

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

DOCKET FILE COPY ORIGINAL

RECEIVED

JAN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reexamination of the Comparative)
Standards for Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

COMMENTS OF EDUCATIONAL MEDIA FOUNDATION

EDUCATIONAL MEDIA FOUNDATION

Robert C. Fisher
Veronica D. McLaughlin

Its Attorneys

FISHER WAYLAND COOPER
LEADER & ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

January 28, 1999

No. of Copies rec'd 074
List ABCDE

SUMMARY

Educational Media Foundation ("EMF") urges the Commission to adopt a window filing application processing system coupled with a lottery procedure similar to that formerly employed in the low power television and television translator service to identify and choose from among competing noncommercial educational applicants. EMF believes that this approach not only represents the fairest and most efficient means of selection but will also foster the prompt initiation of new noncommercial services to the greatest number of listeners and viewers.

Pursuant to this proposal, the Commission should periodically open five or ten-day windows for the filing of noncommercial applications. To prevent over filing, applicants should be limited to filing no more than five applications during a given filing window. Adoption of such a window filing system will eliminate the unfair advantages that "B" cut-off applicants have over lead applicants as well as the inefficiencies associated with the processing of applications under the current cut-off system. Following the close of the window, the Commission should choose from among mutually exclusive applications by lottery. Prior to holding a lottery, however, EMF recommends that the Commission afford mutually exclusive applicants a 120-day settlement period in which to resolve the mutual exclusivity of their proposals through engineering solutions, including frequency changes and other major amendments. EMF believes that permitting applicants to institute technical solutions to resolve mutual exclusivity will eliminate the need for a lottery in many cases, thereby resulting in the prompt initiation of the greatest number of new noncommercial services.

Even where lotteries were necessary, the choice of applicant would prove far more efficient and economical than use of a point system or other comparative system since it would discourage appeals by applicants who disagreed with the Commission's subjective evaluations of

comparative merit. Moreover, each of the criteria suggested by the Commission as part of a point system presents opportunities for manipulation and abuse and often would not prefer the applicant whose proposal would best serve the needs and interests of the community. Selection from among competing noncommercial applicants by lottery would allow the Commission to avoid these problems.

Moreover, the Commission should dispose of pending noncommercial applications by lottery for many of these same reasons. Use of a lottery is only fair since the point system criteria were not in existence when applicants initially filed their applications.

Finally, EMF believes that noncommercial entities should continue to be allowed to apply for frequencies in the commercial band. Where commercial entities are also applicants, noncommercial entities should be able to participate in auctions.

TABLE OF CONTENTS

	<u>PAGE</u>
Summary	i
Table of Contents	iii
Discussion	2
I. The Commission Should Adopt Window Filing and Lottery Procedures to Identify and Choose From Among Eligible Competing Noncommercial Educational Applicants	2
A. Noncommercial Processing Framework	2
B. Lottery versus Comparative Criteria	6
II. The Commission Should Conduct Lotteries to Choose From Among Pending Applications	11
III. Noncommercial Applicants for Commercial Frequencies Should be Permitted to Participate in an Auction or Request Reallocation of the Frequency to Noncommercial Use	11
Conclusion	13

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

RECEIVED
JAN 28 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reexamination of the Comparative) MM Docket No. 95-31
Standards for Noncommercial)
Educational Applicants)

To: The Commission

COMMENTS OF EDUCATIONAL MEDIA FOUNDATION

Educational Media Foundation (“EMF”) hereby submits its comments in response to the *Further Notice of Proposed Rule Making* in the above-captioned matter, released October 21, 1998 (the “*Further Notice*”).

EMF is the licensee of a network of noncommercial educational radio broadcast and FM translator stations known as the K-LOVE Radio Network.^{1/} As detailed herein, EMF urges the Commission to adopt a window filing application processing system coupled with a lottery procedure to identify and choose among competing noncommercial educational applicants. In EMF’s view, such a system represents the fairest and most efficient means of selection and will foster the prompt initiation of new noncommercial services to the greatest number of listeners and viewers.

^{1/} EMF also holds construction permits for several noncommercial educational FM stations and noncommercial FM translator stations.

