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Before the
Federal Communications Commission
Washington, D.C.

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In the matter of	)	
	)	
Reexamination of Comparative	)	MM Docket No. 95-31
Standards for New Noncommercial	)	
Educational Stations	)	

Petition for Reconsideration and/or Clarification
of the Real Life Educational Foundation of Baton Rouge, Inc.

James J. Popham
1320 19th. Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

Counsel for Real Life Educational Foundation of Baton Rouge, Inc.

July 10, 2000

Summary

As a veteran of the noncommercial comparative process and victim of the Commission's previous archaic noncommercial comparative criteria, Real Life commends the Commission on adoption of generally sound noncommercial comparative criteria. Only a few mildly arbitrary taints remain. And they may be easily removed via minor modifications or clarification of the localism points award.

First, the requirement that 75% of an organization's board be local in order to claim the three-point credit as a local entity is arbitrary. It is utterly unexplained and devoid of any apparent plausible justification. Looking to a majority of board members on the other hand would anchor the criterion in the bedrock of Commission precedent and understanding of what constitutes control.

Second, the Commission would elevate form over substance if it persisted in requiring that an organization itself, as opposed to a majority of its board members, have an established presence in a community for two years prior to filing an application. Crediting board member residence would achieve the same benefits and eliminate the same costs as the Commission's present approach – but without inviting arbitrary and confining results. With respect to feigning local qualifications, a board member's local residence – for two years immediately preceding the application – is no more subject to feigning than the location of an applicants headquarters within 25 miles of a proposed community of license. In

terms of establishing local educational credentials, the Commission is at odds with itself. On the one hand, it defines a local organization not only based on the location of physical facilities, but also on the composition and residence of its board. However, when it comes to the two-year establishment provision, it ignores the board and focuses only on bricks and mortar. This defies common sense. The credentials, the knowledge, the meaningful local nexus reside with the people. Those people will bring their knowledge, educational credentials, and local awareness to an organization whether the organization *per se* existed for two years or two minutes before the application was filed.

Real Life, therefore, urges the Commission to modify or clarify the criteria for an award of the three-point localism credit by

- Considering an organization local if a majority (in lieu of 75%) of its board of directors consists of local residents; and
- Considering an organization established if a majority of its board of directors have been local residents for at least two years.

These two minor adjustments to the new point system will remove the last vestiges of arbitrary tarnish from the Commission's otherwise shiny new noncommercial comparative criteria.

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As a veteran of the noncommercial comparative process and victim of the Commission's previous archaic noncommercial comparative criteria,[1] Real Life commends the Commission on adoption of generally sound noncommercial comparative criteria. After 16 years of involvement in an as yet unresolved comparative proceeding,[2] as well as participation in the present rule making, Real Life happily observes that only a few mildly arbitrary taints remain. And they may

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[1] Real Life's case was one of the precipitating events of this proceeding. *Report and Order*, MM Docket No. 95-31 (released April 21, 2000) at ¶5 [hereinafter cited as *Report and Order*], *citing Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991).

[2] Real Life filed an application for a new noncommercial station in Baton Rouge, Louisiana, on March 22, 1984. Nearly 10 years later, on April 16, 1993, the Commission released its *Memorandum Opinion and Order*, 8 FCC Rcd 2675 (1993), affirming the Review Board's decision denying Real Life's application and granting the competing application of Jimmy Swaggart Ministries, Inc. On May 14, 1993, Real Life filed a Notice of Appeal, pursuant to 47 U.S.C. §402(b). After Real Life submitted its brief to the court, the Commission successfully sought remand of the case, which remains undecided pending the outcome of this proceeding. For a more complete rendition of this never-ending saga, Real Life refers the Commission to the excerpt from its statement of

be easily removed via minor modifications or clarification of the localism points award.

First, the requirement that 75% of an organization's board be local in order to claim the three-point credit as a local entity is arbitrary. It is utterly unexplained and devoid of any apparent plausible justification. Looking to a majority of board members on the other hand would anchor the criterion in the bedrock of Commission precedent and understanding of what constitutes control.

Second, the Commission would elevate form over substance if it persisted in requiring that an organization itself, as opposed to a majority of its board members, have an established presence in a community for two years prior to filing an application. Crediting board member residence would achieve the same benefits and eliminate the same costs as the Commission's present approach – but without inviting arbitrary and confining results.

