

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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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

PETITION FOR RECONSIDERATION

EDUCATIONAL MEDIA FOUNDATION

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SUMMARY

Educational Media Foundation (“EMF”), a non-profit educational broadcaster of religious programming and licensee of 22 noncommercial educational (“NCE”) FM radio stations, hereby petitions for reconsideration of the Commission’s Report and Order (FCC 00-120) (the “*Order*”) establishing a point system to select among competing applicants and issue station licenses in the NCE FM radio and television services. Specifically, EMF asks reconsideration as to the substance of and point weighting given to certain favored categories of applicants by the Commission, including the “Tie Breaking” factors used for final determination among tied applicants, and the attribution rules associated with these factors.

EMF believes that the Commission engaged in a result-oriented rulemaking with the explicit intention to favor “public broadcasting”¹ and “Statewide Network” government-affiliated applicants.² EMF and many other non-governmental, non-profit applicants that also offer “diversity and excellence” in “alternative telecommunications services” will be unfairly but decisively disadvantaged by the Commission’s proposed point system. In EMF’s case, this disadvantage may be so severe that potentially only a few of its 77 pending applications for mutually exclusive FM authorizations will be granted to it.

The Commission’s proposed content and weighting of the point system reflect a process that was arbitrary and capricious, often unsupported either by searching analysis or by the record.

¹ “We believe that the new system will ... continue to foster the growth of public broadcasting as ‘an expression of diversity and excellence, and ... a source of alternative telecommunications services for all citizens of the Nation.’ 47 U.S.C. § 396 (a) (5).” *Order* at ¶ 1.

² *See Order* at ¶¶ 56-61.

In particular, the Commission's two point "Statewide Network" preference, aside from its thin authority in the rules, reflects no inquiry as to whether "statewide network" institutions are already fully licensed and able to reach virtually all their intended audience, nor whether the audience for this specialized, instructional educational programming is sufficiently large or diverse that its needs compel a preference against all other NCE program audiences. Moreover, no differential consideration was given to the very different instructional capabilities of television and FM radio.

The Commission's proposed three point "Established Local Applicant" credit, together with the proposed "fewest licenses" and "fewest applications" tie-breaking factors, categorically favor one unique type of applicant: the traditional PBS/NPR affiliate organized as a local non-profit with local board of directors, but receiving national programming and funding from a government funded entity (which is not a licensee itself and is therefore non-attributable). Although these criteria for "Established Local Applicant" status and the tie-breaker factors are seemingly benign, neutral and reasonable, their effect in practice -- as the Commission surely understands -- is to tip the scales decisively against other applicants that hold numerous licenses and also, largely for reasons of economy, distribute national programming by satellite to their licensed stations.

The assignment of three points and tie-breaker preferences to these favored "Established Local" applicants, rather than, say, one point and no tie-breaker preference, is clearly arbitrary, but that arbitrary distinction makes all the difference. There is no serious argument or record support that only "Established Local Applicants" can provide valuable programming to their audiences, or that these applicants have an urgent and preferential need for additional licenses as opposed to often struggling alternative networks that are national in character, as is EMF.

Finally, EMF believes that the point system adopted by the Commission is inconsistent with the strictures of the First Amendment because that system favors the speech choices of government affiliated licensees and licensees that are state or local government entities over the speech of NCE applicants that are not affiliated with the government. The Commission's preferences may also be deemed to violate the Free Exercise clause to the degree the point system disadvantages "religious" over secular broadcasters and their messages.

The stated intent of the Commission's point system is to favor "public broadcasters" (generally funded by federal, state and local funds) and "Statewide Network" affiliates -- almost exclusively state public university systems or local government agencies. CPB, PBS and NPR are national government-funded entities that were created by Congress and are sustained by various state and local government grants. The stations and their PBS/NPR affiliates hold hundreds of NCE television licenses and more than a thousand NCE FM radio licenses and currently reach more than 90% of the national audience.

A long line of Supreme Court cases would prevent the Commission from choosing among private non-commercial applicants based on their proposed program content or from discriminating against religious content. Although this is an issue of first impression because the Commission has, to EMF's knowledge, never before sought to establish the speech rights of government entities and their affiliates as paramount to the rights of other speakers, EMF believes it is even more impermissible for the Commission to do so.

For all these reasons, and as set forth in detail in the discussion to follow, EMF respectfully requests reconsideration and rescission of the Order.

TABLE OF CONTENTS

SUMMARY i

TABLE OF CONTENTS iv

I. Introduction.....1

II. Background2

A. REPORT AND ORDER.....2

B. APPLICATION OF THE NEW RULES TO EMF3

III. Discussion4

A. THE COMMISSION’S CREATION OF A POINT SYSTEM FOR THE AWARD OF NONCOMMERCIAL EDUCATIONAL AUTHORIZATIONS IS ARBITRARY AND CAPRICIOUS AND THEREFORE UNLAWFUL4

1. The Commission was Arbitrary and Capricious in its General Analysis of NCE Broadcasting and Omitted Highly Relevant Factors From That Analysis.....5

a. The Commission did not take into account the existing allocation of licenses.....5

b. The Commission failed to consider the differences between TV and FM radio services or other technical solutions in its analysis.6

2. The Commission’s Award of a Two Point Credit for “Statewide Networks” was Arbitrary and Capricious.7

3. The Commission’s Award of Three Points to Entities with an “Established Local Presence” is Arbitrary and Capricious.....9

4. The Commission’s Adoption of the Primary and Secondary Tie Breakers” for Entities with the Fewest Licenses and Applications is Arbitrary and Capricious.11

5. The Commission Should Clarify that Pending Applicants Who Filed in Response to an “A” Cutoff Notice and for Whom No “B” Cutoff Notice Has Been Issued May Amend Their Technical Proposals to Enhance Their Standing Under the Point System.14

