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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

JOINT COMMENTS OF NATIONAL PUBLIC RADIO, INC., NATIONAL FEDERATION OF COMMUNITY BROADCASTERS AND THE CORPORATION FOR PUBLIC BROADCASTING

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National Public Radio, Inc. ("NPR"), the National Federation of Community Broadcasters ("NFCB") and the Corporation for Public Broadcasting ("CPB") respectfully submit these Joint Comments in response to the Notice of Proposed Rulemaking, dated November 26, 1997, in the above-captioned proceedings (the "NPRM"). For the reasons set forth in these Joint Comments, NPR, NFCB and CPB urge the Commission to abandon its proposal to use a competitive bidding system for mutually-exclusive broadcast applications when one or more of the applicants is a public broadcaster. Instead of using auctions in these cases, the Commission should implement

a selection process which furthers universal public radio service, promotes diversity and localism and does not harm existing public radio stations.

NPR is a non-profit membership organization of more than 590 noncommercial educational radio stations nationwide. NPR produces and distributes such noncommercial educational programming as *All Things Considered*, *Morning Edition*, *Talk Of The Nation*, and *Performance Today*. NPR also operates the Public Radio Satellite Interconnection System and provides representation and membership services to its member stations.

NFCB is a non-profit grassroots organization of noncommercial educational public radio stations characterized by community support, control and programming. NFCB's 85 Participant Members and 95 Associate Members reflect the diversity of the United States: 40% of the members serve rural communities and 35% are minority radio services.

CPB is the private, nonprofit corporation authorized by the Public Broadcast Act of 1967 to facilitate and promote a national system of public telecommunications.

INTRODUCTION AND SUMMARY

In the NPRM, the Commission proposes using auctions to decide among pending and future mutually-exclusive applications for new commercial AM, FM, TV, FM Translator, LPTV, and TV Translator stations.[1] It also requests comment on whether to use auctions to resolve mutually-exclusive applications for modifications to existing

[1] NPRM at ¶¶ 10, 13-22, 39-42.

broadcast facilities.[2] The Commission states that it will *not* consider the question of competing applications for full-service noncommercial stations in this proceeding.[3] Nevertheless, it proposes adhering to an auction process when one or more of the applicants for a station on a "commercial frequency" is a non-profit educational organization under Section 73.503 of the Commission's rules or other non-profit entity.[4] By the term "commercial frequency," the Commission appears to mean all AM frequencies, all FM frequencies outside of the reserved FM band (87.9 - 91.9 MHz), and all television channels other than those reserved for noncommercial educational use, even though applicants may establish noncommercial educational broadcast stations on all AM, FM and TV frequencies.

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[2] Id. at ¶¶ 47-48, 72. However, the Commission proposes that commercial FM modification applications must protect any previously or simultaneously filed application in the reserved FM band, in order to eliminate the possibility of creating a cross-band mutually-exclusive situation. Id. at ¶ 79. NPR, NFCB and CPB fully support this proposal. For those mutually-exclusive applications filed by noncommercial FM stations in the reserved band during the public notice period following the filing of a commercial modification application, the Commission should either treat the applications as simultaneously filed or apply the priority system described in Section IV.

[3] Id. at n.1. NPR, NFCB and CPB wholeheartedly support the Commission's decision, as required under the Balanced Budget Act of 1997, not to institute auctions to decide among competing applications for noncommercial educational broadcast stations. However, NPR, NFCB and CPB urge the Commission to decide the criteria to be used in comparing applicants for noncommercial facilities, so that the partial stay of applications can be lifted and new noncommercial services can be launched. See Reexamination of the Comparative Standards for New Noncommercial Educational Applicants, 10 FCC Rcd 2877 (1995).

[4] NPRM at ¶ 50 (proposing to treat non-profit applicants for non-reserved frequencies, including those who qualify as non-profit educational organizations, no differently under the proposed filing and competitive bidding procedures than any other mutually-exclusive applicant for non-reserved frequencies).

