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March 16, 1999

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OUR FILE NO.
0274-101-63

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW, Room TW-A325
Washington, DC 20554

Re:	Reply Comments of Pensacola Christian College in the matter of the Proceeding concerning <i>Reexamination of the Comparative Standards for Noncommercial Educational Applicants</i> (MM Docket No. 95-31)
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Dear Ms. Salas:

Transmitted herewith, on behalf of **Pensacola Christian College**, is an original and four copies (containing original signatures) of its "Reply Comments on the Commission's Proposed Rule Making" regarding the above-referenced rule making proceeding. The Reply Comments were filed on March 15, 1999, with facsimile signatures.

Should further information be desired regarding this matter, kindly communicate directly with this office.

Very truly yours,



Lee W. Shubert

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

MM Docket No. 95-31

To: The Commission

REPLY COMMENTS OF PENSACOLA CHRISTIAN COLLEGE, INC.

Pensacola Christian College, Inc. ("PCC") hereby submits its Reply Comments in response to the *Further Notice of Proposed Rule Making* in the above-captioned matter, released October 21, 1998 (the "*Further Notice*").

PCC is the licensee of WPCS-89.5FM, Pensacola, Florida, the primary station of a network of noncommercial educational radio broadcast and FM translator stations known as the Rejoice Broadcast Network.¹ PCC will demonstrate that a window filing system, in conjunction with a lottery selection procedure, as PCC initially proposed, eliminates the pitfalls and burdens of a point system, as well as meets the Commission's goals as stated in its *Further Notice*.

Discussion

I. A Point System Will Not Provide Effective Resolution of Mutually Exclusive Applications.

Many commenters expressed concerns about the criteria by which the Commission would award points, should a point system be implemented. Some favored the point criteria proposed in the Commission's *Further Notice*. Others proposed new criteria that would stack points in the commenters' favor, should the applicant be involved in selection procedures. Among the proposals, the commenters argue that points should be awarded: (1) for localism (*i.e.* local origination, local educational institution, local home office and/or main studio, local

¹ PCC's licenses, construction permits and pending applications are a matter of record with the Commission.

and statewide networks, and local accountability); (2) for broadcasting experience; (3) using comparative hearing criteria; (4) for diversity of ownership and/or board of directors; (5) upon a comparison of coverage contours; (6) for technical ability; (7) for unique programming content; (8) for first-finder; (9) for full power applications filed to replace a displaced translator where service has already been established; and (10). according to the criteria proposed in the Commission's *Further Notice*

PCC supports the initial comments filed by Educational Media Foundation ("EMF") regarding the criteria for a point system. EMF observes that each of the "criteria presents opportunities for abuse and manipulation as applicants attempt to tailor their applications to qualify for the most points."² If the Commission implements such a subjective point system using an eclectic point criteria based on the above list, there will presumably be applicants who could and/or would reorganize their business structure for the sole purpose of tailoring their organization to meet the point criteria in order to stack points in their favor, should they become mutually exclusive with another application. To the extreme, once an applicant learns how to manipulate the points in its favor, then that applicant can selectively target applications to challenge, knowing full well that points will be awarded in its favor to secure it a grant. In PCC's experience, there are applicants who monitor the "A" cutoff lists to determine where they will file next to compete with a first-filed applicant. These speculators are often mirror images, or near clones, of the first-filer's application. Thus, a point system has a very strong potential to encourage mass filings of speculative applications on targeted stations' "A" cutoffs.

Another pitfall is that a point system, whether intentionally or unintentionally, likely will establish a model for what may be considered the "ideal applicant" (*i.e.*, the applicant with the most points is the better applicant). There will be individualists, however, that will choose not to metamorphose in order to conform more closely to a point criterion. Such individualists, under the proposed point system, will be disadvantaged for maintaining their individuality and uniqueness. Hence, a point system will serve to discourage relevant and meaningful differences between applicants. Whether intended or not, a point system indeed will work to homogenize

² For examples of abuse that could occur, see page 7 of EMF's January 28, 1999 comment.

many applicants, to conform to the ideal model (*i.e.*, that to benefit by the point criteria). A point system, therefore, patronizes conformity, not individuality. Slavish conformity to point criteria does not equate to optimum service in the public interest.

