

**Before the
Federal Communications Commission
Washington, D.C. 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))	

REPLY COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS

The Association of Public Television Stations (“APTS”) hereby submits its reply comments in the above captioned proceeding relating to the *Second Further Notice of Proposed Rulemaking* in MM Docket No. 95-31, FCC 02-44 [rel. Feb. 25, 2002](“*Second Notice*”). APTS has made clear that eligible noncommercial educational (“NCE”) TV stations (and the translators that rebroadcast them) are exempt from auctions. APTS has proposed additional flexibility for TV translator applications that would preserve existing public television service, coupled with a need-based approach for NCE TV Translator processing, that will accommodate public television’s need for access to TV translator spectrum.

Reply Summary

After careful consideration of all comments addressing the *Second Notice*, APTS submits that its position – that NCE TV applicants for unreserved channels (and TV translators rebroadcasting NCE TV stations) are not subject to competitive bidding and that NCE TV Translator licenses should be awarded using a need-based system – should prevail. APTS' proposed solution allows the best fit with the statutory provisions; express congressional intent

as reflected in the entirety of the Communications Act of 1934, as amended; the remanded court decision in *NPR v. FCC*;¹ established Commission precedent; and good public policy.

Rather predictably, the commercial broadcast interests argue that, for the sake of expediency in this protracted proceeding, the Commission should simply hold NCE broadcasters ineligible for non-reserved channels and frequencies (unless no commercial entity wants them), auction the non-reserved spectrum and be done with it. Many commenters also seem not to understand the key distinction between an NCE broadcaster (licensed under Section 73.621 or Section 73.503 of the Commission’s rules) and a broadcaster that just happens to be a nonprofit entity; some commenters even argue for redefinition of the eligibility requirements of Section 73.621 or the term “noncommercial educational broadcast station.”

Moreover, only one commenter not associated with the public broadcasting industry specifically addressed the issue of NCE TV Translator/LPTV spectrum that APTS believes is a critical component of this proceeding for the public television industry.

Areas of Agreement

The Commission should note that the comments of APTS, along with National Public Radio, Station Resource Group, and National Federation of Community Broadcasters, reflect a general agreement on the appropriate statutory interpretation of Sections 309(j)(2)(C) and 397(6) of the Communications Act, the eligibility restrictions for licensing “noncommercial educational broadcast stations,” and the need for public broadcasters to have access to unreserved broadcast spectrum in order to best serve the public interest. Thus, among the public broadcasting industry groups and other noncommercial entities commenting in this proceeding, there is a broad consensus on the underlying precepts that should guide the Commission in this proceeding.

¹ *National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

Comments of Commercial Broadcasters

Unfortunately, several of the commenters, including the National Association of Broadcasters (“NAB”), advocate not for the “best” solution, but for plain old expediency in order to quickly resolve this proceeding.² Indeed, NAB does not even discuss the statutory interpretation for the auction exemption, but argues that NCEs should be ineligible based solely on the assumption of additional delays from any other approach. NAB’s argument, and those of the commercial broadcast industry, do not give effect to the language of Section 309(j)(2) and, as pointed out by NPR and others, fail the *Chevron* test for statutory language interpretation.

APTS has been participating in this proceeding (or its precursor) since 1995. APTS is acutely cognizant of the need to reach resolution so that the Commission can begin licensing new non-reserved broadcast spectrum to appropriate applicants. In fact, APTS geared its proposal to address concerns about processing ease and timeliness, and to avoid the need for time-consuming, administrative-intensive licensing decisions.

Yet, expediency is not an end in itself, as the *NPR v. FCC* decision attests, nor should the lengthy history of this proceeding once again be subject to legal challenges in order to satisfy expediency or ease of solution. The Commission must grapple with the issues and reach a decision that is consistent with statute, rules, policy and the public interest, not be swayed by the prospect of an expedient, but unsustainable solution. As shown by APTS and others, holding NCE broadcasters ineligible to access non-reserved spectrum is an unsustainable position for the Commission, which would only further delay the licensing of non-reserved spectrum. Moreover, the comments of NAB and others do not address the crux of the TV translator dilemma – public

² Comments of National Association of Broadcasters (“NAB”) at page 2 (“Although this option [holding NCE entities ineligible for licenses for nonreserved channels] would not be preferred if other alternatives were viable...”) and at page 5 (“the only realistic alternative is to hold NCE entities ineligible for licenses for commercial channels so that all competing applicants will be commercial and can proceed expeditiously to auction.”)

broadcasting relies heavily on TV translators, public broadcasting needs access to TV translator spectrum, and there is no reserved spectrum for TV translators.