Real Life, therefore, urges the Commission to modify or clarify the criteria for an award of the three-point localism credit by

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- Considering an organization established if a majority of its board of directors have been local residents for at least two years.

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the case on appeal, a copy of which was appended to Real Life's further comments, filed in this proceeding on January 28, 1999.

These two minor adjustments to the new point system will remove the last vestiges of arbitrary tarnish from the Commission's otherwise shiny new noncommercial comparative criteria.

I. An organization should be eligible for the three-point localism point award if a majority of its board of directors consists of local residents.

A. The 75% standard is arbitrary.

The Commission has ordained that an organization "having 75% of board members residing within 25 miles ... of the proposed community of license" is considered "local" for purposes of the localism credit.[3]

The 75% quantitative standard is arbitrary. First, the Commission offers no explanation whatsoever for the adoption of a 75% benchmark. The new percentage criterion is adopted with no rationale, no reference to the record, no reference to the Commission's prior notices in this proceeding, and no substantive reference to any other regulatory regime – even ITFS, to which the Commission turned in crafting the new noncommercial comparative criterion. In short, if the Commission has any rationale or basis for the 75% standard, it says nothing about it. Nothing could be more offensive to the Commission's obligation to provide a discernible rationale for its actions, rather than remain "intolerably mute."[4]

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[3] *Report and Order* at ¶54.
[4] *Greater Boston Television Corporation v. FCC*, 444 F.2d 841 (D.C.Cir.1970).

Second, no plausible rationale for the 75% criterion may be conjured from any of the Commission's deliberations in this proceeding. Whereas the Commission claims to draw heavily from the ITSF point system,[5] no rational connection may be established between the 75% criterion and the ITSF system. Under the current ITSF rules, the definition of a "local" licensee includes no criterion based on the composition of the board of directors. It relates strictly to physical location.[6] Nor does the 75% criterion find a rational basis in the special provision adopted by the Commission to deal with ITSF applicants consisting of both national and local organizations. That provision limited non-local representation on the entity's board to less than $^{1}/x$, where x was the number of entities participating in the applicant. This provision eliminated the "possibility of a non-local party exercising control merely by fractionalizing the local parties."[7] The 75% requirement has no such effect. A non-local representation of 25%, along with only 26% of the voting power in the 75% local contingent, could achieve 51% majority control. Thus, a majority of the local representation (49% in 75% versus the remaining 26%) could lose control to a faction composed of the non-local voting power plus just a bit more than a third of the local representation. Finally, the Commission itself in this proceeding has noted the very different

[5] *Report and Order* at ¶54.
[6] 47 C.F.R. §74.932, NOTE 1.
[7] *ITFS (Reconsideration)*, 59 RR 2d 1355, 1364, n. 23 (1986).

regulatory goals and regimes of the broadcast and ITFS rules.[8] Therefore, the rationale for the ITSF formula fails to justify the 75% criterion for determining eligibility for the localism credit in the new noncommercial comparative point system.

Third, developing a plausible *post hoc* rationale for the 75% criterion appears problematic. If the concern is assuring control by the local faction, then the 75% standard does both too much and too little. A simple majority of board members would suffice to maintain control among local members of the board and assure that non-local board members could not achieve control. On the other hand, as noted above, the 75% standard would not prevent less than one-half of the local members from joining forces with the non-local members to secure control from a majority of the local members. Thus, a majority of the local members (*i.e.*, 38% of the total) could not retain control if the remaining local members (*i.e.*, 37% of the total) joined with the non-local members (25% of the total), thereby gaining 62% control. Therefore, the 75% standard is no more effective and no less effective than a simple majority standard in assuring control to local board members.