B.	THE COMMISSION’S “STATEWIDE NETWORK” PREFERENCE, “ESTABLISHED LOCAL APPLICANT” PREFERENCE, “TIE BREAKERS” AND ATTRIBUTION RULES EXPRESS A PREFERENCE FOR CERTAIN SPEAKERS AND SPEECH, AND ARE THEREFORE PROHIBITED BY FIRST AMENDMENT CONSIDERATIONS AND PRINCIPLES OF EQUAL PROTECTION.....	16
1.	The Government May Not Pick and Choose Among “Speakers” or “Speech.”	16
2.	Advantaged and Disadvantaged “Speakers” and “Speech” under the <i>Order</i>.	17
3.	Even facially Content-Neutral Regulations Can Violate the First Amendment.	20
4.	Even Though the Commission's Point System Applies Content-Neutral Standards, it is Specifically Intended to Foster Instructional Content “Public Broadcasting.”	21
5.	The Commission’s Point System Violates EMF’s First Amendment Right to Free Exercise of its Religious Beliefs and Mission and it Violates EMF’s Rights Under the Equal Protection Component of the Fifth Amendment.	23
IV.	Conclusion	24

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PETITION FOR RECONSIDERATION

I. INTRODUCTION

Educational Media Foundation (“EMF”), by its counsel and pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. § 1.429, hereby petitions the Commission for reconsideration of its Report and Order (the “*Order*”) in the above-referenced proceeding.¹ In particular, by this petition, EMF seeks reconsideration and rescission of certain aspects of the Commission’s proposed point system that will determine which mutually exclusive applications will be granted licenses for noncommercial educational (“NCE”) television and FM radio stations in the reserved band. The Commission’s action establishing a point system for NCE licenses is arbitrary and capricious and therefore unlawful. Moreover, the Commission point system violates the First and Fifth Amendments and therefore is unconstitutional.

¹ *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, MM Docket No. 95-31, FCC 00-120, released April 21, 2000 (“*Order*”).

As an NCE broadcaster and an applicant for additional NCE FM licenses, EMF is directly affected by the Commission's actions in this matter. Thus, EMF has standing to seek reconsideration of the Order and does so herein.

EMF is a non-profit, non-sectarian educational organization whose goal is to educate its audience with respect to teachings of the Bible, as well as broader topics of contemporary significance ranging from family issues, money management, problems facing children and young adults, and information about other non-profit services in the community. Through its K-LOVE Radio network, EMF offers inspirational music, news, and other cultural programming in furtherance of its educational purpose. EMF operates full-power NCE FM radio stations and FM translator stations throughout the United States.² From its inception in 1982, EMF has been an exemplary and active Commission licensee.³

II. Background

A. REPORT AND ORDER

The Order as adopted created a preferential point system for awarding NCE licenses. The Commission's point system has three basic aspects: (1) a threshold determination concerning the fair distribution of service under 47 U.S.C. § 307(b); (2) a point system based on various factors; and (3) a series of tie breakers if there is no clear winner after steps (1) and (2). Specifically, the Commission's point system contains the following elements:

- 1. Local Diversity (Diversity of Ownership) (2 Points)-** Two points will be awarded to an applicant if the principal community (city grade) contour of the proposed station does

² EMF owns and operates twenty-two full power FM radio stations nationwide. Additionally, EMF holds construction permits for four new FM radio stations.

³ With regard to the instant rule making proceeding, EMF has been an active participant, submitting comments in response to the Commission's request for further comments. *See* Comments, Educational Media Foundation (mm Docket No. 95-31), submitted January 28, 1999.

not overlap the principal community (city grade) contour of any attributable NCE or commercial station in the same service. (“Local Diversity”)

- 2. Technical Parameters (1 or 2 Points)-** An applicant will receive a one point credit for technical parameters if the applicant’s proposed service area will cover at least 10% greater area and 10% greater population than the next best proposal. If an applicant proposes to cover an area and population 25% greater than the next best proposal, the applicant will be awarded two points. (“Technical Factors”)
- 3. Established Local Applicant (3 Points)-** Established local applicants will receive a credit of three points if the applicant is: (1) physically headquartered, (2) has a campus, or (3) has 75% of its board members residing within 25 miles of the reference coordinates of the center of the proposed community of license, in each case, for at least two years prior to the submission of an application. State government entities are deemed “local” throughout their jurisdictions. (“Established Local Applicant”)
- 4. State-Wide Network Credit (2 Points)-** The Commission will afford a two point credit to an entity that does not qualify for local diversity points and that is: (a) an entity, public or private, that provides services within a single state to a minimum of 50 accredited full-time elementary and/or secondary schools under the entity’s control or in coordination with such authority, in furtherance of the curriculum; or (b) an accredited public or private institution of higher learning with a minimum of five full time campuses within a single state that provides service in furtherance of the curriculum; or (c) an entity, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity or institution described (a) or (b) above for use in its school curriculum. (“Statewide Networks”)
- 5. Tie Breakers-** If the application of the point system results in a tie between applicants, the following tie breakers will apply: (1) Primary Tie Breaker (“Primary Tie Breaker”) if the point system results in a tie between applicants, the permit will be awarded to the tied applicant who had the fewest existing same service (FM or TV) authorizations (licenses and permits) at the time of filing; (2) Secondary Tie Breaker (“Secondary Tie Breaker”) if a tie still remains, the permit will be awarded to the tied applicant who had the fewest pending new and major change applications in the same service at the time of filing; (3) as a last resort full service stations will be subject to mandatory time sharing, whereas permits for FM translator stations will be given to the first applicant to file.

B. APPLICATION OF THE NEW RULES TO EMF

Practically speaking, the Commission’s point system will divide NCE applicants into two discrete groups: favored applicants (“government funded Statewide Networks” or “Established Local Applicants,” which are primarily “public broadcasting”, i.e. PBS/NPR/PRI affiliates) that will generally receive a minimum of three or five points (as “Established Local Applicants,” and often also as “Statewide Network” participants) and disfavored applicants (private national NCE

broadcast networks) that will at best receive two points, for “Local Diversity” only. (Notably, even a national NCE broadcaster with Local Diversity (two points) and the best possible Technical Factors (two points) will always be defeated by the five point applicant).