While NPR, NFCB and CPB take no position on the use of auctions to resolve mutually-exclusive applications solely among *commercial* applicants, they urge the Commission to reject the use of auctions in any case where one or more of the applicants is a public broadcaster. The implementation of a competitive bidding system under these circumstances flies in the face of both the law and sound public policy. First, the Balanced Budget Act of 1997 does not authorize the Commission to use auctions when an applicant seeks a license to construct and operate or modify a noncommercial educational broadcast station. Second, subjecting public radio stations to auctions would restrict the diversity of voices and viewpoints available on the public airwaves by effectively closing the entire AM and FM spectrum, except for the reserved FM band, to public radio stations, who lack the substantial resources necessary to compete in auctions. Third, the use of auctions would contradict long-standing Congressional and Commission support for public broadcasting, including precedent opposing the reclamation of Federal funds granted to public broadcasters through government fees.

When a public broadcaster is one of the mutually-exclusive applicants for a frequency outside of the reserved band, the Commission should implement a selection process which promotes universal public radio service, diversity and localism, and protects public broadcasters. Specifically, in the case of mutually-exclusive applications for full-service broadcast stations the Commission should consider a point system which prioritizes applications proposing (a) the first or second noncommercial broadcast service to a geographic area, (b) significant minority or female ownership, control or involvement, or programming which uniquely serves the interests of minorities or women, and/or (c) significant involvement of or service to the local community. For FM

translator applications, the Commission should continue to use its existing priority system. Moreover, public radio stations should be able to replace displaced FM translators on a first-come, first-served basis. Finally, the Commission should prioritize the modification applications of public broadcasters already located outside of the reserved band.

I. The Balanced Budget Act of 1997 Does Not Authorize The FCC To Use Auctions Where An Applicant Proposes A Noncommercial Educational Broadcast Service

The Commission has proposed the use of auctions to decide among mutually-exclusive applications for non-reserved broadcast frequencies – whether or not one or more of the applicants is a public broadcaster – based in part on its understanding that auctions are either mandatory or authorized under Section 3002 of the Balanced Budget Act of 1997, as codified at Section 309(j) of the Communications Act.[5] However, the Balanced Budget Act neither requires nor authorizes the use of auctions when a public broadcaster files an application for a license to construct and operate a new or modified noncommercial educational broadcast station, regardless of whether the station is on a reserved or non-reserved frequency.

The Balanced Budget Act of 1997 provides that the competitive bidding authority granted by the Act "shall not apply to licenses or construction permits issued by the Commission ... for stations described in section 397(6) of this Act."[6] Section 397(6) of the Communications Act refers to a "television or radio broadcast station" which:

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[5] See, e.g., NPRM at ¶¶ 6, 40.

[6] Balanced Budget Act of 1997, Section 3002(a)(2), Pub. L. No. 105-33, 111 Stat. 258 (codified as amended at 47 U.S.C. § 309(j)(2)(C)). The Commission acknowledges this

(A) under the rules and regulations of the Commission in effect on November 2, 1978, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.[7]

Section 397(6) is *not* limited to stations located on the few FM and television channels reserved for noncommercial educational broadcasters, but applies on its face to *all* noncommercial educational broadcasters regardless of their location on the AM, FM or television band.[8]

Moreover, the legislative history underlying the auction provisions of the Balanced Budget Act demonstrates Congress's intent to exempt public broadcasting applicants regardless of whether the particular frequency applied for is in the reserved or non-reserved spectrum. The original House and Senate bills, which were not enacted, would have expressly limited the auction exemption to applications for "channels reserved for noncommercial use."[9] However, the House-Senate conference eliminated this distinction between reserved and unreserved spectrum. Under well-established canons of statutory construction, "[w]here Congress includes limiting language in an

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exemption in its decision not to propose auctions when deciding between applicants for noncommercial facilities. NPRM at n.1.

[7] 47 U.S.C. § 397(6).

[8] See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue ... inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

[9] S. 947, 105th Cong., 1st Sess., § 3001(a)(1) (not enacted); H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1) (enacted as amended).

earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."[10] Accordingly, the auction exemption cannot be limited to reserved noncommercial frequencies.

