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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Reexamination of the Comparative Standard
for New Non-commercial Educational Applicants

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) MM Docket No. 95-31
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FURTHER COMMENTS OF JIMMY SWAGGART MINISTRIES

Date: June 27, 1995

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FURTHER COMMENTS OF JIMMY SWAGGART MINISTRIES

Introduction and Summary

In response to the Commission's request for suggestions on the method it should use to select from among competing applicants for new noncommercial educational licenses, Jimmy Swaggart Ministries ("JSM") filed comments stating that the Commission already has in place the most rational and logical method for selecting from among such applicants: determine which institution will best be able to use the broadcast facility to advance its educational and cultural objectives; in the event that no winner can be determined on that basis, use objective criteria of coverage to award the license.

JSM has now reviewed the other comments and reply comments filed in this proceeding. Nearly all of the other commenters agreed that the notion of a "point" system, as the Commission has proposed for commercial selection criteria, makes no sense in the context of noncommercial stations.^{1/} Many of the other comments appear to congregate

1. Joint Comments of The Association of America's Public Television Stations and National Public Radio at 19; Comments of The National Federation of Community Broadcasters at 2; Comments of Southwest Florida Community Radio, Inc., et al. at 10;

around a new proposal advanced by The Association of America's Public Television Stations and National Public Radio ("NPR"), which would have the Commission look primarily at the composition of the governing board of the applicant, to select the one that (i) most closely resembles the racial, ethnic and gender makeup of the community of license, and (ii) is most closely involved with a broad spectrum of civic organizations in the community. JSM is filing these further comments to urge the Commission to reject NPR's unwise and unsound proposal.^{2/}

NPR's method would stand the Commission's philosophy for noncommercial radio entirely on its head. Serving local community needs, albeit a laudable goal, has never been the purpose of setting aside spectrum for noncommercial broadcasters. See New York University, 10 Rad. Reg. 2d 215 (1967). Noncommercial spectrum has been set aside in order to assist educational entities in advancing their educational work. Id. at 217. Providing a broadcast outlet to such institutions also encourages the dissemination of a variety of programming service that might not otherwise be broadcast by commercial programmers. Sixth Report and Order on Television Assignments, 41 F.C.C. 148 (1952). The NPR proposal is not rationally related to these goals; instead, they would completely subvert them, making noncommercial radio look and sound far more like its commercial cousin. NPR's proposal, in fact, mirrors that employed in the commercial radio service until

Comments of American Family Radio at 6; Comments of the Cedarville College at 18-19.

2. These further comments may be treated as late filed or ex parte comments pursuant to Sections 1.419(b) and 1.1206(a) of the Commission's Rules.

commercial integration was struck down by the Court of Appeals. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

If adopted, the NPR methodology would disfavor many of the most successful and valuable noncommercial radio licensees in America. The entities that would be selected for award of a noncommercial license would typically be those created simply to apply for the license, not any preexisting educational, religious, or cultural institution or any organization with a specific mission or national or regional goals. Neither Yale University nor the Board of Regents of the University of Wisconsin System nor Pomona College would be entitled to obtain (or retain) a noncommercial broadcast license. Each would be trumped by a newly-formed, mainstream, locally-oriented organization with no specific agenda or purpose other than to run a noncommercial radio station. That type of organization already has a home, in the commercial spectrum.

The Commission should continue to adhere to the approach it has consistently espoused: determine which institution will best be able to utilize the station to further its charitable goals. That test is logical, rational, and aptly designed to advance the Commission's policy goals. To adopt the NPR method is an exercise in irrationality if these policy goals are to remain unchanged; to change the goals would require a record that does not exist.

In the worst case, if the Commission were to adopt the drastic step of changing the *raison d'être* for the noncommercial service, it should apply that test only prospectively to new stations, so that it would not disrupt the settled expectations of those (like JSM) that have applied for noncommercial stations based on the longstanding policy,

and so that it would not place all incumbent noncommercial licensees at risk of losing their licenses at renewal time to a newly formed challenger with a board designed, not to further any educational or cultural objectives, but to maximize compliance with the NPR test.