Because of this conjured point system, EMF stands to lose in virtually every case where its application is compared to a competing application under the Commission’s new point system. Since EMF has twenty-six authorizations (including permits) and more than eighty pending applications, it will invariably lose in the event of a tie. Thus, in application, the Commission’s rules unfairly benefits government funded, versus privately funded applicants.

III. Discussion

A. THE COMMISSION’S CREATION OF A POINT SYSTEM FOR THE AWARD OF NONCOMMERCIAL EDUCATIONAL AUTHORIZATIONS IS ARBITRARY AND CAPRICIOUS AND THEREFORE UNLAWFUL

The Commission’s actions are governed by the Administrative Procedure Act (“APA”), which states that an agency’s actions, findings or conclusions may be set aside by a court if they are found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴ It is incumbent upon the agency, in this case the Commission, to make a thorough examination of the record and to clearly state a rational basis for its ultimate decision. As the Supreme Court has held, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁵ An agency must “offer a reasoned explanation that is supported by the record.”⁶ In the instant case, the

⁴ 5 U.S.C. § 706(2)(A).

⁵ *Motor Vehicle Mfrs Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)); see also *MCI Telecomm. Corp. v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993).

⁶ *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

portions of the Order challenged by EMF lack a rational basis, reasoned explanation, or record support justifying the creation of a licensing scheme which lends a decisive preference to Statewide Networks or, predominantly, to “public broadcasters.” Without a clear, consistent and well-supported basis for the Commission’s policy, it is arbitrary and capricious for the Commission to establish a rule unfairly benefiting certain favored speakers to the detriment of other NCE broadcasters.

1. The Commission was Arbitrary and Capricious in its General Analysis of NCE Broadcasting and Omitted Highly Relevant Factors From That Analysis.

a. The Commission did not take into account the existing allocation of licenses.

As of September 30, 1999, there were 373 NCE broadcast television stations and 2066 NCE FM radio stations in the United States.⁷ Of these 373 television stations, 348 are PBS affiliates leaving only 25 that are independent NCE voices.⁸ By EMF’s analysis, there is a PBS affiliated television station located in all but one of the top 100 Nielsen rated markets in the United States. Of the 2066 NCE FM radio stations, more than 600 are NPR affiliates, with a “clearance” or potential audience exceeding 90% of the population.⁹ In addition, approximately 560 NCE FM radio stations obtain programming from Public Radio International (“PRI”).¹⁰

The Order will affect the issuance of approximately 30 new NCE television licenses (an additional 8%) and approximately 270 NCE FM broadcast licenses (an additional 13%) that are currently subject to mutually exclusive applications governed by the Order’s point system. In fact, these statistics significantly overstate the audiences to be served by NCE FM licenses applied for as

⁷ See Broadcast Station Totals, prepared by Audio Services Division (released November 22, 1999).

⁸ See Joint Comments of NPR, APTS and CPB at Exhibit 1.

⁹ *Id.* By contrast, EMF’s 22 full power FM stations have a potential audience of less than 10% of the population.

¹⁰ *Id.*

these mutually exclusive applications are predominantly for licenses in the smaller markets and only ten of the top 100 markets.

In the reasoning of its Order, the Commission does not ask what is the best marginal use for these additional authorizations, given the existing distribution of NCE television and FM radio licenses. Rather, the Commission approaches the issue of additional licensing as if the priorities expressed by its point system are *a priori* values, whether or not additional “Statewide Network” or “Established Local Applicant” licensees in a particular community can be justified by the present demonstrated need in that community.

In light of the fact that these “Statewide Network” and “public broadcasting” stations are already well established in virtually every major American community, the Commission’s failure to incorporate this fact into its analysis of the need for a point system, or the factors and weighting to be used, is arbitrary and capricious.

b. The Commission failed to consider the differences between TV and FM radio services or other technical solutions in its analysis.

There is no consideration given by the Commission in its *Order* to the fact that television and FM broadcast stations have remarkably different characteristics. Among the relevant differences, the value and use of television as an instructional medium is vastly different than the value and use of FM radio for the same purpose. Accordingly, the case for dedication of television to instructional uses (as is apparently contemplated by the “Statewide Network” credit) is much stronger than the case for dedication of FM radio stations to the same purposes.

The Commission also did not consider the NCE full-power license point system in the context of other services that could fulfill the needs addressed by point system factors. Class A television service, such as the non-broadcast Instructional Television Fixed Service (“ITFS”) or the newly created LPFM service. EMF asserts that it was arbitrary and capricious for the Commission to ignore these important considerations in its analysis.

2. The Commission's Award of a Two Point Credit for "Statewide Networks" was Arbitrary and Capricious.

The Commission adopted the "Statewide Network" two-point credit because "favoring diversity might disadvantage state-wide educational networks,"¹¹ "making it difficult for the university to expand the reach of its educational programming."¹² In effect, the "Statewide Network" credit was adopted to counteract the effects of a "local diversity" credit. In creating the "Statewide Network" credit, the Commission made and implemented a value judgment that the public interest is better served by "instructional" education delivered to schools and students, rather than by the broader "general education" programs available from other NCE applicants.¹³ This preference is contrary to the evenhanded treatment of instructional and informational goals and values set forth in Section 73.503(b) of the rules, which states no preference as to FM licensees. The Commission was clearly using a narrow definition of "education," i.e. instructional education, when it created the two point credit for "Statewide Network" entities, but the actual charter of NCE broadcasting is in fact far broader, embracing many kinds of informational programs providing education (broadly defined), culture or entertainment.¹⁴

There is little or no support in the record for a conclusion that the "Statewide Network" credit is a uniquely necessary means to achieve unmet instructional goals. As a practical matter,

¹¹ *Order* at ¶ 34.

