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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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To: The Commission

REPLY COMMENTS OF COLORADO CHRISTIAN UNIVERSITY

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March 15, 1999

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MM Docket No. 95-31

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Colorado Christian University ("CCU") hereby respectfully replies to certain of the comments filed in response to the Commission's Further Notice of Proposed Rulemaking, FCC 98-269, released October 21, 1998 (the "Further Notice").

To facilitate review of these reply comments, first we will present some brief introductory remarks, and then address certain of the comments with respect to each of three areas: The basic procedure to be used in awarding non-commercial educational ("NCE") permits; the specific criteria to be used; and then detailed procedures in applying those criteria.

I. Introduction.

In its January 28, 1999 comments, CCU explained its interest in and outlook toward the matters being addressed in this proceeding.[1/] CCU urged the Commission to implement a point

[1/] Because CCU has no NCE full-service stations on non-reserved frequencies, and has no plans to establish any such facilities, we have chosen not to comment on those proposals in the Further Notice, and will not reply to those who commented on such matters.

system so as to achieve a selection method that will be simple and expedient while at the same time achieving a rational choice among qualified applicants. Such an approach will combine the respective advantages of the former hearing procedure and the proposal for expedient lotteries and thereby serve all relevant aspects of the public interest.

To prepare these reply comments, CCU reviewed approximately 60 sets of comments filed in response to the Further Notice. Although our specific reaction to pertinent portions of those comments is set forth in the next three sections, we would urge the Commission first to consider a general observation. We feel that it is crucial that the Commission consider the nature of various commenters when considering the positions each has taken in this matter. We have prepared and attach as an appendix to these reply comments a list of the commenters, organized by overall type (i.e.: broadcasters, listener/viewers, applicants and others). Within each type, we have indicated the overall selection method which each commenter primarily supports. It seems highly significant that nearly all of the broadcast commenters, who have already devoted huge amounts of their own energy and resources to NCE broadcasting, as well as all of the listeners, who, after all, are to be the ultimate beneficiaries of these proceedings, favor hearings and/or a point system but not a lottery. That is, these parties have a legitimate and unselfish interest in preserving the quality and integrity of the EFM service and are willing to sacrifice some degree of expediency and cost saving in order to ensure that such quality is perpetuated in the future.

The public interest is best defined by those who serve that interest (i.e.: broadcasters) and by those whose needs are to be served (i.e.: listeners). CCU urges the Commission to place special emphasis upon the views of these parties. One might have expected that many listeners

who had been frustrated in not receiving new educational service would demand a procedure such as lotteries calculated to provide that service at the earliest possible date; but they have not done so. Similarly, the vast majority of broadcasters who have had much experience in meeting the educational needs of local communities but who might not necessarily garner maximum credit in a hearing or point system nonetheless have set aside their self-interest to advocate a system that is objective, verifiable, and effective in meeting the educational goals of future listeners.

II. **Overall Selection Method.**

Several commenters address the overall method to be used to select among mutually exclusive ("MX") NCE applicants -- hearings, lotteries or point systems. In its own comments, CCU had documented its strong preference for a point system as a means of combining the virtues of hearings (a rational choice) and lotteries (speed and efficiency).

A. Lottery Systems.

As noted in Attachment A, only a few commenters favored a lottery. Educational Media Foundation ("EMF") contended at p. 11, ¶ 11 of its comments that "a lottery system would most fairly and efficiently dispose of applications currently pending before the Commission...." While CCU does not doubt that a lottery would dispose of applications efficiently, this is a far cry from handling them "most fairly." CCU questions how fairness is advanced when an applicant who proposes a radio facility powerful enough to penetrate homes, businesses and local rural areas with a strong signal and plans to staff a local studio to meet local needs with local programming is apt to lose to an applicant proposing a minimal transmission

facility to be remotely programmed thousands of miles away with no attempt whatever to meet local interests and needs, all simply due to the "luck of the draw" at a lottery. Such a result can hardly be deemed "fair."

Pensacola Christian College ("Pensacola") proposes a fundamental change in the application process which would precede a lottery. Specifically at p. 16, ¶ A of its comments, Pensacola proposes a "short form" application which they claim would somehow produce "an application pool that contains the sought after diversity of applicants and representative mix of minority applicants." Apparently, Pensacola suggests this in recognition of, and as an attempt to mitigate, the inherent problem of a lottery --- that it necessarily is arbitrary and thereby cannot serve the public interest which requires that the purpose of NCE broadcasting be upheld and advanced. However, Pensacola does not explain how its proposed procedure would achieve its intended result. In addition, even if Pensacola's predictions were to become true, its procedure would still not address CCU's fundamental concern that even lotteries restricted to those potential applicants that met Pensacola's short-form standards would still not achieve a selection consistent with Congressional mandates to award authorizations in a way that advances the public interest.

Several other commenters, though, join CCU in providing compelling arguments against the use of lotteries. Public Radio for the Front Range ("Front Range") perhaps states the case against lotteries as concisely as any of the nearly 60 comments CCU has reviewed when they state at p. 3 of their comments that they "...believe that lotteries promote behavior that has nothing to do with furthering an educational mission in a specific community." That, after all, is the very purpose of the NCE service. Only if the Commission wishes to promote behavior

that has nothing to do with furthering that objective can it seriously consider adopting a lottery system.