II. A Point System Would Increase the Burden of the Commission and Be Counterproductive to the Commission's Stated Goals.

Because a point system is a highly subjective process, it is vulnerable to judicial challenge. It follows that selections based upon such a system for the resolution of mutual exclusivity also will be vulnerable to challenge and appeal. This especially would be true with respect to presently pending mutually exclusive applications. PCC again supports EMF's comments in this regard. EMF observes that the adoption of a point system for disposition of currently pending applications would be "unfair since such retroactive application of new criteria would penalize applicants for failing to meet criteria that were nonexistent at the time the applications were filed."³ Challenges and appeals of a point system selection will only increase the Commission's current burden –not relieve it – thereby eviscerating a primary goal of the Commission's proposed rulemaking. Such would not be the case with a Lottery/Window filing system.

A lottery selection process not only would reduce the risk of appeals, it would eliminate the extra burdens of a point system with regard to determining tie breaking procedures and the establishment and monitoring of holding periods. A lottery system would permit and encourage applicants to have a representative present during the lottery process, thereby reducing the odds for a challenge. In any analysis, a point system for the resolution of mutual exclusivity is not as efficient or objective as a lottery. A point system, therefore, should not be implemented and should be avoided by the Commission. Accordingly, PCC urges the Commission to adopt a Lottery/Window filing system to replace the current comparative hearings procedure.

Let the Commission, and all applicants alike, be mindful that the purpose of the Commission's *Further Notice* was to seek comments on how "to improve the process of choosing among competing applicants for noncommercial educational ("NCE") broadcast

³ See page 11 of EMF's January 28, 1999 comment filing.

stations.”⁴ The Commission also has stated that its “goals are to simplify and expedite the selection process, making it easier for applicants and for the Commission, while providing new and upgraded broadcast service to the public more quickly and maximizing participation by noncommercial applicants in [its] selections procedures...”⁵ A point system would not work effectively or efficiently to achieve these stated goals. Rather, a point system will only create more burdens for both the Commission and the applicant. In fact, the Commission will be compelled to devote considerable time to developing “meaningful” point criteria, researching and monitoring the qualifications of each applicant, dealing with petitions and appeals, continually selecting among a perpetual stream of mutually exclusive applicants, determining tie-breakers and establishing and monitoring holding periods – hardly task diminishing events. A Lottery/Window filing system, to the contrary, as demonstrated in PCC’s January 28, 1999 comments, and reiterated below, will accomplish the Commission’s stated goals.

III. A Lottery Selection Procedure Implemented in Conjunction With a Window Filing System Will Achieve the Stated Goals of the Commission.

PCC urges the Commission to continue pursuit of a lottery system, as suggested by the *Further Notice*, with the following stipulations: First, no preferential weighting should be incorporated in the lottery proceedings. Lottery weighting will result in the same pitfalls and burdens as a point system. Second, and more importantly, a window filing system is essential to making a lottery selection procedure successful. A lottery system, alone, will provoke a land rush of applications to flood the Commission. With a window filing system, a predetermined and regularly scheduled number of days would be specified in which applicants may file applications (*e.g.*, the first 5 business days of the month). A limit also should be established as to the number of applications permitted (*e.g.*, 5 applications). This limit will help avoid the land rush of applications. With a filing window system, as PCC proposes, lotteries will only be used in the cases when mutually exclusive applications occur within a filing window. Applications filed before the filing window will be dismissed as premature, and those filed after the filing window will be dismissed with prejudice, especially those which, after a brief review, would have caused mutual exclusivity with an application filed in the window which had just passed.

⁴ See *Further Notice* at 1.

⁵ *Ibid.*, at Appendix C – Need For and Objectives of the Proposed Rule Changes.

This procedure is in keeping with the example of the window filing system in place under the new filing system for commercial FM translator and booster stations as found in 47 CFR §74.1233.

Additionally, implementation of a negotiation period for mutually exclusive applicants should also be established to further reduce the need for a lottery selection. Within this negotiation period, mutually exclusive applicants would be afforded an opportunity to resolve the mutual exclusivity of their proposals by means of engineering solutions, including frequency changes and major amendments, without being assigned a new application reference number and “A” cutoff. The assigning a new file number will only serve to defeat the purpose of the settlement by exposing the amending applicant to new competition. If a settlement between the mutually exclusive applicants could be reached during this negotiation period and tendered in writing to the Commission, PCC submits that many mutually exclusive situations could be resolved without the use of a lottery selection, thereby resulting in the prompt use of NCE spectrum and establishment of new services to the public. In the event that the negotiating applicants cannot reach a settlement, however, a lottery selection would provide for a fair and efficient means by which to resolve the mutual exclusivity without appeal by the applicants involved.

