

**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

**COMMENTS OF
NATIONAL PUBLIC RADIO, INC.**

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Table of Contents

Introduction and Summary	1
I. Based on The Initial Comments Filed in This Proceeding, The Commission's Proposed Options, and Particularly Options 1 and 2, are Significantly Flawed	4
II. The Commission Should Take All Appropriate Steps to Assure Access to Additional Spectrum for NCE Use, Including by Reserving Additional Spectrum Specifically for NCE Use.	9
A. The Commission Should Liberalize the Process and Standards for Reserving Spectrum for NCE Use	9
B. In Addition to Liberalizing the Criteria for Reserving Individual Channels for NCE Use, the Commission Should Reallocate the 82-88 MHz Spectrum to Radio.	12
III. The Definition of "Noncommercial Educational Broadcast Station" and "Public Broadcast Station" Clearly Incorporates A Requirement that the Station Be Used for the Advancement of An Educational Program.	13
IV. The Commission has Long Recognized AM Band NCE Stations as "Noncommercial Educational" or "Public Broadcast" Stations	15
Conclusion.	18

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**REPLY COMMENTS OF
NATIONAL PUBLIC RADIO, INC.**

Introduction and Summary

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. ("NPR") hereby submits its Reply Comments regarding the Commission's Second Further Notice of Proposed Rulemaking in the above-captioned proceeding proposing new rules to resolve mutually exclusive applications for non-reserved spectrum involving commercial and noncommercial educational ("NCE") applicants.¹

As NPR acknowledged in its initial comments, the Commission faces a difficult task in developing an administrative process for resolving mutually exclusive applications filed by commercial and NCE applicants for non-reserved spectrum. In the effort to develop an

¹ In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Association of Americas' Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81), Second Further Notice of Proposed Rulemaking, MM Docket 95-31 (rel. Feb. 25, 2002) [hereinafter "Second Further NPRM"].

Unless otherwise noted, all references to Comments are to comments filed in the instant

administratively simple process to a complex issue, we urge the Commission not to lose sight of the purpose underlying its spectrum allocation authority: the public interest.

Denying NCE access to all non-reserved spectrum through Option 1 or 2 would significantly blunt the extension of NCE service and undermine existing service that is dependent upon translator stations. We also question the wisdom of auctioning all remaining non-reserved spectrum for commercial use. The Commission's ongoing examination of ownership in the commercial broadcasting industry suggests that such a course will result in further consolidation of ownership in fewer and fewer hands. We therefore urge the Commission to reassess its options and consider carefully proposals that assure NCE entities reasonable access to the non-reserved spectrum.

While Option 3 on its own is unlikely to assure sufficient NCE access to spectrum, we again urge the Commission to liberalize the process for reserving additional spectrum specifically for NCE use. In NPR's initial Comments, we proposed a methodology for reserving particular channels in response to reservation petitions, and we urged the Commission to afford NCE entities an opportunity to reserve critically-needed non-reserved channels prior to their auction. Among the initial commenters, the principal opposition to the reservation of additional spectrum for NCE use came from the same entities that supported denying NCE access to non-reserved spectrum -- commercial broadcasters. We believe the Commission is charged with furthering the broader public interest.

To address longer term radio needs, we again urge the Commission to consider reallocating television channel 6 to radio. As NPR and others noted in particular, such a reallocation of spectrum would enable current reserved FM band stations to expand their service

proceeding.

areas, while providing additional spectrum for NCE services generally and facilitating the transition to digital radio. With only two exceptions, all existing television channel 6 licensees have another channel with which to make the transition to digital television. We believe the public benefits associated with allocating an additional 6 MHz block of spectrum adjacent to the existing FM band to over-the-air radio broadcasting far outweigh the interest of existing analog television channel 6 licensees in choosing between two final digital television channel assignments.

Finally, the record in this proceeding confirms what NPR exhaustively demonstrated in our initial comments -- the definition of "noncommercial educational broadcast station" and "public broadcast station" requires both a non-profit educational organization and a proposal to provide a noncommercial educational service. As a result, an entity that proposes to construct and operate a broadcast station but that does not propose a noncommercial educational service is not properly defined as an NCE station. Such an entity is not within the auction exemption for NCE stations and therefore should not be categorically excluded from auctions of mutually exclusive applications for non-reserved channels.