As further evidence of Congress's intent to exempt all noncommercial broadcasters from auctions, it is important to note that the reservation of certain channels for noncommercial use is not a function of Federal law, but of FCC rules. These rules, which were designed to guarantee the availability of a minimum, rather than a maximum, of spectrum for public broadcasters, permit public broadcasters to operate throughout the broadcast spectrum. The Commission routinely issues licenses and construction permits to stations described in Section 397(6) throughout the AM, FM and TV spectrum upon the simple filing of an application demonstrating the applicant's eligibility for a noncommercial educational broadcast station.[11] Noncommercial educational FM stations operating on unreserved channels are governed by the same rules that are applicable to noncommercial educational FM stations in the reserved band, with the exception of certain technical rules.[12] Moreover, noncommercial FM translators are defined as any "FM broadcast translator station which rebroadcasts the signals of a noncommercial educational FM radio broadcast station," regardless of whether the translator or full-service station are located on the reserved or unreserved band.[13]

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[10] Russello v. United States, 464 U.S. 16, 23-24 (1983).

[11] See 47 C.F.R. § 73.1690(c).

[12] 47 C.F.R. § 73.513.

[13] 47 C.F.R. § 74.1201(c).

Thus, based on the plain language of the statute and Congressional intent, the Balanced Budget Act exempts from auctions all applications for new or modified noncommercial educational broadcast permits or licenses, whether or not the applications are for stations on reserved or unreserved frequencies. Accordingly, the allocation of facilities for public broadcast stations must be made pursuant to the Commission's long-standing authority to issue broadcast licenses as the public convenience, interest or necessity dictates.[14]

II. Subjecting Public Broadcasters To Auctions Would Limit The Diversity Of Voices Represented On The Airwaves By Closing A Substantial Portion Of Spectrum To Public Broadcasters

Resorting to an auction when one of the mutually-exclusive applicants for a broadcast frequency is a public broadcaster not only would violate the Balanced Budget Act of 1997, but it would also harm the public interest by restricting the diversity of voices and viewpoints available over the air. Public radio stations routinely provide service via full-service stations and FM translators outside of the limited reserved FM band, and continued access to frequencies in the AM band and unreserved FM band is essential for public broadcasters to extend service to underserved communities, to improve reception and/or merely to maintain an existing level of service when they are forced to relocate an FM translator. Yet, auctions would effectively close these frequencies to public broadcasters, who are in no position to compete in auctions for broadcast frequency assignments. At a time of rapid media consolidation and the resulting decline in the diversity of voices and viewpoints on the airwaves, the

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[14] 47 U.S.C. § 307.

Commission should not institute a procedure which would automatically exclude from much of the broadcast spectrum a diverse group of entities whose very purpose is to offer alternative programming.

A. Access By Public Broadcasters To Frequencies Outside of the Reserved FM Band Is Often Essential To Extend or Maintain Service

Public radio broadcasters often require access to frequencies outside of the reserved noncommercial educational band for both full-service radio stations and FM translators in order to extend or maintain service. The portion of the FM band reserved for noncommercial educational broadcasters (87.9-91.9 MHz) is very small in proportion to the entire FM band (87.9-107.9 MHz). In many areas of the country, the reserved FM band is either filled or unsuitable for additional full-service stations because of FCC rules requiring stations in the reserved FM band to protect against interference to television channel 6 stations or to other spectrum users.[15] Thus, public broadcasters often must look outside of the reserved FM band if they seek new FM frequencies. There are *no* reserved channels in the AM band, which means that public broadcasters must apply for

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[15] See 47 C.F.R. § 73.525 (requiring stations to protect against interference to TV Channel 6 stations within 154-265 kilometers of the noncommercial FM station); Petition for Reconsideration of National Public Radio, Inc., filed June 13, 1997, in Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, at 5-10 (describing the likelihood of adjacent channel interference to and from DTV channel 6 affecting public radio stations in the reserved FM band); 47 C.F.R. § 73.503(b) (providing that noncommercial FM radio stations in the reserved band in Alaska shall not cause harmful interference to and must accept interference from non-Government fixed operations authorized prior to January 1, 1982). The frequency band 88-100 MHz in Alaska was only allocated for FM radio use in 1982, and any new radio stations in this band are required to protect against existing common carrier operations on the band. Amendment of Parts of the Commission's Rules Governing Frequency Allocations and Radio Treaty Matters, 90 F.C.C.2d 507 (1982).

frequencies outside of the reserved band if they wish to provide a noncommercial educational AM service.[16]

