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March 15, 1999

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Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
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445 12th Street, S.W.
Washington, D.C. 20554

Re: MM Docket No. 95-31

Dear Ms. Salas:

Transmitted herewith, on behalf of Educational Communications of Colorado Springs, Inc., is an original and four (4) copies of its Reply Comments in the above-referenced rule making proceeding.

Please contact the undersigned should the Commission have any questions with respect to these Reply Comments.

Sincerely yours,

Lee J. Peltzman
Counsel for
EDUCATIONAL COMMUNICATIONS
OF COLORADO SPRINGS, INC.

Enclosure

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF EDUCATIONAL COMMUNICATIONS OF COLORADO SPRINGS, INC.

Educational Communications of Colorado Springs, Inc. ("ECCS"), by its attorney, hereby submits its Reply Comments with respect to the Commission's Further Notice of Proposed Rule Making in MM Docket No. 95-31.[1] ECCS is the noncommercial educational licensee of Station KTLF(FM), Colorado Springs, Colorado. Additionally, ECCS is an applicant for several noncommercial educational stations both on reserved and non-reserved frequencies within its region and is the licensee of several FM translators, which rebroadcast KTLF's broadcast signal throughout the State of Colorado. Thus, it has an active interest in this rule making.

ECCS agrees with those Commenters finding a lack of merit in the Commission's use of the traditional comparative hearing process in deciding among competing applicants for noncommercial educational frequencies. The Commission's comparative hearing process has become unduly expensive and time-consuming. Due to the amorphous nature of comparative

[1] Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 13 FCC Rcd. 21167 (1998).

issues, which have made FCC decisions difficult to predict, much less understand, the hearing process has failed to produce a system that works for the benefit of qualified broadcasters.

ECCS also agrees with the vast majority of the Commenters that lotteries are an equally undesirable option for resolving mutually-exclusive proceedings. Picking applicants solely on the basis of chance is hardly a rational way to regulate in the public interest. As noted by the Station Resource Group,[2] a lottery is antithetical to the idea of reserving spectrum for special noncommercial purposes. Adoption of lottery procedures would create a free for all in which applicants were given every incentive to file in order to obtain a chance to acquire spectrum.

Moreover, the Commission's use of lotteries would be a tacit admission by the FCC that it lacks the ability or judgment to decide in the public interest. The Commission would hardly pick its staff or fill the actual Commissioner's positions by lottery from all qualified applicants. Why then, would the Commission even consider allocating valuable noncommercial spectrum by chance to any applicant meeting base qualification standards? ECCS agrees with Moody Bible Institute of Chicago,[3] that the public deserves a better process for determining who should be awarded scarce noncommercial educational broadcast spectrum other than by picking the winner among competing applicants "out of a hat."

Additionally, lotteries will likely exacerbate existing abuses by rewarding mass filers. Lotteries would attract applicants eager to file applications for any frequency in order to acquire spectrum. Lotteries would also favor applicants with significant resources who have the ability to file large numbers of applications. It is noted that, already, since the Commission imposed its freeze on mutually-exclusive noncommercial educational applications, a handful of entities have

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[2] Comments of Station Resource Group, filed January 28, 1999, at 9-10.

[3] Comments of Moody Bible Institute of Chicago, filed January 28, 1999, at 5.

filed large numbers of applications in response to Commission cut-off lists in obvious anticipation that the Commission will decide pending cases by way of a lottery.

The use of lotteries to decide among competing applications will not assure that the winning applicant meets any public interest standards beyond the most basic qualifications. Neither will a system of lotteries promote responsive service of high quality. It may well be that the real cause of concern in this proceeding is not the number of mutually-exclusive applications on file but, instead, the possible abandonment by the Commission of any meaningful public interest standard in choosing among competing applications.

