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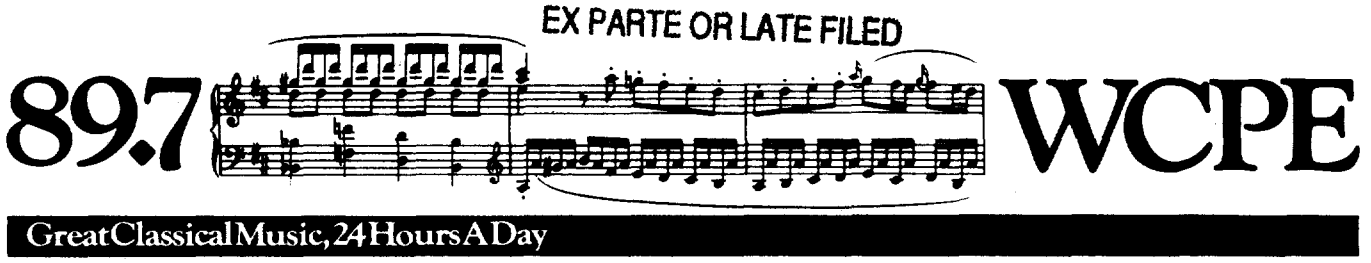

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 11, 1999

Ms. Judy Boley
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Ms. Boley,

Enclosed please find a copy of our formal comments in reference to FCC 95-79; 60 FR 15275; *"Reexamination of the Comparative Standards for New Noncommercial Educational Applicants"*; MM Docket No. 95-31.

We understand that our previous comments on this matter (which were submitted to the Commission on August 25, 1997) have been included in this proceeding, and we appreciate this action.

Sincerely,

Deborah S. Proctor
General Manager

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MAR 16 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	FCC 98-269
	)	
REEXAMINATION OF THE COMPARATIVE	)	
STANDARDS FOR NEW NONCOMMERCIAL	)	
EDUCATIONAL APPLICANTS	)	MM Docket No. 95-31

Additional Reply Comments of EDUCATIONAL INFORMATION CORPORATION

Summary

1> It has been previously determined that the criteria used to evaluate competing applications for new Non-Commercial Educational (NCE) applicants were vague and difficult to apply. Educational Information Corporation (EIC) strongly encourages the Commission to retain the services of Administrative Law Judges (ALJs) and believes that an ALJ's judgement is superior to an arbitrary point system or random chance. The Commission is charged to protect public radio, and we feel there are sufficient ALJ's freed from the recent revision of the commercial hearing process to handle this load. There should be comparative standards for the Commission, and among these should be guarantees to originate more local programming, to maintain local production facilities, to demonstrate reliable service, and to demonstrate substantial public support for the proposal. The Commission should also review each applicant's history of cross-filing. *Spectrum Efficiency* has been quantitatively defined by the Commission and we propose comparative standards to help select the proposals which are more spectrum efficient. The Commission should take steps, within the resources available to it, to ensure that the limited resources of the NCE band are allocated in such a way that benefit to the public is most likely. In the event of closely qualified applicants, the population affected by the decision should be given the opportunity to comment, and public interest and convenience factors should be deciding.

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Discussion

2> EIC truly hopes that the final result of FCC's proposal will equitably and fairly benefit small NCE entities seeking a new or modified NCE broadcast facility by reducing and simplifying the administrative burdens associated with the comparative hearing process and will reduce such requirements by eliminating or simplifying litigation involved in adjudging mutually-exclusive applications for a new NCE broadcast facility.

3> However, when the Commission proposes replacing a litigation process with a point system, or with a "**Point-Weighted Lottery**" (lottery) (ref 3) to determine the "winners" of licenses, the benefits and merits of an investigative litigation process seem laudatory and highly desirable by comparison.

4> Given the option of a point system, the uncertainty of lotteries, or the experienced examination by Administrative Law Judges (ALJs), EIC strongly encourages the Commission to retain the services of ALJs as being a superior solution. The judge can listen, ask, and draw fine lines and specific distinctions in finding a preponderance of the public interest. The ALJ can make decisions based upon fine details and looking beyond appearance; the judge can ask questions and subpoena evidence; the judge can use his experience and his past knowledge and his wisdom in deciding cases where the balance is close. <u>That's what judges are for!</u>

5> The Commission is charged to make decisions which best serve the public interest, convenience, and necessity. This is especially true with NCE allocations. Using a lottery, even with weighting, as the instrument in the allocation of the nation's public broadcasting channels, would add randomness to the process and would not be in the spirit of the enabling

legislation of the Commission itself, and more importantly, would be poorly received by the citizens who hold public radio and public television in high esteem.

Statement of EIC's Interest in the Proceeding

6> The Educational Information Corporation (WCPE) owns and operates WCPE Radio, licensed to Raleigh, North Carolina. WCPE Radio was the lone applicant in a minor-change proceeding beginning in January of 1993 but suffered a cross-filing in 1996 by an applicant whom we feel has a questionable history of conduct. The resolution of this situation remains pending. WCPE believes that issues of commingling of commercial and non-commercial broadcasting interests, individual family control of NCE licenses, the creation of mutually exclusive situations to *warehouse* spectrum, multiple applications, and multiple extension abuses have occurred. WCPE requests that the Commission act to prevent such abuse of process in this proceeding. WCPE measures 142,000 people in the area which we would like to increase our signal strength. (ref 6a) WCPE requested a waiver for regulation which is now recognized as outdated (ref 6b) but none-the-less our Petition for Reconsideration was denied. (ref 6c) While our Petition was active, WCPE failed to receive cross-filing protection which allowed the mutually exclusive filing. WCPE faces the possibility of being drawn into a comparative determination. **WCPE feels that the system should not have permitted a cross filing to have been made while our Petition remained viable.**

7> We doubt if public radio and television users would approve of the use of chance or lottery to determine which public broadcasters are allowed to serve their communities. While chance **might** be the last resort in cases where essentially **identical** applicants apply for essentially identical **new** facilities, **chance should not be used to determine the relative merits of applicants with substantially different histories of past public service, local involvement, upgrade of existing operating facilities, competitive applications, and**

failures to construct. The Commission should take extra special measures to evaluate the history and character of those to whom it entrusts the exclusive use of the public airwaves.

