scope of this proceeding to the issue of governing board changes in the context of NCE broadcast applicants, and the NPRM states that the Commission does not seek comment on board changes in permittees and licensees, Public Broadcasting is concerned about the risk that any treatment adopted in this context will spill over into the licensee/permittee context, based on the FCC’s misguided rationale in making its decision.

¹² See, e.g., Comments of the Association of Public Television Stations, the Corporation for Public Broadcasting, National Public Radio and the Public Broadcasting Service in MB Docket No. 07-294 *et al.* (filed June 26, 2009); Reply Comments of the Association of Public Television Stations, the Corporation for Public Broadcasting, National Public Radio and the Public Broadcasting Service in MB Docket No. 07-294 *et al.* (filed July 13, 2009); Comments of National Public Radio, Public Broadcasting Service, Association of Public Television Stations and Corporation for Public Broadcasting in MB Docket No. 07-294 (filed February 14, 2013); Joint Comments of Public Television and Radio Licensees in MB Docket No. 07-294 *et al.* (filed March 27, 2015); Comments of the Association of Public Television Stations, Corporation for Public Broadcasting, National Public Radio and Public Broadcasting Service in MB

Commissioner O’Rielly in 2017, who has stated that, “[b]ased on the facts and logic, it is clear that public broadcast stations’ ‘ownership’ is not the same as that for commercial entities ... [T]rying to compare public broadcasters’ ownership data to that of commercial broadcasters would be worse than trying to compare apples to oranges; it’s more like comparing apples to zebras or oranges to a ‘57 Chevy.’”¹³ The Commission’s treatment of NCE ownership and governance has also been questioned by Chairman Pai who expressed his skepticism about the implications flowing from NCE board members being treated as owners.¹⁴ It is that mistake – treating NCE board members as owners – that leads to the misplaced notion, reflected to at least some degree in the NPRM, that changes in board membership over 50 percent constitute a transfer of control.

For example, in § 64, the NPRM states that, “Under the Commission’s rules, members of the governing board of such entities are generally treated as ‘owners’ and therefore are listed as parties to the original application.” This is simply a false statement. The NPRM cites no such Commission rule, and no such rule exists. The NPRM cites only to a question on FCC Forms 318 and 340, and rules on attribution of

Docket No. 07-294 *et al.* (filed March 30, 2015); Petition for Reconsideration of NCE Licensees in MB Docket No. 07-294 *et al.* (filed May 3, 2016); Comments of America’s Public Television Stations, Corporation for Public Broadcasting, National Public Radio and Public Broadcasting Service in MB Docket No. 07-294 (filed June 13, 2016); Application for Review of NCE Licensees in MB Docket No. 07-294 *et al.* (filed February 1, 2017).

¹³ Statement of Commissioner O’Rielly in *Promoting Diversification of Ownership in the Broadcasting Services*, Order on Reconsideration in MB Docket No. 07-294 *et al.*, 32 FCC Rcd 3440, 3458 (2017).

¹⁴ See Statement of then-Commissioner Ajit Pai (“I cannot support the Commission’s imposition of a requirement that the officers and directors of noncommercial educational (NCE) broadcasters provide us with personal information ... to obtain unique identifiers.”); see also Statement of Commissioner Michael O’Rielly (“I have reservations about the value of imposing the reporting for commercial entities onto noncommercial educational (“NCE”) broadcast stations ... The rationale for collecting ... additional sensitive, personally identifiable information from these individual “owners” is equally as strained.”); *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order, Second Report and Order, and Order on Reconsideration in MB Docket No. 07-294 *et al.*, 31 FCC Rcd 398 (2016) at 157-58 and 154-55.

LPFM station interests (73.858), definition of attributable interests (73.7000), and multiple ownership (73.3555), none of which state that NCE governing board members are to be treated as “owners.” To the contrary, they make clear that the disclosure of NCE governing board members is only relevant for attribution purposes, due to their “positional” (as opposed to ownership) interests as officers and directors.

Similarly, the NPRM is mistaken in § 65 when it states that “the Commission has frequently treated a transfer of control of a licensee or permittee resulting from even a sudden change in the majority of the governing board as ‘insubstantial,’ and therefore requiring the filing of an FCC Form 316 ‘short form’ associated with minor changes in ownership, rather than an FCC Form 315 ‘long form’ associated with major changes in ownership.” And, in § 66, the NPRM states that “the consequences of classifying a board change as a major or minor change in ownership for a permittee or licensee is simply the need to choose whether to file a Form 315 or 316.” However, the Commission has never determined that *any* changes in the majority of an NCE governing members board constitute a transfer of control. Nor has the Commission ever decided that, if NCE board changes may constitute a transfer of control, such transfers are major or minor based on their timing. Amazingly, for these very important pronouncements, stated as if they were established rules or policies of the Commission, the NPRM cites only to the discredited and now terminated 1989 Transfers of Control NOI, which as earlier noted provides no basis whatsoever for such determinations under core principles of administrative law.

III. Proposed Sections 73.3572(b) and 73.3573(a)(1) Should be Revised to Reflect an Appropriate Understanding of NCE Board Membership

Based on an appropriate legal and conceptual understanding of the role of NCE governing board members, whether the NCE applicant is a governmental entity or a private non-profit or non-stock entity, Public Broadcasting urges the Commission to revise the proposed changes to Sections 73.3572(b) and 73.3573(a)(1) to reflect that governing board changes of NCE applicants will not be considered major application changes.

Thus, the second sentence of Section 73.3572(b) should be modified to state as follows: “However, changes in the governing board of an applicant for a noncommercial educational full power television station shall not be deemed to be a major amendment.”

The second sentence of Section 73.3573(a)(1) should be modified to state as follows: “A major change in ownership is one in which the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed, except that changes in the governing board of an applicant for a reserved channel NCE FM station shall not be deemed to be a major change in ownership.”

Conclusion

Public Broadcasting generally supports the NCE-related proposals in the NPRM, but we urge the Commission to clarify that governing board members of NCE applicants are not owners, and that changes in the membership of governing boards of NCE applicants will not be deemed major application amendments.

Respectfully submitted,

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