

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

In the Matter of

**Reexamination of the Comparative Standards
for Noncommercial Educational Applicants**

MM Docket No. 95-31

COMMENTS OF JIMMY SWAGGART MINISTRIES

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Introduction and Summary

In response to the Commission’s past requests for suggestions on the method it should use to select from among competing applicants for new noncommercial educational (“NCE”) licenses, Jimmy Swaggart Ministries (“JSM”) has filed a series of comments in support of the existing approach, which employs a comparative hearing to determine which institution is best able to use the broadcast facility to advance its educational and cultural objectives. Where competing applicants demonstrate equal ability to “integrate” the facility into their educational operations, the license is awarded based on the secondary criterion of comparative coverage. This approach remains the fairest and most rational one available.

Unlike the very different commercial integration standard rejected by the D.C. Circuit in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the noncommercial integration standard is neither arbitrary nor capricious. It serves the public interest by helping to ensure that broadcast licenses are awarded to the applicants with the greatest capacity to use broadcast facilities effectively, the very purpose for which spectrum has been set aside for noncommercial use. Because there is no way to address this same public interest factor in either a lottery or a point system as proposed by the Commission, JSM urges the Commission to retain the comparative hearing process now in place.

If the Commission is committed to replacing the traditional hearing process with an alternative selection system as proposed, it should recognize that it will be sacrificing the policy aims that previously guided the allocation of NCE spectrum in the name of efficiency. JSM favors

a point system over a lottery, if one or the other must be adopted, because a point system represents the most effective and responsible way to enhance administrative efficiency.

A lottery system is arbitrarily random. Consequently, it is not supportable by any policy consideration other than administrative convenience, and even this desideratum is poorly served. The required diversification and, especially, minority preferences make this alternative excessively burdensome to administer. Both preferences require the Commission to engage in the treacherous exercise of pinpointing the ownership and control of a non-profit entity, on an ongoing as well as initial basis, because their integrity cannot be assured without instituting a holding period and periodic reverification requirement. Furthermore, the minority preference is constitutionally questionable under *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), and may be impossible to implement.

A point system is preferable to a lottery because it is objective without being random. Unlike a lottery, it may be able to reveal at least some of the qualitative distinctions between applicants. The point categories, however, should be carefully chosen to minimize rather than increase administrative burdens on the applicants and the Commission. Otherwise such a system will share many of the defects of the comparative hearing process, but none of its merits.

Even more so than hearings, a point system is susceptible to ties. In both cases, the Commission should continue to rely on the objective, readily measurable factor of comparative coverage to make a final decision. JSM proposes a formula that weights coverage according to the amount of unserved and underserved area: (white area population x 2) + (grey area population x 1.5) + (remaining population x 1). JSM urges the Commission to reject forced time-sharing as an alternative. The educational missions and programming agendas of competing applicants may be highly incompatible, creating a danger of confusion to the public. This danger can be especially acute where religiously affiliated broadcasters are involved, and may raise First Amendment issues.

Finally, if either a lottery or a point system is adopted, it should not be applied retrospectively to pending applications which have already been adjudicated under a comparative hearing process. Administrative efficiency, the very purpose served by replacing comparative hearings with a different system, would be defeated by requiring parties who have already undergone an elaborate hearing process to generate additional paperwork and suffer further delay.

It is also unfair to “change the rules” on applicants who have relied significantly on the Commission’s previous policy and practice.

I. Comparative Hearings Best Serve the Fundamental Rationale for Setting Aside Noncommercial Broadcast Spectrum.

Ever since the Commission began reserving broadcast channels for noncommercial educational use, the fundamental rationale for doing so has been to provide non-profit educational agencies with an effective means of advancing their overall educational programs. *See New York University*, 10 RR 2d 215, ¶ 8 (P & F 1967). This was true in 1938, when the initial spectrum reservations were made; it was true in 1967, when the Commission was first confronted with mutually exclusive applications for NCE spectrum; and it remains true today. *See id.* at ¶ 7 (citing Rules 1057 and 1058, 3 Fed. Reg. 312 (1938)); *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 259, ¶ 11 (1991). In furtherance of this policy, the Commission has routinely asked competing noncommercial applicants to demonstrate that their proposals best “integrate” the requested facility into their respective educational operations. The applicant entitled to a license is the one with the greatest ability to further its own educational and cultural objectives. *See, e.g., Seattle Public Schools*, 4 FCC Rcd 625 (Rev. Bd. 1989).