Procedural Ramifications

8> **Modification of Pending Applications to Conform to New Comparative Criteria Should be Disallowed:** With respect to the procedural ramifications of applying a revised comparative analysis to pending cases, it would not be appropriate to permit applicants in pending comparative cases to amend their proposals in light of any newly-adopted comparative standards. In the well-known Bechtel case, the court noted that many applicants would simply amend their applications to position themselves better, with no real intent to carry out their promises. (ref 8) If a point system is used to award public radio and television licenses, we believe the Commission will ultimately regret the additional "mistakes" a chance-system will inevitably allow to occur.

9> **Example of Abuse:** EIC has been told of one commercial situation within 100 miles of our location, decided by the bingo machine, where a minority employee of an applicant was offered a directorship on a proposed station's governing board so that his minority status could increase the number of ping-pong balls placed into the Commission's bingo machine. The gentlemen declined on moral grounds and left the station instead, moving to another state, and ultimately finding a job as a program director. Although we must present this as hearsay, EIC believes that abuses like this exist, and believes this example to be factual. It is simply too easy to maneuver a point system, load the dice and stack the deck, and fool a bingo machine. The Commission must choose criteria which cannot be manipulated or "stretched", and the Commission must conduct periodic reviews to ensure that a station which claimed that it would fulfil a specific criteria actually did, and continues to, fulfill such criteria.

10> **The Commission Must Protect the Radio Spectrum Reserved for Public Radio:** We are very concerned and quite worried that the Commission is seriously considering a "ping-pong ball, bingo machine" lottery approach, and we can only hope the Commission will re-evaluate this stance and discard it in place of trained and capable Administrative Law Judges, at least as far as public broadcasting is concerned. There is a much smaller percentage of NCE stations to consider (ref 10) and we feel there are sufficient ALJ's freed from the revision of the commercial hearing process to handle this lighter NCE load. The Commission should consider that even if the preponderance of evidence clearly shows that one applicant is better qualified in a particular comparative situation, the lottery method could still select the applicant who just met minimal procedural guidelines, and was in fact, the least qualified of the lot. In commercial broadcasting, the Commission could use the rationalization that "market forces" would ultimately correct the situation, but this is a spectrum held in reserve for the nation's public broadcasting. Factors of chance should be eliminated to every extent possible in the NCE comparative process, otherwise the FCC itself is failing to meet its mandated responsibility.

11> **If It's Already a *Done Deal*:** If the Commission has pre-decided to use a lottery system, and will not reconsider the value of trained professionals guarding the comparative distribution of the limited resources of our public broadcasting bands, the public convenience and interest will suffer and confidence in the Commission will wane. Some already feel that certain Commission Notices of Proposed Rulemakings and Requests for Comments have predestined outcomes, and comments are futile -- this greatly undermines the respect for the Commission. EIC already feels confused, frustrated, and saddened by the way we feel the system has failed to work in our case, and we felt obligated to bring these problems up for independent review. We plead with the Commission not to award non-commercial spectrum with a lottery system. But as we fear such a system may come to pass, we ask the

Commission to fully investigate as many aspects of the comparative process as possible when deciding between mutually exclusive applicants and awarding *points*.

With the specter of a bingo machine and a point system being under serious consideration by the Commission for its use to determine the ultimate fate of 142,000 people to be allowed to receive (or not to be allowed to receive) a better signal from our public radio station, we respectively propose the following comparative criteria for the Commission's consideration:

Eligibility for Point and Chance Consideration

12> **Use Lotteries for Similar Situations, ALJs for Dissimilar Situations:** The Commission should limit the use of lottery techniques to conclude the award process only for substantially similar situations, as has been the case with Instructional Fixed Television Services, Low Power Television Services, and related services. In these cases, all the applicants seek construction permits for new stations out of a limited spectrum pool. These are new services, and there are no existing operators or existing stations. This situation lends itself to a chance determination if share-time agreements or similar cannot be reached by the applicants. (We feel that share time agreements should still be allowed if all parties agree.) Likewise, the Commission should only use chance consideration techniques to judge substantially similar mutually exclusive NCE situations, such as when two or more entities who have substantially equivalent resources, backgrounds, and history, all apply for a new station where none existed. Similarly, if two or more existing and otherwise essentially similar organizations file for mutually exclusive but again essentially similar facilities, all of which would essentially render the same public service benefits, then these same chance techniques may be a reasonable, fair, and efficient way to resolve the situation. However,

EIC feels that no public service organization should be denied the opportunity to plead their case before an ALJ, and dissimilar situations for dissimilar facilities should normally be investigated and decided by a skilled ALJ, rather than chance-selection by a machine. The lower case load in public broadcasting eases the requirements upon the ALJs resources.

Non-Technical Criteria for point Considerations

Note: On each of these comparative criteria suggestions, we prefer that an ALJ evaluate the item. If a point system is to be used, we recommend that a weighted preference be given as noted.

13> **Items Listed in the Commission Request for Reply Comments:** We have addressed in detail many of the items presented in "*B. Other Proposed Criteria*" of the Commission's document, with the exception of these non-technical criteria: **We support:** A preference for the lead applicant; local ties to the community; private funding preferable to governing funding; the lack of a series of multiple technical amendments; and, that the applicant has an established audience. **We are against** the preference of educational institutions in general over educational organizations in general -- we believe the issues should be a) the number of hours during the period of 6 AM to midnight of *instructional programming* (such as adult learning, programs yielding credit for community college studies, etc.) and children's educational programming (like Sesame Street) to be presented, b) the number of hours of educational programming presented, such as news, public affairs, and cultural programs (for example, Masterpiece Theater, opera, drama, and concert performances) rather than, c) general *wide spectrum* entertainment programming (as Are You Being Served?, The Benny Hill Show, or The Eastenders). (ref 13)

14> **Consideration of Paid Staff at each Location:** The applicant which guarantees the larger full time staff at the individual proposed local studio location is to be preferred because the larger staff available to perform a single broadcast service, the better that service is likely to be. If the applicant can demonstrate the ready availability of a substantial number of trained volunteers at each station to assist in providing better service and programming at each location, this should also count favorably.

15> **Consideration of Stations at Schools and Universities with No Paid Staff:** If a station associated with a school uses the station to train students in broadcasting, then the number of man-hours which students participate in the station under consideration should be converted to the equivalent of paid full-time staff who have a salary of zero and considered as staff as in the above paragraph. Non-student volunteers associated with the same station should be considered as in the above paragraph.