Even if the Commission were concerned about maintaining supermajority control in the hands of local board members, the 75% standard may be either excessive or ineffectual. For example, in an organization with a 60%

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[8] *Further Notice of Proposed Rule Making*, MM Docket No. 95-31, 13 FCC Rcd 21167, 21177, n.23 [hereinafter cited as *Further Notice*].

supermajority voting requirements, a coalition of the 25% non-local voting block and a minority of the local members (constituting 37% of the voting power) could not be thwarted by a majority of the local ownership, which held 38% voting power. On the other hand, if the supermajority level was set at two-thirds of the voting power, then the 75% requirement would work – the 38% local block could prevail. However, a requirement that more than two thirds of the board be local would accomplish the same result. Again, a majority of the local members always would constitute more than one-third of the voting power. Consequently, they would retain the ability to defeat any voting block of local and non-local board members in any vote requiring a supermajority to prevail. Thus, the 75% benchmark again suffers from its roots in the arbitrary.

Fourth, the 75% standard criterion by definition hardly may be considered the "minimum eligibility requirement" the Commission declares it to be.[9] And it clashes headlong with the Commission's own disdain for "an artificially complex formula that elevates quantitative over qualitative considerations."[10] No determination of control is devoid of quantitative aspects. However, a percentage criterion snatched from the ether without a stated rationale epitomizes the sort artificial quantitative construct that the Commission endeavored to leave behind.

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[9] *Report and Order* at ¶49.
[10] *Report and Order* at ¶49.

Sixth, the premise of the local credit suggests no rationale for the 75% standard. The Commission seeks to foster participation by local entities in noncommercial educational broadcasting, reserving the credit for "truly local applicants."[11] The premise of this credit, according to the Commission, is "the recognition that education historically is a local undertaking."[12] In essence, education is local; therefore, educational broadcasting should be local. However, none of this speaks to "who should be considered local."[13] There, the Commission turns to its ITFS standards.[14] And, indeed, with respect to the criteria related to physical or geographical location, the Commission draws directly from the ITFS rule.[15] However, as noted above, the 75% criterion reflects neither any specific ITFS rule or standard nor any apparent intent to mimic the effect of the now defunct ITFS local credit provision. Therefore, the 75% standard is arbitrary and virtually indefensible on any rational basis.

B. An organization with a majority of local board members should be eligible for the localism point credit.

Majority local control should be the focal point of the analysis in determining which applicants deserve the local credit. Indeed, control appears to

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[11] *Report and Order* at ¶49.
[12] *Id.*
[13] *Report and Order* at ¶54.
[14] *Id.*
[15] 47 C.F.R. §74.932, NOTE 1.

be focal point of the Commission's concern.[16] First, the adoption of a 75% standard reflects a concern with control of an applicant. No doubt, an organization with 75% of its board members residing within 25 miles of the community of license would be controlled by the local members of the board. Second, in earlier ITSF proceedings, the Commission stated that "In an evaluation of whether an applicant can also be considered local, the most critical factor is determining where control lies in the organization."[17] Therefore, any standard based on a percentage of local board members must address concerns about control of the applicant.

For non-profit organizations with self-perpetuating boards – like Real Life – control resides with a majority of the board. The Commission long has embraced and applied this standard. According to the Commission, ultimate legal control resides with a majority of the board members.[18] Thus, the change – abrupt or gradual – in a majority of the board of an organization with a self-perpetuating

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[16] The Commission's failure to explain the rationale of the 75% standard necessarily leaves Real Life in the dark. The Commission's silence not only prevents a court from effectively reviewing the Commission's action, but also places aggrieved parties in an impossible posture. Left guessing as to what the Commission hoped to accomplish, one is hard pressed to justify a preferable approach which would, perhaps, more effectively or efficiently achieve the Commission's goals. At best, Real Life is left to assume some rationale that might enable it to justify a different standard on terms consistent with the Commission's unstated reason for the benchmark it selected.

[17] *ITFS (Reconsideration), supra*, 59 RR 2d at 1364.

[18] *Transfers of Control of Certain Licensed Non-stock Entities*, 4 FCC Rcd 3403, 3407 (1989).

board constitutes a transfer of control requiring prior Commission consent.[19] This approach is based on the Commission's determinations that

- Both self-perpetuating boards and stockholders possess ultimate authority over their respective organizations;[20] and
- The right to determine the manner or means of operating a licensee by definition goes with "mere" majority stock ownership.[21]

Therefore, the Commission traditionally and consistently has considered control to reside with a simple majority of a self-perpetuating board of directors.

