

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

**JOINT REPLY COMMENTS OF NATIONAL PUBLIC RADIO, INC.,
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND
THE CORPORATION FOR PUBLIC BROADCASTING**

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National Public Radio, Inc. (“NPR”), the Association of America’s Public Television Stations (“APTS”) and the Corporation for Public Broadcasting (“CPB”) hereby submit these Joint Reply Comments in response to the comments filed regarding the Further Notice of Proposed Rulemaking, released October 21, 1998, in the above-captioned proceeding (the “FNPRM”).

Summary

In establishing rules to govern the allocation of licenses for noncommercial broadcast stations, the record in this proceeding is clear: the Commission must conduct a sufficiently meaningful review of the competing applicants and select the applicant best qualified to serve the public interest through the operation of a noncommercial educational station. While NPR, APTS and CPB are supportive of the Commission's desire to develop an administratively efficient process, the Commission must not sacrifice the public interest for expedience.

As demonstrated by an overwhelming consensus of commenters, a lottery system is contrary to the public interest for several reasons. First, lotteries encourage the speculative filing of applications and the filing of minimally adequate applications by applicants with marginal qualifications. Second, the statutory preferences contained within the Commission's lottery authority raise substantial constitutional issues, the resolution of which will only further delay the process of implementing rules to allocate noncommercial licenses. Third, the inherent arbitrariness of lotteries means that in any given case the least qualified applicant may obtain the broadcast license.

A "first to file" rule, as suggested by one commenter, is likewise fatally flawed. It too would encourage the speculative filing of applications, and it would not result in the awarding of noncommercial licenses to the best qualified candidates.

The vast majority of commenters agree that, among the proposed options for allocating noncommercial licenses, only a comparative point system assures the selection of individual licensees based on public interest considerations. There was also significant consensus among the commenters in favor of comparative criteria directed to the values of localism, diversification, and spectrum efficiency as embodied in the NPR, APTS and CPB comparative point proposal. To the extent there were differences of opinion among some commenters about individual criteria, we believe that the combination of a documentation filing requirement, an opportunity for applicants to challenge a prevailing applicant's qualifications, a significant holding period, and periodic licensee certification assures the selection of the best qualified applicants. Finally, a substantial majority of commenters endorsed the NPR, APTS and CPB tie break proposal that would award a license to the applicant with the fewest applications on file among otherwise equal applicants.

With regard to competing commercial and noncommercial applications for non-reserved spectrum, the record in this proceeding is also clear that auctions may not be employed and the Commission may not simply refuse to accept applications proposing noncommercial service on non-reserved spectrum. Rather, the Commission should adopt the special processing track set forth in our initial comments. If the Commission is constrained from adopting that proposal, it should instead adopt a process of reserving additional spectrum when a noncommercial applicant proposes to serve an underserved area, as well as a hybrid comparative point system to decide among competing commercial and noncommercial applicants in other circumstances.

I. The Record In This Proceeding Establishes That The Commission Should Adopt A Meaningful Point System Instead Of A Lottery To Decide Among Competing Applications for Reserved Frequencies

A. There Is An Overwhelming Consensus That A Lottery System Would Not Serve The Public Interest And Should Be Rejected

The participants in this proceeding almost uniformly oppose the use of lotteries to resolve competing applications among noncommercial applicants. Indeed, only three of the approximately fifty-five parties filing comments supported the use of lotteries.¹ Their arguments in favor of lotteries, moreover, actually reinforce the conclusion that awarding noncommercial educational licenses according to random chance is contrary to the public interest.

First, adopting a lottery system will unquestionably inundate the Commission with speculative noncommercial applications. Pensacola Christian College acknowledges that

¹ These entities are Educational Media Foundation, Kaleidoscope Foundation, Inc., and Pensacola Christian College.

the "[s]implicity [of the lottery system it suggests] should spawn more applicants."² It proposes a limit of 5 applications *per month*, or 60 applications per year, *plus* an additional application for each lottery that an applicant loses.³ Kaleidoscope Foundation, Inc. argues that there should be no limits whatsoever on the number of lotteries in which an entity may participate.⁴ Indeed, because applicants will have an incentive to file as many applications as possible to increase their chances in a lottery system, it is no surprise that two of the three parties supporting lotteries are among the entities with the highest number of noncommercial applications currently pending before the Commission.⁵

Second, as Pensacola Christian College acknowledges, lotteries will encourage the filing of applications that meet only a minimal level of acceptability, instead of applications in which the applicants have identified a real need and ability to serve an area. Indeed, Pensacola Christian College suggests an initial short-form application that “requires virtually no up front [sic] costs to the applicant” and even initially “eliminates the expense of contracting with an engineer” until the FCC determines that there are no competing

² Comments of Pensacola Christian College at 4.

