

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Reexamination of the Comparative Standards for Noncommercial Educational Applicants	)	MM Docket No. 95-31
	)	
Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81)	)	
	)	
To: The Commission		

**REPLY COMMENTS OF  
EDUCATIONAL MEDIA FOUNDATION**

Educational Media Foundation (“EMF”), by its counsel, hereby submits its reply comments in response to the *Second Further Notice of Proposed Rulemaking* in the above-captioned matter, released February 25, 2002 (the “*Second Further Notice*”) and the initial comments submitted in response thereto. In the *Second Further Notice*, the Commission seeks comment on various proposals for choosing between competing commercial and noncommercial applicants for non-reserved channels following the decision in *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) that the Commission is forbidden by statute from using competitive bidding to award noncommercial licenses. EMF agrees with those commenters who point out that the Commission’s proposals are inadequate to address the needs of noncommercial educational (“NCE”) entities. Any attempt to exclude NCE entities from competing for non-reserved frequencies, as suggested by the *Second Further Notice*, is both contrary to Congressional intent and detrimental to the growth of NCE broadcasting. Accordingly, as set forth herein, EMF urges that, in those instances where there is a conflict between commercial and NCE entities for a non-reserved frequency, the Commission provide an opportunity for the applicants to enter into a

universal settlement or, in services that do not use the Table of Allotments, to devise an engineering solution. If a solution to the mutual exclusivity cannot be found, the Commission should allow the NCE entities to create a commercial subsidiary or affiliate to compete at auction.

## DISCUSSION

### **I. The Commission's Proposal to Hold NCE Entities Ineligible For Licenses for Non-Reserved Channels and Frequencies is Contrary to Congressional Intent and Will Stifle Growth of the NCE Service**

The Commission should not exclude NCE applicants from station opportunities in the commercial band. The restriction on the Commission's auction authority contained in Section 309(j) of the Communications Act, as amended (the "Communications Act" or the "Act"), clearly was designed to help NCE broadcasters expand the reach of their stations, not to restrict that ability. Congress most certainly was aware that NCE entities are required by statute and FCC rule to provide a nonprofit, educational service and are prohibited from selling advertising on behalf of their stations.<sup>1</sup> Thus, the prohibition on the participation of NCE entities in the auction process was meant by Congress to prevent the Commission from mandating that NCE entities use their limited resources to compete at auction for any new license that they might seek to acquire. It clearly was not the intent of Congress to penalize NCE entities by forbidding them from applying for or operating on new non-reserved channels.

Barring NCE entities from operation on non-reserved frequencies will stifle the growth of the NCE service because the 20% of channels reserved exclusively for NCE use are inadequate to meet demand for new NCE stations. As evidenced by the large number of applicants filing for virtually every vacant reserved channel under the Commission's former noncommercial cutoff

---

<sup>1</sup> See 47 C.F.R. § 73.503, 47 U.S.C. § 399b.

procedures, demand for noncommercial services is high. Moreover, few true opportunities exist within the NCE reserved band for new service. The limited availability of vacant reserved channels in many areas is exacerbated by Commission rules designed to protect Channel 6 television stations from interference by nearby NCE stations.<sup>2</sup> These rules place severe restrictions on NCE station operating power and distance from Channel 6 stations, thereby eliminating the availability of or requiring lower power, interference-prone operation by many NCE stations. Thus, given the limited availability of reserved channels to meet the high demand for noncommercial services, barring NCE entities from operation on non-reserved frequencies would not only be inconsistent with Congress' intent but also inequitable and contrary to the public interest.

**II. The Commission's Proposals to Permit NCE Entities to Acquire Licenses for Non-Reserved Channels and Frequencies When No Conflict Exists With Commercial Entities and to Provide Additional Opportunities to Reserve Channels for NCE Use are Inadequate**

The Commission's proposals (i) to permit NCE entities to acquire licenses for non-reserved channels when no commercial entities want the channels and (ii) to give NCE entities additional opportunities to reserve channels for their use, offer illusory solutions and, like the Commission's proposal to wholly exclude NCE entities from operation on non-reserved frequencies, would result in the effective reservation of large amounts of spectrum for commercial-only use. First, at least with respect to FM allotments, there are very few situations in which commercial entities have failed to apply for a non-reserved frequency during an auction filing window. Thus, there will be very few opportunities for new NCE service on channels in which there is no commercial interest – and certainly no such opportunities in any area of substantial population, the very areas where there will be the most need for new or alternative

---

<sup>2</sup> See 47 C.F.R. § 73.525.

NCE services. Moreover, because the Commission will not allot a new channel without an expression of interest, permitting only commercial entities to initiate proceedings to allot a new non-reserved frequency effectively ensures that there will always be at least one commercial entity seeking use of any new allotment. Similarly, as has been demonstrated by other commenters in this proceeding, in many communities, few if any additional frequencies exist to allot.<sup>3</sup> Even if the Commission gives NCE entities a fair and genuine chance to reserve channels in which commercial applicants have shown an interest, such an action will likely be met with strong opposition from commercial applicants. Thus, EMF questions whether the opportunity to file for channels of no interest to commercial entities, or the opportunity to request the reservation for NCE use of new channels, will really provide any meaningful opportunity for NCE entities to offer new service.