Stanley Aschenbrenner states in his single page of comments: "Public broadcasting is much, much too important to be left to chance (or to the highest bidder). Please make the effort to do this and avoid losing one of the jewels in American Life." We note that Mr. Aschenbrenner is a public radio listener in Lake Oswego, Oregon. CCU believes that the Commission should give great weight to commenters who are listeners to NCE radio stations. The public interest mandates, above all else, that the needs and interests of present and potential listeners be served.

In sum, CCU agrees with these various commenters that just because a lottery system may be more expedient for the Commission to establish and implement, that expedience does not give the Commission adequate reason to establish a selection system that will have the direct effect of decreasing the quality of NCE broadcasting in this country. Rather, the Commission's job is to ensure maintenance of quality educational broadcasting. The Commission's job will not be done until it can look into the eyes of members of Congress and the public alike and emphatically state that the Commission has devised the best selection process possible that will advance the long-established goals for NCE broadcasting and our country.

B. The Point System.

One commenter in particular -- Pensacola - raises several objections to the use of a point system, but all are readily rebuttable. First, Pensacola dismisses the point process as "a modified form of the traditional comparative process" which the Commission no longer favors.

(Pensacola comments, p. 18, first paragraph.) CCU strongly contends that the problems with the traditional comparative process, which the Commission properly seeks to avoid, lie not in its goal of a rational decision, but rather in the cumbersome and abuse-prone procedure that had been used to arrive at that goal. The point system is designed to avoid the expense and delays of hearings while preserving the Commission's mandate to choose meaningfully among applicants.

Next, at p. 18, ¶ A, Pensacola claims that a point system would cost the applicants and the Commission more than just participation in a lottery system, and gives as an example "evaluation time for point award verification and evaluation of eligibility." CCU respectfully rejects the notion of expediency at the cost of quality. Delays and costs are the inevitable components of any process which achieves a desirable result. These costs and delays, which a point system would hold to a minimum, are well worth the impact a successful process will have upon the quality of NCE service to be made available to communities throughout the country in the future.

Pensacola next urges rejection of a point system and implementation of a lottery in order to avoid the awarding of points "based on minor differences [that] had been recommended by some commenters." (Pensacola comments, p. 19, ¶ D.) CCU respectfully notes that the Commission certainly has the ability to distinguish between criteria relating to meeting important educational needs that are verifiable and difficult to feign, as opposed to criteria that lack these qualities. Undoubtedly, some of the proposed criteria that would have value must be rejected by the Commission in formulating a viable point system because of the difficulty of verification or because of the ease with which some applicants could feign their merits. Therefore, the

answer to Pensacola's concern in this area lies in the selection of appropriate criteria and subsequent enforcement, rather than in rejection of the point system itself.

Pensacola next attempts to analogize the Commission's use of an auction system for commercial facilities to a need to eliminate the consideration of a point system for the NCE service. (Pensacola comments, p. 21, ¶ F.) CCU contends that this analogy, if anything, favors the use of a point system. The impetus for an auction system was to avoid the huge log jam which had been created in selecting commercial applicants. Even so, the auction procedure did not entirely eliminate the choice of an applicant in the public interest, but rather sought to equate an applicant's willingness to pay a high price with its ultimate ability to serve the public interest in an efficient way. An auction is <u>not</u> a random selection, as lotteries would be. Rather, it establishes a vastly simplified comparative scheme in which, through their bidding, applicants quantify their own merit. Since a monetary bidding scheme for NCE stations is out of the question, the point system is the next closest analogy. That is, under a point system applicants will "bid" by structuring their applications so as to achieve the greatest number of points in whatever scheme the Commission adopts. Such points will represent their willingness to achieve the Commission's public interest goals for the NCE service. Therefore, the Commission's move to commercial auctions favors selection through a graduated point system, rather than the total randomness of a lottery in which the most casual of applicants is apt to be selected rather than one who has structured itself so as to maximize its "bid."

Pensacola's final point is an absurd and unsupported accusation that those who oppose lotteries seek "to preserve a cumbersome and costly process because maintenance of paper walls and complex process are obstacles that keep outsiders out and insiders well paid." (Pensacola

comments, p. 22.) There is absolutely no reason to impugn the motives of CCU and all the other commenters who urge the Commission to make a rational choice among qualified applicants. There is no basis for assuming that those who will receive maximum credit under a point system are "insiders" or commercially or selfishly motivated. It would seem, if anything, that lotteries are designed to reward those who elevate quantity over quality. On the contrary, a properly constructed point system will award those who have structured their applications so as to maximize service and advance the public interest, as the Commission's point system will define it.