While two commenters have argued that the definition of "noncommercial educational broadcast station" and "public broadcast station" is specific to the FM band and television, the Commission has long recognized AM band NCE stations as "NCE stations" under the statute and its rules, policies and procedures. While the AM band is, as the Second Further NPRM notes, a mature service, the American public continues to rely on AM stations for essential NCE service, and the Commission should not foreclose NCE service via AM stations in the future.

I. Based on The Initial Comments Filed in This Proceeding, The Commission's Proposed Options, and Particularly Options 1 and 2, are Significantly Flawed

Based on the overwhelming consensus among the initial commenters, the three options proposed in the Second Further NPRM, and Options 1 and 2 in particular, suffer from significant flaws. As NPR and many others pointed out, the first two options either actually or effectively deny NCE applicants access to most of the FM band and all of the AM band in direct contravention of the abundant and longstanding Congressional intent favoring the extension of NCE service to the American people.² Refusing to accept NCE applications for non-reserved spectrum -- Option 1 -- or summarily dismissing NCE applicants except in the unlikely case in which no commercial entity has filed a mutually exclusive application -- Option 2 -- would completely nullify the Section 309(j)(2)(C) NCE auction exemption and the affirmative assurance of access to spectrum that it embodies.³

While NPR and others support expanding the opportunities and criteria for reserving spectrum⁴ -- Option 3 -- that option alone is not perfect. With regard to FM translators in

² See NPR Comments at 5-11; Comments of the National Federation of Community Broadcasters at 3 [hereinafter "NFCB Comments"]; Comments of the Curators of the University of Missouri at 4-6 [hereinafter "Missouri Comments"]; Joint Comments by the Moody Bible Institute of Chicago, Houston Christian Broadcasters, Augusta Radio Fellowship Institute, The Sister Sherry Lynn Foundation, and The Praise Network at 4-7 [hereinafter "Joint Comments of Moody Bible Institute et al."]; Comments of the Georgia Public Telecommunications Commission at 3-5; Comments of the University of Northern Iowa at 5 [hereinafter "University of Northern Iowa Comments"]; Comments of the Educational Media Foundation at 2-4; Comments of the State of Oregon at 13-14 [hereinafter "Oregon Comments"]; Comments of the Association of America's Public Television Stations at 7-10 [hereinafter "APTS Comments"]; Comments of Beacon Broadcasting Corp. and United Educational Broadcasting at 4-5 [hereinafter "Comments of Beacon Broadcasting et al."].

³ See NPR Comments at 5-11; Comments of APTS at 7-10; Comments of Beacon Broadcasting Corp et al. at 4-5.

⁴ See NPR Comments at 11-18; NFCB Comments at 5; Missouri Comments at 6-7.

particular, having to formally reserve a channel to operate a facility that is subject to displacement at any time is too cumbersome a process to serve the public interest, especially when the prior translator application processing rules were notably effective in resolving mutually exclusive applications.⁵ Because the Commission is charged with avoiding mutual exclusivity⁶ and the end result of the former translator processing rules was the avoidance of mutual exclusivity and the awarding of translator construction permits based on the actual service proposals, the Commission is not compelled to auction translator applications.⁷ We therefore join the request to exclude translator applications from the auction process entirely.⁸

Commercial broadcasters supported categorically excluding NCEs from all non-reserved spectrum. In addition to administrative simplicity, NAB cited a portion of the Commission's statutory auction authority governing the design of competitive bidding systems. Thus, NAB quoted from Section 309(j)(3)(A), putting its own emphasis on the avoidance of administrative

⁵ See Comments of Beacon Broadcasting Corp. et al. at 3.

⁶ 47 U.S.C. § 309(j)(6)(E).

⁷ Commercial broadcasters are permitted to construct and operate translators only to fill in their primary service area, 47 C.F.R. § 74.1232(d) (2001), and the former rules gave a dispositive preference to fill-in translator applications over extension-of-service applications. *Id.* § 74.1233(d) (1997). The former rules resolved any remaining mutually exclusive translator applications through the application of objective criteria, such as the number of existing aural services, *id.* § 74.1233(f), and, thereafter, through first-come, first-served processing. *Id.* § 74.1233(g).