I. The NPR Proposal Would Undermine the Fundamental Rationale for Setting Aside Noncommercial Spectrum.

The Commission recently reaffirmed that the original and present purpose for setting aside channels reserved for noncommercial educational service is to "assist educational entities [in] advanc[ing] their educational work." Real Life Educ. Foundation, 6 F.C.C.R. 259, 260 (1991) (citing New York University, 10 Rad. Reg. 2d 215, 217 (1967)). NPR rightly states that the Commission's original purpose for setting aside spectrum for noncommercial use was the view that noncommercial programming would provide a diversity of program service unlikely to result from commercial programming alone. NPR Comments at 6 (citing Sixth Report and Order on Television Assignments, 41 F.C.C. 148 (1952)). NPR then argues that the best method for ensuring that noncommercial broadcasters actually provide diverse programming is to favor those noncommercial applicants with "substantial roots in and ties to the local community." NPR Comments at 6.

To effectuate this method, the NPR proposal would have the Commission focus primarily on four structural factors that would supposedly result in the selection of the applicant most likely to be responsive to community needs: (1) the extent to which the governing board of the applicant is representative of the local community's racial, ethnic and gender composition,^{3/} (2) the extent to which the applicant's governing board is integrated

3. NPR Comments at 8.

into local educational, cultural and social organizations,^{4/} (3) the extent to which the applicant has ascertained the community's needs and proposed programming to meet those needs,^{5/} and (4) whether the applicant has a reasonable prospect of effectuating its proposal.^{6/} The NPR proposal would also give comparative weight to applicants whose proposed programming would increase the diversity of public broadcast programming in the market of license.^{7/} Finally, under the NPR proposal the Commission would consider whether either applicant would serve a substantially larger area or population.^{8/}

NPR's test is the wrong one. It would disfavor existing college, university, religious, and other institutions that are historically strong noncommercial broadcasters. The test that NPR proposes will do nothing to enhance diversity; instead, it is likely to diminish it. Applicants broadly representative of and widely integrated into the local community are likely to air programming that caters to the broad mainstream. This result is especially likely given the noncommercial station consolidations that NPR has proposed^{9/} and the probability of increased reliance on private funding sources for public broadcasting. Conversely, an educational, religious or ethnic organization with a specific purpose is likely to air programming designed to help achieve a particular purpose and thereby serve a discrete

4. NPR Comments at 10.

5. Id.

6. Id. at 12.

7. Id. at 14.

8. Id. at 15.

9. See Joint Reply Comments of APTS/NPR and NCE Licensees at 7.

rather than general public broadcasting audience. Only by retaining the comparative criteria set forth in New York University, 10 Rad. Reg. 2d 215, 217 (1967), can the Commission ensure a wide diversity of noncommercial broadcasters and therefore a wide diversity of programming.

II. The NPR Proposal Would Severely Disfavor Any Preexisting Educational, Religious, or Cultural Institution or Any Organization With a Specific Mission or National or Regional Goals.

The NPR proposal suggests that the primary focus in a comparative hearing on a new noncommercial educational license should be on structural factors that supposedly ensure the responsiveness of the applicant to local community needs. NPR Comments at 6-7.

A. The Representative Governing Board Criterion Will Hurt Existing Educational, Religious, and Ethnic Organizations.

Giving comparative credit to organizations whose governing boards are reasonably representative of the local community's racial, ethnic and gender make-up and representative of local educational, cultural and eleemosynary organizations^{10/} will systemically thwart applications by any existing charitable or educational institution (in contrast to a newly formed organization set up for the purpose of filing an FCC application).^{11/} Included among these are colleges and universities, religious and ethnic organizations, and other public policy and political groups.

10. NPR Comments at 7-9.

11. In addition, such a preference may very well be unconstitutional under the Supreme Court's recent Adarand decision. See Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (1995).

Colleges and universities have a clearly defined educational purpose, not a generic "help-the-community" role. They are often vital elements of the communities in which they are located, but their governing boards are often drawn from the ranks of their alumni and other prominent members of the academic or business sectors. Neither the Fellows of the Yale Corporation nor the Trustees of Pomona College are necessarily representative of the demographic makeup of the communities in which they are located, nor should they be to further their educational mission. Yet the NPR standard would surely strip Yale and Pomona of their noncommercial licenses if compared against a newly formed group of "representative" New Haven or Claremont citizens, respectively.