Educational Media Foundation ("EMF") raises two additional concerns with a point system. First, at p. 7, ¶ 3 of its comments, EMF complains that each of the proposed criteria of a point system "presents opportunities for abuse and manipulation as applicants attempt to tailor their applications to qualify for the most points." CCU believes that if the point system is based on criteria that make an applicant better suited to serve its community -- such as giving credit for a local studio with local staff, a high percentage of local programming, a significantly greater signal coverage of rural areas and the like -- then designing an application to have the highest possible value in a comparative point system is hardly "manipulation" but instead will have the positive effect of encouraging better new service to proposed communities. Any such "manipulation" will ultimately serve the public interest of communities across the country.

EMF also states at p. 11, ¶ II(2) that "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 non-existent at the time the applications were filed." CCU does not believe that this is a problem at all. Rather, it will mean that the

points awarded to current applications will more accurately reflect applicants' real intentions to provide meaningful service, as defined by the Commission's public interest objectives. The criteria for which points are to be awarded should be crafted so as to match the attributes of an ideal application that will maximally advance the public interest. Thus, applicants who propose a small inexpensive facility may well receive minimal points, but this merely reflects their minimal level of commitment to the communities they ostensibly propose to serve. On the other hand, those who have prepared applications with ambitious studio and staffing plans that reflect their high level of commitment to the community they propose to serve will obtain maximum credit under a point system. Ideally, the point system will not impose artificial criteria, but rather will recognize those meaningful differences between applicants that translate to a superior ability to promote the goals of the NCE service. There is no unfairness here; rather, the points to be awarded should equate with an applicant's ability to serve the public interest.

C. Conclusion re: Overall Selection Method.

The overriding problem with a lottery is that it cannot implement the purposes of the NCE service. One of its few proponents characterizes it as "fair," but utterly fails to suggest how that is so. Another recognizes the need to skew a lottery toward a fair result, but does not succeed in suggesting how to do so. Other commenters, along with along with CCU, decry the destructive effect lotteries will have upon the quality of future NCE service. The Commission cannot possibly square such a result with its mandate to ensure that NCE goals are met.

The point system, on the other hand, will entail a rational choice but with minimal expense and delay. The various purported problems with a point system can be minimized and in any

event hardly represent abuses but rather reflect the need to reward applicants in proportion to their proposed fulfillment of the Commission's goals for NCE service.

III. Specific Criteria to be Recognized in a Point System

In this section of its reply comments, CCU wishes to address both the positive and negative comments which several commenters have made with respect to specific criteria for which points are to be awarded.

A. Accredited Educational Institutions.

At p. 20, ¶ 6 of its comments, Pensacola claims that "accredited" in one arena or discipline does not necessarily result in a qualification that deserves preferential treatment in other endeavors, and then asks "what does accredited mean to broadcast credentials or an applicant's potential to provide public service?" Perhaps Pensacola's broadcast operations are not directly related to the mission of its educational institution. In the case of CCU, though, growth of our stations is integrally linked to our University's educational offerings. Indeed, growth in our network of stations has directly impacted the growth and educational service of our university in new communities. Outside of the Denver, Colorado area, CCU has full-time campuses in Colorado Springs and Grand Junction. Within the past two months, a full-time campus in Ft. Collins has been developed. The university has been and is looking at providing new campuses where the radio network grows and where there are not comparable educational offerings. Unfortunately, the delay in the Commission's licensing processes have directly impaired our plans. For example, CCU had plans to develop a Pueblo, Colorado campus, but

we have not established our Pueblo educational program due in part to our application for a Pueblo EFM station being stalled because of another MX applicant. Because of accreditation, our listeners can complete an educational program of the University that is re-enforced by the radio stations (in one case actually started in the radio station's studio building) that will positively impact those listeners for the rest of their lives. Therefore, to us at least, accreditation is simply a short hand for our ability to provide a valuable educational service to those who both listen to our stations and enroll in our classes.

Five Broadcasters states that "it would not be fair or consistent with Section 73.503 of the Commission's rules to limit the credit only to accredited universities or colleges." (Five Broadcasters comments, p. 14, ¶ 28.) CCU respectfully asserts that Five Broadcasters does not adequately explain this concern. On the contrary, nationally and regionally accredited educational institutions are universally acknowledged as providing a valuable educational service in the communities in which they are located. This credit simply acknowledges that such service is important to meeting the educational objectives of that community.

B. First Local Service

NPR, APTS and CPB state at p. 22, ¶ 3.A(2) that the FCC "should not adopt its proposal to award a point to the first local service licensed to a community" as this would cause "some applicants to seek a small community with no other licensed broadcast stations, whether or not they intend to focus their broadcast service on the community." And yet, it is a well established fact that licensing a new station to a community forges a relationship of accountability between the new station and the community to which it is licensed that is clearly in the public

interest. The Commission can ensure that this credit is not abused by ruling on a petition to deny that challenges the qualifications of a community under existing precedent. If a named location is not a legitimate community, then the FCC should proceed to dismiss an application proposing to be licensed there, as such an applicant has indeed sought to skew the selection process with a sham preference. But if a community is determined to be legitimate, and an applicant is awarded a construction permit and builds its station there, then a relationship of accountability is established between that community and a broadcast station licensed to serve its needs. That, in turn, will surely serve the public interest.

