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Before the
Federal Communications Commission
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of	)	
	)	
Reexamination of Comparative	)	MM Docket No. 95-31
Standards for New Noncommercial	)	
Educational Stations	)	

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Comments of the Real Life Educational Foundation of Baton Rouge, Inc.

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Comments of the Real Life
Educational Foundation of Baton Rouge, Inc.

Real Life Educational Foundation of Baton Rouge, Inc. ("Real Life"), by its counsel, hereby submits its response to the Commission's *Notice of Proposed Rule Making*, 60 *Fed. Reg.* 15275 (March 23, 1995) [hereinafter cited as *Notice*].[1]

I. SUMMARY

The Commission now applies an anachronistic, vague, and heavily criticized policy in selecting among competing noncommercial applicants. That policy is inherently arbitrary and capricious in several respects. Pending cases, therefore, would and should be evaluated under criteria free from the taint of these arbitrary factors.

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[1]Real Life is an applicant for a new noncommercial FM station in Baton Rouge, Louisiana. This rule making has been precipitated at least in part by the Commission's successfully seeking remand of the record from the United States Court of Appeals for the District of Columbia Circuit in the case of *Real Life Educational Foundation of Baton Rouge, Inc. v. FCC*, No. 93-1320 (D.C. Cir., filed May 14, 1993). Therein Real Life has appealed grant of the competing application of Jimmy Swaggart Ministries. Real Life also notes that its application was filed on March 22, 1984, over 11 years ago.

Real Life also urges adoption of two legally essential modifications to the Commission's criteria to bring them up-to-date and rationalize them *vis-a-vis* the Commission's appreciation of the role and function of noncommercial broadcasting 25 years post-*New York University*. First, the Commission hardly may justify a policy to exclude consideration of media diversification in light of (1) its consistent recognition that noncommercial stations are no less media voices than commercial stations; (2) the significance of media diversity as a goal of broadcast regulation, and (3) the Commission's modification of other related policies to reflect its recognition of that reality.

Real Life also urges the Commission to consider commercial as well as noncommercial signals in assessing the level of existing reception service in noncommercial comparative coverage analyses or, at least, to discount the significance of any coverage preference bases solely on noncommercial services.Again, the Commission would ignore the evolution of noncommercial broadcasting and the modification of its commercial comparative coverage evaluation policies in maintaining the *New York University* policy of excluding available commercial services in its analysis of available services.

Real Life also suggests consideration of several other modifications and clarifications of the Commission's policies, as follows: (1) consideration of minority involvement; (2) consideration of local residence of principals; (3) preference for applicants with "objectives that are directed outwardly to the community rather than inwardly to the licensee;" (4) consideration of the breadth of community

representation on governing boards. Each of these criteria evidence a nexus between the station and the community and, thus, deserve full consideration by the Commission.

II. CONTINUING APPLICATION OF A DISCREDITED 25-YEAR OLD POLICY WOULD BE ARBITRARY AND CONTRARY TO THE PUBLIC INTEREST.

Real Life initially urges the Commission to apply only sound comparative criteria to pending cases. Vague, outdated policies must be retired. The Commission is all too well aware of the perils of continuing to apply policies in the face of arguments that they have lost their public interest integrity. *Bechtel v. FCC,* 957 F.2d 873 (D.C. Cir. 1992) [hereinafter cited as *Bechtel I*]. Therein the court held that an "agency must always stand ready 'to hear new argument' and 'to reexamine the basic propositions' undergirding the policy." *Bechtel I,* 957 F.2d at 878, *citing McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1321 (D.C. Cir. 1988); *see also FCC v. WNCN Listeners Guild,* 450 U.S. 582, 603 (1981). The court has insisted that the Commission defend not only the application of its policy in any case, but also "the underlying validity of the policy itself." *Pacific Gas & Electric, supra,* 506 F. 2d at 39; *see also Bechtel II,* 10 F.3d at 878; *Panhandle Producers & Royalty Owners Association v. Economic Regulatory Administration,* 822 F.2d 1105, 1111 (D.C. Cir. 1987); *Guardian Federal Savings and Loan Association v. FSLIC,* 589 F.2d 658, 666 (D.C.Cir. 1978).

The court's admonition takes on added weight in the present proceeding, in which the Commission is reexamining a largely discredited policy adopted with scant explanation over 25 years ago.[2] *See Black Television Workshop*, 65 *Rad. Reg.(P&F)* 2d 34, 35 (Rev. Bd. 1984). As the Commission has admitted, "Upon reflection, it appears that use of such a vague standard may make rational choices among noncommercial applicants difficult, if not impossible." *Notice* at ¶3, citing *Notice of Proposed Rulemaking*, 7 FCC Rcd 2664, 2669 (1992).