⁸ Indeed, NPR and other public broadcasters previously advocated such a position. Joint Comments of National Public Radio, Inc., National Federation of Community Broadcasters and the Corporation for Public Broadcasting, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, at 23 (filed Jan. 26, 1998).

or judicial delays, and from Section 309(j)(3)(C), in that case emphasizing commercial use.⁹ Putting aside the proper reading of the cited provisions,¹⁰ statutory objectives governing the design of a competitive bidding system hardly amount to a mandate to auction all the remaining unused broadcast spectrum for commercial use.¹¹

Indeed, we believe the critical consideration is the public interest and the principal issue is whether the public interest will be served by denying NCE access to all non-reserved spectrum. In that regard, we urge the Commission to consider the record in its ongoing examination of commercial broadcast ownership.

Overall, there has been an increase in the number of commercial radio stations of 7.1 percent between March 1996 and March 2001. The number of radio owners declined by 25 percent during this five-year period. This decline is primarily due to mergers between existing owners. Over the same period, there has also been an increase in the size of the largest group owners. In 1996, the two largest radio group owners consisted of fewer than 65 radio stations each. In March 2000, the two largest radio group owners consisted of more than 440 radio stations each. In August, the two largest radio groups merged, so that now Clear Channel Communications owns approximately 1,000 radio stations, with pending acquisitions before the Commission for over 200 additional stations. The second largest group owner, Cumulus Broadcasting Inc., has approximately 250 stations.¹²

At the local level, the Commission's most recent Review of the Radio Industry reports a continued downward trend in the number of radio station owners in Arbitron Metro markets and

⁹ Comments of the National Association of Broadcasters at 5 [hereinafter "NAB Comments"].

¹⁰ Sections 309(j)(3)(A) and 309(j)(3)(C) appear specifically aimed at promoting the public interest rather than expediting the allocation of spectrum for commercial use for the benefit of commercial broadcasters. See 47 U.S.C. §§ 309(j)(3)(A), (C).

¹¹ Compare 47 U.S.C. § 309(j)(6)(E) (directing the Commission to avoid mutual exclusivity in application and licensing proceedings).

¹² Policy and Rules Division, Mass Media Bureau, Federal Communications Commission, Review of the Radio Industry, 2001, at 2 (Sept. 2001).

the top owners' increasing share of the total advertising revenues.¹³ An independent analysis confirms this trend, finding that "in 28 out of the 33 radio markets studied, the number of independent owners declined, even though the actual number of stations increased in almost all 33 markets."¹⁴

Public broadcasters are, by contrast, remarkably local and diverse. While the Commission first sought to prevent undue concentration of ownership in commercial broadcasting more than 60 years ago,¹⁵ it has never found a need to address multiple ownership in public broadcasting.¹⁶ Moreover, the Communications Act and Commission rules ensure that public broadcast stations are and remain responsive to their communities of service. Indeed, localism is the single greatest factor in the Commission's point system for resolving mutually exclusive NCE applications for reserved spectrum.¹⁷ In addition, many CPB funded NCE stations are required by the Communications Act to establish and maintain community advisory

¹³ Id. at 2-3.

¹⁴ Comments of the Office of Communication, Inc. of the United Church of Christ, In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rule Making, MM Docket No. 01-317, MM Docket No. 00-244, at 15 (filed Mar. 27, 2002).

¹⁵ See 6 Fed. Reg. 2282 (May 6, 1941).

¹⁶ See In the Matter of Amendment of the Commission's Multiple Ownership Rules to Include Educational FM and TV Stations, Notice of Proposed Rulemaking, 68 F.C.C.2d 831 (1978) (noting that, "[a]lthough the economic concentration concern is not directly applicable" to public broadcasting, initiating an examination of NCE ownership limits); In the Matter of Amendment of the Commission's Multiple Ownership Rules to Include Educational FM and TV Stations, Order, 5 FCC Rcd 392 (1990) (terminating proceeding).