The policy aims underlying the reservation of broadcast spectrum for noncommercial educational use are unique, and the noncommercial “integration” criterion directly implements these aims. Unlike the commercial integration standard rejected by the court in *Bechtel*, noncommercial integration is not a proxy for a separate, tenuously related policy goal. Instead, the standard restates the policy itself: the applicant best able to utilize the license to further its educational programs should be assured access to reserved NCE spectrum, because that is precisely why NCE spectrum was reserved.

In the three decades since the Commission first articulated the NCE integration standard in *New York University*, it has relied on a comparative hearing process to evaluate mutually exclusive applications for NCE spectrum. This process has been criticized for being time-consuming and resource-intensive. *See Further Notice of Proposed Rule Making, Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31 (rel. Oct. 21, 1998), 63 Fed. Reg. 58358, ¶¶ 3, 8 (1998) (“*Further Notice*”). While it is true that comparative hearings may frequently be slow or costly, they unquestionably

maximize the Commission's opportunity to make a fully informed appraisal of the evidence indicating which applicant will most successfully integrate the desired broadcast facilities with its overall educational mission. While adjudication by alternate means may streamline the decisionmaking process, alternatives such as a lottery or point system in no way address the public's policy interest in promoting the most effective use of a valuable educational resource. In fact, they disregard the policy rationale for setting aside NCE spectrum at all. Only the comparative hearing process and noncommercial integration standard equip the Commission to measure competing NCE applicants on the basis of directly relevant policy concerns. Therefore, JSM strongly urges the Commission to retain the comparative hearing process.

II. The Commission Should Retain Comparative Coverage as a Tie-Breaker in Close Cases.

On occasion, the Commission has found that two or more applications for NCE broadcast spectrum have substantially equal capacity to integrate the requested station into their respective educational programs. *See Real Life Educational Foundation of Baton Rouge*, 6 FCC Rcd 2577, ¶ 10 (1991). The Commission should not abandon the comparative hearing process and the noncommercial integration standard merely because they do not always produce an unambiguous winner. Objective criteria such as comparative coverage are appropriate and easily administered tie-breakers, already employed with success by the Commission.

There is no reason for the Commission to reject comparative coverage as a tie-breaker between NCE applications with otherwise equal merit. Coverage is a readily measurable quantity which is easily compared. *Cf. Chapman Radio and Television Co.*, 19 FCC 2d 185, 236 n. 38 (ALJ, 1968), *aff'd*, 19 FCC 2d 157 (Rev. Bd. 1969) (“[U]nlike the other criteria for evaluating comparative proposals, engineering coverage is the least likely to be changed.”). It is also more than simply a “fine distinction,” *Further Notice*, 63 Fed. Reg. 58358 at ¶ 9, between applicants. On the contrary, it is directly related to the public policy goal of maximizing public access to broadcast services.

The initial comparative coverage determination is straightforward: whether one proposal covers substantially more total population than the other. Where the total population count is roughly equal, necessitating a look at secondary factors, one approach taken by the Commission has been to determine which proposal offers greater coverage to underserved areas.

Does one of the proposals provide initial audio or video service to a “white” area, where no such service existed previously? If not, does one of them provide second service to a “grey” area, where only one such service existed previously? *See Real Life*, 6 FCC Rcd 2577 at ¶ 11; *cf. Town and Country Radio, Inc.*, 70 FCC 2d 572, ¶ 6 (Rev. Bd. 1978) (awarding moderate comparative preference, in commercial context, to applicant offering second nighttime service to over 5,000 more persons than competitor).

A simple alternative to this multi-step approach addresses coverage and distribution simultaneously through a weighted population measurement. Every resident of a “white” area would be counted twice, and every resident of a “grey” area one-and-a-half times, in the total population count. *See* discussion, Part III.B.4 *infra*. All else being equal, the broadcast license would be awarded to the applicant offering the greatest coverage under this formula.

