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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 3, 1998

Commissioner Susan Ness  
Federal Communications Commission  
Room 104  
1919 M Street, N.W.  
Washington, DC 20554

Re: **Suggestion for Resolution of Mutually Exclusive NCE-FM Applications**

Dear Commissioner Ness:

Since the *Bechtel* decision in 1993, the Federal Communications Commission has lacked comparative criteria to decide the hundreds of conflicts between mutually exclusive applications for new noncommercial educational FM ("NCE-FM") stations. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Various comparative criteria or point systems that have been suggested entail subjective judgments subject to the same legal challenges raised in *Bechtel*. Although the Commission is authorized to decide these cases by lottery, AFA believes that a lottery would discourage non-profit organizations from pioneering new NCE-FM applications. A simple solution would be to adopt "First In Line" as the primary comparative criteria for NCE-FM application processing. "First in Line" would resolve the backlog of mutually exclusive cases, would provide an incentive for non-profit entities to pioneer new NCE-FM stations, and would greatly simplify the administrative burden on the Commission. This letter will set forth (1) how a lottery would discourage new NCE-FM stations, (2) how a point system offers little chance of improvement over the status quo, (3) how a "First in Line" policy would encourage new NCE-

FM stations, and (4) how a “First in Line” policy would eliminate a substantial portion of the Commission’s current NCE-FM processing burden.

1. Although a lottery could clear the existing backlog of NCE-FM applications, a lottery would encourage copycat applications, with the long-term effect of discouraging the engineering investment to pioneer new NCE-FM applications.

The instant win feature of a lottery, combined with the relatively low cost to file copycat applications would predictably attract a crowd of competing applications to every “A” cut-off. Even applicants who had no genuine interest in operating a station to serve the community would be attracted by the opportunity to win the lottery and then sell the station. As a result, a lottery would generate many more competing applications than the current system and would create an opportunity for non-serious applicants to traffic in licenses.

AFA has observed a pattern of conduct, allowed by the current rules, that AFA sees as anticipating what would be reasonable behavior for copycats to follow under a NCE-FM lottery. As an example, Broadcasting for the Challenged, Inc. (“BFTC”) filed thirteen applications that appeared on “B” cut-offs during the first nine months of 1998, each of which was mutually exclusive with other non-profits’ pioneering applications. But, BFTC filed only copycat applications. During that period not a single BFTC pioneering application appeared on an “A” cut-off list, and BFTC did not build a single NCE-FM station. BFTC simply filed on top of other non-profits which had done the original work to find the frequency. In fact, BFTC has filed on top of applications even when there was another available frequency. AFA concludes that BFTC anticipates that the Commission will adopt a lottery to resolve conflicting NCE-FM applications, and is positioning itself to take advantage of the odds. Several other applicants appear to be following the same opportunistic example set by BFTC.

In another example, AFA had several of its original applications photocopied by Positive Programming Foundation, where they changed a few pages and resubmitted the applications as competing applications, without doing any engineering studies. When AFA complained to the FCC, we were told that the Commission's regulations do not prohibit such a practice. Therefore, for the cost of postage and the use of a copying machine, a competing application can be submitted. A lottery would, no doubt, encourage even more such actions.

The inventory distributed by a lottery does not exist until it is defined by an application for an available NCE-FM frequency that is placed on an "A" cut-off. Since NCE-FM allocations are custom engineered rather than allotted from a table, to find an available frequency to serve a particular community the pioneer applicant for a new station must make a significant investment in engineering. That inventory is not generated by the government, but is developed at the private initiative of non-profit corporations investing their scarce resources. Engineering costs to locate an available NCE-FM frequency and design a new station conservatively averages \$4000.00 to \$5000.00. The engineering costs for subsequent applicants who have access to the initial application can be substantially less. Under a lottery system, a nonprofit organization would be discouraged from investing \$4000.00 of its scarce resources to find an available frequency, if it knows that numerous competing applications will be filed, using the information provided in its original application. A lottery would reward copycat applications and penalize original applicants.

As a consequence, a lottery would create a disincentive to the activity of pioneering new frequencies. This disincentive would affect the smaller non-profits especially. Non-profits would learn that it was poor stewardship of their scarce resources to invest in pioneering an

application for a new station, because the lottery odds that they would be the winner of a construction permit would be no better than any other lottery applicant. In fact, the better pioneering applications would draw more copycat applicants, thus reducing the original applicants' chances of securing a construction permit. As a result, a lottery would discourage the development of new NCE-FM stations.