It seems clear that a Lottery/Window filing system is the procedure of choice to achieve the Commission’s stated goals for efficiency and relieved burden and to replace the current comparative hearings procedure. PCC once again urges the Commission to implement the Lottery/Window filing system following the review of all filed reply comments.

IV. NCE Use of Nonreserved Band and Resolution Between NCE and Commercial Applicants.

Several commenters took issue with NCE use of the nonreserved band and mutual exclusivity resolution between NCE and commercial applicants. One commenter,⁶ by its own interpretation of Section 309(j)(2)(C) of the Communications Act, argues that if an NCE applicant desires to apply for a nonreserved frequency, then that applicant should be required to participate in the auctioning procedure. The theory is that under the requirement of *Melody*

⁶ De La Hunt Broadcasting.

Music, Inc. v. FCC, 345 F.2d 730 (1965), the FCC is required to treat similarly situated applicants in an identical manner. NCE stations operating on nonreserved band spectrum would be considered commercial stations with noncommercial programming and would be allowed to change to commercial programming without notice to the Commission. Another commenter⁷ stated that NCE applicants should be restricted exclusively to the reserved band and that if NCE applicants are allowed to apply for nonreserved band frequencies, then commercial applicants should be allowed to apply for reserved band frequencies.

Multiple commenters filing under the joint filing name of “NCE Broadcasters”⁸ state quite the opposite. The NCE Broadcasters argue that they

believe that the Commission wrongly refers to such [nonreserved] frequencies as “commercial” frequencies. Such frequencies have never been set aside for “commercial” use – they are unreserved frequencies that must be used to serve the public interest, convenience and necessity. Some are used by commercial broadcasters; others are not.⁹

They also accurately assert that a “rendering [of] NCE applicants ineligible for non-reserved channels would be contrary to long-established precedent.”¹⁰

In PCC’s view, the NCE Broadcasters argue well that the nonreserved band should continue to be available to NCE applicants. The NCE Broadcasters state several reasons to support such use¹¹ and even provide an equitable means of resolving mutual exclusivity on

⁷ Elgin FM Limited Partnership.

⁸ Noncommercial Educational Broadcast Licensees represents the following commenters: University of Arizona; Arkansas Educational Television Commission; Board of Regents of the University of Wisconsin System; Boise State University; Central Michigan University; Greater Washington Educational Telecommunications Authority; Iowa Public Broadcasting Board; Iowa State University of Science and Technology; Kent State University; Nashville Public Radio; The Ohio State University; Ohio University; Board of Regents of the University of New Mexico; Spring Hill College; South Carolina Educational Television Commission; St. Louis Regional Educational and Public Television Commission; State of Wisconsin - Educational Communications Board; University of Minnesota; Virginia Tech Foundation; WAMC, Washington State University; WSKG Public Telecommunications Council; collectively called the “NCE Broadcasters.”

⁹ See page 2, footnote #1 of the NCE Broadcaster’s January 28, 1999 comment filing.

¹⁰ *Ibid.*, page 6.

¹¹ Citing *Fostering Expanded use of UHF Television Channels*, 2 FCC 2d 527 (1966), NCE Broadcasters note:

It must be borne in mind that while educational channels (“starred” in the table) are reserved for education, non-reserved channels, usually called

nonreserved channels between NCE and Commercial applicants. The NCE Broadcasters also propose a resolution between NCE and Commercial mutually exclusive applications based on need.¹²

In PCC's view, the above resolution proposal would be adequately effective. PCC also adds that, because there are many frequencies available in the nonreserved band, NCE applicants filing for terrestrially fed FM translator stations should continue to be allowed to apply for these frequencies without hindrance.