TV Translators/LPTVs

Only three commenters addressed the issue of applying the auction exemption to TV translator/LPTV stations and two of those commenters are associated with the public broadcasting industry. The third set of comments, by Three Angels Broadcasting Network, Inc., argues that the auction exemption does not apply to LPTV stations, that the Commission should continue to use its existing auction procedure for LPTV applicants, and that the Commission should not attempt to set licensing criteria for “NCE” LPTV stations.

Three Angels misunderstands the definition of “noncommercial educational broadcast station” and appears to believe that, because it is a nonprofit religious broadcaster, it will not be able to compete at auction for LPTV stations. Three Angels misses the point, that only applicants proposing a qualified “noncommercial educational broadcast station” are exempt from auctions. If Three Angels is not a qualified NCE station under the Commission rules (which seems to be the case), Three Angels' only option is to compete at auction. Moreover, APTS' position (that NCE TV Translators are exempt from auction) would not conflict with Three Angels' expressed concern about competing at auction. The APTS-suggested category of “NCE TV Translator” would apply only to NCE TV Translators that rebroadcast qualified NCE TV stations, not to LPTV stations that originate programming or that rebroadcast commercial stations (or nonprofit broadcast stations that do not qualify as NCE TV stations under 73.621 of the FCC's Rules).

As APTS pointed out in its initial Comments, there is ample Commission precedent interpreting the eligibility criteria of Section 73.621. There is simply no need to revise the

definition of “noncommercial educational broadcast station” or the eligibility criteria in this proceeding. If the Commission were to determine that some revision of the eligibility criteria is necessary (and APTS maintains that it is not necessary), such revision should be the subject of a separate rulemaking proceeding, not taken up in the near-final stages of this proceeding.

Reallocation of TV Channel 6 (82-86 MHz)

Regretfully, despite the many areas of agreement between APTS and NPR and other public radio proponents in this proceeding, APTS must vehemently oppose the suggestion that TV Channel 6 (82-86 MHz) be reallocated and reserved for radio use. Eight (8) of APTS’ member stations have analog public television operations on Channel 6 and strongly desire to retain the ability to return to Channel 6 at the end of DTV transition. Indeed, four (4) of those eight (8) stations were given out-of-core DTV allotments and cannot stay on those DTV channels at the end of transition. The issue of reallocation of TV Channel 6 is not properly before the Commission in this proceeding, nor should NPR or NFCB be permitted to raise it in this proceeding at this late date.³ The Commission is already addressing this issue in MM Docket No. 99-325 and in the overall context of the DTV transition. Moreover, as NPR’s own comments point out, NPR has raised the issue of reallocation of TV Channel 6 in its comments in the digital audio broadcasting proceeding.⁴ The TV Channel 6 issue simply does not belong in the instant proceeding, which is limited to addressing the issue of “how to decide”

³ NPR and NFCB, like APTS, have been active participants in MM Docket No. 95-31 since its inception in 1995.

⁴ Comments of NPR, Page 17 & n. 33.

among competing noncommercial and commercial applications for non-reserved spectrum. While APTS sympathizes with public radio's desire for additional radio spectrum, that issue is beyond the scope of this proceeding and must be dealt with in the context of DTV conversion and weighed against the needs of the eight (8) public TV licensees on Channel 6 and the millions of viewers affected by any TV channel reallocation.

Conclusion

APTS submits that its comments (and those of others in the public broadcasting industry) present the Commission with a comprehensive, sustainable statutory approach and detailed implementation scheme to resolve this proceeding in a way that will best serve the public interest while maintaining appropriate NCE access to unreserved broadcast spectrum. In addition, APTS has provided the only viable option addressing the lack of reservation for NCE TV Translators. APTS proposed a flexible "preservation of service" based on a first-come, first-served processing approach, coupled with an easy self-certification and "opt in" process for a new category of "NCE TV Translators" which, if mutually exclusive with other translator/LPTV applications, would be subject to a need-based first/second NCE service determination.

APTS urges the Commission to establish appropriate rules and policies, consistent with its comments above and its earlier comments, that will allow public television access to non-reserved spectrum for NCE TV stations and NCE TV Translators.

Respectfully submitted,

/s/ Lonna M. Thompson

Marilyn Mohrman-Gillis

Vice President, Policy and Legal Affairs

Lonna M. Thompson

Associate Vice President, Strategic Initiatives
and Corporate Counsel

Andrew D. Cotlar

Staff Attorney

Association of Public Television Stations

666 Eleventh Street, NW, Suite 1100

Washington, D.C. 20001

www.pts.org

Telephone: 202-654-4200

FAX: 202-654-4236

June 17, 2002