¹⁷ See In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order, 15 FCC Rcd 7386, at ¶¶ 41-55 (2000).

boards, conduct public meetings and otherwise remain responsive to the needs of all individuals within their service area.¹⁸

Diversity of ownership, in turn, correlates directly with diversity of programming and the public interest.

Diversity is one of the guiding principles of the Commission's local radio ownership rule. This principle is intended to advance the values of the First Amendment, which, as the Supreme Court stated, 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'¹⁹

Not coincidentally, the trend in listening to radio reflects the trend in ownership since the 1996 Telecommunications Act: listening to commercial radio has steadily declined in the past 6 years.²⁰

In these circumstances, we believe additional NCE stations is essential to furthering the public interest. Because NCE access to spectrum, including non-reserved spectrum, is a prerequisite to expanding NCE services to the American people, we again urge the Commission to explore other proposals for resolving mutually exclusive commercial and NCE applications.²¹

While no compromise solution will satisfy all the affected interests, a solution that requires or results in the denial of all NCE access is patently not in the public interest.

¹⁸ 47 U.S.C. § 396(k)(4), (8).

¹⁹ See In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rule Making, MM Docket No. 01-317, MM Docket No. 00-244, at ¶ 29 (rel. Nov. 9, 2001) (quoting Associated Press, 326 U.S. 1, 20 (1945)).

²⁰ Arbitron, Radio's Leading Indicator at 5 (Jan. 2002) reprinted at <http://www.arbitron.com/downloads/leadindicator2002.pdf> (estimating a 10% decline in listening to commercial radio since 1996).

²¹ See Oregon Comments at 20-21; University of Northern Iowa Comments at 6-7; Joint Comments of Moody Bible Institute et al. at 9-13.

II. The Commission Should Take All Appropriate Steps to Assure Access to Additional Spectrum for NCE Use, Including by Reserving Additional Spectrum Specifically for NCE Use

In its initial Comments, NPR proposed two complementary ways in which the Commission could address a longstanding imbalance between the demand for spectrum for NCE use and the availability of spectrum for such use. First, based on the Commission's own suggestion, NPR proposed a methodology for reserving channels in response to individual reservation petitions. Second, as a longer term solution, NPR proposed the reallocation of television channel 6 to radio. While the initial comments reflect a range of opinions on the issue of reserving spectrum for NCE use, we believe the approach we have advocated provides an important means to meeting the need for spectrum for NCE use and the public interest.

A. The Commission Should Liberalize the Process and Standards for Reserving Spectrum for NCE Use

NPR's initial Comments urged the Commission to afford potential NCE applicants an opportunity to seek the reservation of non-reserved channels, including those already allotted and scheduled for auction, and to expand the criteria for reserving individual channels. The specific proposal was as follows:

- Reserved Spectrum is Available. An NCE entity would first demonstrate that it is technically precluded from using the reserved FM spectrum or there is insufficient available reserved spectrum to serve at least 50 percent of the area within the protected service contour of the subject allotment assuming full-class operation of a station at the allotment site ("50 Percent Standard"). If there is reserved spectrum that meets the 50 Percent Standard, the Commission would proceed to auction the non-reserved channel scheduled for auction.
- No Reserved Spectrum and No Other Non-reserved Channel. If there is no reserved spectrum meeting the 50 Percent Standard and there is also no other non-reserved channel available that would meet the 50 Percent Standard, the Commission would reserve the non-reserved channel scheduled for auction.

- No Reserved Spectrum but One or More Other Non-reserved Channels are Available. If there is no reserved spectrum meeting the 50 Percent Standard but there are other non-reserved channels available that would meet the 50 Percent Standard, the Commission would proceed to auction the non-reserved channel previously scheduled for auction but reserve one of the available non-reserved channels.

To gauge the impact of such a methodology, NPR commissioned an engineering study of a sampling of the FM channels scheduled for auction as part of Auction No. 37.²² Based on the results of that study, the foregoing methodology would produce a modest number of new reserved channels, assuming NCE entities actually petitioned to reserve the relevant channels, while enabling the Commission to auction the vast majority of the channel currently scheduled for auction.²³

Among the initial commenters, commercial broadcast interests opposed any additional reservation of spectrum. Thus, NAB noted that the Commission has reserved the 20 lower channels of FM band and 20 percent of the spectrum allocated for full power television channels.²⁴ It further noted that the Commission previously adopted a slight modification of its reservation criteria and questions whether additional NCE service is even desirable in areas where reserved FM spectrum is no longer available. Finally, NAB and others urged the Commission to refrain from reserving any currently vacant but previously allocated channels to

²² See NPR Comments at 14-15 & Attachment A.