The occasional need to resort to an objective tie-breaker does not make the hearing process arbitrary. A comparative hearing process is desirable even where it produces a tie, because it ensures that every competing proposal is tested first in light of the public policy interests that the Commission is pledged to promote. An appropriate tie-breaker such as weighted comparative coverage does not lessen the virtues of the comparative hearing process. Instead, it works in tandem with the hearing process to enhance the Commission’s ability to carry out its public service mandate.

III. If the Traditional Comparative Hearing Process is to be Abandoned, a Well-Designed Point System is Preferable to a Lottery.

If the Commission chooses to adopt either a lottery or a point system in place of the traditional comparative hearing process, it should recognize that it will necessarily lose its most effective means of evaluating the strength of mutually exclusive applications for NCE spectrum. What the Commission and the public stand to gain in return is a reduction in the administrative burdens on all parties. Any method chosen to replace the traditional hearing process should unequivocally advance this goal. Viewed in light of this principle, a well-designed point system is a superior alternative to a lottery.

A. A Lottery Cannot Be Administered in an Effective, Efficient or Fair Way.

A lottery is superficially attractive because of its apparent simplicity, and because it guarantees an unambiguous winner in all cases. However, the diversification and minority

preferences mandated by the Communications Act, 47 U.S.C. § 309(i)(3), *see Further Notice*, 63 Fed. Reg. 58358 at ¶ 12, make a lottery virtually impossible to administer, without offsetting the arbitrariness inherent in any random selection process. These disadvantages make a lottery an undesirable method for the allocation of NCE spectrum.

As the Commission has correctly implied, *Further Notice*, 63 Fed. Reg. 58358 at ¶ 11, random selection—the characteristic feature of a lottery—is also its fundamental drawback. Competing applications for the use of reserved NCE bandwidths will not always be equal in terms of coverage, programming quality, or the ability to incorporate the broadcast facility into their educational operations. Under a lottery system, nothing but chance assures that a station permit will be awarded to the applicant with the most deserving proposal. Likewise, nothing but chance exists to prevent a permit from being awarded to the least deserving proposal.

Mandatory preferences for diversification of ownership and for minority control do nothing to alleviate the public policy costs of random selection in the noncommercial educational context.¹ To the contrary, in the noncommercial context such preferences are virtually impossible to administer. Most noncommercial applicants are non-profit entities, where the concept of “control” simply does not exist, yet determining control is necessary to implement the statutory preferences. *Further Notice*, 63 Fed. Reg. 58358 at ¶ 15. Tying such a determination to the composition of an applicant’s governing board, *id.* at ¶¶ 16, 33, is an unsatisfactory solution for at least two important reasons. First, board membership is inherently fluid. In the language of the *Bechtel* court, it “lacks permanence.” 10 F.3d at 879. It is therefore an arbitrary and inadequate basis for allocating broadcast preferences. Second, a preference tied to board composition invites abusive manipulation of an applicant’s board membership, as the Commission itself recognizes. *Further Notice*, 63 Fed. Reg. 58358 at ¶ 16. This unfairly favors newcomers who have an opportunity to custom-tailor their board to please the Commission, perhaps solely for the purpose

¹ Such preferences advance the general policy of Congress and the Commission of promoting diversity in the broadcast arena, but this otherwise laudable policy bears no relationship to the educational function NCE spectrum was set aside in order to serve. Although it might be possible to “improve” a lottery proposal slightly by incorporating additional factors such as educational presence into the weighting formula, more closely approximating the policy imperatives unique to the allocation of NCE spectrum, the process becomes more ungainly as it becomes less random. The very features that make a lottery attractive—simplicity, economy and finality—would be severely compromised.

of obtaining a broadcast license, and disadvantages existing organizations with an established educational track record.