The Commission attempts to remedy these problems by suggesting that it award statutory "preferences" to certain applicants to increase their chances of prevailing. However, any process involving a determination based on random selection will always be arbitrary and subject to the selection of a less qualified applicant. Moreover, if the Commission were to adopt racial preferences, such preference would be subject to strict judicial scrutiny and would be extremely difficult, if not impossible, to justify on Constitutional grounds. Meeting this judicially-imposed test would cause additional delay for noncommercial educational broadcasters who have already waited for years for a Commission licensing decision as a result of the ongoing FCC freeze in processing mutually-exclusive applicants, pending the establishment of new selection criteria.

Unlike lotteries, a point system would be a better selection method because it would select the best qualified applicant. Also, it would be easier to administer than comparative hearings. Thus, ECCS agrees with those Commenters who recommended that the Commission adopt a point system. Such a system would result in decisionmaking based on objective and rational considerations rather than on blind luck.

ECCS agrees with those Commenters who, in discussing a point system, state that points should not be awarded for commitments that, however laudatory, are unenforceable. Neither should the Commission implement a point system which would encourage and reward abuse and gamesmanship by applicants. The criteria used to award applicants must be based on judgments that are verifiable and enduring, not speculative or ephemeral.[4] While certain characteristics of an applicant may seem on the surface meritorious and deserving of enhancement points or credits, only those characteristics that are not subject to voluntary and immediate change or dilution once an application is approved should actually be accorded such credits.[5]

There are certain credits which are easily verifiable and which should produce a superior applicant who can be expected to broadcast in the public interest. Initially, any applicant who goes through the trouble of locating a channel and filing an application should be rewarded with a decisive credit. This "first applicant" credit was supported by numerous parties for good reason.[6] Under the Commission's current application procedures, once an applicant finds a noncommercial educational channel, it must prepare and submit the required application for construction permit. However, the Commission accepts such applications by placing them on public notice and then inviting the filing of competing applications. At present, the applicant

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[4] Station Resource Group at 10-11.

[5] Moody Bible Institute of Chicago at 5-6.

[6] Comments of Houston Christian Broadcasters, Inc., filed January 28, 1999, at 9-10; Comments of James J. Stephens, Jr., filed January 28, 1999, at 1; Comments of Cornerstone Community Radio, Inc., filed January 28, 1999, at 2; Moody Bible Institute of Chicago at 9-10. Comments of Sound of Life, Inc., et al, filed January 28, 1999, at 10. As pointed out by Houston Christian Broadcasters, one applicant, an entity calling itself Broadcasting for the Challenged, has filed over 100 applications with the Commission, yet, amazingly, this group has never submitted a "lead" application for a noncommercial educational station. It instead has sat back, waiting for other applicants to do the hard work of locating available channels, only to file competing applications in response to FCC cut-off lists. Houston Christian Broadcasters at 10, n. 11.

who has gone through the trouble of locating the available channel and preparing the initial application specifying a new noncommercial educational FM station receives no credit for its pioneering efforts. Rather, his efforts are typically rewarded by the filing of numerous mutually-exclusive applications, often by parties who have never gone to the trouble of ever locating an available channel. These conflicting applications delay the implementation of service and are filed for no other reason than either to effectuate a settlement or place that entity in a position of possibly being able to take part in a lottery should the Commission be foolish enough to adopt such a mechanism. ECCS agrees with those Commenters who have concluded that the first applicant, based on the application filing date, should be accorded merit points for its pioneering efforts. Such merit points serve the public interest by encouraging qualified noncommercial educational FM applicants to use available channels.

ECCS also supports according points to experienced professional broadcasters. It would appear to be common sense that one of the most relevant factors pertinent to the operation of a noncommercial educational station is prior experience in the operation of a noncommercial educational broadcast station. Experienced noncommercial educational broadcasters are the entities most likely to provide professional, high quality broadcast services. Therefore, credit should be given to an applicant having a principal (at least 10% stockholder or partner) having at least three (3) years experience as a principal in an operating noncommercial educational broadcast station.[7] Alternately, ECCS would support the proposal of Houston Christian Broadcasters that a point be given to any noncommercial educational applicant who can show a

[7] Comments of Community Television, Inc., filed January 28, 1999, at 3.

record of noncommercial educational broadcast station operation and service to the public for a period of at least five (5) years prior to the filing date of its application as long as such operation is untainted by fines, forfeitures, or Commission admonitions with respect to violations of the Commission's noncommercial educational broadcast rules.