Applicants like Real Life are entitled to consideration of their applications under sound, defensible standards, rather than the regulatory detritus of another age. The court was emphatic in *Bechtel II*, 10 F.3d at 887, that the Commission's commercial "integration" criterion, held arbitrary and capricious by the court, could not be employed pending resolution of a rulemaking in which that criterion was subject to reexamination:

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[2]At that time, the Commission stated:

> We further believe that an issue should be specified as to the relative integrated use of the requested FM facility proposed by each of the applicants in its overall educational operation. In adopting these issues in a case of first impression, we further note that our standard comparative criteria (local residence, integration, broadcast experience, diversification, etc.) are virtually meaningless in a case of this type.

New York University, 10 *Rad. Reg.(P&F)* 2d at 217. Precious little explanation was provided. The Commission simply seemed to rely on the "separate and independent" nature of noncommercial broadcasting, while at the same time admitting that:

> The Commission never squarely faced the question of whether these reservations were intended strictly as educational tools or were planned to be hybrid facilities to serve that end, as necessary, and during the remainder of the time to serve as additional available conventional, although non-commercial, broadcast outlets.

New York University, 10 *Rad. Reg.(P&F)* 2d 215, 217 (1967). The Commission gave no other explanation as to why the commercial standard comparative criteria were "meaningless."

> If a policy is arbitrary and capricious, however, the mere fact that the Commission is reconsidering that policy does not authorize the Commission to continue making arbitrary and capricious decisions. As Bechtel was denied a license on the basis of an arbitrary and capricious policy, she is entitled to a proceeding in which the Commission considers her application...under standards free of that policy.

Again, in the present proceeding, the court's directive is more compelling because, unlike the *Bechtel* case, during which the Commission was considering revisions to the policy in question, the policy which otherwise would be applied by the Commission already has been found inadequate by the Commission.

Therefore, any Commission comparative decision in a noncommercial case based on arbitrary and capricious policies of the past would be unlawful. Only sound policies may be applied.

III. FAILURE TO CONSIDER AN APPLICANT'S OTHER MEDIA INTERESTS WOULD BE ARBITRARY AND CAPRICIOUS.

Long, long ago, in a world far different from the video marketplace of today, the Commission determined that the standard comparative criteria for commercial comparative proceedings (including diversification of media ownership) were "virtually meaningless" in the case of competing applications for a noncommercial station. *New York University,* 10 *Rad. Reg.(P&F)* 2d at 217. Now the convergence of the reality that noncommercial stations are "voices" in the community and the fundamental communications policy favoring a diversity of voices render the Commission's pronouncement of 27 years ago itself meaningless. Furthermore, in

many other contexts the Commission has altered its rules and polices to reflect its recognition that noncommercial stations are media voices.

A. Viewpoint Diversity is a Fundamental and Preeminent Goal of Broadcast Regulation.

Promoting voice or viewpoint diversity has been a cornerstone of broadcast regulation. The United States Supreme Court has pointed out that:

> In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints.

Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978). Therein the Court showed no reluctance to affirm the Commission's judgment that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The diversity of their viewpoints cannot be expected to be the same as if they were antagonistically run. *Id.*, 436 U.S. at 796, 797. The court also has emphasized that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547, 567 (1990), *citing Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

In recognition of the significance of diversification of media ownership, the Commission long has considered diversification a factor of primary significance in the comparative evaluation of commercial broadcast applicants. *Policy Statement on*

Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965). As more recently acknowledged by the Commission:

> [T]he diversification criterion is based on the premise that, by dispersing media ownership, the ultimate goals of viewpoint diversity and economic competition will be promoted. This is based on the assumption that the greater number of media owners in a given community, the greater the likelihood that viewers and listeners will hear diverse views and no individual or entity will have undue sway over public opinion.

Comparative Renewal Process, 3 FCC Rcd 5179, 5188 (1988). Where one applicant will provide a new media voice, while the other will not, the diversification factor is of controlling significance. *Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982); *KBBS, Inc.*, 91 FCC 2d 115 (Rev. Bd. 1983).

B. The Commission Has Embraced the Reality that Noncommercial Stations Are Media Voices.

No longer are noncommercial stations the "mere appendages of academia" which utterly distinguished them from their commercial counterparts in 1967. *San Joaquin Television Improvement Corp.*, 96 FCC 2d 617, 620 (Rev. Bd. 1984) [hereinafter cited as *San Joaquin*]. By 1976, the Commission already had recognized the fading distinction between the programming roles of commercial and noncommercial stations, observing that noncommercial stations were subject to "programming and other regulatory responsibilities virtually indistinguishable from those obtaining to ordinary commercial stations." *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 58 FCC 2d 526 (1976), *cited in San Joaquin*, 96 FCC 2d at 620. The Commission similarly stated in 1981 that noncommercial stations provide a "broad range of services to the

listening public" -- rather than a service constricted to academic or scholarly pursuits. *Public Radio and TV Programming*, 87 FCC 2d 716, 735 (1981). By then the Commission had recognized that the remaining distinctions between the services offered by commercial and noncommercial stations had all but vanished:

> From the perspective of the Commission, public broadcasting is characterized largely by a negative distinction, *i.e.*, public stations are not operated by profit seeking organizations nor supported by on-the-air advertising.