Approximately 37 NPR members have already established full-service noncommercial educational stations outside of the reserved FM band, including eight stations in Alaska (which are also NFCB members), seven stations in Michigan, three stations in Indiana and three stations in New York. Three NFCB members in addition to the Alaska members mentioned above have established full-service FM radio stations outside of the reserved FM band: one in each of New York City, Berkeley, CA, and Provincetown, MA. Approximately 29 NPR members have established full-service noncommercial educational stations on the AM band, including three stations in each of Alaska, Iowa and New York. Three NFCB members are located on the AM band: one in each of New Mexico, North Dakota and West Virginia. The flexibility of these public radio stations to make changes that would improve, extend or even maintain their service could be restricted if the Commission adopted rules subjecting mutually-exclusive modification applications to auctions. Public radio stations cannot afford a loss of flexibility at a time when the conversion to digital television may force many public radio stations to relocate or otherwise modify their facilities.[17]

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[16] The Commission's rules clearly recognize the need of noncommercial educational broadcasters for access to frequencies outside of the FCC band, and authorize the establishment of noncommercial educational service throughout the AM and FM band. See 47 C.F.R. § 73.513; 47 C.F.R. § 73.1690(c); see also supra Section I, p. 7.

[17] See Petition for Reconsideration of National Public Radio, Inc., filed June 13, 1997, in Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, at 2-4.

In addition to these existing noncommercial educational radio stations on the AM band and unreserved FM band, approximately 30 of the mutually-exclusive applications currently pending for radio frequencies outside of the reserved FM band were filed by applicants proposing a noncommercial educational service.[18] Some of these applicants are NPR or NFCB members. While the number of noncommercial educational applicants is small in comparison with the total number of pending applications, the allocations are important to the public broadcasters who have applied for them. Indeed, given public broadcasters' lack the resources, they typically have identified a critical need before filing an application for a new license.

Many rural and isolated communities rely upon FM translators to receive public radio station signals. However, due to the limited number of reserved FM frequencies, unreserved frequencies are often essential for the establishment of noncommercial FM translators.[19] The number of reserved FM frequencies available for translator use is limited further by FCC rules that require FM translators to protect against interference with television channel 6 stations and other spectrum users.[20] These rules and spectrum

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[18] This information was provided by staff of the FCC's Mass Media Bureau, Audio Services Division in January 1998.

[19] The Commission's rules recognize that the FM translators of noncommercial educational broadcasters may be located outside of the reserved FM band. A noncommercial FM translator may be authorized to operate on FM channels 201-300 (87.9 - 107.9 MHz). 47 C.F.R. § 74.1202(b)(2). In addition, the rules define a "noncommercial FM translator" as an "FM broadcast translator station which rebroadcasts the signals of a noncommercial educational FM radio broadcast station." 47 C.F.R. § 74.1201(c). The definition makes no reference to the station's location on the reserved or unreserved FM band. See supra Section I, p. 7.

[20] See 47 C.F.R. § 74.1205; 47 C.F.R. § 74.1202(b)(3).

crowding frequently render the reserved FM band off-limits to FM translators throughout much of the country. Thus, public radio stations from such states as Arizona, Iowa, Minnesota, New Mexico, and Wisconsin, to name just a few, have established or applied for FM translator stations on frequencies outside of the reserved FM band. For instance, twelve of Minnesota Public Radio's 18 FM translators are currently located outside of the reserved FM band.

Public radio stations require access to frequencies outside of the reserved FM band for FM translators not only to extend public radio service to underserved communities, but often simply to maintain existing service. Since FM translators are a "secondary" service, they frequently must be relocated in order to ensure that the translator does not cause any actual interference to a new or newly-modified full-service station.[21] For example, the University of Northern Iowa estimates that it has been forced to relocate FM translators five times over the last ten years. As the FM broadcast spectrum gets more and more crowded, and as the conversion to digital television proceeds, the relocation of FM translators will become even more commonplace. If public broadcasters must participate in auctions every time they are forced to relocate a translator, there could be a downward spiral in the coverage of public radio and, hence, a silencing of diverse programming in many parts of the country.

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[21] See 47 C.F.R. § 74.1203.

