

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

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

MM Docket No. 95-31

To: The Commission

REPLY COMMENTS OF
NATIONAL RELIGIOUS BROADCASTERS

National Religious Broadcasters ("NRB") hereby submits its reply comments addressing certain proposals in the above-referenced proceeding for comparative "preferences" to be used in either a weighted lottery or "point system" procedure for selecting among competing applicants for noncommercial stations.¹ Specifically, NRB opposes proposals which would prevent religious applicants from competing for noncommercial station licenses on the same footing as other applicants. NRB urges the Commission to adopt selection criteria which would be neutral

¹ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants (Further Notice of Proposed Rulemaking)*, MM Docket No. 95-31, (rel. Oct. 21, 1998) ("Further Notice"). NRB is a national association of radio and television broadcasters and programmers whose purpose is to "foster and encourage the broadcasting of religious programming." National Religious Broadcasters, *Directory of Religious Broadcasting* 14 (1992-93). A significant number of NRB member stations operate on a noncommercial basis and are, therefore, directly affected by Commission action in this docket.

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towards religious applicants, both on their face and in practical effect.² In the latter regard, the FCC should (1) reject the proposed preference under the point system for applicants who receive government funding for their broadcast operations, and (2) if the agency adopts a preference for “statewide educational networks” under either selection procedure, it should afford the preference to private, as well as public, statewide networks.

I. The Commission Should Not Adopt A Preference For Applicants That Receive Government Funding

NRB opposes proposals to give a preference under the “point system” for stations who receive funding from government sources.³ While proponents characterize the proposal as a facially neutral standard, it would operate to discriminate directly against religious broadcasters because of their ineligibility for such funding. This preference would not only disserve the public’s interest in receiving a wide diversity of broadcast voices but also violate the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb, as well as the First Amendment.

The government-funding preference would face a high statutory bar. RFRA prevents the federal government from burdening the exercise of religion except when the government can show: (1) that the regulation is based on a compelling government interest; and (2) that the

² Only one commenter proposed an explicit preference for “secular” applicants over religious applicants. *See* Comments of Student Educational Broadcasters, MM Docket No. 95-31, at 3 (filed Jan. 27, 1999) (contending that “there are more different religions and philosophical beliefs than there are available channels in the whole FM NCE and commercial band” and that consequently “all channel allocations would be filled”). The logic behind this argument is unclear, but the law against it is not: the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, would bar any attempt to explicitly discriminate against religious applicants in this fashion.

³ *See, e.g.*, Comments of National Public Radio, *et al.*, MM Docket No. 95-31, at 23 (filed Jan. 28, 1999) (“NPR Comments”).

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regulation is the least restrictive means of furthering that compelling interest. Application of the proposed government funding preference in mutually exclusive licensing proceeding, while ostensibly neutral, would in effect penalize religious broadcasters because they are barred by law from receiving the type of government funding envisioned by those commenters who receive support from government agencies.⁴ The onus placed upon religious broadcasters by their inability to qualify for a preference available to all other non-commercial broadcasters would “burden the exercise of religion” and implicate the higher standard of scrutiny under the statute.

It is instructive to note that RFRA was enacted in part to prevent zoning ordinances from excluding churches from neighborhoods.⁵ The analogy to broadcast licensing should be obvious: By establishing a government-funding preference, the Commission would effectively “zone” religious broadcasters out of the remaining noncommercial spectrum. To justify such action, the FCC would need to demonstrate that it has both a compelling interest in establishing this preference and that no less restrictive means would satisfy the goal. The agency would be hard-pressed to meet either prong of the legal test here.

In addition, the government-funding preference raises grave constitutional concerns. While it may be constitutionally permissible under the First Amendment for the government to

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⁴ For example, some commenters specifically recommend Public Telecommunications Facilities Program (“PTFP”) funding as a proxy for government funding. NPR Comments at 23. Federal law explicitly bars religious broadcasters from eligibility for these funds. 15 CFR § 2301.19(b) (“During the period in which the grantee possesses or uses the federally funded facilities, the grantee may not use or allow the use of Federally funded equipment for purposes the essential thrust of which are sectarian...”)

⁵ See, e.g., Hearing Before the Senate Committee on the Judiciary (S.2969), 102 Congress, 2d Session, Sept. 18, 1992, at 74-75.

refuse to fund religious institutions, “[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.”⁶ When government is engaged in radio licensing, it has the obligation to do so in a manner which does not penalize an individual’s free exercise of his or her religious beliefs. “The message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”⁷

Creating a licensing system which directly disfavors religious broadcasters also would raise grave content- and viewpoint-based discrimination issues under the Free Speech Clause.⁸ And even aside from the question of religious speech, a scheme favoring noncommercial licensees that receive government funding would muffle voices that—as independent speakers unrestrained by fear of offending their funding source—might be best able to air more diverse, critical views about public policy issues.