These issues are particularly problematic in regard to the required minority control preference. How might the Commission measure the racial status of an entire organization or its governing board? For example, would an educational entity's minority status be inferred based on a numerical weighted average of all board members at the time of application, or over some historical period? What if board composition or membership changes during the application process? Would large boards fare better than small ones, or vice versa? How should differing racial compositions be compared? Such inquiries invoke serious constitutional concerns. Under the Supreme Court's decision in *Adarand*, racial quotas in any form are subject to strict judicial scrutiny and require compelling justification. See *Further Notice*, 63 Fed. Reg. 58358 at ¶ 15. Even then, there is no assurance that a court would find the Commission's lottery proposal narrowly tailored to state interests. Protracted litigation on the sensitive subject of race would add several more years to the current hiatus in awarding noncommercial broadcast licenses.

Finally, any attempt to address the "permanence" and manipulation issues by imposing a holding period is a minefield in the minority control context. The Commission should not put itself in the position of requiring an organization to elect a person of a specified race to its governing board.

B. A Well-Designed Point System is the Most Rational and Effective Way to Meet the Goal of Reducing Administrative Burdens.

In the event that the Commission does decide to abandon the long-standing policies which support the retention of a traditional hearing process, a well-crafted point system is preferable to a lottery. Unlike random selection, a point system is capable of revealing at least some of the material distinctions between competing applicants for NCE spectrum. If structured well, such a system can effectively fulfill the Commission's desire to reduce the cost and complexity of its adjudications. If care is not taken, however, a point system may become merely an ungainly paper substitute for a genuine hearing.

Should a point system ultimately be adopted, JSM proposes that points be awarded for local diversity, for the first local service licensed to a community, and for broadcast experience. An established educational presence should be a prerequisite for obtaining points in

any of these categories, in order to avoid abuse by applicants with no independent educational mission, organized exclusively for the purpose of obtaining a broadcast license. Finally, as with traditional hearings, a weighted population count should be used to break ties between otherwise equal applicants.

1. *To Combat Abuse of the License Application Process, An Established Educational Presence Should be a Prerequisite for the Award of Points.*

The Commission has proposed “local educational presence” as a possible factor in the award of credits under a point system. *See Further Notice*, 63 Fed. Reg. 58358 at n. 26. It is doubtful whether local presence is a viable proxy for an applicant’s degree of need for a broadcast license at a given location. However, the length of an applicant’s educational presence is highly relevant to combating abuse of the license application process. Because of this, JSM proposes that the Commission require all NCE applicants to have conducted educational operations for a period of five years prior to filing, in order to receive points in *any* category.

The Commission rightly points out the potential for abuse and speculation in the license application process. *Further Notice*, 63 Fed. Reg. 58358 at n. 26 and ¶ 30. “Educational” organizations formed exclusively for the purpose of obtaining a broadcast license should not be ranked on a par with applicants that have a proven commitment to carrying out a genuine educational and cultural mission. Furthermore, an educational presence requirement helps to ensure that point-based adjudication is not wholly divorced from the unique, education-oriented policy imperatives relevant to the allocation of NCE spectrum. *See Part I supra*.

An appropriate period of required organizational “presence” is five years prior to the time of application for a noncommercial broadcast license. Five years is sufficient time for the applicant to have developed a verifiable educational track record, and to demonstrate that its reason for being extends to more than just the operation of a broadcast station. At the same time, five years is not so long as to place an unreasonably extended burden on the activities of newly formed but genuine educational entities.²

² In its length and in its policy rationale, a five-year educational presence requirement resembles the holding period proposed by the Commission to preserve the integrity of certain lottery or point preferences, *see Further Notice*, 63 Fed. Reg. 58358 at ¶¶ 29-31, but it does not require the Commission to intervene in station affairs after a license is granted.

2. *Local Diversity, “First Local Service,” and Broadcast Experience are Appropriate and Easily Administered Bases for the Award of Points.*

The Commission has called, rightly, for point categories that are “easy to document, difficult to feign, and directly and verifiably connected to furthering a public interest goal.” *Further Notice*, 63 Fed. Reg. 58358 at ¶ 22. JSM believes that the proposed point category of local diversity meets these objectives, as does the fair distribution point for the first local service licensed to a community. In addition, broadcast experience should also be taken into consideration, for one point.