16> **Time on the Air; Continuous is Best:** The applicant which guarantees to broadcast continuously, 24 hours a day, 365 days a year, is to be preferred, because a station which is on the air continuously is more likely to be useful to the public than a service which is only on the air a portion of the time. The fact that a station operates around the clock, throughout the year, should be considered an advantage in a comparison against another which does not do so. One may legitimately view a station which goes off the air for a portion of the day as having a "spectrum efficiency" of zero during such times -- it's service area is zero, but it's preclusionary effect to other stations still exists in full.

17> **Origination of Significantly More Local Programming:** <u>The applicant which guarantees to originate significantly more local programming, originating from the local control room of the local studio located in the city of license</u>, rather than importing externally produced network programming <u>is to be preferred</u>. Origination of local programming is

defined as having a live announcer on the premises who hosts the program with live spoken word, selects and integrates the broadcast material fed to the station's transmitter live and in real time, and is present at the location to answer telephone calls from listeners concerning the material broadcast and to be broadcast. A computerized automation system does not meet this definition whether manned or not, nor does a pre-recorded program, nor does a network program feed from another location even if the applicant owns and staffs such other location.

18> **Local Ownership is Preferred to Common Ownership:** *Common Ownership* is a negative to public radio and contrary to the idea behind public radio for the community. Common ownership should therefore be a negative in the NCE comparative process. *Common ownership* is becoming synonymous with *common neglect* -- when a licensee has thirty stations under its effective wing (by using multiple corporations and other such legal maneuvering) it can only be expected to be concerned with centralized programming and generalizations of community needs. Speaking about the relaxation of the multiple ownership rules on our area, the general manager of a state-owned North Carolina public radio station said: "*We're going to lose a lot of local flavor [because of chain stations]. I think the frenzy will continue for quite a while, before long there may be only three companies that own broadcast properties in the Triangle. Then you have an oligopoly in which consumers are less well served.*" (ref 18)

19> **Public Service or Greed?** Too often, commonly-owned so-called "non-profit" public stations are concerned primarily with fundraising. We have documentation of a public radio station with multiple construction permits, and an application for a 50,000 watt remote facility which will have to be fed by satellite (because it's about a hundred fifty miles away from the main studio) which cross-filed against an existing lead application. A local newspaper reported that this station has amassed over $2,700,000 in cash reserves and $2,200,000 in another capital expansion fund. (ref 19a) We have been told by two other

independently related sources that this station is actively offering to purchase any non-commercial **or any commercial station** in the state. A minimum of three existing public FM stations fear that they will suffer serious financial loss by this action, **and one station fears that it may be driven off the air.** (ref 19b) EIC invites the Commission to consider that process of aggressively absorbing existing stations has laughingly been called "*Klingonization*" and each "victory" silences a community public radio voice. (ref 19c)

20> **Independent Stations are Better:** The State of North Carolina, many years ago, pointed out that individual licensees located across the State could serve the people of the State much better than a network of stations stretching out its "*tentacles*" from the center of the state "*like a giant octopus*". With this in mind, the North Carolina Legislature decided against a common radio network and decided instead to allow independent stations providing non-state-network, independent, locally-oriented programming, originating at it's university campuses across the State. (ref 20)

21> **Public Radio doesn't need "*Super-Pumps*":** Community broadcasters, and broadcasters not affiliated with regional conglomerates and national networks, are too well familiar with the falsity of the notion that one central station is better. The local broadcaster, with one station, is by nature inherently more in touch with the communities served than a regional or national organization can ever hope to be. Few will argue that a small single-location local business will not strive to give better service than a large multi-location regional chain. The more super-repeaters waived from the main studio rule there are in a system (or "*super-pumps*" as they are being called by other public radio stations in our area) the less important the individual needs of the individual community become.

22> **Adequate Technical Facilities Must be Provided:** The applicant who can guarantee better equipment and production facilities at each individual station should be

favored; for instance, a station with three fully equipped control rooms is to be preferred over the applicant who only guarantees to provide one or two.

23> **Guarantees and Demonstration of Reliable Service Must be Provided:** The applicant who can guarantee more reliable service, especially by guaranteeing standby electricity, water, and facilities for staff during emergencies and natural disasters, is to be preferred. Existing stations which can document that the station stayed on the air during widespread natural disasters which interrupted normal power and communications facilities should also be considered and weighted in the applicant's favor.

24> **Demonstrated Public Interest and Convenience Issues Must be Considered:** The applicant who can demonstrate the most substantial public support for the proposal is to be preferred. This does mean that the existing applicant has the advantage; the fact of the matter is that any existing applicant has already demonstrated that the market forces which drive public broadcasting have given the applicant the ability and resources to seek to provide better service for its users.

25> **Tie-Breakers and Close Calls involving an Existing Facility Should be Decided by the Public because the Public is the Entity who will Gain or Lose:** The Commission should not decide comparative cases involving an existing facility which require a tie-breaker. The population affected by the decision should be given the opportunity to comment, and the public interest and convenience should be the deciding factor. An ALJ, who is removed by hundreds or thousands of miles from the area in contest, needs to know the preferences and opinions of the people in areas affected by his decision, if he is to have the best chance of weighing the options in close-call situations. The judge will then have the benefit of knowing more about the public desires and needs, and this information will be available to assist in his

final decision. Therefore, in cases involving existing facilities, the people affected by the decision should have a voice and representation in the comparative process.

26> **There is an Important Place for an Administrative Law Judge:** An ALJ should be available to oversee every comparative case for a NCE facility (unless all parties agree to the point and/or lottery system) and the ALJ should use his or her expertise to investigate every claim by every contestant, and should have full use of every investigative and discovery power legally available to him. There must be one professional who is impersonal in the matter and "wise" to the tactics of those who would seek to subvert the system. Those applicants who are honest and have nothing to hide have no reason to fear a through investigation by a skilled and wise ALJ. The Commission should not have to bear the costs of the ALJ or the process and it need not. The cost of the proceeding should be borne by the contestants if they cannot resolve their exclusivity problem after receiving their "60 day letter" from the FCC asking them to resolve their mutually exclusive situation by themselves.