³ See id. at 6, 8-10.

⁴ Comments of Kaleidoscope Foundation, Inc. at 4.

⁵ According to a chart prepared by the Station Resource Group based on information from the FCC Web site, Educational Media Foundation has 85 noncommercial applications pending, which makes it the entity with the fourth highest number of noncommercial applications pending. See Comments of Station Resource Group, Exhibit 1. Pensacola Christian College has 38 noncommercial applications pending, making it the entity with the sixth highest number of noncommercial applications pending. While Educational Media Foundation proposes opening filing windows approximately twice per year instead of once a month, with a limit of 5 applications per window, it already has assured itself of a strong advantage in a lottery system with its 85 pending applications. See Comments of Educational Media Foundation at 2.

applications or that the applicant has won the lottery.⁶ While such a system may require “less effort and expense [from an applicant] than would be required for a driver’s license in most states,”⁷ it would require the Commission either: (1) to grant an application without knowing whether the station could be constructed; or (2) to expend its already limited resources determining whether and how a station might be constructed.

Third, none of the comments favoring lotteries adequately addresses the constitutional issues associated with the statutory preferences included in the lottery standards. Educational Media Foundation and Kaleidoscope Foundation, Inc. generally support the statutory preferences for diversification of ownership and minority ownership, but add nothing to the record to support these preferences. Pensacola Christian College, on the other hand, states -- with no support whatsoever -- that the Commission need not implement the preferences mandated by statute because the streamlined application procedure used in the lottery system “produces an application pool that contains the sought after diversity of applications and representative mix of minority applications.”⁸

Given such fallacious, self-serving arguments in favor of lotteries, and the compelling public policy reasons against lotteries set forth in the comments of NPR, APTS and CPB and almost every other commenter,⁹ the Commission must conclude that the use

⁶ Comments of Pensacola Christian College at 16.

⁷ Id.

⁸ Id.

⁹ Comments of NPR, APTS and CPB at 7-10. See also Comments of The Sister Sherry Lynn Foundation, Inc., at 2 ("Lotteries are a form of legalized gambling."); Comments of Colorado Christian University at 6-9 (citing, inter alia, the likelihood of

of lotteries to resolve mutually exclusive applications among noncommercial educational applicants is contrary to the public interest.

B. A "First To File" System Is Not In The Public Interest

For many of the above reasons, there is also no merit to the suggestion by one commenter that, among mutually exclusive noncommercial applicants, the Commission should award the broadcast license to the applicant that files first.¹⁰ Much like a lottery, such a system permits, if not encourages, the filing of barely adequate proposals by entities with only marginal qualifications because the single, prevailing consideration is the time and date of filing rather than the applicant's qualifications to operate a noncommercial educational broadcast facility in the public interest.¹¹ Even if a "first to file" system were analogized to a pioneer's preference, as was suggested, Congress concluded in the Balanced Budget Act of 1997 that such preferences do not promote the public interest, convenience and necessity.¹²

speculation, the inability of state-wide and regional networks to plan for future expansion, and the Commission's public interest mandate); Comments of Moody Bible Institute at 4-5 (citing the arbitrariness of lotteries).

¹⁰ See Comments of American Family Association at 5-6.

¹¹ For this reason, an overriding "first-to-file" preference has no place in a comparative point process to determine the best qualified candidate. See Comments of Cornerstone Community Radio, Inc. at 2; Comments of Dale Jackson at 6-7. Compare Comments of the Moody Bible Institute at 11 (asserting that the rejection of a "first to file" preference, even if to deter speculation and to accommodate future upgrades by existing licensees, amounts to spectrum "warehousing" by the Commission contrary to the public interest).

¹² See Balanced Budget Act of 1997, § 3002(A) (accelerating the termination date of the Commission's program for providing preferential treatment in licensing to so-called "pioneers"); H.R. Conf. Rep. No. 217, 105th Cong., 2d Sess. 573 (1997). Compare Comments of the Moody Bible Institute at 11 ("The Commission's Notice references

While we are sympathetic to the desire to avoid protracted administrative proceedings to resolve mutually exclusive applications, the Commission must conduct a meaningful review to promote the important public interest mission of noncommercial broadcasting.

