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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Reexamination of the Comparative	)	
Standards for New Noncommercial	)	MM Docket No. 95-31
Educational Applicants	)	
	)	
To: The Commission		

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REPLY COMMENTS OF THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

The National Federation of Community Broadcasters ("NFCB") hereby submits these reply comments in the above referenced docket.

NFCB reiterates its support for the broad principles embodied in the comparative criteria set out in the comments filed by America's Public Television Stations and National Public Radio (APTS/NPR). NFCB believes that the Commission must consider these criteria holistically, with an emphasis on increasing the diversity of voices in the marketplace of ideas.

I. DIVERSITY

A number of the commenters agree with NFCB that the Commission should consider, and promote, diversification in granting new noncommercial broadcast licenses, *see, e.g.*, Real Life Educational Foundation of Baton Rouge Comments at 3-7 ("Real Life"); Southwest Florida Community Radio Comments at 7-8 ("Southwest Florida"), American Family Radio Comments at 5 ("AFR"), and that in any event, no preference should be given to state agencies and entities. *See, e.g.*, Southwest Florida Reply Comments at 3. NFCB agrees with Real Life's assertion that "promoting voice or viewpoint diversity has been a cornerstone of broadcast regulation," and that the fact that the commission is granting noncommercial licenses does not change that goal. It also agrees that to the extent that *New York University*, 10 RR2d 215

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(1967) and *Real Life Education Fund of Baton Rouge, Inc.*, 6 FCCRcd 259 (1991) instruct the Commission to disregard diversity in granting noncommercial educational licenses, they should be overruled. Real Life Comments at 3-5; *see* NFCB Comments at 3-4.[1]

II. REPRESENTATIVE GOVERNING BOARD

A number of the commenters oppose APTS/NPR's suggestion that the Commission look favorably upon a noncommercial applicant whose governing board "is representative of the community, including its racial, ethnic and gender composition and the various educational, cultural, eleemosynary organizations...." APTS/NPR Comments at 8. Moody Bible Institute of Chicago ("Moody Bible") argues that because the make up of these boards change often, it is "unrealistic for the Commission to give a preference to one applicant over another based on the ephemeral characteristics of board members...." Moody Bible Comments at 7. Southwest Florida argues that this factor has "no demonstrative nexus to provision of more responsive programming." Southwest Florida Reply Comments at 2. And Southwest Florida and AFR fear that this requirement would run contrary to the holding of the D.C. Circuit in *Bechtel v. FCC*, 10 F.3d 875 (1993) ("*Bechtel II*"). Southwest Florida Reply Comments at 2-4; AFR Comments at 4.

These concerns are misguided. If, as APTS/NPR suggests, the articles of incorporation or other managing documents ensure that the composition of its governing board will remain representative of the community, the changes in specific board personnel are largely irrelevant.

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[1]NFCB differs with Real Life to the extent that Real Life argues that commercial and noncommercial stations are fungible. There are still good reasons for the Commission to treat commercial and noncommercial stations differently in various regulatory matters.

See APTS/NPR Comments at 8-9.[2]

Secondly, Southwest's concern that a governing board that is representative of the community will not necessarily lead to programming that is more responsive to the community, runs contrary both to common sense and to the Supreme Court's *Metro* decision, which found that ownership structure indeed impacts on programming:

> From its inception, 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. Thus, "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and presentation of news."

Metro Broadcasting v. FCC, 110 S.Ct. 2997 (1990).

Finally, Southwest and AFR misconstrue *Bechtel II* to mean that the Commission can *never* consider ownership structure when granting licenses. Even assuming, *arguendo*, that *Bechtel II* applies to the grant of noncommercial licenses, the Court was concerned that comparative factors such as integration of ownership were meaningless because the Commission, through its policies, did "little to ensure its continuation once the promise of integration had carried an applicant to victory." *Bechtel II*, 10 F.3d at 879. The Court took particular note of the fact that the Commission's rules permitted a winning licensee to sell its station after just one year of operation. *Id.* Both NFCB and APTS/NPR have suggested holding periods for

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[2]And, as discussed below, NFCB favors reporting and other requirements to ensure that a licensee adheres to its promise to maintain a representative governing board. This would also alleviate Southwest Florida's concern that "Articles [of Incorporation] can also be easily amended" to remove a requirement that a governing board be representative of the community. *See* Southwest Florida Reply Comments at 3.

noncommercial licenses[3] that largely ameliorate the concerns of *Bechtel II*, and NFCB would support reporting, or similar requirements, that would ensure licensee compliance with comparative promises.[4]

III. PRIVATE VERSUS PUBLIC FUNDING

Moody Bible and Cedarville College urge the Commission to grant a preference to applicants that do not receive funding from the government. Moody Bible Comments at 12-13; Cedarville College Comments at 9-10.