Id., 87 FCC 2d at 732. Even that distinction has blurred. The only sort of on-the-air advertising on noncommercial stations which remains prohibited by the Commission is paid advertising for commercial entities. *Educational Broadcast Stations*, 90 FCC 2d 895 (1982).[3]

Indeed, the Commission has imposed regulations on noncommercial stations which not only recognized and confirmed their roles as media voices, but effectively required them to function like commercial stations in addressing issues of concern in their communities. *Public Broadcasting*, 98 FCC 2d 746 (1984); *see also Valley Broadcasters, Inc.*, 5 FCC Rcd 2785, 2788 (1990) [hereinafter cited as *Valley Broadcasters*] ("In 1984....the Commission adopted an issue responsive programming rule for noncommercial educational stations that is essentially identical to that applicable to commercial radio stations.")[4]

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[3]The scope of permissible "underwriting" announcements also has been broadened by the Commission on several occasions. 47 C.F.R. §73.503 (d)(1993).

[4]Also in 1984, the United States Supreme Court held that noncommercial educational stations which receive federal grants from the Corporation for Public Broadcasting could not be barred from editorializing -- perhaps, the most potent element of the role of a media voice. *League of Women Voters of California v. FCC*, 486 U.S. 364 (1984).

Thus, noncommercial broadcasting today barely resembles noncommercial broadcasting in 1967 and has emerged as a media voice no less potent than commercial broadcasting.

C. The Commission Has Modified Other Policies to Reflect Its Recognition that Noncommercial Stations Are No Less Media Voices Than Their Commercial Station Counterparts.

In numerous instances the Commission has exercised its sound discretion to modify pertinent policies accordingly. In commercial comparative cases, an applicant's interest in a noncommercial station in a neighboring community has been considered significant under the diversification criterion. *San Joaquin,* 96 FCC 2d at 621-622. Noting that noncommercial stations had become "prominent media voices in the community" and were "an important and effective media voice in the communications community," the Board concluded that "such stations plainly have a vital impact on the matter of overall diversification of control over various media voices." *Id.* Similarly, the noncommercial broadcast interests of a university, which was among the applicants for a commercial frequency, were counted against the university under the diversification criterion. *Advanced Broadcast Technologies, Inc.,* 5 FCC Rcd 7651 (1990). Therein the Commission stated:

> *Talleyrand* and *San Joaquin* establish that non-commercial applicants for commercial allocations are subject to the same criteria as commercial applicants. Assessing a demerit under the circumstances of this case will further the overall objectives of the *Policy Statement on Comparative B/cast Hearings,* 1 FCC 2d 393, 394 (1965).

Id., 5 FCC Rcd at 7652.[5]

The Commission also now considers noncommercial stations as "media voices" in a market on the same basis as commercial stations for purposes of determining whether the level of broadcast service in a market is sufficient to permit waiver of the Commission's "one-to-a-market" rule. *Second Report and Order,* 4 FCC Rcd 1741, 1751 (1989).[6] Similarly, the Commission looked to a commercial station licensee's ownership of a noncommercial station in a market in denying the licensee's request for waiver of the one-to-a-market rule. *Kargo Broadcasting,Inc.*, 5 FCC Rcd 3442, 3444-3445, n.11 (1990)("Although 47 C.F.R. § 73.3555 does not prohibit the common ownership of an FM and a noncommercial TV station in the same market, the ownership of additional non-commercial stations is properly considered in a determination of overall market influence.") Finally, the Commission has erased the distinction between commercial and noncommercial stations in evaluating existing service levels and comparative coverage of commercial applicants. *Valley Broadcasters, supra; Channel 32 Broadcasting Company,* 6 FCC Rcd 5188 (1991). Thus, in a variety of circumstances,

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[5]Thus, the Review Board was to note:

> [T]he instant case ineluctably raises the question of whether it is appropriate to charge an applicant for its noncommercial station in a contest for a commercial frequency, but -- obversely -- not charge an applicant for a noncommercial frequency for its existing commercial (or noncommercial) stations.

Certification Order, 5 FCC Rcd 3421-3422.

[6]47 C.F.R. §73.3555(c) prohibits the common ownership or control of a commercial radio station and a commercial television station in the same market. The Commission, however, has adopted a policy of waiving the rule provided a certain number of independent media voices remains in the market. *Second Report and Order, supra,* 4 FCC RCd at 1751-1753.

the Commission readily has embraced the fundamental reality that noncommercial stations are media voices affecting diversity.