Discussion

I. The Commission Should Adopt Window Filing and Lottery Procedures to Identify and Choose From Among Eligible Competing Noncommercial Educational Applicants

A. Noncommercial Processing Framework

First and foremost, EMF urges the Commission to adopt a window filing procedure for the processing of competing noncommercial educational applications similar to that formerly employed in the low power television and television translator service prior to adoption of the auction procedures. Pursuant to this proposal, the Commission should periodically open a five or ten-day window for the filing of noncommercial applications. To prevent a "land rush" in response to a window opening, each applicant would be limited to filing no more than five applications during a given filing window. To afford noncommercial applicants sufficient opportunities to initiate new service, EMF recommends that the Commission open a minimum of two filing windows per year.

Following the close of a window, applications would either be placed on a proposed grant list or grouped with other mutually exclusive applications for selection by lottery. Prior to holding a lottery, however, EMF recommends that the Commission adopt an interim step whereby applicants would be afforded a 120-day settlement period in which to resolve the mutual exclusivity of their proposals through engineering solutions, which should include the ability to change frequencies and implement other major amendments.^{2/} EMF believes that applicants would be able to take advantage of technical solutions to resolve the mutual exclusivity of their proposals in a great number of cases, thereby resulting in the initiation of more noncommercial

^{2/} To discourage speculation, monetary settlements should continue to be limited to reasonable out-of-pocket expenses.

services. Only in those isolated instances where applicants have been unable to eliminate the mutual exclusivity would winning applications be selected by lottery.

The ability to resolve mutual exclusivity through frequency changes and other major amendments would enable the grant of more applications to provide NCE service to the public -- a win-win situation for both applicants and the public. EMF currently has a number of pending mutually exclusive applications for new noncommercial educational FM stations. If major amendments had been permitted to resolve these situations, EMF would have been able to settle a number of these proceedings quickly and efficiently, thereby permitting the prompt initiation of new noncommercial services to the public.

Currently, the Commission does not permit an applicant to file a major amendment and retain its cut-off protection based, in part, on the theory that other potential applicants would be deprived of their *Ashbacker* right to comparative consideration.^{3/} Should the Commission adopt a window filing procedure, however, no such problem would exist. If an application is amended pursuant to a settlement after a window has closed, the amended application should be entitled to retain cut-off protection since all potential applicants would have been afforded the opportunity to apply for that frequency.^{4/} As the Commission has recognized:

Ashbacker does not create a right to file a competing application upon public notice. Rather, it held that when properly filed mutually exclusive applications are before the Commission, the Commission cannot grant one and relegate the other to an empty 'hearing.' The Supreme Court acknowledged that the Commission might adopt reasonable procedures for considering mutually exclusive applications

^{3/} See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) (holding that where two bona fide applications are mutually exclusive, the grant of one without a hearing on both impermissibly deprives the losing applicant of its statutory right to a hearing).

^{4/} Major amendments would continue to appear on public notice as required by Section 309(b) of the Communications Act so that the public could file comments. The Commission, however, would not accept new competing applications.

in an orderly fashion. . . Thus, . . . Ashbacker leaves to Commission discretion the circumstances under which applications are considered mutually exclusive.^{5/}

Adoption of a window-filing processing procedure would be both fairer and more efficient than the use of the current cut-off procedure because it would identify and reward those parties with the greatest interest in a frequency. The current cut-off procedures are flawed in several key respects that serve to penalize the lead applicant. Under the current scheme, the lead applicant which desires to offer service in a given community must expend resources in locating an available frequency and preparing the requisite engineering. Upon appearing on an "A" cut-off list, it has been EMF's experience that almost invariably a number of other applicants then decides to offer service in the same or a neighboring community and files competing applications with similar engineering proposals. This only serves to thwart the lead applicant from initiating new noncommercial service to a community, while rewarding the tag-along "B" applicants who lacked the motivation to locate the frequency themselves and conduct their own preliminary engineering analyses.