27> **Programming Should be Directed to the General Public:** In the event that a mutually exclusive situation develops between a applicant which guarantees to broadcasts programs to the general public and an applicant which espouses a particular philosophy, such as proffering religious or partisan viewpoints, the Commission should always award the grant to the station which programs non-partisan programming. By it's very nature, religious or partisan programming serves only a portion of the public; the soundness of this position is reflected in practice by a multitude of federal and state agencies which decline assistance to such stations from the Corporation for Public Broadcasting (CPB) nationally, through the North Carolina Agency for Public Telecommunication (NCAPT) in our state. (ref 27)

28> **Fewer Stations are Better, Single Station Operator versus Multiple Station Operators:** In a contest between a multiple station operator and a single or small-number

station operator, the applicant which operates a smaller number of stations, and is thus permitting greater proportional attention to the needs of each station's individual overall audience, should be preferred. In cases where applicants operate translators which have an ERP greater than that specified in Paragraphs 74.735 or 74.1235 (so called "*super-translators*") these larger facilities (often operating under waiver of the main studio rule) should be counted as multiple stations.

29> **Existing Stations are Better Bets -- Upgrades versus New Stations:** It is well known that support of public radio stations is declining, and many public broadcasters are either selling facilities or going silent. Although the total number of NCE stations on the air is increasing, the data shows that **the number of stations going off the air is increasing faster than the number of stations in total.** Therefore, newer stations are more likely to fail than existing stations. (ref 29) An applicant who proposes to upgrade an existing station, rather than an applicant who proposes to create a new station, is to be preferred. When faced with a mutually-exclusive situation between a proposed non-existent NCE facility, and an existing NCE facility upgrade, the existing facility should therefore be favored, as the upgrade would enhance the ability of the existing station to continue operations.

Abuses of Process

30> **Excessive Cross Filings:** Some organizations which hold significant NCE and commercial broadcast interests have been involved in an unusually disproportionate number of cross-filings. When the purpose of multiple applications is partially to secure a "range of options" or to "warehouse broadcast spectrum" or to "stop the expiration clock", such activity serves little purpose other than to increase the number of comparative hearings and to delay legitimate organizations the ability to the FM allocation which they need to serve the public.

31> **Warehousing:** Moreover, it has been the case that the primary purpose of a cross-filing was to delay the broadcast operations of a potential competitor, seek monetary or other gains, or to "warehouse" multiple applications to be saved for possible use in future periods. We spoke with a NCE broadcaster who is involved in several self-caused mutually-exclusive situations. When asked why he had a specific construction permit for six years yet failed to begin any construction, and cross filed to stop his expiration clock, he quickly replied: "***That's not illegal!***" (ref 31)

32> **Eliminate Cross-Filings as a "Maneuvering Tactic":** Such schemes and maneuvers were not contemplated when the regulations for NCE stations were codified. Therefore, the following suggestions are offered to lessen the incentive for a such an organization to cross-file on an existing applicant, therefore:

a) The Commission should not accept an application for changes to a non-operating facility which by the modification causes a mutually exclusive situation to another NCE application of an operating NCE broadcast facility. The option to upgrade an existing facility should take priority over the option to upgrade a proposed but non-existent service.

b) The ability to cross-file should not extend the time given to construct the facilities granted in the original construction permit -- in other words, cross-filing should not "stop the clock" (or worse -- *reset the clock*) for required completion of construction. We recommend that any request which has been given an extension in time by virtue of a cross-filing be dismissed.

c) The Commission should hesitate to grant an application to any organization which cross-filed on another applicant for a NCE facility if the

organization or any member of the organization which cross-files, owns any interest in any commercial broadcast facilities.

d) The Commission should hesitate to grant an application to any organization which cross-filed on another NCE applicant for a NCE broadcast facility if the corporation which cross-files, or a board member thereof, owns, or is a board member of, a corporation which owns a significant number of NCE broadcast outlets and/or construction permits and/or applications.

33> **Holding Periods:** We disagree with the idea of a "holding period" as a reliable method of "weeding-out" speculators -- some speculators can have great patience when they have nothing to lose by waiting! The Commission can check its records and find that certain applicants have over a hundred years of cumulative extensions! We feel the past history of actions of such applicants should be given close scrutiny. If the applicant has a history of multiple filings, delays in construction and multiple extensions for granted applications, and multiple "drop-in" applications with unique and customized directional pattern requirements, this should indicate to the Commission that the applicant may simply be seeking open frequencies for the opportunity of increased overall coverage area, without regard to the particulars of the location or the population living therein. If the defending applicant is an existing community broadcaster, with existing "roots" to the communities to be served, it is more likely that such service will continue to be rendered to the public at large by a grant to the existing broadcaster, despite what the Court said in the case of Bechtel. (In that proceeding, we feel that the criteria which the Commission used to preferentially assign broadcast facilities to organizations and individuals having ties to the community was reasonable, fitting, and proper. We feel it was unfortunate that the Commission could not successfully defend this position, and we would invite the Commission to re-visit this issue at some future date.)

34> **EIC's View of Point Systems in General:** We believe ALJs are preferred in most cases, not only because they bring an added element of control to the comparative process, but because precise numerical weighing and mathematical formulations are not only cumbersome but illogical when applied to intangibles, and inappropriate when applied to NCE licensing situations. Assigning points to promises made by applicants for proposed facilities vying for position is likely to be fruitless; it is akin to asking a student if he cheated on his exam -- you'll be told of course he didn't whether the student is honest or not. Promises of future actions and service will be soon forgotten after the license is "won". The Commission is going to have to look at the past history and the proven track record, or lack thereof, to make any reasonable judgement of future performance. *Such may be cumbersome, but necessary.* Much of the burden can be placed on the applicants themselves -- each should be given the ability to research fully the complete financial and business history of the other, and present findings to the Commission at time of review with documentation, and with the right of all parties involved to, **with the oversight of the ALJ**, subpoena information and explore for the facts -- after all, any non-profit organization is funded by public money and operates on a channel owned by the public -- there are no such thing as corporate secrets in organizations which are trustees of their donations and the NCE spectrum. (We have what we call "*The Barbara Walters' Rule*" -- be ready at any time for Barbara Walters to walk in with her cameras and want to take a look at your whole organization.) Again, we encourage the Commission to make use of the value and talents of experienced Administrative Law Judges to ferret out the true facts and worthiness of all.