Finally, the proposed preference is not supported by sound public policy. Commenters supporting this preference argue that public funding is evidence that a station serves the public interest because some branch or level of government would have already prescreened the

⁶ *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment).

⁷ *See Board of Education v. Mergens*, 496 U.S. 226, 248 (1990).

⁸ *See R.A.V. v. St. Paul*, 505 U.S. 337, 391 (1992); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Perry Ed. Assn. V. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983); *Police Dept of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

applicants for this purpose.⁹ These commenters, however, fail to demonstrate why government funding would necessarily implicate the Commission's licensing concerns under the Communications Act. Moreover, this fallacious argument suggests that further distinctions should be made: Would these same commenters contend that an applicant who receives more public funding than other applicants be "better" than those that receive less? In short, applicants may receive funding for a variety of reasons beyond their ability to serve the public.¹⁰ Merely qualifying to receive government funding does not merit a preference in the licensee selection process.

II. The Commission Should Give A State-Wide Education Network Preference to Public and Private Institutions Alike

The *Further Notice* seeks comment on a proposal to grant a preference (under either a weighted lottery or point system procedure) to applicants for "stations that would be part of an existing education plan of a state or municipality."¹¹ As a general concept, NRB does not oppose a preference for so-called "statewide networks." As the FCC recognized long ago, such networked stations can help provide noncommercial educational programming to widely dispersed areas that might not otherwise be viable prospects for noncommercial stations.¹²

⁹ See NPR Comments at 23.

¹⁰ See 15 C.F.R. § 2301.3

¹¹ See *Further Notice*, ¶¶ 14, 24; see also, e.g., *Comments of the Regents of the University of California*, MM Docket No. 95-31, 3 (filed Jan. 27, 1999).

¹² See, e.g., *Amendment of the Commission's Multiple Ownership Rules to Include Educational FM and TV Stations*, 68 FCC 2d 831, 833 (1978). At that time, the Commission noted that it had "encouraged the development of these state networks" in part to "foster the earlier establishment of these stations.... The justification, however, for continuing to encourage

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However, there is no longer any sound policy justification—if there ever was—for limiting such a preference to publicly owned and operated networks. Private educational institutions can and do provide diverse educational and cultural programming through the networks they have developed.¹³ And in this era of declining government subsidies for public broadcasting generally, there is no reason to conclude that public institutions would be better able financially to develop and operate a network of NCE stations. Moreover, limiting this preference to public institutions by definition excludes religious institutions—and thus would raise serious questions under RFRA. Therefore, if the Commission adopts any preference for statewide educational networks, the preference should be extended to privately operated networks as well as public ones.

III. If the Commission Adopts a Preference for Applicants With “Broadly Representative” Board Membership, the FCC Should Not Favor Applicants Whose Boards Contain Representatives of Several Denominations or Faiths

The *Further Notice* seeks comment on a proposal under the point system to grant a preference to applicants who can demonstrate that “their leadership is broadly representative of the community.”¹⁴ The FCC notes that among the “elements of the community, as traditionally

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statewide networks—the prospect that much of the public would otherwise be denied educational broadcasting service—is open to serious question.” *Id.*

¹³ *Accord, Comments of Cedarville College*, MM Docket No. 95-31, at 2 (filed Jan. 28, 1999).

¹⁴ *Further Notice*, ¶ 24.

considered,” are “religious groups”—along with businesses, civic groups, professions, schools, and government¹⁵

It is not clear from the *Notice*, however, whether under this preference the agency would favor applicants whose boards reflect diversity within each community “element” as opposed to simply looking for at least one representative of each element. NRB has no quarrel with the latter concept, but would object to the establishment of a preference for applicants whose religious presence is divided among several faiths or denominations. As with respect to the government-funding preference, it would be constitutionally problematic for the agency to favor one configuration of religious representation over another (whether the FCC would favor one particular faith over another or a group of denominations or faiths over a single religious entity). Such action on the agency’s part would certainly evoke RFRA concerns as well. Consequently, the FCC should avoid establishing a preference for “religious diversity” among applicant board members.

¹⁵ *Id.*, n.27.

CONCLUSION

For the foregoing reasons, NRB urges the Commission to reject the proposed preference for government-funded applicants, to modify the proposed preference for statewide networks to include both private and public institutional applicants, and to clarify that any preference adopted for "broadly representative" applicant boards would not favor entities whose board members represent more than one denomination or faith.

Respectfully submitted,

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