The problem is even more acute for state university systems. Membership of a state board of regents should reflect statewide educational, financial, and political needs. Moreover, state university systems with campuses (and broadcast facilities) scattered throughout the state are in an impossible position. There is only one Board of Regents of the University of Wisconsin System (one of the commenters in this proceeding, curiously enough). Its particular demographic composition cannot possibly reflect both Milwaukee and LaCrosse, both Madison and Eau Claire. If the board's composition happens to match up with that of one of its campuses' communities, it loses elsewhere.

Governing boards of organizations with a specific religious or ethnic focus face similar problems under the NPR test. Such groups often have governing boards made up solely of members of their specific group, for entirely sensible, proper, and constitutionally protected reasons. A Roman Catholic Archdiocese should not be forced either to admit Protestants, Jews, and Muslims to its governing board solely to ensure local

representativeness, or to suffer a comparative demerit. Likewise, Hispanic broadcasters in Los Angeles could conceivably be required to have Vietnamese, Chinese, Korean, Japanese, black and non-Hispanic-white governing board members. Further, organizations with a focus on a particular issue or issues, such as the Progress & Freedom Foundation or the NAACP could be forced to take on governing board members with diametrically opposed views.

B. The Locally Integrated Governing Board Criterion Will Also Hurt Existing Educational, Religious, and Ethnic Organizations

The second prong of NPR's proposed test--giving comparative credit to organizations whose governing board members and officers are integrated into local educational, cultural, social and civic organizations^{12/}--will also thwart applications from colleges and universities, religious and ethnic organizations, and other public policy and political groups. While members of these groups are often involved in local educational, civic, and cultural organizations, this involvement in other local organizations would be merely incidental to their membership on the governing board. Their entirely proper purpose in belonging to the governing board is to advance the specific goals of the organization, not to serve as a representative of other local groups.

Governing boards of organizations with a non-local focus would routinely fail to be "integrated" into local educational, cultural, social and civic organizations and institutions solely for the reason that governing board members are likely to be spread across the state or nation. Further, the entirely proper purpose in belonging to a governing board of

12. NPR Comments at 10.

a state-wide or nation-wide organization is to advance the organization's state-wide or nation-wide goals, not to be responsive to the general needs of one particular locality.

C. The Ascertainment Criterion, As Formulated by NPR, Will Hurt Existing Educational, Religious, and Ethnic Organizations

The NPR proposal also suggests that applicants who conduct an ascertainment of community needs should receive comparative credit. NPR Comments at 10-11. In addition, applicants who propose programming to meet the ascertained needs of the community should receive further credit. *Id.* at 11. As envisioned by NPR, such a credit will again impede applications from colleges and universities, religious and ethnic organizations, and other public policy and political groups.

Colleges and universities are, in fact, often active in ascertaining the local community's educational and cultural needs as they tailor their curriculum to meet these needs. Likewise, religious and ethnic organizations are likely to conduct ascertainment of the local community's needs as those needs relate to the organization's goals. Outreach and ascertainment are often vital to the success of religious and ethnic groups. Outreach and ascertainment are also a vital part of successfully integrating the use of the broadcast facility into the organization's overall educational or cultural purpose. ^{13/}

However, NPR also envisions that the Commission will ensure that an applicant's programming proposals mirror the ascertained needs of the diverse audiences within the community, with "creative news and public affairs program[ing] [receiving]

13. In the Initial Decision in the case that precipitated this NPRM, the ALJ noted several resources that JSM, a religious organization, had in place to ascertain community needs. Real Life Educ. Foundation, 4 F.C.C.R. 8433, 8437-38 (Admin. L.J. 1989).

substantial credit." NPR Comments at 11. Yet both universities and religious and ethnic groups are unlikely to program material that is inconsistent with the organization's goals, tenets or purpose even though that material would address an ascertained community need. Under the NPR proposal, organizations formed for a purpose other than providing programming that meets community needs would receive a demerit for their fundamental programming choices.