C. Fair Distribution of Service.

Several commenters express concern over the ease with which this criterion can be manipulated by unscrupulous applicants. However, CCU believes that the Commission already has substantial experience in meeting these concerns and can ensure a procedure by which it may continue to do so under a point system.

Educational Media Foundation at p. 7 of its comments discredits the fair distribution of service criterion as encouraging applicants "to select relatively obscure towns and villages as communities of license, thereby giving rise to disputes with other applicants of whether the area specified constitutes a 'community' within the meaning of the Communications Act." CCU respectfully notes that fair distribution of service is mandated by Section 307(b) of the Communications Act of 1934 as amended and unless and until Congress removes this provision, one of the goals of educational broadcasting must be to serve the maximum number of communities in the United States.

In a similar vein, while acknowledging the need for fair distribution of service under Section 307(b), the Five Broadcasters fear at page 12, ¶ 23 of their comments that "a great deal will come to depend upon the fairly trivial distinctions that decide what population groups constitute 'communities' under Section 307(b)." But the Commission has developed substantial expertise over the past several decades in determining whether a community is genuinely deserving of a broadcast license. Just last week, the Commission denied an application for Avon, North Carolina after a traditional analysis showed that Avon did not constitute a "community" for licensing purposes. See, Avon, North Carolina, DA 99-496, released March 12, 1999. If a community is too "obscure" then the application would not serve the public interest and should be dismissed.

Station Resource Group (bottom of p. 11) contends that "favoring one NCE applicant over another based upon the arbitrary choice of community of license would promote gamesmanship rather than any discernable benefit to the public." CCU believes that there is no question that "gamesmanship" has already occurred, such as when one of our competitors named a mere railroad stop as its proposed community of license. The answer to this problem is given in the Joint Comments of Non-Commercial Educational Broadcast Licensees at page 12, where they state that "based on their experience, the NCE broadcasters believe that legitimate petitions to deny applications (which by statute, the Commission must consider) are necessary to winnow out abusive and speculative applications that do not comply with existing application requirements and Commission rules." CCU emphatically agrees. The existing petition to deny procedure is an essential means to offer the Commission an ability to weed out abusive and speculative applications and must be perpetuated. Since the Commission is unable to conduct its own

research into each proffered applicant's merits, it should continue to rely upon other applicants to alert it to potentially disqualifying points, including the specification of an area that does not qualify as a licensable community. Indeed, when faced with its competitor that had submitted an application for the rail stop as a community of license for a full service station, CCU prepared and filed a petition to deny providing convincing evidence that the proposed community did not deserve a license. We were able to determine this because we were already in the community with a translator and frequently visited the listeners there. However, the Commission has not processed our petition to deny, and this has disserved the public interest by preventing a legitimate applicant such as CCU from receiving a grant while it is tied up. By entertaining and promptly processing petitions to deny, the Commission will be able to check any potential abuses of the requirement that an applicant specify a proper community of license. Once that is done, Section 307(b) mandates that a choice of communities precede other comparisons.

As a further means of preventing abuse in this area, Community Broadcasting, Inc. requested at page 6 of its comments that: "to ensure that the upgraded local service credits being suggested are meaningful, communities having populations of less than 2,500 people should not be eligible." Similarly, the Non-Commercial Educational Broadcast Licensees, at page 12 of their comments, recognize the appropriateness of a decisive Section 307(b) credit, but urge that it not be awarded to minuscule communities of 500 persons or less since such applicants "have no intention of providing 'local service' to those minuscule communities." The suggestion of a cut-off point of 2,500, or even 500, is entirely arbitrary, and bears no meaningful relationship to a community's need for educational broadcast service; rather, Commission precedent examines in greater detail the nature of a community and considers size to be only one component in

determining eligibility for licensure or a Section 307(b) preference. CCU further notes that it has applied for construction permits for a number of small communities with every intention to provide a "local service" to those communities. In fact, we provide local service to a number of our extremely small translator communities in a number of ways including meetings and community gathering events attended and led by our staff. Through extension education, some small communities are learning of new education programs available to them at their location that they would not have heard without our commitment to their communities. Therefore, an arbitrary cut-off of 2,500, or even 500, is simply inappropriate, as the Commission has other tools with which to determine whether a Section 307(b) credit should be given or whether a community should be eligible at all.

D. Finder's Preference.

Dale Jackson at page 6, ¶ V states that "the highest preference...should be for a finder's preference." American Family Association at page 1 advances "first in line" as "the primary comparative criterion for NCE-FM application processing." While CCU agrees that a finder's preference could lessen the backlog of mutually exclusive cases, would provide an incentive for non-profit entities to pioneer new NCE stations and would greatly simplify the administrative burden on the Commission, we do not agree that it should be the dominant criterion utilized by the Commission to select among MX applications. In fact, we contend that a finder's preference should not even be one of a number of criteria to be utilized. While the Five Broadcasters at page 10, ¶ 19 seek to assure the Commission that a "land rush" of applications is an unfounded concern, CCU respectfully disagrees. In fact, a number of