But the question is not whether a noncommercial applicant receives government funding, but whether it is financially able to build and operate its station. First, the end of funding for public broadcasting is not inevitable. But even in the face of reductions, and possible elimination of government funding in 1998, noncommercial entities that have relied upon such funding are exploring, and finding, alternative means of funding. *See, e.g.*, Farhi, "Now, a

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[3]AFR proposes a three year holding period, modified so that losing applicants would have a right of first refusal if the license holder desires to transfer the license. AFR Comments at 3. This proposal has several flaws. First, it would not permit participation by new applicants, who may be more qualified than the old applicants. Second, it would require an entirely new comparative hearing if more than one losing applicant exercised its right of first refusal. NFCB believes that should the Commission impose a holding period, it should make clear that the holding requirement will not be routinely waived, and grant waivers only for good cause shown. NFCB Comments at 2 n.2.

[4]In support of its argument that a representative governing board runs afoul of *Bechtel II*, Southwest Florida quotes the Court's admonition that "[o]ne should be skeptical when regulatory agencies promote organizational forms that private enterprise would not otherwise adopt...." Southwest Florida Reply Comments at 2, quoting *Bechtel II* at 881. Even though the analogy of broadcast licensees to "private enterprise" is particularly inapt, in fact, representative governing boards ***are*** an organizational form that private enterprise has adopted. Unlike the integration of ownership and management that was criticized in *Bechtel II*, governing boards, like corporate boards, do not manage the day-to-day operations of the stations they oversee. Instead they set broad policy and other goals.

Word from Their Underwriter," Washington Post, June 7, 1995, A1. They therefore should not be punished if, in the meantime, they receive assistance from the government.[5]

IV. DISPOSITIVE PREFERENCE FOR EDUCATIONAL INSTITUTIONS

Cedarville College urges the Commission to grant educational institutions "a *per se* comparative preference over educational institutions unless the educational organization makes a special showing...." Cedarville College Comments at 3-8. Cedarville claims that "the record supports establishing a rebuttable presumption that educational institutions are more likely to serve the public interest than educational organizations." *Id.*

Not only is this argument completely self-serving, it is entirely unsupported. Cedarville has presented nothing but bald generalities about educational institutions and so-called "educational organizations," to support its conclusion that the former deserve an almost irrebuttable presumption. In fact, there is evidence that, just like other licensees, educational institutions occasionally use their licenses in ways that are contrary to the public interest. *E.g. WXPN*, 44 RR2d 747 (1978)(renewal application of noncommercial educational FM station licensed to University of Pennsylvania denied because licensee engaged in unlawful delegation of authority to supervise and control station. Licensee, *inter alia*, refused to investigate numerous com-

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[5]Cedarville College claims that [i]t would be a violation of the...First Amendment...to offer governmental entities a preference over private entities for being government entities. Such a preference would act as a pernicious system of censorship in which the speech of government actors and those who accepted government funds would be preferred over private citizens." Cedarville College Comments at 10. Of course, many noncommercial educational licensees are not "governmental entities," and are not made so by accepting public funding. However, in any event, no commenter here is asking the Commission to give preference to government entities or government funded entities. Indeed, it is Cedarville which is seeking such a preference for entities that are not government funded. A preference for these so-called "private" entities is no less defensible than a preference for "government" entities that Cedarville derides.

plaints by staff members and listeners, and failed to respond timely to Commission inquiries). The Commission should swiftly reject any suggestion that a particular noncommercial entity should receive such an overwhelming advantage over others.

V. LOCAL ORIGINATION PROGRAMMING

Moody Bible urges the Commission not to consider an applicant's proposal to provide locally originated programming. Because the question of whether or not a program is locally originated "entails consideration of the content of programming," Moody Bible argues that such consideration "raises troubling constitutional questions." Moody Bible Comments at 7.

As NFCB stated in its comments at p. 5, there are no constitutional concerns raised by the Commission's consideration of an applicant's programming. It is entirely appropriate for the Commission to evaluate an applicant's programming plans, including its plans to provide locally originated programming. *See UCC v. FCC*, 707 F.2d 1416 (D.C. Cir. 1983).

CONCLUSION

The Commission should value diversity of ownership and programming in choosing non-commercial, educational licensees. But it should not, in any event, grant a preference to a noncommercial applicant based solely on its status as an entirely privately funded entity, a state entity or an "educational institution." The principals embodied in the APTS/NPR criteria, taken as a whole, provide the best guidelines for the Commission in determining which non-

commercial educational applicant will best serve the needs of the community.

Respectfully submitted,

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