V. Replacement Applications for Displaced Translator or Booster Stations

Full power applications that are filed to protect and/or replace a displaced translator or booster station, construction permit or pending application in response to an overfiling, should be granted instead of the overfiling application. The protecting/replacing application seeks to preserve an existing or proposed by a translator or booster station. Translator stations often are chosen at the onset of operation because they are less expensive to operate when going into a new market and establishing a supporting listenership. Once the station is self-supporting, a licensee may then upgrade to a larger primary service. A licensee with a translator or booster station, construction permit or pending application having been overfiled

“commercial,” are not reserved for commercial use but are equally available to ETV. The reserved status of the “starred” channels protects them from commercial applicants even though the demand for additional channels may be great. The unreserved channels are not protected and may be sought by either educational or commercial interests. There are at least a half a dozen ETV stations operating on unreserved channels, and several others have gone into operation on such channels and later secured their reservation when it became clear that the channel would be used entirely for noncommercial educational broadcasting.

See also page 7 of the NCE Broadcaster's January 28, 1999 comment filing.

¹² The NCE Broadcasters suggest that the Commission should first determine whether the channel is better used for NCE or commercial use, based on the following criteria: (1) Would an NCE applicant provide a first or second NCE service to an area (based on population served)? If so, the NCE need for the channel is greater; (2) For radio only, would an NCE applicant provide an additional NCE service in an area (based on population served) where the ratio of NCE radio service to commercial radio service is less than 1/5? (This ratio is the equivalent of the current [20]% reservation of FM radio spectrum for NCE use – 20 channels out of 100). If so, the NCE need for the channel is greater; (3) For TV only; (4) For radio only, would the NCE applicant provide NCE coverage to an area that is not adequately served by NCE stations for technical reason (i.e., VHF TV Channel 6 interference, foreign allotments, terrain obstructions, antenna siting problems, etc.)? Ibid.

by another applicant's full power application, should have the opportunity to upgrade its existing or proposed service with a full service facility.

In PCC's experience, some applicants research areas being served by an existing translator station and then craft a full power proposal to overfile the secondary service translator station. These applicants rely on the current Rules that afford no recourse for the overfiled secondary service translator or booster station but to file a competing application. Some of these overfiled translators have served their communities faithfully for years. The licensee being overfiled has a vested interest in the community being served and ought to be allowed to file for a replacement full power station to maintain its service to the community it already serves. If the translator licensee fails to recognize the overfiling and respond with a timely filed replacement full power station application, then it should be assumed that the translator licensee no longer has a desire to maintain service to the community served by the now displaced translator.

Conclusion

PCC submits that a point system selection procedure based on a highly subjective point criterion to resolve mutually exclusive applications, both pending and future, would be ineffective, inefficient and would only serve to increase the administrative burdens of both the Commission and the applicant. Furthermore, a point system would discourage individuality between applicants and provoke all applicants to some level of conformity, as defined by the point criterion. Lastly, a point system would surely be vulnerable to judicial challenge and appeal, thereby further perpetuating the current backlog of mutually exclusive applications.

A Lottery/Window filing system, on the other hand, would effectively and fairly serve to resolve all pending and future mutually exclusive NCE applications, thereby relieving the present burden of the Commission to decide these cases on an *ad hoc* basis, and provide prompt effective use of the NCE spectrum and establish new services to the targeted communities. A Lottery/ Window filing system would virtually eliminate mutually exclusive applications from even occurring through implementation of a filing window with an application filing limit and would literally eliminate speculative applications altogether, which are the cause for a majority of the mutual exclusivity cases currently backlogged.

Nonreserved spectrum should continue to be available to NCE applicants. Mutual exclusivity between NCE and Commercial applicants can be fairly resolved on the basis of need. Licensees of FM translator and booster stations that have been displaced by the overfiling of a full power application should have the opportunity to file a replacement application in order to preserve service already established by the translator or booster station. Replacement applications should be granted instead of the overfiling applications.

Whatever system the Commission decides to implement as a result of these proceedings, the Commission should, at the very least, incorporate a window filing system as well as a negotiation period wherein the applicants with mutually exclusive applications may attempt to reach a settlement to resolve their mutual exclusivity before implementing selection procedures. It is PCC's desire and recommendation that the Commission adopt the Lottery/Window filing system proposed in detail in PCC's January 28, 1999 comment filing and reiterated herein.

Respectfully submitted.
PENSACOLA CHRISTIAN COLLEGE, INC.



Dr. Arlin Horton
President / Founder

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