**III. In Cases Where Commercial and NCE Entities Are Competing for the Same Channel, the Commission Should Provide an Opportunity for Settlements and Engineering Solutions, and Where Unsuccessful, Should Permit NCE Applicants to Create Commercial Subsidiaries or Affiliates to Participate at Auction**

In light of EMF's above-stated conclusions, the FCC must allow NCE entities the right to file for non-reserved channels. In cases in which commercial and NCE entities both file for a license for the same channel the Commission should, prior to auction, open a window in which the mutually exclusive applicants may file a universal settlement or, in services that do not use the Table of Allotments, minor technical amendments to resolve the conflict.<sup>4</sup> Permitting such solutions would help to place licenses in the hands of the entities most interested in serving the relevant community. While permitting settlements and engineering solutions between

---

<sup>3</sup> See, e.g., Joint Comments by Moody Bible Institute of Chicago *et al.*, filed April 15, 2002.

<sup>4</sup> Certain applicants already have an opportunity to resolve their mutually exclusive applications prior to auction. See footnote 5, *infra*.

competitors would implicate the Commission's anti-collusion rule, as the Commission itself recognized, exceptions have been made to the rule in other contexts.<sup>5</sup> In EMF's view, the rationale for amending the anti-collusion rule is even more compelling in this context than in others in which the Commission has made exceptions to the rule as, absent such an exception, NCE entities may be altogether prohibited from competing for non-reserved frequencies. As demonstrated above, such an outcome would not only be inconsistent with Congress' statutory intent, but would hinder the growth of the NCE service.

In the event that mutually exclusive parties are unable to reach a settlement or devise an engineering solution, the Commission should require that all applicants propose commercial operation and auction the permit. All NCE applicants should be afforded a limited time in which to file a *pro forma* amendment to their applications proposing a for-profit subsidiary or affiliate as the licensee in order to enable them to participate in the auction.<sup>6</sup> As the Commission itself recognized, permitting settlements and technical resolutions without allowing participation in auctions by NCE entities would accomplish little since commercial applicants would have no

---

<sup>5</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, ¶ 17 (1988) (“*Competitive Bidding R&O*”) (permitting settlements and engineering solutions by AM applicants in mutually exclusive groups that contain a major modification application); See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order*, 14 FCC Rcd 8724, ¶ 17 (1988) (“*Competitive Bidding MO&O*”) (permitting resolution of mutual exclusivities by settlement and engineering solutions in the secondary broadcast services).

<sup>6</sup> The Commission does not evaluate an applicant's basic qualifications, including its ownership, until after the auction. See *Competitive Bidding R&O* at ¶ 91, *Competitive Bidding MO&O* at ¶ 14-18. Thus, permitting such an amendment at this time will not burden the Commission's processes. In fact, the Commission could require the amendment by the end of the settlement window in the event no settlement is reached, in which case it would not delay the auction at all.

incentive to try to reach a pre-auction resolution of the conflict.<sup>7</sup> Thus, for NCE entities to have more than an illusory chance of obtaining a license on a non-reserved frequency, they must be allowed to participate in auctions.

Once these channels are auctioned, there should be no restrictions on their future use as NCE channels. NCE entities should be permitted to directly acquire licenses authorizing operation on non-reserved frequencies from commercial entities and to convert these authorizations to NCE status. There is nothing special about these new channels – they are for all intents and purposes equivalent to all currently existing channels. Currently, commercial and NCE entities routinely purchase facilities from each other and convert the authorizations to reflect their use. Such transactions allow the market to determine the best use of the non-reserved channels. In cases where there are more commercial channels than a market can support, a failing station is often sold or donated to an NCE entity. In cases where there is adequate NCE service and a high demand for new commercial services, NCE entities operating on non-reserved channels have sold their facilities to commercial broadcasters for commercial use. The Commission has identified no problems or abuses with the current system to be remedied by a draconian restriction on the transfer of these facilities, nor has the practice harmed the public interest. Moreover, Section 309(j) does not mandate such a prohibition. On its face, Section 309(j) only withholds Commission auction authority for NCE stations; it does not bar the purchase of any station by NCE entities. Any such extension of the statute by the Commission would be contrary to Congress' intent of aiding NCE stations by exempting them from mandatory auctions and would ultimately be harmful to their growth while achieving no offsetting benefits.

---

<sup>7</sup> See *Second Further Notice* at ¶ 13.

**CONCLUSION**

In sum, NCE entities play a unique role in providing diverse, quality educational programming in the public interest. Yet the number of channels reserved exclusively for NCE use is insufficient to permit these entities to adequately serve their communities. Thus, the Commission's proposals to bar NCE entities from applying for and operating on non-reserved frequencies is unfair and inconsistent with the public interest as well as Congressional intent in enacting Section 309(j) of the Communications Act. For these reasons, EMF urges the Commission to continue to permit NCE entities to apply for licenses in the non-reserved band. To resolve conflicts between commercial and NCE entities, the Commission should permit settlements and, in non-Table services, minor technical amendments and, if the parties are unable to settle the matter, should permit NCE entities to participate in auctions through a for-profit subsidiary or affiliate.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

By: \_\_\_\_\_  
David D. Oxenford  
Veronica D. McLaughlin

Its Attorneys

SHAW PITTMAN LLP  
2300 N Street, N.W.  
Washington, D.C. 20037-1128  
(202) 663-8000

Dated: May 15, 2002