¹² *Order* at ¶ 56.

¹³ In adoption of the "Statewide Network" two-point credit, the Commission states: "state-wide networks have ensured that educational programming is available throughout a specific area in a coordinated and organized manner most appropriate to that area, and especially to schools ... often using the economic efficiencies of a centralized point of operation to bring new service to outlying areas within their jurisdiction." *Order* at ¶ 56. However, the same benefits of "coordinated and organized" programming from a "centralized point of operation" provided by national NCE FM broadcasters was not accorded any point preference.

¹⁴ 47 C.F.R. § 73.503(b); *see also* Joint Comments of NPR, APTS and CPB (MM Docket No. 95-31), filed January 28, 1999 at Exhibit 1, pages 1-6.

virtually all true instructional activity takes place in the classroom, received from teachers, textbooks, the library, and, increasingly, from the Internet. The Commission should have examined what additional component of the educational curriculum is provided by *broadcast* programming, what the audience is for that broadcast curriculum, by category of student and approximate numbers of students, before concluding that a medium famously suited to send generalized programs to large numbers of people in a community should instead be licensed for the purpose of sending very specific instructional programming to a small and select demographic group, i.e. students, who already have an abundance of other educational resources available at their school.

The Commission found authority for the “Statewide Network” credit by relying on its existing rule embodied at 47CFR 73.502, a rule which was not created pursuant to any specific legislative directive, and which, although it has been in effect since 1963, has apparently never been relied upon by the Commission in a proceeding or published hearing, or litigated as to its validity, in the entire thirty seven years of its existence. The authority of this rule, and the Commission’s circular reliance on its own previous rulemaking, are not entitled to significant weight.

Finally, the arbitrary nature of the “Statewide Network” credit is perhaps best illustrated by the following hypothetical proceeding in which the New Jersey Public Broadcasting Authority, a “Statewide Network” participant, and Princeton University, having but one campus, were both to apply for a second license within the contour of their existing station. In this case, the “Statewide Network” instructional programming would be categorically preferred to the offerings of Princeton, and the same would be true of the University of New Hampshire versus Dartmouth College, or as to the Rhode Island Public Telecommunications Authority versus Brown University.

For all the reasons set forth above, EMF asserts that the two-point “Statewide Network” credit adopted by the Commission is arbitrary and capricious, unsupported by the record.

3. The Commission's Award of Three Points to Entities with an "Established Local Presence" is Arbitrary and Capricious.

The Commission's decision to award a decisive point advantage to an entity with an "Established Local Presence" is arbitrary and capricious. While the Commission attempts to articulate a foundation for its localism preference, it fails to explain in any detail or justify why this element warrants three points, as opposed to any points or the one or two points that applicants can receive for meeting the other criteria in the point scheme.¹⁵ By granting three points to such an applicant, the Commission has given decisive weight to this one element in a tournament where the highest possible score is only six or seven total points. Notably, the ITFS service pertains only to instructional purposes, not to the broader definition of "education" pertinent to the NCE television and FM radio services.¹⁶

The practical effect of granting three points to Established Local Applicants is to disfavor national NCE group ownership. Under the Commission's broad definition of "local," a Statewide Network will receive three points if it has a campus within twenty-five miles of the reference coordinates of the center of the proposed community of license, and its board of regents will be deemed "local" wherever they reside. Similarly, the typical community non-profit "public broadcasting" affiliate will likely be headquartered or have 75% of its board members residing in the area, and will qualify as "local" even if it never airs any local programming. The apparent

¹⁵ There is no justification or rational basis for elevating this one element over all the rest; rather, the Commission simply concludes that: "In the ITFS point system, local applicants received four out of a possible eleven points. We believe that local applicants should receive points in a similar proportion in the NCE point system, and thus will assign established local applicants three instead of the two points originally proposed." *Order* at ¶ 53.

¹⁶ 47 C.F.R. § 73.503(b).

purpose in lending decisive significance to this element of the point system is in fact to favor public broadcasting and statewide educational entities over national NCE networks.¹⁷

In addition, there is no logical nexus between the Commission's goal of localism and the mechanism it has created. The fact that a station's board of directors resides near the community of license bears no relation to the programming the station will carry or the issues that the station will address responsibilities generally exercised by the station manager. There is no requirement that any particular amount of programming be locally originated or that a certain percentage of the programming deal with local issues. As with the integration credit struck down in *Bechtel*, there has been no demonstration that having a headquarters or requiring a board of directors to reside in a certain area will have any measurable effect on the station's programming.¹⁸ Local ownership, without more, is not a relevant measure of anything.

Furthermore, the proposed rule that a board of regents of a statewide university system is an Established Local Applicant in every area of the state is purely arbitrary. For example, under the Commission's construction, the Ohio Board of Regents governing the Ohio state university system would be simultaneously "local" in all areas of the state from Athens to Zanesville – a pure myth. And this particular aspect of the rule does not impose any requirement that the Board actually be comprised of state residents. Similarly, if a state government applies for an NCE facility it will be considered local throughout the entire state, regardless of where the station obtains its programming, or who actually manages the station.

The Commission's reliance on a definition of localism drawn from the context of ITFS is also misplaced. While the Commission acknowledges in the *Order* that ITFS and NCE services are not identical, it states that "education is a primary objective of both services, and our finding in the

¹⁷ *Order* at Paragraphs 1 and 18.

¹⁸ *See Bechtel v. FCC*, 10 F.3d 875 (1993).

ITFS proceeding that education is essentially a local undertaking, is equally applicable to the NCE broadcast service.”¹⁹ Once again, however, the Commission has confused the notion of *instructional* educational *narrowcasting* with *informational* general educational *broadcasting*. Section 73.503(b) of the Commission’s rules also permits NCE FM radio stations to transmit “educational, cultural, and entertainment programs to the public.”²⁰ This is substantially different from the role of ITFS, which is to provide formal instructional programming to students enrolled in an accredited school – an admittedly local undertaking.