The current cut-off list processing system also promotes manipulative and, in EMF's view, unproductive, gamesmanship. Insofar as population and area coverage may become criteria to be examined on a comparative basis, one scenario is for a "B" cut-off applicant to wait until the last day of the "B" cut-off period to amend the technical proposal contained in its application to

^{5/} *MCI Airsignal International, Inc.*, FCC 84-397, 1984 FCC LEXIS 2119, at * 7-8 (Aug. 17, 1984) (upholding against *Ashbacker* challenge former Section 22.31(g)(2) of the Commission's rules, which permitted an amended application to retain its original cut-off date where major amendment to change frequency filed in order to avoid conflict with another applicant); *see also Low Power Television and Television Translator Service*, 102 F2d 295, 299 (1984) (stating in the context of the LPTV proceeding that the general Public Notice notifying prospective applicants that they must file their applications during the specified filing window in order to receive consideration along with other mutually exclusive applications filed during the same filing period would fairly advise such applicants of "what is being cut-off by the notice").

increase population and/or area coverage, while at the same time hoping that the lead “A” applicant has only matched the technical facilities contained in the “B” applicant’s initial, unamended application. In addition, the 50% limitation contained in the current major change rules applicable to NCE applicants further penalizes the lead applicant by restricting its ability to amend its proposal to gain a more equal footing with the “B” applicants.

To the extent that the current cut-off list processing procedures are designed, in part, to award the frequency to the most technically qualified applicant, it has been EMF’s experience that the engineering proposals of competing applicants typically are not so radically different that they present any meaningful basis for differentiation.^{6/} Generally speaking, the engineering proposals in many competing applications are roughly similar in terms of population and area coverage. Moreover, as discussed below, greater population and area coverage does not always lead to the most efficient mode of operations. Finally, in those cases where an applicant has proposed significantly lower power operations relative to the other applicants, under the post-filing settlement period procedure outlined above engineering solutions could possibly resolve the competing proposals’ mutual exclusivity.

Use of cut-off lists is also inefficient because it requires double processing by the Commission of all applications. First, the Commission must process an application to determine whether it meets all technical requirements and whether its proposal will cause interference to licensed or pending facilities that have been cut off. Applications that pass this initial evaluation are placed on an “A” cut-off list inviting competing applications. After the cut-off date, the application must be processed a second time to determine whether any competing mutually

^{6/} Indeed, as the Commission is well aware, certain “B” applicants merely copy the engineering from the lead applicant’s application.

exclusive applications were filed. As the Commission recognized in the LPTV context, this redundant processing is an inefficient use of its limited resources.

Regardless of whether lottery or comparative point procedures are ultimately adopted by the Commission, EMF strongly urges the Commission to adopt a window filing processing system. Absent a change from the current cut-off system, a lottery would only serve to encourage applicants to file applications for a large number of facilities since they could “piggy back” on the engineering of the lead applicant. Adoption of a point or traditional comparative hearing system would also favor the “B” cut-off applicants by allowing them to tailor their applications to gain a comparative advantage over the lead application. A window filing system would ensure that the pool of applicants consists of those most interested in providing new noncommercial service to the proposed service area.

B. Lottery versus Comparative Criteria

In those cases where competing applicants are unable to craft an engineering solution to resolve their mutual exclusivity during the post-filing settlement period, the winning applicant should be chosen by lottery. This approach will prove far more efficient and economical than use of either a point system or traditional comparative hearings. Use of a point system or other comparative system will only lead to lengthy and costly delays in service to the public. As the Commission noted, unsuccessful applicants are less likely to appeal the results of random selection than of a more subjective process.^{7/} A selection process based on comparative criteria would also discourage settlements during the post-filing settlement period proposed above. An applicant that believes its proposal merits a comparative advantage will be less willing to explore engineering solutions or compromises with other competing applicants.

^{7/} See *Further Notice* at 6-7.

The Commission has recognized the difficulty of making rational distinctions between applicants using the existing noncommercial criteria in traditional comparative hearings.^{8/} While a point system seems more definite, it is subject to many of the same criticisms as comparative hearings, including the difficulty of choosing meaningful criteria that will result in the choice of the clearly superior applicant and the ability of applicants to manipulate the criteria for their benefit.

Should the Commission adopt a point system, it is considering awarding points based on the following criteria: (1) local diversity; (2) fair distribution of service; (3) technical parameters; and (4) other factors such as minority control, established local presence, participation in a state-wide plan, and, in the television context, leadership that is significantly more representative of the community than that of other applicants.

Each of these criteria presents opportunities for abuse and manipulation as applicants attempt to tailor their applications to qualify for the most points. For example, with respect to the "local diversity" criterion, an entity that would not otherwise receive points for local diversity would be encouraged to cause a separate entity to be formed and install a governing board whose members do not control other local noncommercial stations.