²³ Id. at 15. Of the 25 channels examined, 4 would be subject to reservation under the suggested standard. There were an additional 4 channels in areas in which there is no comparable reserved spectrum available but where there are additional non-reserved channels that could be reserved. Assuming properly prepared reservation petitions, therefore, Commission could immediately auction 21 of the 25 channels in the sample and reserve a total of 8 channels for NCE use.

²⁴ NAB Comments at 6.

avoid unsettling the expectations of commercial broadcasters.²⁵

Individually or collectively, these arguments do not justify a denial of new opportunities to reserve spectrum for NCE use. While the Commission reserved the bottom 20 channels of the FM band, that reservation occurred more than 6 decades ago,²⁶ it was never understood to be a ceiling on the availability of spectrum for NCE use, stations utilizing the reserved FM spectrum have long been required to restrict their facilities to protect adjacent channel 6 stations, and the spectrum has become far from adequate as a minimum quantum of spectrum for NCE use. With regard to the slight relaxation of the reservation criteria, it only applies to previously unallocated channels, so the more than 450 channels subject to auction could not have been reserved under that criteria.

In response to NAB's assertion that, if there is no available reserved spectrum in a given area, NCE service must be plentiful, the fact is that proximity to Canada and Mexico and, more significantly, the presence of adjacent spectrum television channel 6 stations has greatly restricted the use of the reserved FM channels. As noted by the University of Northern Iowa, "Channel-six TV stations and their protection zones cover nearly two thirds of the United States causing NCE stations located in such areas to operate as second-class (often vertical polarization only) power-limited stations."²⁷

Finally, with regard to the expectations of commercial broadcasters, the circumstances today are far different than prevailed at the time the currently vacant non-reserved channels were

²⁵ See NAB Comments at 7; Comments of SSR Communications, Inc. at 1-2; Comments of Jack Gartner at 4.

²⁶ See Second Further NPRM at 2 n.3.

²⁷ University of Northern Iowa Comments at 2.

allocated. Among other things, no one could have predicted the decision in NPR v. FCC or the Commission's proposals to bar NCE entities from obtaining any new non-reserved spectrum. In addition, the Commission previously afforded NCE and commercial entities an equal opportunity to apply for and construct stations on non-reserved spectrum. As a result, an NCE applicant could obtain spectrum to construct an NCE station without having to formally reserve the spectrum.

In short, there is a critical need for an additional, expanded opportunity to reserve non-reserved channels, including those previously allocated but currently vacant and subject to auction. None of the arguments posed by commercial interests justify foreclosing NCE applicants from the few remaining allotments.

B. In Addition to Liberalizing the Criteria for Reserving Individual Channels for NCE Use, the Commission Should Reallocate the 82-88 MHz Spectrum to Radio

As a longer-term solution to the need for more spectrum, NPR's initial comments advocated the reallocation of the television channel 6 spectrum to radio.²⁸ The additional spectrum would help satisfy current and future demand, allow existing reserved FM spectrum stations to increase power and otherwise expand their service areas, and facilitate the transition to digital audio broadcasting. The reallocation of the channel 6 spectrum is broadly supported among NCE radio broadcasters.²⁹ Reallocating the channel 6 spectrum also poses little hardship to existing channel 6 licensees because every channel 6 licensee was given a different digital

²⁸ See NPR Comments at 16-18.

²⁹ See NFCB Comments at 5. See also Reply Comments of the Station Resource Group, Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service, MM Docket No. 99-325, at 3 (filed Mar. 21, 2002) (advocating the reservation of the 82-88 MHz spectrum for NCE use).

television channel assignment.³⁰ Accordingly, because the reallocation of television channel 6 to radio broadcast use would so significantly serve the public interest in the extension of both analog and digital radio service, we again urge the Commission to initiate such a reallocation, and we pledge our support and assistance in implementing such a reallocation.