C. The Comments Demonstrate That A Point System Offers An Objective And Appropriately Efficient Method For Selecting The Best Qualified Applicant

The near universal rejection of lotteries in this proceeding is matched by an overwhelming consensus in favor of a point system to award noncommercial broadcast licenses. The arguments of those who opposed a point system, moreover, do not withstand scrutiny.

First, contrary to the views of a few of the commenters,¹³ a point system provides a meaningful, legally sustainable comparison of the competing applicants for a noncommercial educational broadcast license. An applicant's ability to serve the public is very much a product of its institutional interests, its broadcast experience, its ability to provide locally responsive service to the proposed community of service, and the specific elements of its proposal. Combined with a significant holding period, which the

nothing in support for the proposition that a pioneer preference . . . is not in the public interest.”)

¹³ Compare, e.g., Comments of Station Resource Group at 10 (“[T]he Commission can design a point system that will make awards with some of the rational selectivity of a comparative hearing and some of the efficiency of a lottery.”) and Comments of National Federation of Community Broadcasters at 8 (“A point system is less administratively burdensome than comparative hearings for both the Commission and for applicants, but, in contrast to lotteries, is still able to distinguish among applicants.”) with Comments of Educational Media Foundation at 7 (“[a point system] is subject to many of the same criticisms as comparative hearings”).

overwhelming majority of commenters support, a point system directed to such considerations is legally sustainable.¹⁴

Second, a point system need not produce lengthy delays, as Educational Media Foundation and American Family Association suggest,¹⁵ even compared to the use of lotteries. Indeed, the Commission reached precisely that conclusion when it adopted the ITFS point system. “[T]he point system adopted in this Order will result in the expeditious processing of mutually-exclusive applications and the speed with which a lottery would result in a selection would not be significantly faster, if at all.”¹⁶ The Commission’s subsequent experience administering the ITFS point system has demonstrated the wisdom of its decision.

In the context of the public broadcast licensing rules, use of a point system rather than a lottery may be even more justified on timing and efficiency grounds. As NFCB points out, adopting a lottery system is likely to delay the process of awarding noncommercial licenses because of the need to develop a constitutionally adequate justification for the statutorily mandated minority weightings in light of *Adarand*.¹⁷ Thus,

¹⁴ We therefore disagree with the notion that a properly constructed point system obviates the need for a holding period. See Joint Comments of Noncommercial Educational Broadcast Licensees on Selection Process for Competing Applications. Compare FNPRM at ¶ 31 & n.29 (discussing *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992)).

¹⁵ Comments of Educational Media Foundation at 6; Comments of American Family Association at 4.

¹⁶ Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to Instructional Television Fixed Service, Second Report and Order, 50 Fed. Reg. 26736, at ¶ 43 (June 28, 1985).

¹⁷ Comments of National Federation of Community Broadcasters at 7.

by the time the lottery preferences are developed, tested, and judicially resolved, the Commission will have ample opportunity to implement a comparative point system.

Finally, the time and resources spent administering a point system are more than justified by the significant federal interest in noncommercial broadcasting. The Commission is obligated to encourage public telecommunications services that are “responsive to the interests of people both in particular localities and throughout the United States,” that “constitute an expression of diversity and excellence,” and that “constitute a source of alternative telecommunications services for all the citizens of the Nation.”¹⁸ The Commission can only meet this obligation by assessing and comparing the relevant attributes of the competing applicants.¹⁹

D. The Commission Should Adopt The Point System Recommended by NPR, APTS and CPB

NPR, APTS and CPB believe that the point system we proposed strikes the appropriate balance between ease of administration and meaningful comparative scrutiny of competing public broadcast applicants. This point system, outlined below, emphasizes the values of localism, diversification, and spectrum efficiency that have long been the hallmark of public broadcasting:

Localism

- a local headquarters credit (one point)

¹⁸ 47 U.S.C. § 396(a)(5).

¹⁹ See Comments of NPR, APTS and CPB at 7-8. See also Comments of Center for Media Education et al. at 2-4.