First local transmission service is generally unproblematic. It reflects one of the allotment priorities enshrined in the Communications Act at 47 U.S.C. § 307(b) and is routinely applied in commercial adjudications. *See, e.g., Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988).

In its turn, local diversity is “easy to document” and “difficult to feign” as long as the inquiry is governed by actual ownership or control by the applicant, rather than complex questions of attribution of a non-profit entity. *Cf.* Part III.A *supra* (describing analytical and administrative difficulties associated with a minority control presence). The appropriate question should be whether or not the applicant—rather than its directors, members or employees—holds other local media interests. As for public interest concerns, the emphasis on local rather than absolute diversity allows the Commission to advance its general policy of promoting the dissemination of a wide range of viewpoints. At the same time, it avoids placing undue restrictions on statewide educational networks, *Further Notice*, 63 Fed. Reg. 58358 at ¶ 21, or on other organizations whose educational vision and prestige are regional or national in scope.

As with local diversity, the broadcast experience of an applicant organization can meaningfully and easily be documented if the relevant experience of the organization itself is what is being measured. The general public interest is served by granting an advantage to applicants that have already acquired expertise in areas important to broadcast excellence, such as programming, finance, regulation and technology. As the D.C. Circuit Court observed in *Bechtel*, rewarding broadcast experience helps the Commission to “pick winners.” 10 F.3d at 884. Prior track records are a valuable predictor of future success.

3. *The Proposed “Other Factors” Are Not Viable Point Categories in Either Administrative or Public Policy Terms.*

The Further Notice of Proposed Rule Making proposes several “other factors” as possible bases for the award of points to competing applications for NCE spectrum. Other than the local educational presence credit, *see* Part III.B.1 *supra*, these include a minority control credit, a statewide plan credit, and a representativeness credit. None of these alternatives meets the Commission’s need for easily applicable criteria that advance public policy goals in a meaningful way. In fact, they may be as intellectually bankrupt as the now-discredited commercial integration standard. Consequently, they should be discarded from consideration.

Just as in the lottery context, *see* Part III.A *supra*, a minority control credit is constitutionally problematic and would be inordinately difficult to administer. It leads to complex determinations of who is a “minority” and what is “control,” and involves the Commission in long-term monitoring of these sensitive questions. *See Further Notice*, 63 Fed. Reg. 58358 at ¶ 24. A representativeness credit is equally awkward to administer. In addition, such a credit disadvantages well-established charitable or educational applicants if their leadership draws on a particular, underserved segment of the community rather than a cross-section of it. It instead favors entities which have been established for the exclusive purpose of obtaining a broadcast license, and bluntly disfavors organizations with national scope or prestige. *See Further Comments of Jimmy Swaggart Ministries*, MM Docket No. 95-31, pp. 6-8 (filed June 27, 1995). Because both credits are likely to be linked to the composition of an applicant’s governing board, they invite abuse and may require ongoing intervention by the Commission in a non-profit licensee’s internal affairs. *See* Part III.A *supra*.

In turn, it is unclear how a statewide plan credit would advance public policy. It is appropriate and fair that statewide, regional or municipal educational plans not be disadvantaged in an analysis of local diversity. *See Further Notice*, 63 Fed. Reg. 58358 at ¶ 21(A). This does not mean that statewide plan members should be unduly privileged over other applicants. Is the tenth or twentieth entrant into a statewide plan entitled to the same degree of preference as the first licensed broadcast facility in a community? The addition of new participants to a statewide plan, especially one that already provides extensive coverage, may not on the margin provide any

measurable enhancement to the diversity, quality or distribution of broadcast service to the public, nor indicate how likely the applicant is to further its educational objectives.