D. The Ability to Effectuate Factor Should Be Only a Secondary Consideration

The ability of an applicant to effectuate its proposal,^{14/} as distinguished from the basic, objective financial qualifications, could be considered as a factor, but is of only marginal utility and should not carry "substantial weight"^{15/} in a comparative evaluation. Once competing applicants have satisfied the basic financial requirements (a relatively objective test), it becomes difficult and subjective to infer from past broadcast experience and additional financial resources, the likelihood of an applicant's ongoing ability to follow through on its proposal. Moreover, this factor has little direct relation to the Commission's goal for the noncommercial service of assuring a diversity of programming by assisting educational entities in advancing their educational work. If, however, applicants are equal in their ability to integrate the station into their educational work, and neither has a comparative coverage advantage, then past broadcast experience or financial resources might be an appropriate consideration.

14. NPR Comments at 12.

15. Id.

III. The Comparative Coverage Factor Should be Retained as a Secondary Consideration.

The comparative coverage factor^{16/} is a factor in the present test and has proved useful as a secondary consideration when neither applicant has a clear advantage in their ability to use the station to advance their educational goals. The used of an objective criterion has provided successful, undisputed resolution of cases where the more subjective considerations are in equipoise. As such, and as JSM has argued before,^{17/} the factor should be retained as a secondary consideration.

IV. Expanded Consideration of Programming Proposals is Unwise and Unnecessary

Programming proposals are often indirectly considered under the present standard in that proposed programming often relates to the ability of the applicant to effectively use the station to further its educational work.^{18/} For example, a proposal by a university to conduct over-the-air classes would be relevant to whether the university could better utilize the station to accomplish its educational goals. However, direct consideration of programming proposals to ensure the diversity of noncommercial programming in a given market is unwise and unnecessary. As the Commission's underlying rationale for noncommercial spectrum recognizes, diversity of programming will occur when applicants are selected on the basis of their ability to further their particular educational work.

16. NPR Comments at 15.

17. Comments of Jimmy Swaggart Ministries submitted on May 15, 1995 at 2.

18. See, e.g., Real Life Educ. Foundation, 4 F.C.C.R. 8433, 8438, 8441 (Admin. L.J. 1989).

Despite acknowledging that providing diverse programming is an important factor,^{19/} NPR self-servingly rejects assessing a comparative disadvantage to applicants who would distribute nationally or regionally syndicated programming already broadcast in the market.^{20/} This exception reveals that, as described in parts I and II above, the true effect of NPR's proposal is to maximize the number of licenses likely to carry NPR's programming. Although the high quality of NPR programming is not in question, its standard comes at the expense of the widest possible diversity of noncommercial programming.

V. If the NPR Proposal is Adopted, It Should Only be Applied Prospectively to New Stations.

As discussed in detail above, the implementation of the NPR proposal would work a sea change both in the fundamental rationale for setting aside noncommercial spectrum and in the composition of the noncommercial broadcasting community. If applied to renewal applications or pending new-station applications, such a drastic and unanticipated transformation would injure the legitimate expectancies of existing licensees and those that have applied for noncommercial stations in reliance on the longstanding policy. The Commission has recognized in similar circumstances that unfair prejudice can result to those who have relied on comparative criteria that are subsequently changed. See Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664, 2669 (1992).

19. NPR Comments at 13.

20. Id. at 15.

Therefore, if the NPR proposal is adopted, it should be applied only prospectively to applications for new stations filed after the effective date of the new rules.

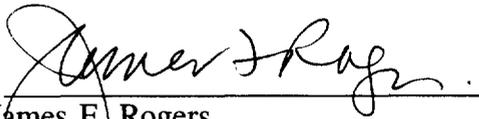
Conclusion

For the reasons set forth above, JSM respectfully requests that the Commission reject the NPR proposal and retain the approach it has consistently espoused: determine which institution will best integrate the station into its overall cultural and educational objectives; in the event that no winner can be determined on that basis, use objective criteria of coverage to award the license.

Respectfully submitted,

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