- a local directors and officers credit, where at least 75% of the directors and officers are local (one point)
- a local funding credit, where at least 50% of the expected funding is from local or public sources (one point)
- an established local educational presence credit (one point)
- a representativeness credit, for applicants with board members who are widely-representative of the local community (one point)

Diversification

- a diversity of ownership credit, for applicants who own no more than 5 or 10 other radio stations or 5 or 10 other television stations (two points for 5 or fewer stations, one point for 10 or fewer stations)

Spectrum Efficiency

- a fair distribution of service credit (two points for first noncommercial aural or video service in a community, one point for second noncommercial aural or video service in a community)
- a technical differences credit for materially greater technical proposals (up to two points)
- a credit for public funding or PTFP eligibility and application (one point)
- a facilities improvement credit (two points)²⁰

Combined with the other aspects of the NPR, APTS and CPB proposal, including the tie breaking measures, holding period obligation, documentation requirements, and an

²⁰ NPR, APTS and CPB suggest the use of a nearly identical point system to decide among mutually-exclusive applications for FM and TV translators. See Comments of NPR, APTS and CPB at 25-26. With FM translators, however, the Commission should first compare only those applicants proposing a fill-in translator service or, if there are no such applicants, only those applicants proposing to replace a displaced translator in order to maintain an existing level of service. With TV translators, translators displaced due to the transition to digital television must be given priority.

opportunity to challenge the qualifications of a prevailing applicant, there is substantial support for a comparative point system as proposed by NPR, APTS and CPB.²¹

1. The NPR, APTS and CPB Point System Emphasizes the Qualitative Factors Essential To Operating A Public Broadcast Facility In The Public Interest

a. Localism

The promotion of localism, one of the bedrock principles underlying Title III of the Communications Act, warrants a significant preference for applicants with a significant institutional interest in the community to be served. Such an applicant is in the best position to assess the diverse needs and interests of the community and to provide services responsive to those needs and interests. An applicant's headquarters location, board composition, source(s) of funding, and ties to the educational, cultural, and social resources of the community have a direct bearing on the applicant's ability to understand and serve the diverse needs and unique interests of that community.

Certain commenters criticize any point system that requires examining such applicant qualities because they are subject to manipulation in the first instance and subject to change over time.²² There is general recognition, however, that under whatever comparative, merit-based system is adopted, there must be sufficient opportunity for

²¹ See Joint Comments of Noncommercial Educational Broadcast Licensees on Selection Process for Competing Applications at 8-12; Comments of West Coast Public Radio and Rocky Mountain Public Radio on Selection Process for Competing Applications at 6-11; Joint Comments of the Executive Committee of the Trustees of Boston University and WRNI Foundation at 4-5.

²² E.g. Comments of Station Resource Group at Educational Media Foundation at 13 (“SRG is skeptical that the criteria for determining ‘representativeness’ can be easily defined or that the Commission could easily enforce such a criterion.”).

applicants to review relevant documentation underlying each of the competing proposals and challenge an applicant's claimed qualifications.²³ Providing such opportunities, even without extensive discovery or adjudicatory proceedings, will nonetheless reveal and ultimately deter manipulation of the localism criteria.

With regard to changes that occur after an applicant is awarded a license, the specific thresholds within each criteria constitute the minimum level at which a point may be awarded.²⁴ Post award changes within, or even among, the categories of criteria should be irrelevant unless the change would have altered the outcome had it been reflected in the licensee's original application. Further, those who support a comparative, merit-based system, as well as the Commission itself, also recognize the need for periodic certification and a significant holding period.²⁵ Such measures assure the ongoing relevance of the original Commission determination of the best qualified applicant.

While it is appropriate to promote localism by preferring applicants with institutional interests in the proposed community of service, the Commission should not

²³ See *id.* at 18 (“Applicants seeking [a local presence] credit would be required to submit a copy of their articles of incorporation or other enabling document containing such a ‘local’ commitment.”)

²⁴ There is nothing to prevent a prevailing applicant from relocating its headquarters, for instance, so long as it maintains its headquarters within the local area. Likewise, changes in the licensee's board of directors can be accommodated; the entity merely must maintain sufficient ties to the community to continue to warrant the point it originally received.

²⁵ See FNPRM at ¶ 30; Comments of Station Resource Group at 19; Comments of National Federation of Community Broadcasters at 18-19; Comments of Center for Media Education et al. at 18; Comments of the State of Oregon at 13.

base its licensing decisions on considerations of program origination, format, or content.²⁶

No one contests the importance of locally responsive programming, but consideration of the actual proposed program service requires much more subjective assessments than do consideration of an entity's organizational attributes. Moreover, the locus of the production of a program -- local, regional, or national -- is not determinative of whether the programming meets the needs and interests of a given community of service. In deed, noncommercial broadcast stations typically include a mix of locally originated and independently produced programming to construct a locally responsive program service.