4. The Commission’s Adoption of the “Primary and Secondary Tie Breakers” for Entities with the Fewest Licenses and Applications is Arbitrary and Capricious.

There is no rational basis or record support for the Primary and Secondary Tie breaker procedures that the Commission has established for the award of NCE authorizations held by the applicants. The Primary Tie breaker is based upon the fewest number of existing same service station authorizations.²¹ The Commission’s rationale for adopting this tie breaker criterion is to “help address the commenter concern that small local educators with no or few other broadcast interests should not be ‘squeezed out’ by large national chains of NCE stations.” *Id.* The Commission further offers that “we do believe, among equally qualified applicants, that the public should have the opportunity to receive service from the applicant who has the fewest existing outlets to express a particular viewpoint.” *Id.* However, the Commission provides no rational explanation for this “belief” because, in EMF’s view, there is none. If the program choices available to a listener in Casa Grande, Arizona, for example, are either an EMF station or that of a “stand-alone” broadcaster, what difference does it make to that listener whether EMF also has a station in North Myrtle Beach, South Carolina? The true sentiment being expressed by the

¹⁹ *Order* at ¶ 46.

²⁰ 47 C.F.R. § 73.503(b).

Commission would appear to be that a “stand alone” broadcaster somehow has a greater “right” to a broadcast outlet than an incumbent broadcaster. EMF respectfully submits that the proper goal in this proceeding is to maximize both the number and quality of programming choices available to the listening public. It is not to pick “winners and losers” on the basis of which type of broadcaster the Commission believes has a greater inherent right to use a broadcast outlet.²²

The Secondary Tie breaker adopted by the Commission is based upon the fewest number of pending applications in the same service. The Commission cites two reasons for adopting this criterion. The first is to “encourage applicants to file judiciously to conserve spectrum . . .”²³ However, the Commission offers no explanation of how filing fewer applications preserves spectrum in a mutually exclusive context or how “conserving spectrum” in the NCE band serves the public interest. If anything, the public interest is served by converting unused, fallow spectrum into productive use. EMF currently estimates that its religious, cultural and educational programming may be heard by approximately 5% of the national audience. In EMF’s view, it is making a positive contribution to local programming diversity, which is a more laudable goal than allowing unused spectrum to be wasted.

Second, the Commission offers that the Secondary Tie breaker procedure will “reduce the number of speculative ‘me too’ applications.” On a retroactive basis, the application of the new tie breaker system actually rewards the speculative “me-too” applicants. EMF regards the speculative

Footnote continued from previous page

²¹ *Order at ¶ 72.*

²² In the context of discussing the new Tie breaker procedures the purpose of the Commission’s reference to the former procedures used in the ITFS service is unclear. Use of these procedures in the ITFS service does not make their use rational in this context. Other more compelling reasons may have existed for using these procedures in the ITFS context due to the instructional nature of the ITFS service. Or it could very well be that use of these procedures was also arbitrary and capricious in context of the ITFS service.

²³ *Order at ¶ 73.*

“me-too” filers to be those applicants with no operating stations that have “over-filed” each time a new frequency has been applied for – including, on occasion, two or three applications in the same community. The new tie breaker system actually rewards these over-filers because they have no stations and will thus prevail over EMF and other group owners under the Primary Tie breaker. Hence, EMF is inexplicably penalized on the basis of the number of stations it has obtained – the vast majority of which it purchased from third parties.

An equally arbitrary aspect of the new Tie breaker system is its failure to take into account the relative populations already served by competing applicants. Under the Primary Tie breaker, for example, an applicant owning a single station in a large market serving a million persons will prevail in every instance over an entity with two stations in rural communities serving only a small fraction of that number. The Primary and Secondary Tie breaker will also discourage applicants such as EMF from establishing stations in smaller communities because these stations will count against EMF in future applications for larger facilities. Similarly, if EMF must limit the number of its applications to avoid being penalized by the Secondary Tie breaker, if faced with a choice between different sized communities in most instances EMF would file an application to serve the larger community. Finally, the Tie breaker procedures will also thwart EMF’s efforts to convert its FM translator operations to full power FM stations. Many of EMF’s pending full power applications were filed in order to replace existing secondary translator service to sparsely populated rural areas with permanent full power service. Under the new Tie breaker system, EMF will be penalized for each of these applications.

The new Tie breaker procedures, combined with the Established Local Presence three-point preference, overwhelmingly tilt the scale against privately funded, national religious broadcasters such as EMF. Based upon EMF’s preliminary analysis of how each of its known mutually exclusive NCE applications will fare under the new point system, EMF estimates that it will lose in

more than 90% of the proceedings. In most of those instances, EMF's application will lose because of the Tie breaker procedures. The Established Local Presence preference already more than adequately addresses the "commenter" concern that small local educators (which include public broadcasters affiliated with the largest national networks – PBS, NPR and PRI) will be squeezed out by the broadcasters. There is no need to establish a *de facto* cap on the number of stations a single licensee can own nationwide. The Tiebreaker procedures only serve to thwart the efforts of privately funded, national religious broadcasters to expand the reach of their programming. For these reasons, the Tiebreaker procedures are arbitrary and capricious.

5. The Commission Should Clarify that Pending Applicants Who Filed in Response to an "A" Cutoff Notice and for Whom No "B" Cutoff Notice Has Been Issued May Amend Their Technical Proposals to Enhance Their Standing Under the Point System.

Upon issuance of the *Order*, the Commission implemented a filing freeze on new NCE applications and applications for major changes of existing NCE stations operating on reserved channels. However, to facilitate a smooth transition from the A/B cutoff filing method to the window filing system, the Commission indicated that it would accept reserved channel NCE applications filed in response to "A" cutoff notices that have been issued where the "B" cutoff has yet to occur.²⁴ The Commission failed to specify whether pending applicants who filed pursuant to an "A" cutoff that expired prior to the release of the *Order* and for which no "B" cutoff has been issued will be permitted to amend their applications to enhance their technical proposals, a right that they would have had under the A/B cutoff filing system. EMF requests that the Commission clarify that the right of these pending applicants to modify their technical proposals to enhance their standing under the new point system will be preserved.