B. Most Radio Frequencies Outside of The Reserved FM Band Will Be Closed To Public Broadcasters If They Must Compete In Auctions For The Frequencies

If the Commission subjects public radio broadcasters to auctions when deciding among competing applications for radio broadcast frequencies outside of the reserved noncommercial FM band, it will effectively close these frequencies to public broadcasters. The entire AM and FM band is crowded, even in sparsely-populated areas such as the Rocky Mountain states of Arizona, New Mexico and Utah, so an application for a new full-service or translator station is likely to be subject to competing applications and, if the Commission adopts its proposal, auctions. Furthermore, auctions will become more likely as the conversion to digital television results in frequent relocations and modifications of both television and radio stations.

However, public radio broadcasters lack the substantial resources necessary to compete and prevail in auctions. They operate on shoe-string budgets funded primarily through charitable contributions and government funding. Whatever extra money they have is reinvested in the production or acquisition of additional high-quality programming to serve their communities of license. Public broadcasters are prohibited from raising money by accepting advertisements.[22] As not-for-profit entities, they cannot rely upon later profits to recoup an auction investment. Consequently, they would have serious difficulties finding a lending institution that would provide financing for an auction bid.

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[22] 47 C.F.R. § 73.503(d).

In contrast, the revenue of the largest commercial radio broadcasters is extremely high. For example, Westinghouse/CBS, one of the largest radio owners, had estimated revenues of $1.5 billion for 1997.[23] Other industry giants reported revenues in the hundreds of millions of dollars.[24] Commercial broadcasters have purchased stations at prices that are far beyond the reach of noncommercial entities. For example, in 1996, commercial entities paid amounts as high as $168 million for two FM stations in Detroit, $68 million in cash for an FM radio station in Chicago and $65 million in cash for an FM radio station in Miami.[25] A major market AM station – WWRC, Washington, DC -- was sold for $22.5 million.[26] The disparity of resources between public and commercial

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[23] *Westinghouse To Acquire 98 Radio Stations*, N.Y. Times, Sept. 20, 1997, at 27 (Northeast ed.).

[24] As of June 25, 1997, before the Westinghouse/American Radio Systems merger, the largest U.S. broadcasters reported revenues as follows: Westinghouse Electric/CBS $1.02 billion; Chancellor/Evergreen $793 million; Jacor Communications $502 million; Clear Channel Communications $392 million; American Radio Systems $381 million; Walt Disney Co./ABC 297 million; Capstar Broadcasting $290 million; SFX Communications $276 million; Cox Communications $218 million; Emmis Broadcasting $140 million. *Who calls tune?* The Boston Sunday Globe, Sept. 7, 1997 (citing Duncan's American radio).

[25] The following commercial FM radio stations were among those sold in 1996: WMXD and WJLB, Detroit, MI, for $168 million; WPNT-FM, Chicago, IL, for $68 million cash; WEDR, Miami, FL, for $65 million cash; WWMX, Baltimore, MD, for $60 million; WRMA, Fort Lauderdale/Miami, FL, and WXDJ, Homestead/Miami, FL, for $115 million; KXOA-FM, Sacramento, CA, for $27.5 million; KFSD-FM, San Diego, CA, for $23 million; KYLD-FM, San Mateo/San Francisco, CA, $44 million; KEWS, Arlington/Dallas, TX, $32.1 million and buyer gives seller KDFX(AM); WGRR, Hamilton/Cincinnati, OH, for $31 million; WTKS, Cocoa Beach/Orlando, FL, for $21.3 million; and WKIX-FM, Raleigh/Durham, NC, for $16 million. *The $1 million-plus club* listing of television and radio station deals, Broadcasting & Cable, vol. 127 No. 5, Feb. 3, 1997.

[26] Id.

broadcasters is so great that the adoption of bidding credits or other assistance to public broadcasters in the auction context is unlikely to close the gap.

Although public broadcasters will be consistently outbid in an auction, this does not mean they are not entitled to an FCC license. The market rationale behind granting spectrum to the highest bidder – "allocating spectrum to those valuing it the most and best able to serve the public"[27] – is fundamentally flawed when both commercial and public broadcasters compete for a license. First, public broadcasters value spectrum very highly even though they cannot pay as much for it as commercial broadcasters. Second, it is acknowledged that public broadcasters – who answer first to the public and not to shareholders or investors – provide a critical service to the public. Indeed, Congress and the Commission have recognized that public broadcasters often satisfy the interests of the public not served by commercial broadcast stations.[28] Since the market rationale supporting auctions is inapplicable to public broadcasters, it cannot justify the closing of a substantial portion of the spectrum to public broadcasters.