applicants have already started to act as if the Commission would honor a number of "first" applications. We find that these are mostly national organizations with little commitment to specific local communities. Therefore, we do not believe that this credit is calculated to result in actions in the public interest. While some NCE entities indeed operate on thin budgets and cannot afford to build stations that will not support themselves, a number of other applicants have full time application generating staffs who already have submitted scores of applications to the Commission on a monthly basis. A finder's preference would only encourage those applicants to increase their efforts yet further and encourage even others to do the same. We have heard at least one applicant express its fear that "once all the frequencies are gone, they are gone" whereupon they proceeded to file many new applications. This leads us to believe that a finder's preference criterion would strongly encourage a barrage of new applications for virtually all remaining unused channels. The ability of such applicants to provide genuine service to all of the communities they propose at once is doubtful, and this would also have the effect of freezing out future new applicants from obtaining an unused channel in a community eventually. We believe that keeping channels open for future development is not a matter of "warehousing" frequencies by the Commission. Rather, any "warehousing" effect would be achieved by a finder's preference that would encourage the best-funded national applicants to make an immediate grab of all available frequencies, thus freezing out those with more modest, specifically-tailored plans for a specific community.

E. Local Funding Credit.

CCU supports credit for local funding. Several commenters also appear to support this concept but in fact stray from the notion. Thus, the Non-Commercial Educational Broadcast Licensees state at page 8, ¶ 1 of their comments that "a point should be awarded to applicants for which at least 50% of the expected funding for the station is from local or public sources, which may include federal grant funding from Public Telecommunications Facilities Program of NTIA, Department of Commerce." NPR, APTS and CPB urge a similar preference at page 23, ¶ c of their comments by suggesting that the FCC should award one point to an applicant "if at least 50% of the expected funding for the proposed facilities is from "local," CPB and/or public sources." While CCU supports credit for local funding, a distinction must be made. CCU respectfully notes that funding from a federal government source or from general "public" sources cannot possibly be considered "local" in the same sense as funding coming from the proposed community of license. It is only genuinely local funding (that is, from the community and/or the immediately surrounding area) which will serve the purpose of this credit to ensure financial ties between the proposed station and the community to be served. Funding from the federal government in Washington, DC is simply not equivalent for this purpose to funding from the community to be licensed. Such a credit would also unduly discriminate against non-governmental, non-profit applicants.

There is an additional type of discrimination inherent in this proposal which CCU must note. Existing laws prohibit public funds from supporting religious broadcasting. Accordingly, only non-sectarian stations can become eligible for government funding. Since religious programming is an essential component of meeting the needs of communities which the Commission has repeatedly recognized in past licensing proceedings, acceptance of a preference

for public funded facilities would unduly discriminate against religious applicants in a way which violates established public interest standards of the FCC and cannot be permitted as part of the point system.

F. Localism Defined.

NPR, APTS and CBP at page 12, ¶ 2 of their comments seek to define the term local as "(a) located within 100 miles of the proposed facilities, or (b) located within the same state...." CCU is concerned that under such definitions for "local," an applicant who applies for a station in the same community in which its educational corporation is located would not be considered any more "local" than an educational corporation located 250 miles from a proposed community to be licensed (albeit at a far corner of the same state). Clearly, all else being equal, an applicant headquartered in the proposed community of license is in a better position to ascertain and address the needs and interests of that community than one headquartered far away. Accordingly, this proposed definition is far too expansive to achieve its intended purpose.

In a similar vein, Pensacola Christian College at page 21 of their comments questions the value of applicant integration into a community and whether points should be awarded on that basis. CCU responds that it and many of the licensees have found the answer to this question through their experience. An applicant who is integrated into a community can more easily express and respond to the needs of that community than one who is not so integrated. It requires people, and not just equipment, to be in a local community in order to assess and respond to the unique needs of local listeners.

G. Non-Profit Tax-Exempt Status.

The joint comments of the Executive Committee of the Trustees of Boston University and WRNI Foundation (page 5, first paragraph) urges that the Commission require NCE applicants to file evidence of their non-commercial status with the Commission and that documentation of 501(c)(3) status "should be required of those seeking to claim a piece of scarce NCE broadcast spectrum." CCU enthusiastically agrees. Guaranteeing that an applicant cannot make a profit for its principles makes it more likely to be sensitive to its educational mission to serve the public. NCE service in this country is too important to allow for the possibility of profit to create a possible conflict of interest. We respectfully note that one mass filer of applications for construction permits across the country represents itself as non-profit, but in fact does not appear to have registered as a 501(c)(3) entity. By requiring NCE applicants to demonstrate registration as a non-profit organization, the Commission would greatly advance a public goal while taking a big step toward improving the NCE application "landscape."