More to the point, it has awarded credits in other broadcast comparative evaluations based on simple majority control. Minority preferences were awarded in LPTV lotteries for entities with majority minority interests.[22] In the case of non-stock entities, the Commission looked to the composition of the board.[23] Likewise, in the ITSF proceedings, the Commission awarded the accreditation preference not only if the applicant itself was accredited, but also "if participants which would themselves be entitled to the accreditation preference hold a majority of the votes on the board."[24]

In view of the above, considering an organization "local" for purposes of the three-point localism credit if a simple majority of its board of directors were local would enjoy a rational basis. It would be consistent with the Commission's

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[19] *Id.*
[20] *Id.*
[21] *Peoria Community Broadcasters* 79 FCC 2d 311, 317 (1980).
[22] *Random Selection Lotteries*, 93 FCC 2d 952, 976 (1983).
[23] *Id.*, 93 FCC 2d at 977.
[24] *ITFS (Reconsideration), supra*, 59 RR 2d at 1364.

long-standing appreciation that a majority retains ultimate control. It would be equally consistent with the award of credits in other broadcast and ITSF proceedings. Therefore, the Commission should amend new section 73.7000 to define a local applicant as one having more than 50% of board members residing within 25 miles of the community of license.

II. An applicant should be considered established if a majority of its directors have resided within 25 miles of the proposed community of license for two years immediately preceding application.

An applicant should be considered an established entity if a majority of its board members have lived in the local area for two years preceding filing the application. The Commission's new rule would consider an applicant established if the organization met the criterion for local for the two years preceding the application. An organization would be considered local if 75% of its board members resided in the local area. However, if these same board members were part of an organization formed one minute or even one year before the application was filed, then the Commission's new comparative criteria would deny them the localism credit. No basis exists for this proverbial distinction without a difference.[25]

[25] Real Life also wonders how the Commission will apply the credit to an organization that now has existed for 16 years – doggedly pursuing its application, although it was a relatively new organization when it filed its application. Indeed, the Commission and its staff will face some troublesome issues in adopting procedures to apply the new comparative criteria to applications that have been on file for years. Will new NCE

A. Looking to individual board members would be just as beneficial vis-à-vis the Commission's goals as looking to the applicant organization itself.

The Commission's goals for preferring established entities would be equally well served by looking to a majority of an applicant's board members. The established-entity criterion is based on two stated considerations – to limit the feigning of local qualifications and to establish an applicant's educational credentials.[26]

With respect to feigning local qualifications, a board member's local residence – for two years immediately preceding the application – is no more subject to feigning than the location of an applicants headquarters within 25 miles of a proposed community of license. No organization is any more likely to move a number of potential board members to a community two years in advance for purposes of claiming a credit than it is to set up a headquarters two years in advance of a possible application. The latter feint would be accomplished more easily inasmuch as fewer people likely would be involved. In any event, the Commission's new filing window procedure will prevent either feint unless the Commission opens windows for periods well excess of two years! Additionally, the Commission's new rules further deter abuse after grant of an application by conditioning the localism credit on requirements in the organization's governing

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applicants be permitted to upgrade, as were ITFS applicants? *See ITFS (Reconsideration), supra*, 59 RR 2d at 1365. Or will they be evaluated on the basis of their status on the old B cut-off date?

[26] *Report and Order* at ¶55.

documents that the organization continue to satisfy the definition of local.[27] Thus, local board members would be assured for the duration of the applicant's ownership of the facility. They could not move in, wait two years, file, win, and run. The new rules also impose a holding period that locks in the applicant for four years and removes any incentive to manipulate the process by preventing a sale of the station for a profit. Therefore, neither feigning local status nor subsequently abusing the credit system would be any more likely if the Commission looked to an organization's principals, as well as its buildings.

In terms of establishing local educational credentials, the Commission is at odds with itself. On the one hand, it defines a local organization not only based on the location of physical facilities, but also on the composition and residence of its board.[28] However, when it comes to the two-year establishment provision, it ignores the board and focuses only on bricks and mortar. This defies common sense. Educational organizations and institutions consist of buildings and people. But the vital element of every organization or institution is its people. Buildings, whether headquarters or campus, have no credentials, no knowledge, no ability to make decisions. The credentials, the knowledge, the meaningful local nexus reside with the people. Those people will bring their knowledge, educational credentials, and local awareness to an organization whether the organization *per se* existed for two years or two minutes before the application was filed. In short, if educational

[27] New §73.7003.

broadcasting should be local because education is local, then the essence of the matter is the background of the people – their residency in the community for the two preceding years – not the date their corporate charter was filed.