C. Without Access To Frequencies Located Outside of The Reserved Band, The Diversity Of Voices And Programming Available To The Public Will Be Diminished

By closing a majority of the radio spectrum to public broadcasters, the Commission threatens to sacrifice one of the primary goals driving its broadcast policies

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[27] NPRM at ¶ 18.

[28] See Revision of Program Policies and Reporting Requirements Related to Public Broadcast Licensees, 98 F.C.C.2d 746, 751 (1984); H. Rep. No. 82, 97th Cong., 1st Sess., at 11 (1981) ("The existing act clearly emphasizes the intent of Congress that diverse programming with sensitivity to the diverse needs, interests and concerns of our Nation's people, which may be underserved by commercial broadcasting, remain central to the unique service provided by Public Broadcasting").

over the last sixty years -- maximizing the diversity of ownership, points of view and programming available to the public.[29] This goal stems from the First Amendment, "which rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[30] The Commission should not sacrifice this goal after all of these years for the sake of a one-time addition to the Federal treasury.

The goal of diversity is already threatened by the rapid consolidation of the media industry since the adoption of the Telecommunications Act of 1996.[31] FCC Chairman William Kennard has expressed concern on several occasions about the impact of media consolidation on diversity.[32] In a Separate Statement to the NPRM, Commissioner Gloria Tristani stated that she is "deeply concerned that minority ownership of broadcast stations has declined from 3.07 percent in 1995 to 2.81 percent in 1996-97."[33] According to Larry

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[29] See, e.g., NPRM at ¶¶ 2, 92; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rulemaking, FCC 94-323 (Dec. 15, 1994) (citing core goal of "maximizing the diversity of points of view available to the public over the mass media"); Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Inquiry, 11 FCC Rcd 13003, 13005 n.5 (1996) (articulating the Commission's primary concern with "diversity in ownership as a means of enhancing diversity in programming service to the public").

[30] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[31] Pub. L. No. 104-104, 100 Stat. 56 (1996).

[32] See *Kennard Set For Quick Confirmation*, Multichannel News, No. 40, Vol. 18, Oct. 6, 1997, at 2; *Kennard Foresees Other Areas For Exam*, Advertising Age, Nov. 10, 1997, at 12; *Los Angeles Times Interview; William Kennard: On Regulating the Marketplace Of The Telecommunications Boom*, L.A. Times, Jan. 19, 1998, at M3.

[33] NPRM, Separate Statement of Commissioner Gloria Tristani, at 1.

Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration ("NTIA"), U.S. Department of Commerce, the top 10 commercial radio groups control more than 1,000 radio stations across the country.[34] Secretary Irving stated that this trend has hurt localism and diversity of ownership, resulting, for example, in a 10% drop in minority ownership of broadcast outlets just over the last year.[35] Radio industry mergers have also raised concerns at the Antitrust Division of the U.S. Department of Justice.[36] Thus, it is especially important at this time to adopt policies which promote broadcast diversity.

Public broadcasters provide a critical contribution to the diversity of voices and programming available to the public. The Commission has found that public broadcasters offer diverse programs that meet "cultural and informational interests often given minimal attention by commercial broadcasters."[37] Public broadcasters are expected

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[34] See Communications Daily, Jan. 9, 1998, at 8; see also Rathburn & Brown, *Radio's New Order*, Broadcasting & Cable Magazine, June 23, 1997, at 26-28 (noting that the 25 largest radio groups controlled 1,372 radio stations, constituting 13% of the Nation's 10,273 radio stations).

[35] See Communications Daily, Jan. 9, 1998, at 8.

[36] See, e.g., Antitrust Division Press Release, Justice Department Requires American Radio Systems Corp. To Divest Radio Stations In California And North Carolina: Action Marks Fourth Challenge To Radio Mergers Since Passage Of Telecom Act (Feb. 27, 1997); Antitrust Division Press Release, Gulfstar Communications Abandons Purchase Of Three Arkansas Radio Stations After Justice Department Expresses Antitrust Concerns (March 6, 1997); Connoisseur Communications Gets Justice Department Clearance To Acquire Two Youngstown, Ohio Radio Stations After Selling Two Others (Oct. 23, 1997).