4. *The Proposed Point Categories for First and Second Service and for Technological Parameters Should Be Combined into a Weighted Comparative Coverage Measurement for Tie-Breaking Purposes.*

Traditionally, the Commission has granted a significant preference under 47 U.S.C. § 307(b) to both commercial and noncommercial applicants proposing first or second reception service to a given area. It has also awarded a preference to applicants that offer superior geographic and/or population coverage generally. *See, e.g., Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, ¶ 9 (Rev. Bd. 1984). These factors, easily addressed in a comparative hearing context, fit uncomfortably within a point-based model. However, they can be combined to create a meaningful coverage and distribution measurement that lends itself well to comparison. Because of this, the Commission should not award points for first service, second service, and markedly superior relative technical parameters, as proposed. Instead, it should adopt comparative coverage as a tie-breaker, weighting the measurement in favor of proposals that provide superior coverage to underserved populations.

The Commission's proposal to award points for first or second broadcast service under the heading of "fair distribution" rightly acknowledges that all other things being equal, the public has its greatest interest in service to "white" and "grey" areas. White area service is particularly favored. It is unclear how the Commission's fair distribution proposal is to be administered, however. For example, are the point categories (first service received, second service received, and first service licensed in the community) cumulative, or exclusive? That is, can a single applicant obtain points under all three headings? That would give fair distribution a disproportionate and outcome-determinative role in the overall point scheme.

More seriously, the fair distribution point scheme as proposed fails to identify applicants with markedly superior or inferior coverage of underserved communities. This failure can lead to anomalous outcomes. An applicant offering service to a white area with one resident would receive the same number of points as an applicant offering service to a white area with ten thousand residents. The former applicant, thanks to its single white area customer, would also receive more points than an applicant offering grey area service to a population of fifty thousand.

The possibility of such disparities illustrates the arbitrariness of addressing fair distribution through points.

Similarly, the award of fair distribution points may unfairly advantage an applicant with minimal white or grey area service against a competing applicant with greatly superior general coverage. Under the point proposal for technical parameters, the latter applicant could not obtain points unless it offered ten percent greater coverage in both area and population. A point awarded for such a markedly superior technical proposal could easily be “canceled out” by the point awarded to a competing proposal offering coverage to a single grey area resident, or defeated outright by the two points awarded for coverage to a single white area resident.

In its turn, the technical parameters category is administratively awkward as proposed and lends itself to equally anomalous adjudicative outcomes. First, the award of technical parameters points requires a preliminary comparison of the engineering data of all applicants for a particular broadcast license. As prospective licensees enter or withdraw their applications, ongoing recalculation of the other applicants’ point totals will be required. This creates uncertainty for the applicants and excess work for the Commission. Second, the proposed technical parameters category artificially limits the ability of the Commission to reward meaningful technical merits. For example, applicants offering coverage to similarly sized geographic areas, but very different-sized populations, would be treated as equivalent. An applicant offering even twice as much population coverage as its counterpart would perceive no advantage, and the Commission would be powerless to take the difference into consideration.

The Commission suggests that the purpose for requiring area-based as well as population-based technical superiority is to ensure that the licensing process will not unduly privilege urban residents “with many existing broadcast choices” over the underserved residents of isolated geographic areas. *See Further Notice*, 63 Fed. Reg. 58358 at ¶ 23. In other words, this requirement is simply a proxy for fair distribution. Rather than engaging in a redundancy, the Commission should eliminate geographic coverage as a distinct consideration. Instead, it should combine fair distribution and population coverage into a single measurement, by giving extra weight to white- and grey-area populations covered by a proposed broadcast station. This is fair, easily done, and analytically meaningful. Because the resulting score lends itself well to objective

comparison, it can serve as the basis for a tie-breaking scheme that is consistent with the Commission's past practice.

To arrive at a weighted coverage measurement, JSM proposes the following formula:

$$(\text{WHITE AREA POPULATION} \times 2) + (\text{GREY AREA POPULATION} \times 1.5) + (\text{REMAINING POPULATION} \times 1) = \text{WEIGHTED COVERAGE SCORE}$$

This measure acknowledges that while public policy values general broadcast coverage highly, it values grey area coverage more and white area coverage the most. *See FBC, Inc.*, 95 FCC 2d 1344, ¶ 12 (Rev. Bd. 1983) (“[P]roviding service to people who receive no service or little service is one of the Commission’s basic missions.”). It thus rewards proposals with a superior ability to reach underserved populations. However, it does not allow comparative outcomes to be skewed disproportionately by the presence of only a few people in a white or grey area of proposed coverage.