In summary, if a lottery occurs, fewer pioneering applications will be filed because the engineering costs to pioneer a new NCE-FM station will not be justified where the pioneer's odds of obtaining a construction permit are no greater than any other lottery player's odds. Over the long term, a lottery would discourage the development of new NCE-FM stations and poorly serve the public interest, convenience and necessity.

2. A point system for comparing competing NCE-FM applications will not resolve the Commission's administrative problems.

Subjective elements in a point system would attract *Bechtel* type legal challenges. Consequently, a point system would be unlikely to accomplish the initial task of resolving the backlog of NCE-FM conflicts.

Aside from legal challenges, a comparative point system would perpetuate the Commission's burdensome processing and hearing obligations. Unlike the reduced number of applications that would be processed under a "First in Line" system, as discussed below, every application filed under a point system would require engineering and legal processing, plus additional processing to rate it according to the point system. Then every conflict would trigger a comparative hearing. Therefore, a point system would provide no relief to the on-going administrative burdens of the Commission.

3. Use of “First In Line” as the primary selection criteria among otherwise qualified, conflicting NCE-FM applications would expedite construction of new stations and act as an incentive to pioneering new NCE-FM service.

Rather than a lottery or a point system, the American Family Association urges the Commission to grant a construction permit to the first qualified NCE-FM applicant to file (“First in Line” policy). A “First in Line” policy would provide an incentive for non-profit organizations to invest in the engineering required to locate new available frequencies. If the applicant was qualified and met all the application requirements, and the engineering was proper, the Commission could grant a construction permit immediately after the “A” cut-off. This procedure would provide a measure of certainty for a non-profit evaluating whether or not to invest in the engineering to seek a new NCE-FM station for a particular community. If the non-profit was qualified, and was the first to file a proper application, they could be confident of receiving a construction permit. This approach would stimulate pioneering applications and result in new NCE-FM services to areas that are currently unserved.

Although use of “First in Line” as the primary criteria for resolving conflicts between NCE-FM applications would be a new policy, the Commission has long recognized the kindred concept of a “finder’s preference” as a valid tool to promote the public interest, convenience and necessity. *Notice of Proposed Rulemaking*, 7FCC Rcd 2664 (April 10, 1992).

4. “First in Line” would significantly reduce the Commission’s administrative burden.

The “First in Line” policy would provide an objective basis to quickly resolve the hundreds of mutually exclusive applications which now exist, significantly relieving the Commission’s administrative backlog. Additionally, the “First in Line” policy would vastly reduce the number of applications the Commission needed to review on an on-going basis.

Under a “First in Line” policy, only if the first application proved to be unacceptable would the Commission process the second application in line. Only if the second application was rejected would the Commission be required to process the third application, and so on. This would significantly reduce the Commission’s application processing load.

Furthermore, the objectivity of a “First in Line” policy would discourage any potential legal challenges which are sure to come if the Commission adopts a subjective point system. The fact that a “First in Line” approach would be easily understood, be easily processed, require no subjective decisions by the FCC, and be fair to every party desiring to apply for a frequency, would make it the best available approach to withstand a court challenge.

Unlike a point system, a “First in Line” policy would eliminate the Commission’s administrative burden for comparative hearings. At the same time, “First in Line” would spare competing non-profit applicants the wasteful expenditure of thousands of dollars in legal fees for a comparative hearing that always produces a loser.

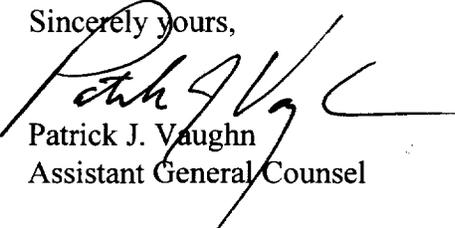
Thus, a “First in Line” policy would greatly reduce the Commission’s administrative burden, while at the same time conserving the resources of non-profit applicants.

#### Conclusion.

Initially, a “First in Line” policy would efficiently resolve the backlog of mutually exclusive NCE-FM applications. Then, over the long term, a “First in Line” policy would stimulate provision of noncommercial service to new communities by encouraging more pioneering applications. Additionally, a “First in Line” policy would eliminate the Commission’s obligation to conduct comparative hearings and would dramatically reduce the number of applications the Commission was obliged to process. In contrast, a lottery would

discourage the long term development of new NCE-FM services by destroying the incentive to pioneer new applications. A lottery would also play into the hands of parties intending to traffic in licenses. In further contrast, a point system would offer no relief to the Commission's processing and hearing burdens. Foreseeable legal challenges to a point system would delay elimination of the backlog of existing application conflicts. Therefore, the public interest would be best served by a "First in Line" policy.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Patrick J. Vaughn", with a long horizontal flourish extending to the right.

Patrick J. Vaughn  
Assistant General Counsel