[37] Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 58 F.C.C.2d 526, 536 (1976); see also 47 U.S.C. § 396(a)(5)-(6) (Public Broadcasting Act of 1967 adopted to encourage programming that would constitute "an expression of diversity and excellence," offer "a source of alternative telecommunications

to provide "significant alternative programming designed to satisfy the interests of the public *not served* by commercial broadcasters."[38] Public broadcasters are also committed to airing programming that serves the unique needs of local audiences. Since a significant portion of a public broadcaster's budget is comprised of direct financial contributions from local audiences, public broadcasters have a special duty to serve local needs and interests.[39]

Congress intended all citizens of the United States to have access to the diverse programming offered by public broadcasters.[40] However, only 91% of all Americans currently receive one or more public radio signals.[41] To maximize the diversity of voices and programming available to the public and to achieve Congress' goal of universal service, public broadcasters must be able to continue expanding their services to reach additional unserved and underserved communities, as well as to preserve their current level of service. They can only do that if the Commission rejects its proposal to subject public broadcasters to auctions when they have filed competing applications for new or modified licenses outside of the limited reserved noncommercial band.

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services for all citizens of the Nation," and address "the needs of unserved and underserved audiences, particularly children and minorities").

[38] Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 F.C.C.2d at 751 (emphasis added).

[39] See id. at 753-754.

[40] See 47 U.S.C. § 396 (a)(7) ("it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States").

[41] See Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting, at 14 (1997).

III. Subjecting Public Broadcasters To Auctions – And Thereby Taking Back Government Funding Through Auction Payments – Contradicts Both Logic And A Long History Of Support For Public Broadcasting.

In addition to audience contributions, a significant portion of a public radio station's budget is derived from government funding. Many public radio stations receive Federal funding through CPB community service grants and national program acquisition grants.[42] In addition, public radio stations can apply to the Public Telecommunications Facilities Program, administered by the NTIA, for grants to purchase equipment and extend signal reach. States and communities also provide grants to public broadcasters, and in some cases are public broadcasting licensees. Federal government funding constitutes on average 14%-16% of an NPR member station's budget, although it may constitute as much as 50% or more of the budgets of some rural public radio stations, including some stations licensed to Native American tribes. Whatever percentage of their budgets consists of Federal government funding, public broadcasters rely upon this funding to provide high-quality and diverse services to their communities. Given the high prices that auctions and commercial radio and television sales have garnered in the past, the money required to prevail in an auction would likely equal or exceed a public radio station's total Federal government funding.

By subjecting public broadcasters to auctions for frequencies outside of the reserved band, the Commission would merely take back government funding in the form of auction payments – in the unlikely event that public broadcasters could afford to participate in auctions in the first place. This would contradict both logic and long-

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[42] See 47 U.S.C. § 396(k).

standing precedent exempting public broadcasters from the fees imposed by the FCC, including application fees and regulatory fees.[43]

During the 1995 debates over the status of government funding for public broadcasters, the American public threw its support behind the continued public funding of noncommercial educational broadcasting.[44] A recent Roper poll found that, when given the choice of twenty services, the American public judged public radio and public television the second and third best values in return for tax dollars spent, trailing only national defense.[45] The Commission should not void this support by reclaiming government funding from any public broadcaster which seeks a new broadcast frequency to improve service to the public, reach unserved or underserved communities, or maintain an existing level of service.

IV. Where a Public Broadcaster Is An Applicant For A Frequency Outside Of The Reserved Band, The Commission Should Use A Modified Selection Process That Preserves The Public Interest In Diversity

Instead of using a competitive bidding system contrary to the Balanced Budget Act of 1997 and long-standing and well-justified precedent, the Commission should implement a modified selection process when faced with mutually-exclusive applications

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[43] 47 C.F.R. § 1.1114(c); 47 C.F.R. § 1.1162(e).

[44] See Irvin Molotsky, *One Tough Bird, After All: How Public Broadcasting Survived the Attacks Of Conservatives*, N.Y. Times, Nov. 27, 1997, at B1 (in which Representative Edward Porter, R-Ill, is quoted as stating, "The American People rose up and said that they valued public broadcasting and wanted it preserved").