III. The Definition of "Noncommercial Educational Broadcast Station" and "Public Broadcast Station" Clearly Incorporates A Requirement that the Station Be Used for the Advancement of An Educational Program

In NPR's initial comments, we exhaustively demonstrated why, for purposes of the Section 309(J)(2)(C) of the Act, the Section 397(6) definition of "noncommercial educational broadcast station" and "public broadcast station" is based on the non-profit educational nature of the applicant and the noncommercial educational service it proposes to provide.³¹ As of the date referenced in the statutory definition, as well as at all times previously and thereafter, the Commission has required non-profit educational organizations applying to construct and operate an NCE broadcast station to propose an educational service as a bedrock threshold eligibility qualification.³² The contrary suggestion -- that an NCE or public broadcast station means any station operated by a nonprofit educational organization -- would mean that commercial stations operated by non-profit educational organizations, such as WFMT-FM, Chicago, IL, KOMU-TV, Columbia, MO, and WUVA-FM, Charlottesville, VA, are actually NCE stations, even though they've never been treated as such by the Commission.

³⁰ In two instances, the Commission assigned digital channel 6 to non-channel 6 stations. In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, MM Docket No. 87-268, 12 FCC Rcd. 14588, at ¶ 151 (1997).

³¹ NPR Comments at 18-27.

³² Id. at 19-22.

Furthermore, there is no other basis for defining NCE or public broadcast stations based solely on the nature of the licensee. The decision in NPR v. FCC³³ did not address the question raised in the Second Further NPRM and, therefore, cannot be read to have answered it.³⁴ Defining NCE and public broadcast stations based on both the nature of the entity and its proposed service is also consistent with the Commission's interpretation of the auction exemption for public safety services.³⁵

Accordingly, an entity that proposes to construct and operate a broadcast station but that does not propose an educational service is not properly defined as an NCE station, is not within the auction exemption for NCE stations, and, therefore, should not be categorically excluded from auctions of mutually exclusive applications for non-reserved channels.

Among the initial comments filed in this proceeding, including those filed by commercial broadcasters who might perceive a benefit from excluding all non-profit entities from broadcast spectrum auctions, there was not a single commenter who disagreed with the foregoing. While a few commenters question what it means to provide an educational service,³⁶ an examination of the meaning of "educational" is extraneous to the issue at hand -- what were the NCE eligibility

³³ 254 F.3d 226 (D.C. Cir. 2001).

³⁴ NPR Comments at 22-24. As we noted, while the opinion uses the terms "commercial spectrum" and "commercial licenses" interchangeably, it did not purport to re-interpret or overturn more than six decades of Commission rules and policy differentiating commercial and NCE stations based on the nature of the service proposed or provided. Id. at 23-24.

³⁵ Id. at 24-27.

³⁶ For instance, several otherwise identical comments filed by Richard L. Hayes, Jr. acknowledge that the Communications Act and the Commission's rules impose an educational service eligibility requirement but state that "the Commission needs to make the 'showing' meaningful." See, e.g., Formal Comments of Satellite Beach Community Broadcasters at 5. See also Comments of Summit Media Broadcasting, LLC. at 1-2 (disputing the non-profit, educational purpose of NCE stations).

requirements on the date of enactment of Section 397(6) of the Communications Act, November 2, 1978. Based on the overwhelming weight of evidence, including the record in this proceeding, an NCE station is defined by reference to the noncommercial educational nature of the licensee and a noncommercial educational service it proposes, and only NCE stations are statutorily exempt from auctions.

IV. The Commission has Long Recognized AM Band NCE Stations as "Noncommercial Educational" or "Public Broadcast" Stations

Two entities contended that the Commission is compelled to resolve mutually exclusive AM station applications by auction because "an AM broadcast license does not fall within the definition of Section 397(6) of the Communications Act."³⁷ This view is contrary to well-settled Commission rules and precedent, as evidenced by the Second Further NPRM itself.³⁸

As an initial matter, the notion that, "[i]n the AM Broadcast Service, there is no such thing as an NCE license,"³⁹ is belied by the existence of 37 NCE AM stations just among NPR's Members. Moreover, noncommercial AM stations have proliferated in Alaska and other areas because of the unavailability of reserved FM spectrum.⁴⁰ Particularly in those locations, a

³⁷ Comments of Booth, Freret, Imlay & Tepper, P.C. at 3 [hereinafter "BFIT Comments"]; Comments of Amador S. Bustos at 2 [hereinafter "Bustos Comments"]. Curiously, the two sets of comments are remarkably similar in content, style, and structure, and apparently share a common author.