Likewise, the "fair distribution of service" criterion will encourage applicants to select relatively obscure towns and villages as communities of license, thereby giving rise to disputes with other applicants over whether the area specified constitutes a "community" within the meaning of the Communications Act and whether the area is separate and distinct from a larger city so as to warrant a first local service credit. In any case, this criterion often would not provide

^{8/} See *Public Notice* at 3 (citing *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580 n.8 (Rev. Bd. 1991)).

a meaningful distinction between proposals. Where two radio broadcast applications were mutually exclusive, rarely would only one of them propose a full-time aural service to its proposed community of license.^{9/} Moreover, the vast majority of Americans already receive one or more noncommercial radio and television services.^{10/}

The award of points based on the “technical parameters” of the proposed facilities will encourage applicants to apply for maximum facilities regardless of whether that proposal is the most efficient way of providing broadcast service to the community. Multipath problems caused by terrain factors, for example, may be eliminated or ameliorated by reduced power operation. An area may also be better served by two stations operating at lower power than only one operating at maximum facilities. A station operating at maximum facilities may place a weak signal into a neighboring community, which could be better served by a second station located in that community. However, the extension of the maximum facility station’s signal into the neighboring community could nevertheless preclude allotment of a second station in that community.

The “technical parameters” criterion will also result in more frequent use of directional antennas to maximize coverage, thereby increasing the prevailing applicant’s cost of operations. Finally, if a license is awarded on the basis of this criterion, there should be some mechanism in

^{9/} This situation could occur where the contour overlap between the proposed stations is small, suggesting that the applicants are interested in serving essentially separate and distinct areas. In such a case, however, the losing applicant could re-engineer its proposal to remedy the interference and refile its application in the next filing window.

^{10/} See Corporation for Public Broadcasting, *Frequently Asked Questions 1997*, at www.cpb.org/content/faq/faqp11.html (reporting that 91% of Americans receive at least one public radio signal, and 99% receive local public television channels). When other noncommercial stations are added to the figures for public radio, the percentages of Americans receiving noncommercial channels climbs even higher.

place to ensure that the applicant will construct and continue to operate with the same technically superior facilities it had originally proposed in its winning application. However, this would require imposing some form of restriction on an applicant's ability to modify its facilities to reduce power, which would be, at the very least, impractical in a number of situations, such as where a permittee loses its tower site.

Each of the remaining criteria suggested by the Commission in the *Further Notice* also has substantial drawbacks. The "representativeness" credit is subject to the same kinds of manipulation as the "local diversity" criterion. The "local educational presence" credit would not necessarily prefer the applicant whose proposal would best serve the needs and interests of the community. For example, pursuant to this criterion a local high school proposing to serve its students within a one-square mile area would be preferred over a non-local organization though the latter's programming might be preferred by the wider community. In addition, application of any of these factors, as well as of the local diversity criterion, would require the imposition of a lengthy holding period in light of the court's decision in *Bechtel v. FCC*, 10 F.3d 875, 879 (D.C. Cir. 1993).¹¹

The adoption of a lottery procedure would avoid all of these pitfalls and potential for abuse. Although a lottery would not permit comparison of applicants' qualifications, each applicant would continue to be required to meet basic eligibility standards in order to apply. These standards ensure that any applicant selected possesses the qualifications to provide noncommercial service in the public interest. Moreover, noncommercial entities depend for their

¹¹ In *Bechtel*, the District of Columbia Court of Appeals held in the commercial context that the Commission's award of a comparative preference for the integration of ownership and management was arbitrary and capricious, in part, because applicants who prevailed on the basis of the preference had no obligation to remain integrated or to sell their stations to an integrated buyer. 10 F.3d at 879.

survival on the financial support of their listeners and underwriters. Accordingly, they have a strong incentive to provide quality service. Finally, it is certainly far from clear that use of the comparative criteria that have been suggested would result in the choice of the best applicant.

The Communications Act of 1934, as amended, requires the Commission to give a preference in any broadcast lottery to applicants which (1) would increase the diversification of ownership, or (2) are controlled by minorities.^{12/} Accordingly, should the Commission adopt a lottery procedure, as acknowledged in the *Further Notice* it will be required to consider the constitutional issues posed by the minority preference in light of certain court decisions.^{13/} Insofar as legislative action may be invoked to modify the scope of the minority preference, EMF notes that the national media diversity preference would likely aid minorities in the same way that bidding credits and other benefits to small businesses applying for certain auctioned spectrum aid minorities.^{14/}

Moreover, for purposes of determining whether an applicant merits a diversity preference, the Commission should determine control of a noncommercial entity by reference to the entity's

^{12/} See 47 U.S.C. § 309(i)(3).