[45] See *Public Radio, Public Television Give Americans Valuable Return On Tax Dollars, Roper Poll Shows*, Corporation for Public Broadcasting Press Release (July 24, 1997) (describing survey conducted by Roper Starch Worldwide, Inc. in March 1997,

for non-reserved broadcast frequencies where one or more of the applicants is a public broadcaster. This process should recognize the public interest in extending noncommercial broadcast service to unserved communities, expanding the diversity of voices, viewpoints and programming available on the air, promoting localism, maximizing existing noncommercial services, and maintaining existing levels of service.

As an initial matter, the Commission should implement "engineering solutions, negotiations or other tools that avoid mutual exclusivity altogether."[46] When such mechanisms do not result in a clear license award, the Commission should consider a system which prioritizes mutually-exclusive applications for full-service broadcast stations as follows:

- Where an applicant (which meets the Commission's minimum qualifications for a noncommercial educational license) proposes the first or second noncommercial educational AM, FM or TV service in a geographic area.
- Where an applicant proposes a service with significant minority or female ownership, control or involvement, or programming which uniquely serves the interests of minorities or women.
- Where an applicant proposes the significant involvement of or service to the local community, including first local origination capability of a noncommercial broadcaster in a geographic area.

Each applicant would receive points based on their satisfaction of the above criteria. The applicant which receives the most points under this system would receive the requested permit or license. The Commission could prohibit any applicant which obtains an FCC permit or license as a result of the point system from assigning or

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commissioned by CPB).

[46] H.R. Rep. No. 217, 105th Cong., at 572, reprinted in 1997 U.S. Code Cong. & Admin. News 192; see also 47 U.S.C. § 309(J)(6)(E).

transferring the permit or license for a period of time, such as the initial license period. If a public broadcaster which obtained its permit or license as a result of its noncommercial educational status sought to assign or transfer the permit or license to an entity proposing a commercial service, or to convert from a noncommercial to a commercial license, the Commission could then hold an auction.

This approach carries out the intent of Section 307(b) of the Communications Act, as amended, which requires the Commission to distribute licenses among states and communities so as to "provide a fair, efficient, and equitable distribution of radio service."[47] It also furthers the public interest in the availability of public broadcast service to all citizens of the United States.[48] Moreover, it promotes the diversification of ownership and programming, an objective that the Commission has stated it would like to preserve in this proceeding.[49]

A similar approach is used by the NTIA's Public Telecommunications Facilities Program ("PTFP").[50] The NTIA prioritizes PTFP requests that propose a first broadcast signal to a geographic area and first local origination capacity in a geographic area.[51] It

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[47] 47 U.S.C. § 307(b).

[48] 47 U.S.C. § 396(a)(7).

[49] NPRM at ¶ 92.

[50] 15 C.F.R. § 2301 et seq.

[51] 15 C.F.R. § 2301.4.

also gives special consideration to applications that foster ownership of, operation of, and participation in public telecommunications entities by minorities and women.[52]

In the case of mutually-exclusive applications for FM translator stations, the Commission should continue to use its current prioritization system. Under Section 74.1233 of the Commission's rules, the Commission gives priority to those FM translator stations proposing to provide fill-in service.[53] In other cases, where it cannot find different frequencies for the translators, the Commission grants applications based on the following priorities: (1) first full-time aural service; (2) second full-time aural service; and (3) other public interest matters including, but not limited to, the number of aural services received in the proposed service area, the need for or lack of public radio service, and other matters such as the relative size of the proposed communities and their growth rate. Where these procedures do not resolve mutual exclusivity, the Commission grants the applications on a first-come, first-served basis.[54]

Notwithstanding the above set of priorities, public radio applicants seeking to replace a displaced FM translator should receive permits on a first-come, first-served basis. This is consistent with the Commission's efforts to maintain existing levels of service when TV translators are displaced during the transition to digital television.[55]

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[52] 15 C.F.R. § 2301.5.

[53] 47 C.F.R. § 74.1233(d).

[54] 47 C.F.R. § 74.1233(e)-(g).

[55] See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, MM Docket No. 87-268, ¶ 144 (rel. Apr. 21, 1997).