Discouraging "*Really-For-Profit* Non-Profit" Schemes

35> **Abuse of the System:** We fear that more and more profit-motivated individuals and families are applying for NCE facilities by incorporating and filing under non-profit auspices. It is simply too easy to get non-profit status from the IRS; in 1978 there were at least

504,510 non-profit organizations in the United States; in 1985, the number rose to 839,843. (ref 35a) Almost 700,000 charities and private foundations were registered with the IRS just in 1998 alone! (ref 35b) *True* community radio -- as can happen when several unrelated individuals incorporate and operate a NCE station as a community broadcaster for the true benefit of the community, is a laudable practice. But sometimes, several closely-related family members form a tightly-held corporation, such as a husband holding 51% voting rights, a wife holding 25% voting rights, and child holding the remaining 24%; or there are several unrelated individuals on the organization's Board of Directors, but one of them holds 100% of the voting rights. (ref 35c) When such entities apply for and receive non-profit status, and then seek NCE broadcasting allocations in locations quite remote from their residences to the exclusion of local community groups, we feel a great concern. Add the fact that these stations claim to be educational in nature (we have seen a case with a one-sentence program statement in it's FCC application) and that they solicit the public for tax deductible gifts, and our concern increases. (ref 35d)

36> **A Family Business:** Individuals and "family-held" organizations were not contemplated when the regulations for NCE stations were codified, and the relaxation of the regulations permitting unlimited number of stations owned by one individual have caused a glut of applications to be offered to the Commission. One individual with which we are cognizant, is involved with over thirty stations, a dozen organizations, some non-profit, some commercial enterprises. We do not think this is what the Commission envisioned when it said: "*A non-commercial educational FM broadcast station will be licensed only to a non-profit educational organization and upon showing that the station will be used for the advancement of an educational program.*" (FCC Paragraph 73.502) The Commission need only turn on the television to see a glut of individuals posing as righteous messengers of the Deity and selling indulgences and hope to those in despair. The Commission should reflect on the fact that its seal was on the broadcast licenses of individuals like Jim and Tammy

Bakker. What can the Commission do to lessen the chances that the same mistakes will be made in the future? We feel that the oversight of an ALJ would, in comparative cases now before the Commission, likely prevent the deception caused in the past by families like the Bakkers. (ref 36) It's not that hard to sense when someone is "*Stealin' in the Name of the Lord*", as the song goes.

37> **Reversing the "for profit Non-Profit" Trend:** We suggest that any comparative standards which the Commission adopts should ensure that:

a) No new NCE license should be granted to any individual. A previous license should be ineligible for renewal if cross-filed upon at renewal time.

b) No new NCE license should be granted to a for-profit entity. A previous licenses should be ineligible for renewal if cross-filed upon at renewal time.

c) No new NCE license should be granted to any entity which has fewer than three board members, none of whom may be related by blood or marriage. Any previous licenses should not be eligible for renewal if cross-filed upon at renewal time.

d) No new license of a NCE broadcast facility should be granted to any organization which has a board member who controls more than 33-1/3% of the corporation's voting rights, or has two or more board members who are related by blood or marriage and together control more than 33-1/3% of the corporation's voting rights. Any previously granted licenses should not be eligible for renewal if cross-filed upon or petitioned to deny at renewal time.

Public Service Ability During Disasters Should be a Requirement

38> **Full Service Emergency Power:** The availability of full service emergency electric power at the studio site, any and all relay sites, and the transmitter site, allowing the facility to operate around the clock with full facilities and full power despite failure of commercial power sources, should definitely be retained as a comparative criterion. Any NCE applicant who truly wishes to serve the public will budget for full standby capability. Those who are not willing to do so are only "fair weather broadcasters" and, in a comparative situation, should not be favored.

39> **An Example:** EIC installed emergency power at substantial cost to serve its studio, its interconnecting sites, and its transmitter site. Recently, Hurricane Fran struck North Carolina, and caused what local and national emergency management officials have determined to have been the most widespread power outage ever in the history of the United States. (ref 39) Six hours before the hurricane passed over each area, widespread power outages began. We lost commercial power at approximately 9 PM (it remained off into the next week). We were back on the air in less than one minute, our generator consuming one gallon of diesel fuel every five minutes to keep our station running at full power. During the hurricane itself, and for several days after, our station was the only audible broadcast signal in much of the disaster area. Out of sixty stations normally audible in the areas, only five remained on the air during the hurricane and for several days thereafter (one was only able to rebroadcast a TV station's audio; it's studio remained without emergency power).

40> **The Proof is in the Pudding:** Our station was the only public radio station anywhere in the hurricane area to remain on the air. (The President later declared the eastern two-thirds of the State to be an official Disaster Area.) Every other public radio broadcaster from the coast to the piedmont went off the air and was useless to the public even before the

hurricane crossed their broadcasting territory. Even the Emergency Broadcast System malfunctioned and was NOT on the air, a pre-recorded talk program was being played on the only full service AM station in the area (one of the very few outlets to remain on the air) and the State Emergency Preparedness authorities directed their updates towards our station via amateur radio. Several members of the public contacted us later to state that our emergency information was responsible for saving their lives, and we received official Commendations from the Governor of North Carolina and from the North Carolina Division of Emergency Preparedness. (ref 40)

41> **In Real Emergencies, a Standby Generator and Sufficient on-Premises Fuel is Mandatory:** At a time when telephone lines go down, when telephone offices shut down for days because their batteries run out (as happened here), battery operated radios and car radios are the only method of communicating with the public at large -- the pre-planned ability for a public broadcaster to stay on the air during disasters is one of the highest forms of public service. A station must have the ability to receive and transmit emergency information.