Finally, localism is appropriately defined to include state or other governmental licensees in light of their unique status and important historic role in the development of noncommercial broadcasting. Unlike private entities, governmental licensees are obligated to serve the interests of all constituencies within the entire geographic area over which they may exercise legal authority. As a practical matter, moreover, acknowledging and accommodating the unique circumstances of state and other governmental licensees is justified by their long tradition of producing locally responsive programming.²⁷ These reasons amply justify the Commission's support for the continued development of state and other governmental public broadcasting networks²⁸ and consideration of such

²⁶ See Comments of National Federation of Community Broadcasters at 11-12.

²⁷ Our initial comments provided just a brief overview of the extensive array of locally oriented programming offered by state and other governmental licensees. Comments of NPR, APTS and CPB at 14 and Exhibit 3.

²⁸ See FNPRM at ¶ 14. In the case of public radio, this support is also expressed in the requirement that the Commission consider the extent to which each applicant meets the requirements of a state-wide plan for noncommercial educational FM broadcast stations. 47 C.F.R. § 73.502. The suggestion of a few commenters that the Commission

licensee's special status as provided for in the NPR, APTS and CPB comparative point proposal.²⁹

b. Diversification

The record in this proceeding supports consideration of ownership diversification, but on a national rather than the local level. A diversification preference based on an applicant's broadcast ownership nationally balances the desire to encourage new noncommercial broadcast entrants while recognizing that broadcasting experience enhances an applicant's ability to implement its service proposal to provide a valued public telecommunications service.

A local diversification preference, as the Commission proposed, appears to assume that an applicant cannot effectively provide multiple, locally responsive program services to a common geographic area with consolidated business operations. If anything, increased operational efficiency permits an entity to devote more resources to the actual program services it provides. Moreover, it is unclear why an applicant that provides the same programming service to different geographic areas should be favored on diversification grounds over an applicant that operates as many facilities but offers

give no consideration to state networks or state-wide plans is therefore both incorrect as a matter of law and insupportable as a matter of policy. See Comments of Faith Broadcasting, Inc. at 8.

²⁹ See Comments of NPR, APTS and CPB at 14-15.

multiple program services.³⁰ Indeed, the Commission’s “local diversity” credit proposal is likely to favor distant applicants with nationwide networks over local applicants.³¹

Finally, as the Station Resource Group correctly notes, it is difficult to reconcile *crediting* an applicant for having a local educational presence while *disfavoring* such applicants when they propose serving the diverse needs and interests of their constituency through multiple program services.

A university which has a ‘student station’ or a station specializing in a particular musical format may respond to an important public need by proposing a station with a news and information format. Although the two stations would serve completely different constituencies and have no programming in common, the application for the second station would be disfavored on ‘local diversity’ grounds.³²

Because such licensees are unlikely to seek to operate broadcast facilities outside the areas in which they have an educational presence, the Commission’s “local diversity” criterion is likely to inhibit the service such applicants might otherwise provide to the public.

Given such fundamental flaws, the Commission should discard its proposed local diversity credit. Because consideration of diversification on a national basis would prevent

³⁰ Compare Comments of National Federation of Community Broadcasters at 13 (proposing the award of “[t]wo points if the applicant controls between two and five stations, none of which are in the same market”).

³¹ See Comments of NPR, APTS and CPB at 21-22. See also Joint Comments of the Executive Committee of the Trustees of Boston University and WRNI Foundation at 3 (“The local diversity credit proposed by the Commission . . . favors non-local applicants with hundreds of stations across the country, but without any overlap in the principal community contour of a proposed NCE station, over a truly local applicant seeking to extend its signal to an outlying area if the proposed facilities have an overlap, no matter how slight, with the applicant’s current station.”).