^{13/} See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998). As the Commission noted, the minority control credit suggested as part of a point system is also subject to potential constitutional concerns.

^{14/} See, e.g., *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10877-78 (1997); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Tenth Report and Order*, 11 FCC Rcd 19974, 19980 (1996) (IVDS), *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Sixth Report and Order*, 11 FCC Rcd 136 (1995), *aff'd sub. nom Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (broadband PCS). As with the diversification of ownership preference, the statute indicates that the purpose of the minority preference is to diversify the ownership of the media of mass communications. Thus, these two preferences seek to accomplish the same purpose.

governing board. To ensure that the preference serves its purpose, the Commission also should require applicants that prevail on the basis of this preference to maintain a similarly qualified board for five years following the commencement of operations.^{15/}

II. The Commission Should Conduct Lotteries to Choose From Among Pending Applications

The Commission should dispose of pending noncommercial applications by lottery. As with new applications, a lottery system would most fairly and efficiently dispose of applications currently pending before the Commission while also permitting the prompt initiation of new noncommercial service to the public. In the event that the Commission's use of lottery procedures is delayed due to a challenge on constitutional grounds, lotteries should nevertheless be conducted immediately in those cases where none of the applicants is entitled to a minority preference.

Adoption of a point system to dispose of applications that are currently pending would be unfair since such retroactive application of new criteria would penalize applicants for failing to meet criteria that were nonexistent at the time the applications were filed.

III. Noncommercial Applicants for Commercial Frequencies Should be Permitted to Participate in an Auction or Request Reallocation of the Frequency to Noncommercial Use

The Commission should not exclude noncommercial applicants from the commercial band.

Section 309(j) of the Communications Act of 1934, as amended, provides:

^{15/} For example, an applicant who received a 2:1 preference because none of its board members had a majority interest in any other media would be required to maintain a board whose members had no such interest. An applicant who received a 1.5:1 preference because its board held interests in one, two or three other media outlets would be required to maintain a board whose members held no more than three such interests. Should monitoring present a problem, the Commission could require applicants wishing to take advantage of the diversity preference to amend their governing documents to limit the media interests that the applicant and its board may hold.

If . . . mutually exclusive applications are accepted for any initial license or construction permit, then . . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission . . . for stations described in Section 397(6) of this Act.”^{16/}

Section 397(6) of the Act defines the terms “noncommercial educational broadcast station” and “public broadcast station.” This provision was intended to address only frequencies in the reserved band. It is very possible that the drafters were unaware that certain noncommercial applicants had applied to operate NCE stations on frequencies in the commercial band. Significantly, this restriction on the Commission’s auction authority is clearly designed to *help* noncommercial broadcasters by preventing the sale of reserved band frequencies to the highest bidder. Congress certainly did not intend to penalize noncommercial entities by preventing them from applying for commercial frequencies. Thus, EMF believes that noncommercial entities should be permitted to participate in auctions. In appropriate cases, however, noncommercial entities should continue to be permitted to request that commercial frequencies be reallocated to noncommercial educational use.^{17/}

^{16/} 47 U.S.C. § 309(j)(1)-(2).

^{17/} See, e.g., *Rosendale, New York*, 12 FCC Rcd 10020 (1997), *recon. dismissed*, 13 FCC Rcd 308 (MMB 1998); *Strasburg, Colorado*, 12 FCC Rcd 6065 (MMB 1997); *Ukiah California*, 11 FCC Rcd 13933 (MMB 1996); *Anchorage, Palmer and Seward, Alaska*, 5 FCC Rcd 7570 (MMB 1990).

Conclusion

For the reasons set forth above, EMF respectfully requests that the Commission adopt the processing framework proposed herein for choosing among applicants for noncommercial educational stations.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

By *Veronica D. McLaughlin*
Robert C. Fisher
Veronica D. McLaughlin

Its Attorneys

FISHER WAYLAND COOPER
LEADER & ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

January 28, 1999