> "*Needless to say, in the aftermath of Fran, you were our main contact with the outside world for five days. Many thanks for being there with your generator.*" (Pat Stalder)
>
> "*Your all-night broadcasting was the only thing that kept me from panic during Hurricane Fran. I was alone in the dark listening to the tree limbs bang against my home in that terrifying wind all night long. I was grateful for the music as well as the periodic weather updates. Somehow, I felt connected with the human race because of your announcer's voice.*" (Anne Scoggins)
>
> "*Our sincere thank you for your heroic efforts during Fran. WCPE was about the only signal on the air during the worst hours. Thank you again.*" (Peggy and Bob Adams)
>
> "*WCPE and the team of volunteers deserve special thanks from the listening community. The performance of the station throughout Hurricane Fran, plus your foresight in having an emergency generator, is public radio at its best.*" (Charles and Shirley Weiss)

42> **Life and Safety Issues:** Not to include full-backup multiple-day emergency power in the comparative decision making process is a disservice to the public. It should be

considered that any desire to remove emergency power from the comparative process may be spawned from the fact that applicants must pay the full cost for emergency power equipment, because many government funding agencies cannot consider a financial grant towards such equipment because of their limited resources. Any applicant not willing to make such a financial commitment to their prospective listeners is little-qualified to participate in a comparative process as **the availability of emergency power is a life and safety issue.**

Coordination with Local and State Agencies and Organizations

43> **Coordination with Statewide Plans and Local Organizations:** The Commission should examine which applicant will best integrate the station operations with the area's educational and cultural objectives. If there is a state agency concerned with public telecommunication, the Commission should seek the opinion and feedback of that state agency. In this regard, the Commission should examine which applicant will best integrate the station operations with the state's desired educational and cultural objectives. The Commission should examine which applicant presently has a reasonable process in place to determine educational and cultural needs, and has tangible evidence of having proposed services and objectives that will meet identified community needs. If any applicant is not eligible to be included in the State's public radio plan or public radio advisory group, that applicant should be disqualified from any comparative process.

44> **Public Radio and Television should mean Just That -- Directed to the Public at Large:** The Commission should favor the applicant which has objectives directed outwardly to the community of license, not exclusively to the purposes of the licensee, such as propagation of a particular philosophy or religious or political viewpoint.

45> **History of Past Timely Construction:** The Commission should examine which applicant has brought prior facilities to operation in the least time. The cumulative number of extensions requested by the applicant for all stations owned or controlled by the applicant should be considered.

46> **Guarantee of Quickest Construction:** The Commission should examine the amount of time which each applicant can guarantee their proposed facilities will be completed and actually begin broadcasting. The applicant who can guarantee the minimal time, with forfeiture of the construction permit without the possibility of a time extension as a requirement, should be considered. (The Commission may want to give special consideration to "community" licensees who are proposing a facility for their area of residence, and who do not hold any other broadcast licenses.)

47> **History of Cross-Filings:** The Commission should review the number of cross-filings which each applicant participated in, especially considering how many cross-filings occurred in which the applicant did not have the lead application. The applicant causing the fewer number of cross-filings should be considered.

48> **Demonstration of Financial Ability to Construct:** The Commission should require each applicant to demonstrate that all outstanding applications (both commercial and non-commercial) can be financed and operated for a period of at least six months without any new revenue whatsoever. Every request for modification should contain a complete financial fitness and capability exhibit (currently, this is not required). "Pledges" should not be considered -- even the personal assets of board members are no better than poker chips which haven't been cashed in. No law requires that promises of gifts for unconstructed facilities need be fulfilled. We recommend that all applicants for mutually exclusive facilities be required to demonstrate financial ability as proposed, when proposed. If a board member has

enough personal assets to guarantee the construction and operation of a facility in a comparative situation, then to count in the comparison, those assets should be irrevocably transferred to the non-profit organization, and irreversibly committed to be spent on the facility's construction. Those who cannot adequately do so should have the conflicting application dismissed.

49> **Demonstration of Commitment to Public Radio:** Applicants who only participate in non-commercial public broadcasting should be considered over applicants who hold both commercial and non-commercial broadcast facilities.

50> **Diverse Governing Board:** Applicants whose boards have an individual with more than 33-1/3% voting rights, control of stock, and so forth, or boards substantially under the control of one closely-related family by blood or marriage, or a closely-related family of corporations controlling similarly-related broadcast concerns exceeding 33-1/3% of control or ownership, should be dismissed from any comparative determination.

51> **Limited Broadcast Interests:** Other than government-owned institutions specifically chartered by their enabling government body for the specific purpose of operating public broadcast stations, applicants who hold two times or more construction permits and/or licenses than the competing party, should be dismissed from consideration.

52> **Personal Financial Motivations:** The overall composition of, and amounts of compensations given to, members of the applicant's board of directors (for all broadcast properties held) should be thoroughly examined and available for inspection by all competing for the facility in question. Both the financial ability to construct the proposed facilities, and the financial motivation for desiring the facilities, are very relevant factors to be investigated.

Optimum use of Limited Spectrum

53> **Spectrum Efficiency:** Spectrum efficiency is a major issue of concern. *Spectrum Efficiency* has been defined by the Commission as the ratio of the service area (the listening area) of the station to the interference area of the station (the area over which the station cannot be heard, but retains the ability to cause interference to other stations). Past Commission calculations have determined that omni-directional operation at the highest power and antenna height possible provides the best spectrum efficiency. That is, as power and antenna height increase, the service area of a full power, full height, non-directional station increases faster than the interference area. Therefore, the following is offered to help determine the spectrum efficiency of competing applications:

54> **Higher Power Operation Preferred:** Proposals which anticipate utilizing significantly higher power are inherently more spectrum efficient, and to be preferred.

55> **Expansion of Existing Stations Preferred:** Proposals which do not increase the number of public stations but rather increase the operating parameters of existing stations are inherently more spectrum efficient, and to be preferred.

56> **No Co-Channel Short Spacing:** Proposals which have no short spaced co-channel concerns or protections are inherently more spectrum efficient, and to be preferred. Proposals which limit nearby existing and operating stations on its co-channel frequency from the potential of expanding should receive negative weighting.

57> **No First-Adjacent-Channel Short Spacing:** Proposals which have no short spaced first-adjacent-channel concerns or protections are inherently more spectrum efficient, and to

be preferred. Proposals which limit nearby existing and operating stations on first-adjacent-channel frequencies from the potential of expanding should receive negative weighting.

58> **No Overlap with Second- or Third-Adjacent Protection Contours:** Proposals which do not place their 100 dBu contour over the protected contour of a second- or third-adjacent station are to be preferred. Proposals which limit nearby existing and operating stations on second- or third-adjacent channel frequencies from the potential of expanding should receive negative weighting.

59> **Highest Center of Radiation:** The higher a transmitting antenna is, the more inherently spectrum efficient it is. Proposals which anticipate using antenna with a significant height above average terrain are to be preferred.