³² Comments of Station Resource Group at 13; see also Comments of NPR, APTS and CPB at 21-22.

individual broadcast entities from unduly concentrating ownership of public broadcast facilities and encourage diversification of ownership more generally, the Commission should instead adopt the diversification criterion proposed by NPR, APTS and CPB.

c. Spectrum Efficiency

NPR, APTS and CPB believe that the record in this proceeding clearly supports consideration of spectrum efficiency, including criteria directed to the fair distribution of service and the technical parameters of a service proposal. Crediting the first and second noncommercial educational services to an area and population, as the Commission proposed, effectuates the statutory mandate set forth in Section 307(b) of the Communications Act to promote the fair, efficient, and equitable distribution of service among communities.³³ However, the vast majority of commenters rightfully oppose the Commission's proposal to credit the first local service *licensed* to a community. In the case of noncommercial educational radio, reserved noncommercial channels are not allotted to particular communities, and noncommercial educational stations are currently not required to place a signal over the community of license.³⁴ More generally, a public radio or television applicant so inclined can often construct a service proposal that nominally serves a currently unserved community of license while actually serving a

³³ 47 U.S.C. § 307(b). While some commenters correctly note the Commission's prior practice of addressing the Section 307(b) issue prior to conducting a comparative review of competing broadcast applications, there is nothing to prevent the Commission from altering the manner in which it implements the Section 307(b) mandate. Compare Comments of Houston Christian Broadcasters, Inc. at 20-21.

³⁴ See Comments of Station Resource Group at 11.

contiguous, more highly desired area.³⁵ In addition, such a criterion might favor an applicant for providing a "first service" even though the community of license already receives a multitude of commercial and noncommercial services.³⁶

It is appropriate to examine the technical parameters of each proposal -- principally the population and area to be served -- and credit a technically superior proposal, as the Commission has proposed. It may be, as some commenters have suggested, that a "technical parameters" credit will not be dispositive of most comparative licensing contests because applicants have a natural incentive to maximize their service proposals.³⁷ The fact that such a criterion may not resolve most, or even many, contests, however, does not mean that it is unimportant in those contests in which it differentiates among the competing applications. Indeed, given the demand for broadcast licenses, spectrum efficiency considerations justify awarding a license to the applicant that proposes to serve a greater area and population as among applicants whose relative qualifications otherwise do not reveal a clearly superior proposal.³⁸

Finally, the additional criteria NPR, APTS and CPB proposed would further both universal service and spectrum efficiency. Crediting an applicant that has received state or local governmental funding or is eligible for Public Telecommunications Facilities

³⁵ Comments of NPR, APTS and CPB at 21-22. See also Comments of Houston Christian Broadcasters, Inc. at 8 ("it is a simple matter for a [sic] NCE applicant to configure the proposed service contours in a [sic] NCE application to avoid such overlap")

³⁶ Comments of NPR, APTS and CPB at 22.

³⁷ Comments of Station Resource Group at 16

³⁸ See, e.g., Comments of Center for Media Education et al. at 19.

Program (“PTFP”) funding reinforces the determination that construction of the proposed facilities serves the public interest.³⁹ For the same reasons, the Commission should credit an applicant that proposes a major modification to an existing full-power facility that improves the facility’s technical service capability.⁴⁰ The fact that this criterion, like the “technical parameters” criterion proposed by the Commission, may not prove dispositive in most cases does not mean it should not be dispositive in those cases in which the applicants and their service proposals are otherwise qualitatively equal.

2. There Is Substantial Support For The Other Elements of the NPR, APTS and CPB Proposal

The commenters in this proceeding overwhelmingly support the NPR, APTS and CPB proposal to resolve ties by awarding a license to the applicant with the fewest pending applications in the same aural or video broadcast service at the time of filing.⁴¹ Such a tie-breaking measure is easy to apply⁴² and generally discourages entities from

³⁹ Comments of NPR, APTS and CPB at 23-24.

⁴⁰ Id. at 24-25.

⁴¹ See Comments of National Federation of Community Broadcasters at 16; Comments of Station Resource Group at 18; Comments of Noncommercial Educational Broadcast Licensees on Selection Process for Competing Applications at 14-15; Comments of West Coast Public Radio and Rocky Mountain Public Radio on Selection Process for Competing Applications at 14, Comments of Roaring Fork Public Radio Translator, Inc. and Pitkin County, Colorado at 5; Comments of KPBS Public Radio Foundation at 2.