²⁴ See *Order* at ¶ 121.

Under the A/B cutoff filing system, pending applications filed in response to an “A” cutoff could be amended as a matter of right until the expiration of the “B” cutoff.²⁵ In certain of its pending applications, EMF fully intended to take advantage of this right of amendment in order to put forth its best technical proposal prior to the “B” cutoff. To prohibit the right to file such amendments and enhance the technical proposal would be unfair to applicants such as EMF as well as arbitrary and capricious. Applicants such as EMF with pending “A” cutoff applications were given no warning that the right to amend their applications might be taken away with no notice or transition period. Not only would it be unfair to take away the amendment right of such pending applicants in this fashion, but no rational justification exists for prohibiting these applicants from enhancing their technical proposals to compete more effectively under the new point system.

Permitting pending “A” cutoff applicants to enhance their technical proposals to increase the area and/or population to be served will allow the Commission to choose from among the best possible service proposals, thereby benefiting the public. Moreover, permitting enhancement of technical proposals in pending applications for which the “B” cutoff deadline has not yet expired would not delay the provision of new noncommercial educational service since these applicants are no longer subject to competing applications and, pursuant to the new rules, they will be required to supplement their applications to demonstrate their entitlement to points under the new system.²⁶ For these reasons, EMF urges the Commission to clarify that pending applicants for whom the “B” cutoff filing deadline has not yet passed will be permitted to amend their technical proposals to enhance their standing under the new point system.

²⁵ See 47 C.F.R. § 73.3522(b).

²⁶ See *Order* at ¶ 91 and n.68.

B. THE COMMISSION’S “STATEWIDE NETWORK” PREFERENCE, “ESTABLISHED LOCAL APPLICANT” PREFERENCE, “TIE BREAKERS” AND ATTRIBUTION RULES EXPRESS A PREFERENCE FOR CERTAIN SPEAKERS AND SPEECH, AND ARE THEREFORE PROHIBITED BY THE FIRST AMENDMENT AND PRINCIPLES OF EQUAL PROTECTION.

1. The Government May Not Pick and Choose Among “Speakers” or “Speech.”

The Commission’s adoption of a “Statewide Network” preference and an “Established Local Applicant” preference, together with the associated attribution rules and “Tie Breakers,” raise a question of first impression under the First Amendment’s free expression clause and the Equal Protection component of the Fifth Amendment, because the Commission has adopted a preferential scheme that predominantly favors government entities, or government affiliated entities and government-funded entities over a class of private entities and speakers. These preferences advance decisively the ability of these applicants to obtain NCE television and FM radio station licenses, as against entities that have no such relationship with government and are truly private non-profit concerns, such as EMF. In a broader sense, the Commission’s preferences advance the interests of an audience of students and those who prefer “public broadcasting” (hypothetically “local”) programming, over the interests of an audience that prefers the educational programming of national religious broadcasters such as EMF, and therefore these preferences implicate “equal protection” concerns.

In decisions regarding initial licensing and the threshold question of what parties may be preferred as licensees (or be denied that license in deference to a preferred licensee), EMF believes that broad, very stringent and well-settled principles of First Amendment law apply.²⁷ The

²⁷ The central themes of important broadcast-related First Amendment decisions at the Supreme Court have not addressed initial licensing of speakers, but instead the rights and duties of existing licensees. In *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 89 S. Ct. 1794 (1969) (“*Red Lion*”), an existing licensee sought to overturn an obligation to carry programming required by the Commission’s “fairness doctrine.” In *Columbia Broad.*

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government cannot “pick and choose” among speakers or preferred speech without showing a compelling or substantial state interest, and that a regulation is narrowly tailored to advance that interest:

“Any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues be uninhibited, robust and wide-open.’ [citation] Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an ‘equality of status in the field of ideas’ and government must afford all points of view an equal opportunity to be heard.” *Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).²⁸

EMF believes that, under these facts, the Commission must face strict scrutiny of the point system preferences, show a compelling (or at the least substantial)²⁹ interest in the stated purpose of its regulatory scheme, content-neutrality in fact, and that the scheme is narrowly tailored to suit any sufficient interest, if shown.

2. Advantaged and Disadvantaged “Speakers” and “Speech” under the Order.

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System, Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1972), a broadcaster successfully resisted an asserted obligation to broadcast paid advertising with a message that it did not wish to endorse. In *FCC v. League of Women Voters of Cal.*, public broadcasters sought and obtained relief from a regulatory prohibition that they not engage in “editorializing”. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106 (1984). Similarly, in *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633 (1998), a public broadcasting entity was upheld in its refusal to include a minor political candidate in a debate, based on its right to exercise editorial discretion as a licensee.

²⁸ See also, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 71 S. Ct. 325 (1951). “Because it [the spectrum] cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis.” *National Broad. Co., Inc. v. U.S.*, 319 U.S. 190, 226, 63 S. Ct. 997, 1014 (1943).

²⁹ *FCC v. League of Women Voters of Cal.*, *supra*.

The class of parties gaining advantage under the “Statewide Network” preference is apparent on the face of the Order, as the Statewide Network preference applies in practice almost wholly to state universities or state-sponsored “educational television commissions” that participate in a statewide programming plan. Although this preference is hypothetically available to a qualifying public or private entity,³⁰ there may be only one private entity in the nation that can eventually satisfy these criteria, as the Commission itself recognized.³¹

As a matter of law, the state educational associations or public broadcasting commissions that administer the typical statewide networks are “state actors,”³² as are other licensees associated with state and local governments, or state universities or their boards of trustees, or the occasional local school board. Moreover, the curriculum and message to be conveyed by the “Statewide Networks” is, if not outright “government speech,” certainly speech of a specific content - instructional -- which is explicitly preferred by the Order over other categories of protected general educational speech.