Finally, to the extent that the Commission remains concerned about "area familiarity or uniquely responsive local programming,"[29] even within institutions, it is the people, not the bricks and mortar, who have the familiarity and decide on programming. Therefore, the local educational nexus exists through people. Acknowledging this basic reality will do nothing to subvert the Commission's preference for localism in noncommercial broadcasting.

B. The Commission's current rule elevates form over substance and invites utterly arbitrary results.

By looking only to the institutional shell and ignoring the people that are the true heart and soul of an organization, the Commission predictably invites arbitrary results that mock its rules. For example, three local teachers, two members of the city council, and two local doctors are deeply concerned about the lack of educational and instructional programming in their community. They form a new organization for the purpose of filing an application for a new NCE station in their community. Each of the board members has lived in the community for over ten years. They propose to broadcast 6 hours of instructional programming per day, plus several hours of health-related programs and daily issue-oriented

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[28] New §73.7000

programming. They also propose to let several local community colleges use the station as a training ground for their students. A local university, which is owned by a private foundation with board members from all over the country, which has a "national" student body, and which already operates a local NCE station also applies for the station. They desire a second station so that they may have a jazz format station to complement their classical music station. Both applicants will provide the same coverage. Under the Commission's new criteria, the college prevails. Its three-point localism credit beats the first applicant's two-point diversity credit. The first applicant gets no local credit because, although the board members all are long-term local residents, their organization did not exist for two years prior to filing the application. Local buildings trump a truly local board of directors.

Similarly, a local church, founded in 1953, forms a new non-profit corporation to apply for a new NCE station. They do so to insulate the church itself from the proposed station's liabilities and to enable them bring in some additional expertise to the board. Thus, a retired local college president, a retired local radio station manager, and two former local school board members join the pastor and several members of the church's governing board on the applicant's board. All, but one of the board members have lived in the community for at least five years. Their coverage area encompasses 43,000 people. Another church, founded in 1997 by an itinerant preacher and several loyal followers, also files an

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[29] *Report and Order* at ¶¶43, 49.

application for the station, but in the church's own name. They propose a low budget facility that will provide service to 14,000 people. Again, the second applicant prevails based on a three-point localism credit versus the two-point coverage credit for the first applicant. The first applicant is denied a localism credit because the applicant itself did not exist two years prior to its filing the application. These results are precisely what the Commission can expect if it refuses to rationalize its rules concerning the award of the three-point credit for localism.

Therefore, the Commission ought square its rules with their stated purposes and consider an applicant established if a majority of its board has resided within 25 miles of the community of license for at least two years.

III. Conclusion

In view of the above, Real Life urges the Commission to reconsider its *Report and Order* in this proceeding and amend new section 73.7000 of its Rules and Regulations to

- Define an organization as local if a majority of its board members have lived within 25 miles of the proposed community of license for two years preceding the filing of the application; and
- Define as established an organization the majority of board members of which have lived within 25 miles of the proposed community of license for two years preceding the filing of the application.

Real Life appreciates the difficulty the Commission faced and commends the Commission for adopting a point system that will prevent another Energizer®

Bunny, 16-year comparative debacle like that Real Life continues to endure. And Real Life appreciates that the proverbial glass is more than half full. At the same time, the several inconsistencies noted herein ought be remedied. It was one thing for the Greeks to leave a minor flaw in their structures in order to highlight the perfection of their work as a whole. It is another for the Commission, charged with avoiding the arbitrary and capricious, to leave the imperfections of its work untouched.

Respectfully submitted,

James J. Popham
1320 19th. Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

Counsel for Real Life Educational Foundation of Baton Rouge, Inc.

July 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing petition for reconsideration were served on this 10th day of July, 2000, via first class mail, postage prepaid, upon the following:

Christopher J. Wright
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Eric L. Bernthal
James F. Rogers
Latham & Watkins
1001 Pennsylvania Ave.
Suite 1300
Washington, D.C. 20004
Counsel for Jimmy Swaggart Ministries

James J. Popham