H. Relationship to Proposed Service Area.

Public Radio for the Front Range, at page 2, ¶ 2 of its comments reviews its history with mutually exclusive applicants to its Channel 205 and 209 applications and states: "four other applicants -- none with a significant relationship to the proposed service area -- had filed mutually exclusive applications." CCU is one of those mutually exclusive applicants to whom the commenter refers. CCU agrees that this commenter is the exact type of educational organization the Commission should award as deserving an application preference. However, CCU would caution that the determination of whether an applicant has a genuine relationship

to its proposed service area may involve a number of factors. CCU recognizes that Public Radio for the Front Range is a local community educational company formed by a number of individuals from within that community and truly deserves one of the available channels. However, CCU also believes that it will meet unique and vital educational needs in the area, and should deserve some sort of credit as well, although perhaps a lesser one. In this particular context, we respectfully note that CCU recently opened a locally staffed extension campus in Ft. Collins after years of planning. CCU's radio network planning has been in parallel with our instructional plans. Therefore, although we lack the depth of community ties of Public Radio for the Front Range in this instance, we have demonstrated our genuine commitment to the community's educational needs in a way which other mutually exclusive applicants for this facility have not.

I. Technical Parameters. One commenter notes the problems which inadequately engineered or inefficient facilities can cause. Chris McConkey states that he "can receive two and sometimes three public radio stations sporadically depending on reception conditions but only one consistently. Sometimes I can receive my favorite morning shows on the kitchen radio if the roof antenna is positioned right, and sometimes not." CCU notes that Mr. McConkey is a public radio listener living in Enfield, New York and urges the Commission to give great weight to comments filed by listeners like him who have no self interest in this proceeding other than a desire to be served by quality NCE stations. While we often consider the 60 dBu contour as a station service area coverage, in reality the strength of the signal determines how well it will penetrate areas partially shaded and how well the signal will penetrate a home or a building to provide adequate signal to clock radios and other insensitive receivers. Any selection process

must take into account the strength of the technical parameters of an application, as this will have a direct effect of providing service to the listeners who are to be the primary beneficiaries of this process.

Several other commenters raise various concerns with using technical parameters as a selection criterion. Educational Media Foundation ("EMF") attempts to discredit this criterion at page 5 of its comments by claiming its experience "that the engineering proposals of competing applicants typically are not so radically different that they present any meaningful basis for differentiation." CCU's experience has been quite different. In fact, in many of the MX proceedings in which we are involved, there is a striking difference in the service areas and signal penetration offered by the competing applicants. In one particular instance, a number of years ago we observed the need to replace four of our translators covering approximately 40,000 people (in some places poorly) with a full service 3,900 watt station. The population and listenership had grown to where the area not only warranted a high power station, but also warranted an appropriate amount of distinct local programming. We spent much time designing the facility that would utilize the same antenna as another educational station. However, six months before we completed our application another applicant with no history with the area filed for a construction permit for a 75 watt radio station on a first adjacent channel from the same mountain peak. The difference in coverage and penetration between the two competing applications is over 16 dBu, an overwhelming difference that will translate directly into service to listeners. This is a meaningful difference which deserves credit in any comparative scheme.

EMF also fears that a technical parameter criterion "will also result in more frequent use of directional antennas to maximize coverage, thereby increasing the prevailing applicant's cost

of operations." EMF comments at page 8, last paragraph. However, the measure of quality of service is not an applicant's cost. EMF appears to assume that the cheapest proposal would somehow best serve the public interest. The plain fact is that applicants determine their commitment to a proposed new service and design a facility at a cost that reflects that commitment. While we certainly do not advocate awarding credit in relation to an applicant's proposed expenses, surely no credit is deserved by an applicant who plans to minimize service merely in order to save money.

On a related note, EMF also questions whether greater population and area coverage necessarily leads to the most efficient mode of operations and fears that the awarding of points based on technical parameters "will encourage applicants to apply for maximum facilities regardless of whether that proposal is the most efficient way of providing broadcasting service." EMF comments pp. 5 and 8. CCU does not propose that "most efficient operation" be taken into account. Efficiency is a subjective judgment to be made by each applicant. As Mr. McConkey noted in his comments (discussed above), listeners in outlying areas have a right to educational service which an "efficient" proposal would ignore. The Commission has always favored applicants who extend service to underserved areas. EMF's notion of "efficiency" contravenes this objective.

Public Radio for the Front Range (comments, p. 6, first paragraph) and Station Resource Group (p. 12, ¶ 2(1)) both express concern that larger service areas do not necessarily equate to an increase in local programming diversity, which is one of the goals of the NCE service. We respectfully disagree. For obvious First Amendment reasons, the Commission cannot directly regulate programming. However, regulation has always proceeded under the theory that

maximizing listener choice will increase the chance that listeners will receive diverse programming. Therefore, criteria encouraging maximized service areas and more powerful penetration of local populations will extend the benefits of educational broadcasting to as many listeners as possible, and if those listeners in outlying areas can receive a number of different stations, their diversity needs will be met as well.

Station Resource Group raises a practical concern that: "while it might be possible to condition construction permits on the delivery of service to the area and population proposed, such a condition would severely limit a permittee's flexibility to modify its facilities." (Station Resource Group comments p. 16, bottom paragraph.) CCU sees no reason why a permittee would not be able to increase its power and coverage under a proposed point system. The question of an applicant's ability to lower its power, though, presents a more serious concern.