60> **Use of "Mild" Directional Antenna Characteristic, Ratio:** Proposals which anticipate utilizing directional antennas with "mild" directional ratios (maximum power to minimum power) are to be preferred over proposals which approach the maximum directivity permitted by the Commission.

61> **Use of "Mild" Directional Antenna Characteristic, Slope:** Proposals which anticipate utilizing directional antennas with "mild" directional slopes are to be preferred over proposals which approach the maximum slope permitted by the Commission.

62> **Use of Non-Directional Antenna:** Proposals which anticipate utilizing non-directional antennas (except to limit power which would otherwise be wasted over the Atlantic Ocean, the Pacific Ocean, the Gulf of Mexico, and land areas such as deserts which are forecasted by the US Census Bureau to have *de minimis* population density) are inherently more spectrum efficient, and to be preferred over any directional proposal.

Conclusion

63> **FCC Licenses are a Limited Resource:** In closing, the Commission should take steps, within the resources available to the Commission, to ensure that the limited resources of the NCE band are allocated in such a way that the maximum benefit to the public is most likely. If this means that a human being must act as a judge to individually hear cases, then such best suits the public interest and convenience, and such should be the continued practice of the Commission.

64> **The FCC has a Duty to Perform:** The Commission is charged with protecting the public necessity, serving the public interest, and accommodating the public's concern. Especially in the case of Public Broadcasting, the Commission cannot consider expedience as an administrative "out" -- the Commission must consider what it can do to best fulfill it's obligations under statute. We assert that this means the Commission is required to continue comparative hearings of mutually exclusive non-commercial educational cases using administrative law judges with wisdom, knowledge, savvy, and the legal ability to subpoena witnesses, secure records and date, and investigate the facts.

65> Anything less is a disservice to the public.

For the Educational Information Corporation, on this, the 12 day of March, 1999.

Deborah S. Proctor, BSEE, CPBE

General Manager, WCPE

President, EIC

References and Credits and Notes

3> The Commission is considering using random selection of numbered ping-pong balls to determine the "winners" of NCE spectrum. Even though the selection would be weighted by some factors, this method adds randomness into the consideration and less ensures that the applicant better suited to operate the station receives the grant.

6a> Population study by RF Projects, Inc., Cary, North Carolina, an independent engineering firm. The Commission calculates 10,000 people, using a different counting method and qualification criteria.

6b> EIC has asked for a waiver of the second-adjacent-channel NCE standard (80 dBu) based upon the fact that the commercial standard is 20 dB higher (100 dBu). The waiver request was for less than 2 dB (81.6 dBu) which could have been considered *de minimis*. The Commission effectively confirmed the validity of EIC's position in MM 98-93 (FCC 98-117, June 15, 1998) "1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules" stating: "*Although both commercial and noncommercial FM interference standards are derived from a common methodology, the commercial rules use a less preclusive 100 dBu interfering contour to calculate minimum distance separations for stations operating on second-adjacent frequencies. We propose to eliminate the inconsistency between the commercial and non-commercial station interference protection standards. Based on our licensing experience in the commercial FM band, we believe that this preclusive standard better identifies areas of potentially degraded or lost service within a station's protected service area caused by another station operating on a second adjacent channel. We also believe it would afford certain FM educational and translator stations an opportunity to increase power and service, and provide flexibility to relocate facilities. In addition, the proposed change would permit some stations the opportunity to increase effective radiated power and, therefore, coverage at a relatively low cost.*"

6c> On June 16, 1998 -- One day after release of the text in the above note -- the FCC denied the WCPE Petition. (The denial was not released by the FCC until October 8, 1998).

8> *Bechtel v. FCC*, 10 F3d 875 (DC Cir 1993)

10> According to the M Street Journal dated November 11, 1998, there are 12,641 radio stations, of which 2,247 are non-commercial, the remaining are 10,394 being commercial stations. According to the FCC as of January 31, 1998, there are 12,241 AM and FM stations, of which 1,934 are non-commercial; and, there are 1,509 TV stations, of which 367 are non-commercial. Thus, on the average, the ALJ's load will have been reduced by about 80% by using the lottery system for the commercial contests.

13> The currently deleted FCC paragraph 73.112 had a note associated with it which gave very good descriptions and definitions of instructional, educational, and entertainment programs. This note's definitions may prove useful in certain comparative determinations.

18> Quote in the Independent magazine, Raleigh/Durham, NC, June 19, 1996.

19a> Information from article published in the Independent magazine, May 6, 1998.

19b> Documentation will be given on a confidential basis at the Commission's request.

19c> Statement made at an open meeting of the North Carolina Public Radio Association, held in Asheville, North Carolina, on August 10, 1995.

20> From a report to the University of North Carolina written by Mr. Don Trapp, a researcher, public radio advocate, and State employee.

27> The CPB funding qualification requirements ("*Eligibility Criteria for 1998*") clearly states: "*A program schedule designed to further the principles of religious philosophies does not meet the definition of this criterion.*" and "*Stations licensed to political organizations do not meet the definition of this criterion.*" The NCAPT regulation is written to mirror and reflect the CPB criteria (NC Statutes, Part 22, Paragraph 143B-426.12).

29> According to the M Street Radio Directory (8th Edition) 4 NCE radio stations went off the air in 1989, 2 in 1990, 23 in 1991, 23 in 1992, 23 in 1993, 40 in 1994, 34 in 1995, 29 in 1996, and 26 in 1997 (the last year for which data was published).

31> From June 10, 1997 interstate telephone call made by EIC to party described.

35a> Howard L. Oleck, Nonprofit Corporations, Organizations, and Associations, pages 30-35, Prentice-Hall, Inc., ISBN 0-13-623380-5.

35b> Chronicle of Philanthropy, March 11, 1999.

35c and 35d> Such applications are currently on file with the Commission for stations requested in central North Carolina.

36> This author was employed at a TV station (then WRDU-TV channel 28, in Durham, North Carolina) which the Bakkers' rented out for a telethon back in the early 1970s. The station had placed a black tarp over construction materials which had been moved out of the way for the event. When the telethon started, the author was behind the tarp looking for some masking tape and saw one the crew go to a telephone in the film library directly adjacent, and heard the crew member say over the phone "*We're on; start the phones ringing!*" It was unforgettable; the whole telethon seemed a money-making sham.