³⁸ Second Further NPRM at 2.

³⁹ BFIT Comments at 3. See also Bustos Comments at 2 ("In the AM Broadcast Service, there is no such thing as an NCE license.")

⁴⁰ In Alaska, for instance, the frequency band 88-100 MHz was only allocated for FM radio use in 1982. Amendment of Parts of the Commission's Rules Governing Frequency Allocations and Radio Treaty Matters, 90 F.C.C.2d 507 (1982). Moreover, noncommercial stations in the reserved FM band in Alaska must not cause harmful interference to and must accept interference from non-Government fixed operations authorized prior to January 1, 1982. See 47 C.F.R. §

determination that noncommercial AM stations do not constitute public broadcast stations under the Act and are therefore subject to auction could significantly impair the future availability of noncommercial radio service.

The Commission's rules clearly distinguish between commercial and noncommercial AM stations. Noncommercial and commercial AM station applicants apply to construct and operate their respective station facilities using different application forms.⁴¹ While all AM station applicants apply for a station license on a common form, they must specify whether they are seeking a commercial AM station license or a noncommercial AM license.⁴² Commercial and noncommercial AM stations are also subject to different ownership reporting requirements.⁴³ In addition, Commercial and noncommercial AM stations are subject to different local public inspection file requirements.⁴⁴

Once the station is constructed and the license granted, the Commission's rules also

73.503(b).

⁴¹ Compare Form 340 (Application for Construction Permit for Noncommercial Educational Broadcast Station) with Form 301 (Application for Construction Permit for Commercial Broadcast Station).

⁴² See Form 302, Section II.

⁴³ Each year, commercial AM stations are obligated to file Form 323 eliciting information regarding stock, partnership, and other material changes common among for-profit corporations. 47 C.F.R. § 73.3615(a)-(c). Noncommercial AM stations file a Form 323-E reporting changes of a sort reflective of their not-for-profit ownership status. Id. § 73.3615(d)-(f).

⁴⁴ Compare 47 C.F.R. 73.3526(a)(2) ("Every permittee or licensee of an *AM*, *FM*, or *TV station in the commercial broadcast services* shall maintain a public inspection file containing the material, relating to that station, described in paragraphs (e)(1) through (e)(10) and paragraph (e)(13) of this section.") (emphasis supplied) with 47 C.F.R. § 73.3527(a)(2) ("Every permittee or licensee of an *AM*, *FM*, or *TV station in the noncommercial educational broadcast services* shall maintain a public inspection file containing the material, relating to that station, described in paragraphs (e)(1) through (e)(11) of this section.") (emphasis supplied).

permit noncommercial educational AM licensees to change to a commercial license and operation only after applying for and obtaining Commission approval of an appropriate modification of the station license.⁴⁵ Commission approval is also a prerequisite to converting a commercial AM station to noncommercial status and operation.⁴⁶ Finally, noncommercial AM stations have long been required to provide a noncommercial service under Section 399b of the Act⁴⁷ because they constitute a “public broadcast” or “noncommercial educational” broadcast station under Section 397(6) of the Act.⁴⁸

⁴⁵ 47 C.F.R. § 73.1690(c)(9).

⁴⁶ Id.

⁴⁷ 47 U.S.C. § 399b(b)(2).

⁴⁸ See Letter to Mr. Robert E. Hardy, Director of Broadcasting, Station KAWC-AM, 8210-RS, C11-6 (Nov. 13., 1989).

Conclusion

NPR supports the Commission's efforts to establish appropriate rules to resolve mutually exclusive applications for non-reserved spectrum involving NCE applicants, including through the adoption of measures consistent with the foregoing comments.

Respectfully submitted,

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