The cumulative practical effect of the “Established Local Applicant” preference (including the definition of localism found in the *Order*), coupled with the “Tie Breaking” and the associated attribution rules, is to predominantly favor another well-known category of applicants - those which conform to the traditional “public broadcasting” affiliate model of organization: local non-profit entities holding single station licenses (particularly in the FM radio service);³³ with a local board in easy compliance with the Order’s criteria; and obtaining substantial funding and programming from non-attributable CPB, national PBS or NPR sources (non-attributable because these entities do not

³⁰ *Order* at ¶¶ 58-59.

³¹ *Order* at ¶ 58, fn. 42.

³² *See Arkansas Educational Television, supra.*

³³ “[M]ost of public broadcasters funded by CPB are local.” *Order* at ¶ 47.

themselves hold licenses). In addition, the specific definition of localism, that State government entities are presumed to be local throughout their jurisdictions, neatly assures that state governments can always qualify for the “Established Local Applicant” preference.³⁴

The “Established Local Applicant” criteria and associated rules were carefully crafted to include virtually all state universities, statewide educational associations and “public broadcasting” affiliates by virtue of their predictable attributes. But these criteria are even more effective in *excluding* national network NCE broadcasters (such as EMF, American Family Association, Moody Bible Institute, Calvary Chapel of Twin Falls, Inc., Family Stations, Inc. and Bible Broadcasting Network, Inc.) which are, almost exclusively, religious broadcasters.³⁵

The Commission was not reticent about its mission to “foster the growth of public broadcasting as an expression of diversity and excellence” (*Order* at ¶ 1) or its speech preferences.³⁶ Nor was the Commission unaware of which groups would be affected by the point system as adopted: “As for the concern that small local educators could be ‘squeezed out’ by large national chains of NCE stations, we consider this a valid concern, and will address it by including a localism factor in our point system, and by considering the extent of an applicant’s national broadcast interests as a secondary factor, as a tie breaker.” *Order* at ¶ 34. “We have considered but disagree ... that a credit for localism would adversely impact religious organizations.” *Order* at ¶ 52.

And, in the context of the two-point “Statewide Network” credit: “We recognize that there are also larger national and regional networks of noncommercial stations that enjoy some of the

³⁴ Notably, in contrast to the Ohio Board of Regents, the Ohio conference of the Methodist Church, although it has churches in the smallest of Ohio communities, does not qualify as “local” everywhere in Ohio.

³⁵ The prominent exception being Broadcasting for the Challenged, Inc.

³⁶ “*Public broadcasting* holds a special place in meeting the informational, cultural and educational needs of the nation.” “Through a point system, we can ... clearly express the

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same operating efficiencies as the entities who will be eligible for this credit ... those types of networks will not be eligible for this credit ... we do not believe that national and regional networks are able to provide equivalently focused educational benefits. Such networks are generally satellite operations of distant stations, without the ability to set the educational policies for schools or have schools accountable to them.” *Order* at ¶ 60. The Commission was clearly aware that the “Statewide Network” credit and the “Established Local Applicant” credit would disadvantage national NCE broadcasters, and that these broadcaster are almost all religious broadcasters.³⁷

3. Even Facially Content-Neutral Regulations Can Violate the First Amendment.

The Commission has asserted that its intention in adopting the point system and related rules is not to distinguish between speakers or their speech, but simply to create content-neutral regulations in the public interest.³⁸ In so doing, it apparently relies upon the line of cases beginning with *U.S. v. O’Brien*³⁹ that adopt a lesser standard for review: that the regulation be within the constitutional power of government, that it serve an important state interest, that the regulation be content-neutral, and that it be narrowly tailored to advance that interest.⁴⁰

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public interest factors that the Commission finds important in NCE broadcasters, and select the applicant who best exemplifies these criteria.” *Order* at ¶ 15, 18.

³⁷ Indeed, there is a long and documented history that the Commission has been unwilling to treat religious broadcast applicants on an even basis with secular public broadcasters. *See* Comments, *National Religious Broadcasters (MM Docket No. 95-31)*, filed May 31, 1995.

³⁸ *Order* at ¶ 59. The Commission’s claim that it does not “intend” the Statewide Network credit to favor government speakers over private speakers seems somewhat disingenuous. Of course, private speakers may qualify for the credit, but only if they furnish the type of programming that is required by the government speakers.

³⁹ *U.S. v. O’Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968)(“*O’Brien*”).

⁴⁰ *League of Women Voters*, a case that follows the same general structure of *O’Brien* and *Red Lion* still adopts a “substantial government interest” test because of the direct prohibition of “editorializing,” which the Court considers a content restriction, even if no specific content or viewpoint is proscribed.

In the recent *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643, 645 (1994) (“*Turner Broadcasting*”), Justice Kennedy wrote at length on the standards to which a government regulation will be held when it favors or suppresses certain speech, even in circumstances where the regulations are purportedly content-neutral on their face:

[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. [citations] Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. ... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny [citations]...

the ‘principal inquiry in determining content-neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.’ [citations]. The purpose, or justification, of a regulation will often be evident on its face. [citation] But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. [citations] Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.

4. Even Though the Commission's Point System Applies Content-Neutral Standards, it is Specifically Intended to Foster Instructional Content “Public Broadcasting.”

The Commission’s “Statewide Network” credit and “Established Local Applicant” credit, though justified on benign and seemingly neutral grounds, in fact amount to an exercise of the Commission’s preference for, on the one hand, instructional educational speech, controlled and delivered by public universities in the main, or, as to the second credit, structural criteria which will decisively favor “public broadcasting” affiliates, state government entities that are licensees, and a very limited number of other truly private applicants that are organized in the same manner.