39> This includes Hurricane Hugo in 1989 and Hurricane Hazel in 1954. In some areas, every single person lost electric power. It took a full week or longer to restore power to most households and businesses. (North Carolina Electric Cooperative, Carolina Country, November, 1996)

40> Certificate of Appreciation to WCPE-FM for continuous coverage during and following Hurricane Fran by Governor James B. Hunt, Jr. Another Commendation was given to WCPE Radio by the North Carolina Division of Emergency Management, by Billy Ray Cameron, Director, for the same service.

General Standards to Qualify for Comparative Contests

Note: We feel failure to meet any of these basic qualifications should be considered negative factors or cause an applicant to be dismissed from the comparative process:

18> **Local Ownership is Preferred to Common Ownership:** We recommend that the Commission find a method (despite the Bechtel case) of considering local ownership, local ties to the community, local representation on the board of directors, local residence of station principals, and local program origination and main studio as a preferred comparative factor. For instance, if at least one member of the board of directors does not live in the community of license, the applicant should be dismissed from the comparative process.

29> **Fewer Stations are Better:** We recommend that any non-existent facility be deleted from consideration in a comparative process, unless all contestants are applying for new facilities.

32> **Eliminate Cross-Filings as a "Maneuvering Tactic":** b) We recommend that any request which has been modified thereby causing a mutually exclusive situation where the original request was not mutually exclusive, be dismissed from the comparative process.

42> **Life and Safety Issues:** We recommend that any applicant who will not provide full emergency backup power (with not less than three days of fuel on premises) for the entire facility proposed be deleted from consideration in a comparative contest. This emergency backup capacity should also be able to operate all tower obstruction lights and safety features in 100% compliance with the FAA safety requirements.

43> **Coordination with Statewide Plans:** If any applicant is not eligible to be included in the State's public radio plan, that applicant should be disqualified from any comparative process.

48> **Demonstration of Financial Ability to Construct:** The applicant who cannot construct and operate all pending facilities should be dismissed from any comparative process.

50> **Diverse Governing Board:** Applicants who have any individual or family with more than 33-1/3% control should be dismissed from any comparative process.

51> **Limited Broadcast Interests:** Other than government-owned institutions specifically charged with the creation of a statewide network by the governing body of the state, applicants who hold two times or more as many construction permits and/or licenses than the competing party should be dismissed from any comparative process.

55> **Expansion of Existing Stations Preferred:** We recommend that existing stations be allowed to construct in preference over the creation of new stations, as long as the area which would have been served by the new station is served by at least five other aural services, at least one of which is a public station and may be the existing station's proposal. In such situations, the new applicant would be dismissed from the comparative process.

Weighting of Applicants

14> **Consideration of Paid Staff at each Location:** We recommend that each full time staff member at the location in consideration increase the station's weighting. We recommend that part-time staff hours and documentable volunteer hours for the past year count proportionately.

15> **Consideration of Non-Paid Staff and Volunteers at School Stations and "Community" Stations:** We recommend that non-paid staff and volunteers of school and university stations, and "community" stations, be proportionally considered as paid staff for the purposes of weighting.

16> **Time on the Air:** We recommend that the gross weighting of each applicant be adjusted by the percentage of time they will be on the air with regular programming during the 8,767 hours of the full calendar year.

17> **Origination of Significantly More Local Programming:** We recommend that the gross weighting of each applicant be adjusted by the percentage time which programming originates from the local control room.

22> **Adequate Technical Facilities Must be Provided:** We recommend that a rough facilities comparison be used to award weighting to each applicant based upon the documentable value of the proposed facility.

24> **Demonstrated Public Interest and Convenience Issues Must be Considered:** We recommend that public comment from residents in the proposed coverage area of the proposed stations be considered in the weighting.

28> **Fewer Stations are Better:** We recommend that the number of commercial and non-commercial stations owned or controlled by the applicant should decrease their gross weighting total.

44> **Public Radio and Television should mean Just That:** The Commission should favor the applicant which has objectives directed outwardly to the community of license, otherwise, the gross weighting of the applicant should be reduced.

45> **History of Past Timely Construction:** We recommend that the total number of extensions for time to complete stations yet to be constructed by each competitor reduce the weighting given to each competitor.

46> **Guarantee of Quickest Construction:** We recommend that the applicant who guarantees to construct and operate in the shorter time be given extra weighting.

47> **History of Cross-Filings:** We recommend that the number of past mutually-exclusive filings by each applicant reduce the weighting of each applicant.

49> **Demonstration of Commitment to Public Radio:** We recommend that applicants who have both commercial and non-commercial holdings should have their weighting decreased by the percentage of holdings which are commercial facilities.

54> **Higher Power Operation Preferred:** We recommend weighting be given for the higher proposed Root Mean Square (RMS) Effective Radiated Power (ERP).

56> **No Co-Channel Short Spacing:** If an applicant cannot operate with a class C facility (100 kW at 300+ meters HAAT) in Region II, or a Class B maximum facility (50 kW at 150 meters HAAT) in Region I or IA, we recommend that each co-channel station which must be protected by the applicant's proposal cause the applicant's weighting to be significantly decreased.

57> **No First-Adjacent-Channel Short Spacing:** If an applicant cannot operate with facilities specified in Note 56, we recommend that each first-adjacent-channel station which must be protected by the applicant's proposal cause the applicant's weighting to be decreased.

58> **No Overlap with Second- or Third-Adjacent Protection Contours:** If an applicant does not propose to operate with facilities specified in Note 56, we recommend that each second- and third-adjacent-channel station which must be protected by the proposal under consideration cause the applicant's weighting to be slightly decreased.

59> **Highest Center of Radiation:** We recommend that each applicant be given weighting for the higher center of radiation above average terrain if they operate at the maximum ERP permitted in the Region in which they are located.

60> **Use of "Mild" Directional Antenna Characteristic, Ratio:** We recommend that the applicants proposing to use directional antennas be given negative weighting if their antenna proposes more than six decibels of directivity.

61> **Use of "Mild" Directional Antenna Characteristic, Slope:** We recommend that the applicants proposing to use directional antennas be given negative weighting if their antenna pattern proposes a maximum rate of change greater than one decibel per ten degrees.

62> **Use of Non-Directional Antenna:** We recommend that any station which proposes operation with a non-directional antenna be given extra weighting.

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Attachment A

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