IV. Forced Time-Sharing is an Unwise and Unfair Approach to Resolving Ties.

Forced time-sharing is not an appropriate substitute for an objective tie-breaker where two applications share an identical point total. Requiring licensees to associate publicly with their rivals, over the airwaves, promotes unsound policy and presents potentially serious constitutional difficulties. Alternatively, asking the applicants to negotiate the time-sharing themselves, *see Further Notice*, 63 Fed. Reg. 58358 at ¶ 26, represents an abdication of the Commission’s own responsibility to allocate noncommercial spectrum effectively.

Competing applicants for broadcast spectrum may, not infrequently, have distinctly incompatible educational agendas. Forcing them to divide broadcast time between them may have the effect of confusing the public, and diminishing the educational effectiveness of each organization’s broadcast operations. For example, a station offering instructional programming on modern medical techniques might co-exist very uncomfortably with a station operated on behalf of adherents of Christian Science. In JSM’s own FM licensing proceeding, adverse to Real Life Educational Foundation of Baton Rouge, both parties steadfastly resisted a time-sharing arrangement. Because of fundamentally incompatible theological positions, time-sharing would have unduly compromised each organization’s intended message.

If the Commission imposes a time-sharing arrangement on unwilling parties, what allocation criteria can it use? Who will have access to the most desirable broadcast hours? Can this decision be made on a content-neutral basis, without actual or perceived favoritism? These are delicate questions, encompassing constitutional concerns under the freedom of association and religion clauses. “[C]ommon sense, not to mention the First Amendment, counsel against the Commission’s trying to decide what America should see and hear over the airwaves.” *Bechtel*, 10 F.3d at 886. These concerns are especially sensitive in cases involving religious broadcasters, where the Commission may be perceived as preferring one applicant’s theological viewpoint over the other’s.

V. If Either a Lottery or a Point System is Adopted, It Should Be Applied Only Prospectively, Not to Applicants That Have Already Been Evaluated in a Traditional Comparative Hearing.

The adoption of a point system or a lottery requires the Commission to sacrifice its goal of furthering the long-standing policies that justify the reservation of broadcast spectrum for NCE use, *see* Part I *supra*, in exchange for streamlining the administrative burdens associated with the process of adjudicating mutually exclusive license applications. Such a new system should not be imposed on pending applications submitted in reliance on the prior policy. As the Commission has recognized under similar circumstances, 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 FCC Rcd 2664, 2669 (1992).

At the very least, pending applications should be adjudicated under a new system only if a traditional comparative hearing has never been held. To do otherwise would be irrational in the absence of any basis for declaring the old system either arbitrary or capricious. The worst that can be said of the traditional comparative hearing process is simply that it is challenging to administer. If the entire point of replacing the traditional process is to enhance efficiency, it makes no sense to undertake a second process after a comparative hearing has already taken place. To conduct a lottery or tabulate points at that stage would increase rather than decrease the administrative cost of completing the licensing process. Applicants who have already been subjected to the rigors of a hearing, and who have already suffered a great deal of delay in the resolution of their applications, should not be asked to undergo new and different administrative hurdles. In turn, the Commission should not burden itself with additional proceedings under a

lottery or point system when it has already invested a significant amount of time and resources in a comparative hearing in order to identify the most deserving applicant.

Conclusion

For the foregoing reasons, JSM urges the Commission to retain its present comparative criterion for mutually exclusive noncommercial broadcast applications, along with the accompanying hearing process. Comparative coverage, weighted in accordance with fair distribution principles, should be retained as a tie-breaker if two or more competing applications have substantially equal subjective merits.

Alternatively, JSM proposes a point system that includes categories for local diversity, first local service licensed to a community, and broadcast experience, with a 5-year educational presence requirement as a prerequisite for receiving points. Forced time-sharing should be rejected as a tie-breaker, in favor of weighted comparative coverage. JSM also encourages the Commission to apply newly adopted selection standards only to those applicants who have not already been evaluated in a traditional comparative hearing.

Respectfully submitted,

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