That, in turn, relates to comments of EMF (pp. 8-9) and Station Resource Group (page 16, ¶ c) concerning the issue of enforcement. As EMF states, if a license is awarded on the basis of technical parameters, "there should be some mechanism in 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." CCU assumes that applicants who do their engineering and legal homework, which the Commission should encourage in any NCE rulemaking, would not normally face loss of their site. In our experience utilizing approximately 30 transmission sites, we make certain in our tower agreements that adequate notice is provided if a site owner determines our facilities need to be removed, and this provides us with adequate time to find another site, apply to the Commission for a change and await the Commission's actions. The Commission should have little sympathy toward an applicant who loses its site due to inadequate

planning research or out of a mere desire to save money. In the event of a genuine emergency, the Commission already has in place standards by which to judge an applicant's good faith in having made its original application. CCU would suggest in such instances that if an applicant can establish that developments were genuinely unforeseeable and beyond its reasonable control, it should not be harshly penalized for having to change site, but should be required to replicate as closely as possible the service it had originally proposed. Applicants found to abuse this privilege, though, should be harshly penalized as discussed at ¶ 39 of CCU's comments.

IV. Specific Procedural Considerations

In this final section of our Reply Comments, CCU discusses various proposals and comments which address specific procedures to be used in conjunction with a selection process.

A. Filing Window.

A number of commenters, including Educational Media Foundation (p. 6, first paragraph) propose that the Commission adopt a processing system in which a five or ten day filing window would be provided, during which potential applicants could submit a maximum of five applications. CCU agrees with the concept of a filing window, as it would encourage applicants to file for specific facilities in which they are most interested and would discourage the "land rush" mentality already discussed in Section III.D, supra., which would encourage speculation and minimal service. CCU notes that of the approximately 60 formal comments submitted in this proceeding which we reviewed, CCU did not observe a single commenter who opposed the use of a filing window.

B. 120-Day Settlement Period.

Educational Media Foundation at p. 2, ¶ 1.A of its Comments, "recommends that the Commission adopt an interim step whereby applicants would be afforded a 120-day settlement window in which to resolve the mutual exclusivity of their proposal through engineering solutions, which should include the ability to change frequencies ... resulting in the initiation of more non-commercial services." EMF further states, "if an application is amended pursuant to settlement after a window has closed, the amended application should be entitled to retain cut-off protection...." CCU agrees that the 120-day settlement period would be beneficial to the public interest as agreements would result in additional and quicker new service provided to any given community. However, it is critical that any applicant agreeing to make a change to remove mutual exclusivity should be entitled to retain its cut-off protection. We are convinced that if protection had been previously afforded, a number of existing mutually exclusive applications could have been settled, but in our experience, no party wanted to risk starting the application process all over again through a major change.

C. Breaking a Tie.

NPR, APTS and CPB, (p. 3, ¶ 2) propose that in the event of a tie, the FCC award the license to the applicant with the fewest pending applications, and then through a lottery among any applicants who might still be tied. CCU believes that considering the fewest number of pending applications is a valid method of breaking ties, as it rewards those applicants who are not running "application mills" and who have devoted their efforts and resources to serving a specific community's needs. However, for the reasons we have already discussed with respect

to lotteries in general, we cannot endorse the use of a lottery, even in order to break a tie. Rather, as CCU suggested at pages 16-18 of its own Comments, the Commission should prioritize other factors and turn to each of these in turn until a tie is broken.

D. Documentation Supporting Certifications.

Any point system based upon applicants' certifications must be subject to verification and enforcement, or it will be prone to abuse and ultimately come to reward those with the least integrity. As the Commission should not be expected to devote its own scarce resources to investigating the bona fides of each applicant, it is essential that it rely upon competitors and potential listeners to assess the validity of claims for which each applicant seeks credit. In order to do so, it is essential that such parties be afforded the necessary tools. For this reason, certifications must be supported by documentation.

The joint comments of Non-Commercial Educational Broadcast Licensees at page 13 recommend that "documentation supporting certifications and applications should be made available to competing applicants after the mutual exclusivity among the applicants is discovered." They then list such documentation. CCU strongly agrees, but we contend that it would be even more helpful if such documentation were to be included in the original application, as this would enable interested parties (such as potential listeners) other than only competing applicants to participate in this process. CCU further agrees with the commenters that these added documentation measures would not normally increase processing burdens on Commission staff, because the staff would not need to become involved in evaluating this material unless and until a problem was presented to the staff for evaluation through a petition to deny.

A number of other commenters suggest that there is no way to verify the statements of fact provided by applicants. That is the key weakness to a point system. The requirement of documentation is the logical solution. It would provide challengers with the necessary tools to evaluate the genuineness of an applicant's claims. Of equal importance, the sheer knowledge that claims could be tested will induce any but the most reckless applicant to present only verifiable claims in the first place.