⁴² For this reason alone, the suggested use of a formula related to service to underserved areas, although appropriately considered in the context of the point system itself, is poorly suited to resolving a tie between otherwise equal proposals. See Comments of Jimmy Swaggart Industries at 12-13. For that reason, as well, NPR, APTS and CPB continue to favor the use of a lottery as a very last resort. See Comments of NPR, APTS and CPB at 27.

filing applications unless they are truly committed to the particular service proposal.⁴³

Conversely, a first-to-file measure, as some commenters proposed, rewards a successful “race to the Portals,” not necessarily the best qualified applicant or the public interest.⁴⁴ In any event, the commenters overwhelmingly oppose the use of mandatory time sharing in lieu of resolving a contest between otherwise equally qualified applicants.⁴⁵

Among the parties supporting a point system, moreover, there was almost uniform support for a significant holding period. Suggestions ranged from 3 years to a complete, 8-year license term.⁴⁶ Because of the public interest significance of the outcome of any license contest, NPR, APTS and CPB believe an 8 year holding period is justified. We are also skeptical of permitting a licensee either to “donate” a license or to transfer its license and recover its expenses prior to the expiration of the holding period.⁴⁷ As a general

⁴³ Comments of NPR, APTS and CPB at 27.

⁴⁴ See Comments of Roaring Fork Public Radio Translator, Inc. at 5.

⁴⁵ E.g. Comments of New Life Evangelistic Center, Inc. at 3; Comments of Jimmy Swaggart Ministries at 13-14; Comments of Roaring Fork Public Radio Translator, Inc. and Pitkin County at 5; Comments of Colorado Christian University at 17-18.

⁴⁶ See Comments of WAY-FM, Inc. et al. at 8 (3 years); Comments of Houston Christian Broadcasters at 15-16 (3-5 years); Comments of Faith Broadcasting at 10 (3-5 years); Comments of Moody Bible Institute at 15-16 (3-5 years); Comments of Station Resource Group at 19 (5 years); Comments of Minnesota Public Radio at 3 (5 years); Comments of St. Gabriel Communications Ltd. at 4 (5 years); Comments of Public Radio for the Front Range at 6 (5-7 years); Comments of National Federation of Community Broadcasters at 18 (8 years); Comments of the University of California at 4 (5 years); Comments of Colorado Christian University at 19-20 (8 years).

⁴⁷ We do not support a rule that a license may *never* transfer a license or that it may only recoup its start-up costs even after the expiration of the applicable holding period. See Comments of Americans for Radio Diversity at 3. Such a limitation would deter licensees from investing capital in their broadcast facilities.

matter, and regardless of whether any consideration flows to the licensee, permitting an applicant to obtain and then transfer a license defeats the basis for the original license decision in a comparative process.⁴⁸ Permitting a licensee to transfer its license and recover its costs prior to the end of the holding period also creates a potentially time consuming and complex task of determining which expenses are appropriately reimbursable.

We recognize, however, that a waiver of a holding period requirement may be justified in particular circumstances. For instance, if two licensees determine that consolidation of their business operations will permit them to more effectively serve their audiences, they should have a meaningful opportunity to persuade the Commission that the transfer of one or more of their licenses serves the public interest, notwithstanding an otherwise applicable holding period requirement. Because noncommercial broadcasting licensees typically hold their licenses for long periods of time, we do not expect the Commission to confront holding period waiver requests as a routine matter, but the Commission's rules should allow for the opportunity.

Finally, the Commission must require applicants to provide documentation supporting their comparative credit claims and to permit applicants to challenge each others' qualifications through a petition to deny process.⁴⁹ To the extent such measures may impose an administrative burden in those cases in which a challenge is made, surely this burden is outweighed by the public interest, which requires a fair and effective process

⁴⁸ See Comments of Houston Christian Broadcasters, Inc. at 15-16.

⁴⁹ See Comments of NPR, APTS and CPB at 29-30.

for awarding broadcast licenses to the best qualified applicants. Moreover, providing applicants with some limited means to test the credibility of an opposing applicant's proposal shifts to private parties at least some of the burden of enforcing the Commission's rules and assuring the integrity of its comparative point process. Having to disclose the basic documentation that supports (or fails to support) an applicant's claimed qualifications is also likely to encourage settlements because mutually exclusive applicants will have a more informed basis on which to predict the outcome of individual comparative contests.

II. The Commission Should Use A Special Processing Track Or, Alternatively Reserve Additional Spectrum And Use A Hybrid Point System Approach When A Noncommercial Educational Entity

The comments filed in this proceeding support the plain meaning of the spectrum auction provisions of the Balanced Budget Act of 1997: noncommercial applicants may not be required to compete at auction to provide a public broadcasting service whether or not the spectrum has been reserved for such use. Moreover, the statutory and public policy bases for rejecting the use of auctions in broadcast license contests involving noncommercial broadcast applicants also prevent the Commission from deciding to limit such applicants to reserved broadcast frequencies. The appropriate resolution of this matter, as proposed by NPR, APTS and CPB, is to resolve license contests among commercial and noncommercial applicants according to the special processing track we proposed or, in the alternative, the reservation of additional spectrum and the use of a

hybrid comparative process that fairly measures the competing commercial and noncommercial proposals.⁵⁰

The overwhelming consensus of the commenters in this proceeding confirms the only appropriate interpretation of the relevant provisions of the Balanced Budget Act.