ECCS supports those Commenters who seek diversity points. The Commission should award two (2) points to applicants that own five (5) or fewer radio or television stations and one (1) point to applicants that own ten (10) or fewer radio or television stations. Such a point structure would promote diversity of ownership and assist new broadcast entrants, while penalizing those applicants who file scores of applications helter skelter throughout the country.

To further deter mass filings, ECCS supports the proposal made by many Commenters that the Commission adopt a "window filing" procedure and limit the number of applications any applicant, or its affiliate, may file to no more than five (5) applications per window.

ECCS also supports the recommendation that applicants proposing a first full-time noncommercial educational aural service (a service that provides the first noncommercial full-service signal to an area) receive two (2) points and that applicants providing noncommercial educational service to an underserved area (an area receiving service from only one other noncommercial educational full-service station) receive one (1) point. Applicants seeking such credit should be required to provide the necessary showing of coverage. To prevent manipulation of the Commission's application process, applications receiving such credits should have their grants conditioned upon the applicant constructing its facility substantially as authorized. Modifications should be permitted only upon good cause and continued coverage of at least 80% of the authorized service area should be required to satisfy such a requirement.

Finally, ECCS supports a local presence credit as long as there is a reasonable definition of "local." ECCS would accept the definition formulated by Noncommercial Educational Broadcast Licensees[8] that "local" be defined as being located within 100 miles of the proposed facilities or located within the same state.

As noted earlier, ECCS does not support comparative credits based on easily modified criteria since such incentives only encourage applicants to play games with the Commission's standards. Several proposed criteria fall within this description. First, the proposal for a "local diversity" credit based on an applicant's proposed station not having contour overlap with the principal community contour of a commonly controlled broadcast station could easily lead to applicant abuse. Applicants can manufacture proposed service contours to avoid such overlap, then modify them once they have been issued a construction permit based on an award of this "credit." Moreover, unlike commercial FM channels, noncommercial educational channels are not allotted to particular communities nor are such stations even required to cover their communities of license with a city grade contour. Thus, favoring one applicant over another based upon the arbitrary choice of community of license would promote gamesmanship rather than any discernible benefit to the public.

Similarly, awarding points based on a "representativeness" credit, as has been suggested by many Commenters would simply not work. First, ECCS believes that such a subjective credit would simply be unworkable since the Commission has never established criteria for determining "representativeness" nor can such a term be easily defined. Would the Commission grant credit to members of a group or would they have to be leaders and how long would such

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[8] Joint Comments of Noncommercial Educational Broadcast Licensees on Selection Process for Competing Applicants, filed January 28, 1999, at 8.

individuals have to be associated with those groups to receive credit? Moreover, would a licensee chosen based on such a credit have to keep the Commission informed on a monthly basis as to the status of its board, and, if its board membership changed, as most do, would it have its license revoked?

ECCS also objects to any credit being awarded for the first transmission service to a community. Such a credit can easily be manufactured by an applicant choosing a small bedroom community when its intention is really to serve a large nearby community. Granting such a credit would only encourage manipulation of the application process.

ECCS also objects to awarding any credit to educational institutions seeking a noncommercial educational authorization. No Commission rule requires that a noncommercial educational applicant be an accredited state organization. The Commission should not be in the business of deciding which type of Constitutionally protected speech is preferable. If the Commission were to award such a credit, then it should recognize applicants as eligible for the credit by virtue of being part of a private entity's state-wide network plan. Such a plan would result in just as much diverse programming, state-wide, as any other state-wide plan credit.

For the reasons stated above, ECCS urges the Commission to adopt a meaningful point system which will best serve the public interest.

Respectfully submitted,

EDUCATIONAL COMMUNICATIONS
OF COLORADO SPRINGS, INC.

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