E. Petitions to Deny.

Once claims can be tested through documentation, NPR, APTS and CPB argue at page 30 of their Comments that a petition to deny procedure should be permitted. CCU strongly agrees, as at this point the Commission will have to become involved in resolving a dispute. However, since the dispute will have to be documented with the material made available by the applicants in support of their claims, the dispute should be easy to resolve by Commission staff, perhaps through one pleading cycle and/or a very brief "paper hearing". CCU respectfully disagrees with NPR, APTS and CPB that a petition to deny will necessarily require a full Section 309(e) hearing. The Commission has previously implemented procedures which require something significantly less than a full evidentiary hearing to resolve matters which are largely documentary in nature, as here. To cite only a single example, streamlined paper hearings were initially used to select among competing cellular applications and this procedure was upheld by the Court of Appeals, Cellular Mobile Systems of Pennsylvania v. FCC, 782 F2d 182 (DC Cir. 1985). CCU would simply add as a general matter that if the Commission is to successfully implement a meaningful but abbreviated selection process, then it must be willing to enforce

occasional abuses which may be brought to its attention. These matters are addressed in pages 19-21 of CCU's Comments.

Conclusion

As CCU demonstrated in its initial comments in this matter, it would be unwise for the Commission to misconstrue Congressional permission to implement lotteries as a mandate. While the administrative efficiency of such a procedure is superficially appealing, the Commission's mandate is to serve the public interest, and that, in turn, requires that an efficient selection be made of the applicant most likely to render service of quality and value to listeners. Without the competitive forces that drive commercial broadcasting, the Commission cannot defer to the marketplace its responsibility to make a rational selection in whatever way it believes that non-commercial educational applicants will best serve the needs of their communities and listeners. It is highly significant that the comments received from NCE broadcasters and, especially, from listeners argue forcefully against the use of lotteries.

While CCU presented in its original comments a list of criteria it felt would best achieve the Commission's goals, and has defended those choices herein, the most important consideration at this point is for the Commission to select those criteria which it believes will enable it to truly advance its long-established and time-honored goals for the NCE service. To minimize burdens upon the Commission and its staff, applicants must be required to document their certified entitlement to comparative merit, so that other applicants and especially potential listeners will be in a position to monitor the integrity of the process and apprise the Commission of any abuses that are discovered.

In conclusion, non-commercial educational broadcasters have compiled a superb record of service to their communities and have provided a crucial alternative to the very different service rendered by commercial broadcasters. It is incumbent upon the Commission to implement a selection process which will enable the NCE service to continue to serve the needs of the American people.

Respectfully submitted,

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Appendix – Listing of Support of Various Systems

Of the forty-eight Commentors who stated either a preference for or against a hearing, point or lottery system to select a mx'd applicant for a NCE channel, only three of them – Pensacola Christian College, Educational Media Foundation, and Kaleidoscope supported the use of a lottery.

Commentors who are:	Those supporting Hearing, then Point System, Or Not preferring Lottery	Those supporting a Point System	Those supporting Lottery
Broadcasters (who may also be applicants)	National Fed. Of Community Broadcasters Pinebrook Foundation, Inc. KDNK Board of Directors Student Educational Broadcasting	Trustees of Boston University West Coast Public Radio & Rocky Mountain Public Radio Agusta Radio Fellowship Institute Houston Christian Broadcasters Five Broadcasters Colorado Christian University Dale Jackson Sister Sherry Lynn Foundation Community Broadcasting, Inc. Organizations led by Way-FM, Inc. Noncommercial Educational Broadcast Licensees Station Resource Group National Public Radio (group) Moody Bible Institute of Chicago Roaring Fork Public Radio Cornerstone Community Radio Maranatha, Inc. Taylor University Broadcasting KBPS Public Radio Foundation University of California New Life Evangelistic Center, Inc.	Pensacola Christian College Educational Media Foundation
Listeners / Viewers	Center for Media Education Stanley Aschenbrenner Alic Doran Mary Ellen Seger Richard W. Alexander Margaret & Robert Dresbach	Americans for Radio Diversity Residents of Ponca, Nebraska Cris McConkey	
Applicant (only)	Jimmy Swaggart Ministries St. Gabriel Communications, James J. Stephens, Jr.	Public Radio For the Front Range Western Baptist College	Kaleidoscope

Not Stated	CSN International Clark Hoffman	State of Oregon Curt R. Dunnam Penny Jackson Robert T. Wertime	

Commentors supporting either a Lottery or a Point System, but not Comparative Hearings:

Real Life Educational Foundation of Baton Rouge, Inc.
Community Television, Inc.
Francis Marion University – as long as there is a "Local Educational Institution" credit

Commentors not supporting a Lottery, Point System or Comparative Hearings:

Commentor:	Idea(s) or Point(s) Advanced:
Manuel F. V. Pereira	Preference for applicants who find channel; Preference to locally based applicants; Preference for those who serve 2 languages; Proposes filing window
Laredo Community College	Triage existing backlogged applications
Cedarville College	Private Colleges should be able to qualify for state-wide plans
American Family Association	First In Line should be the primary comparative criteria for NCE-FM application processing

Commentors not supporting a Comparative Hearing, Lottery or Point System, but their comments relate to noncommercial applicants applying for non-reserved channels or frequencies:

De La Hunt Broadcasting
Big Sky Broadcasting Company
Jack I. Gartner
Elgin FM Limited Partnership
Noncommercial Educational Broadcast Licensees