The statutory prohibition against competitive bidding for noncommercial educational or public broadcasters is defined not by the frequencies or channels proposed to be used by those broadcasters, but by the eligibility of the applicant and its proposed use of the frequencies or channels. Had Congress sought to limit the exemption to applications for channels 'reserved' for noncommercial educational use, it could have done so. It did not. The statutory language is clear and unambiguous.⁵¹

Thus, the suggestion that "[t]he *nature of the allotment* should control,"⁵² is belied by the clear and unconditional exemption set forth in the statute.

Even if allocating licenses among competing commercial and noncommercial applicants other than by auction results in more noncommercial service to the public, it is

⁵⁰ Id. at 38-42.

⁵¹ Comments of Noncommercial Educational Broadcast Licensees on Use of Spectrum Not Reserved for Noncommercial Use at 3-4. The suggestion by Big Sky Broadcasting Company that "Section 309(i)(5)(B) did 'not prevent the Commission from awarding licenses for [NCE] stations though the competitive bidding process'" is plainly wrong. See Comments of Big Sky Broadcasting Company at 3. Section 309(i)(5)(B) provides that "Subparagraph (A) of this paragraph, shall not apply with respect to licenses or permits for [public broadcast stations]. 47 U.S.C. § 309(i)(5)(B). Subparagraph (A), in turn, provides that "[e]xcept as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997." 47 U.S.C. § 309(i)(5)(A) (emphasis added). Clearly, Congress was reserving the Commission's authority to allocate public broadcast licenses by random selection, not by auction.

⁵² Comments of De La Hunt Broadcasting at 3.

hard to understand why such an outcome is contrary to the public interest.⁵³ In any event, the doomsday prophesy that public broadcasters will apply for all available nonreserved frequencies is addressed by the simple expedient of a holding period or, if necessary, a prohibition against license transfers to entities proposing a commercial broadcast service.⁵⁴

With regard to the Commission's proposal to forbid noncommercial applicants from applying for non-reserved spectrum, there is no support in law, policy, or the record of this proceeding for that proposal. The Commission cannot justify foreclosing access to non-reserved spectrum when Congress intentionally exempted noncommercial applicants from auctions involving such spectrum. Moreover, the limited reservation of spectrum for noncommercial broadcast use has always been understood as an attempt to assure no less than a minimum level of public broadcast service, not a limit on the maximum amount of such service. Given the unavailability of reserved spectrum in many parts of the country, the adoption of such a proposal would foreclose new noncommercial broadcast service and even reduce the current level of service -- for instance, when translators currently operating on non-reserved spectrum are forced to move.

To resolve contests among commercial and noncommercial applicants for nonreserved spectrum, the prevailing statutory and public policy considerations warrant awarding the license among the best qualified noncommercial applicants according to the

⁵³ Cf. Creation of a Low Power Radio Service, Notice of Proposed Rulemaking, MM Docket No. 99-25, at 1 (rel. Feb. 3, 1999) (proposing the creation of new classes of "low power" stations "to address unmet needs for community-oriented radio broadcasting, foster opportunities for new radio broadcast ownership, and promote additional diversity in radio voices and program services.")

comparative point system ultimately adopted to decide among such applicants for reserved spectrum. In the alternative, the Commission should expand the circumstances in which additional spectrum might be reserved for noncommercial use and utilize a comparative point system that fairly balances the relative merits of the commercial and noncommercial applicants, as NPR, APTS and CPB proposed in our initial comments.

⁵⁴ Comments of NPR, APTS and CPB at 39. In addition, the Commission might impose a reasonable limit on the number of applications for non-reserved spectrum that an entity may file. Id.

Conclusion

For the foregoing reasons, and as more fully demonstrated above and in the initial comments of NPR, APTS and CPB, the Commission should (1) reject the use of lotteries and adopt the comparative point system proposed by NPR, APTS and CPB and (2) adopt the NPR, APTS and CPB special processing track for allocating license among competing commercial and noncommercial applicants.

Respectfully submitted,

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