The issue is not whether diversification of media interests should be the only criterion. The Commission certainly could continue to consider the educational work of each applicant under the "noncommercial integration" issue or some rational variation thereof.[7] What the Commission must avoid, however, is ignoring diversification entirely, especially in the wake of numerous Commission decisions recognizing noncommercial stations as media voices and treating them as such -- and in light of the considerable significance of voice diversity as public policy goal.

Therefore, continuing embrace of its anachronistic *New York University* policy regarding diversification would be arbitrary and capricious.

IV. THE COMMISSION SHOULD CONSIDER COMMERCIAL AS WELL AS NONCOMMERCIAL SERVICES IN DETERMINING THE LEVEL OF AVAILABLE SERVICES IN COMPARATIVE COVERAGE ANALYSES.

Pursuant to the *New York University* policy, the Commission now looks only to the "available educational FM signals within the respective service areas of the two applicants." *New York University,* 10 *Rad. Reg.(P&F)* 2d at 217. Real Life

[7]Such an approach would parallel the commercial comparative criteria, which include diversification of media interests as significant, but not singular factor, along with, *inter alia*, other service related criteria. *See 1965 Policy Statement, supra; Notice of Proposed Rulemaking*, 7 FCC Rcd 2664 (1992).

urges the Commission to modify its policy and consider all available signals (commercial and noncommercial) in the coverage areas of the applicants.

Again, the *New York University* policy regarding comparative coverage has been overtaken by the core changes in noncommercial broadcasting. Indeed, the Commission has acknowledged this metamorphosis and modified its analysis of comparative coverage in commercial comparative cases accordingly. In *Valley Broadcasters, supra,* 5 FCC Rcd at 2787-2788, the Commission eliminated the distinction between commercial and noncommercial stations in determining the level of broadcast service provided by stations licensed to a community (the so-called "transmission" service element of a coverage analysis).[8] The Commission relied on the changing nature of noncommercial broadcasting in deciding to change its policy. *Id.*, 5 FCC Rcd at 2787-2788.

The Commission subsequently held that noncommercial station signals also should be counted in assessing the level of service in a community provided by stations from within and without the community (the so-called "reception service" element of the 307(b) analysis). *Channel 32 Broadcasting Company, supra,* 6 FCC Rcd at 5188. Therein the Commission stated:

> In this regard, *Valley* makes clear that noncommercial educational stations now have an obligation to serve the programming need of

[8]Under the mandate of 47 U.S.C. §307(b)(1971) to make an equitable distribution of licenses "among the several States and communities," the Commission, for example, awards a decisive preference to an applicant who will provide the first broadcast service licensed to a community. *Robert J. Reverman*, 78 FCC 2d 1110, 1115 (Rev.Bd. 1980). Thus, in *Valley Broadcasters*, the Commission stated that the existence of a noncommercial station in a community should be considered in determining the level of service in a community under the 307(b) issue.

> their communities and that such stations cannot be automatically excluded from the analysis of existing service. 5 FCC Rcd at 2788 ¶26. Therefore, we agree with Holt and Channel 32 that no legitimate public purpose would be served by exempting all noncommercial educational stations from consideration in the analysis of comparative coverage issues, such as the one presented in this case.

Id. Real Life, therefore, urges the Commission to conform its policy to reality and consider commercial, as well as noncommercial signals in noncommercial comparative coverage analyses.

The Commission at least ought discount comparative coverage advantages in noncommercial cases. First, the marginal value of a second noncommercial service is less significant than the marginal value of a second overall broadcast service because (1) in terms of overall spectrum efficiency, the value of a true second service far exceeds the value of a second service of a certain type (but "nth" overall service); and (2) as the distinction between commercial and noncommercial stations has declined, the marginal value of additional noncommercial services has declined. Furthermore, even in *New York University,* the Commission expressed the reservation that coverage should not be the determinative factor in noncommercial cases. *New York University*, 10 *Rad. Reg.(P&F)* 2d at 217. Therefore, to the extent comparative coverage remains an issue, it should be discounted to reflect the more marginal value of an additional noncommercial signal in cases where numerous commercial services already are available.

V. CONCLUSION

Real Life urges these fundamental rationalizations of the Commission's noncommercial comparative criteria. Real Life also suggests consideration of several other clarifications and modifications of the Commission's present comparative polices, as follows: (1) consideration of minority involvement; (2) consideration of local residence of principals; (3) preference for applicants with "objectives that are directed outwardly to the community rather than inwardly to the licensee;" (4) consideration of the breadth of community representation on governing boards. Each and all of these criteria evidence a nexus between the station and the community and, thus, deserve full consideration by the Commission.

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