Moreover, the applications to be subject to the *Order* and the point system are already on file with the Commission, and disadvantaged parties have no realistic opportunity to conform their operations or their structure to improve their chances under the point system preferences. The Commission’s action was taken with a highly detailed knowledge of these finite applicants and their

relevant attributes (including their likely broadcast programs) as disclosed in these applications and in various comments and reply comments in the proceeding.

Under these peculiarly retrospective circumstances, the Commission could calculate the result of its point system preferences almost on an applicant by applicant, license by license, market by market basis. Therefore, the facial neutrality of the Commission's seemingly benign criteria is especially subject to the possibility that these criteria were in fact intended to benefit certain specific interests and disadvantage others, according to their known speech and messages. There is abundant indication in the Order that, at a minimum, the Commission well understood who the beneficiaries and the disadvantaged parties would be.

The Supreme Court has decided several cases where similar fact patterns were present. In *Arkansas Writers Project*, *Minneapolis Star*, and *Grosjean*, local governments enacted tax schemes incident on newspapers or magazines that appeared to be content-neutral on their face, but in fact exacted taxation only on a certain small and readily ascertainable group of "speakers."⁴¹ In each case, the Court found that, despite the apparent neutrality of the regulation, its incidence on a limited class of speakers amounted to unconstitutional discrimination. "We need not and do not impugn the motives of the Minnesota Legislature... Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment... even regulations aimed a proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star*, 460 U.S. at 592.

In summary, EMF asserts that the Commission's two point preference for "Statewide Networks" is on its face a preference for government speakers and government speech, which

⁴¹ See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722 (1987) ("Arkansas Writers' Project"); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S. Ct. 1365 (1983) ("Minneapolis Star"); *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444 (1936) ("Grosjean").

adversely affects EMF because EMF is a non-government speaker. The three point “Established Local Applicant” preference and the Tie Breaker and attribution rules, even if facially neutral, single out a favored group of applicants, local affiliates of “public broadcasting” networks, while decisively disadvantaging another group of private national NCE religious broadcasters. For the reasons and on the precedents discussed above, EMF asserts that neither of these preferences are consistent with the requirements of the First Amendment or the Equal Protection clause.

5. The Commission’s Point System Violates EMF’s First Amendment Right to Free Exercise of its Religious Beliefs and Mission and it Violates EMF’s Rights Under the Equal Protection Component of the Fifth Amendment.

Based on its evaluation of the probable effects of the Commission’s point system on EMF’s ability to obtain authorizations from the applications it has filed for proposed NCE FM radio stations, EMF asserts that the point system results in a violation of EMF’s First Amendment right to free exercise of its religious beliefs and mission and EMF’s rights under the Equal Protection component of the Fifth Amendment. The point system should be reviewed with strict scrutiny.⁴² To overcome that scrutiny, the Commission must show that its point system serves a compelling interest⁴³ and is neutral toward religion or the religious message of, in this case, national network NCE broadcasters who are almost entirely religious broadcasters.⁴⁴

McDaniel, supra., stands for the proposition that government may not exclude a party from participation in public life (in that case, a state constitutional convention) because they are also engaged in religious ministry. The participation in public life by a broadcast licensee is self-evident, and EMF asserts that a Commission regulation that consciously (if even indirectly) prefers secular broadcast interests and discriminates against religious broadcasters, or even a class of

⁴² See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097 (1995).

⁴³ See *McDaniel v. Paty*, 435 U.S. 618; 98 S. Ct. 1322 (1978) (“McDaniel”); see also 42 USC Section 2000(bb) (“the “Religious Freedom Restoration Act”).

religious broadcasters, must withstand strict scrutiny analysis and show a compelling interest in the regulation. Insofar as the point system is intended to favor education from primarily secular sources, as is apparent in the Order, that interest on its face discriminates against religious broadcasters and must survive the strictest scrutiny.⁴⁵ Insofar as the Commission's point system achieves its aim through apparently benign criteria such as localism, the Commission must still show that interest to be compelling enough to justify its adverse affects on a class of religious broadcasters who are national network NCE broadcasters.⁴⁶ In neither case can the Commission make such a showing.

IV. Conclusion

The Commission's point system has made it all the more likely that government-related "public broadcasting" affiliates (be they statewide network participants or PBS/NPR/PRI local affiliates) will gain licenses in mutually exclusive application situations, even if they are seeking a second station within the contour of a station they already operate, as opposed to a new entrant in the market who will provide true diversity but cannot prevail over the "statewide network" and "established local applicant" incumbents. Thus, the actual policy advanced by the Commission (as it virtually admits in the Order) is that government sponsored public broadcasting is good, and there should be more of it, even if a diverse alternative, in many cases a national religious broadcaster, will be decisively disadvantaged in offering its alternative to the public.

EMF believes the speaker preferences and content-laden priorities actually advanced by the Commission's point system render it unconstitutional, and that the result-oriented logic used to

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⁴⁴ See *RAV v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992) ("R.A.V.")

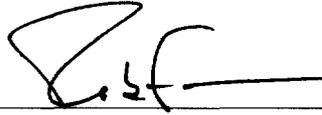
⁴⁵ *RAV, supra.*

⁴⁶ See *McDaniel, supra.*

arrive at the specific elements of the new rules were arbitrary and capricious. EMF urges the Commission to reconsider and rescind these regulations, and commence a new proposed rule-making that will consider the many points raised in this petition and, crucially, formulate rules that serve the broadest aspect of the public interest: diversity of program choices.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION



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Document #: 954598 v.7

DECLARATION

I, Joseph C. Miller, Director of Finance/Signal Development for Educational Media Foundation ("EMF"), hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I have reviewed the exact contents of the foregoing Petition for Reconsideration, and except for facts of which official notice may be taken, the facts set forth therein are true and complete to the best of my knowledge, information and belief.

This Declaration is signed this 10th day of July, 2000 under penalty of perjury under the laws of the United States.



Joseph C. Miller
Director of Finance