Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Creation of a Low Power Radio Service	)	MM Docket No. 99-25
Amendment of Service and Eligibility Rules for	)	
FM Broadcast Translator Stations	)	MB Docket No. 07-172, RM 11338

To: The Commission

PETITION FOR RECONSIDERATION OF
FIFTH ORDER ON RECONSIDERATION AND SIXTH REPORT AND ORDER

Michael Couzens and Alan Korn, two attorneys practicing before the Commission ("Petitioners"), here seek reconsideration of Sixth Report and Order referenced above ("the Order"). Petitioners are proponents of new and strengthened local community radio broadcast services. We actively participated in assisting local non-profits to make application for new noncommercial FM authorizations during the 2007 and 2010 filing windows. Our experience then – and since – prompts some comments on the adopted details of the Commission's authorization process. The opportunity for a new LPFM filing window has been long delayed, and we do not wish to delay it further. If the Commission decides to refer these matters to the attention of staff, instead of addressing them through a formal reconsideration, we certainly would be gratified at the time saved, but would hope our concerns actually do get addressed.

1. New Point System Selection Criteria

Petitioners agree with the new point system selection criteria for LPFM.[1] We would have preferred, as some suggested, that a broader palette of point preferences be selected, to minimize ties.

1 These are summarized in para. 162 of the Order as follows: "We will award one point to applicants for each of the following: (1) established community presence; (2) local program origination; (3) main studio/staff presence (with an extra point going to those applicants making both the local program origination and main studio pledges); (4) service to Tribal lands by a Tribal Nation Applicant; and (5) new entry into radio broadcasting."

But this is not the place to change the fair balance that has been struck. Our only refinement would be in the handling of student-run stations that are part of a larger multi-campus system (para. 160, the University of California at Merced example). The Commission determined that, where such student organizations were functionally independent from the parent licensee, they would be eligible to apply, even thought the parent institution was licensee of an existing full power station that otherwise would bar their eligibility (under the former rule, unless no one else applied). But it was decided that in such cases, the applicant could not claim a "new entrant" point (Id. Para. 160). To us this stance seems facially inconsistent. Such an applicant should be required to show that it is functionally independent of the larger institutional entity in its day-to-day decision making. But if this is done, it should be eligible for a "new entrant" point.

2. Durability of New Entry Credit Claim

The Order notes a concern that applicants claiming to be local must remain so, and promise to remain so, paras. 134 – 136. The discussion of the new entrant credit is brief, and contains no similar discussion of the need for that credit to be maintained throughout the pendency of the application, para. 191. We suggest that this be clarified with instructions, to state that any subsequent acquisition of an attributable interest, by assignment, transfer, or new application, be reported in an amendment, including change of that point system claim question from a "yes" to a "no."[2]

3. Documentation of Eligibility and Claims

The new rules are not consistent across the board in what will be required by way of documentation, both as to eligibility and as to point system claims. Unless clarified, this can become a serious weakness, expanding staff time in processing, and litigation over questions of fact that should

2 While it is beyond the scope of issues to be raised for reconsideration, it could be asked whether a new entry credit should also require that the status be perpetuated after licensing, for a period of four years or for some other defined period. Without such a condition, there is no assurance of any public interest benefit accruing from the award of the credit.

have been settled easily. Under established policies, point system claims must be corroborated by timely submission of documents.[3] The Commission has made hundreds of noncommercial educational point-system comparative rulings since 2007, and each omnibus ruling has included some version of these statements:

> Applicant point claims must be readily ascertainable from timely-filed application exhibits. Certifications which require the applicant to submit documentation, but which are not supported with any such timely submitted documentation, cannot be credited.
>
> While there is some flexibility in the type of documentation an applicant may provide, an applicant submitting no timely documentation at all cannot have made a valid certification.[4]

In adopting the point system in 2000, the Commission recognized the need for both: an explicit timely claim, and timely submitted documents to back up that claim.

> We agree with the commenters that, while the application should be a simple one in which the Commission can rely on certifications, competing applicants should be able to verify that competing applicants qualify for the points claimed, and that the Commission should have access to the documentation for purposes of random audits.[5]

The Commission was agreeing with one commenting party that:

> . . . the Commission will thus be able to rely on certification check off boxes without sifting through the documentation but interested parties would have the opportunity to submit meaningful comments. [Id., at para. 88]

Here the new eligibility statement falls short of this standard:

> Only local organizations will be permitted to submit applications and to hold authorizations in the LPFM service. For purposes of this paragraph, an organization will be deemed local *if it can certify*, at the time of application, that it meets the criteria listed below and it is continues to satisfy the criteria at all times thereafter. [revised Section 73.853(b), *emphasis added*]

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3 ". . .that it has placed documentation of its diversity qualifications in a local public file and has submitted to the Commission copies of that documentation," FCC Form No. 340, Instructions, Question IV(2)

4 *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window, FCC 10-29 released on February 16, 2010.*

5 *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) at para. 89.

We believe it essential to the smooth and fair processing of applications that there be a checked-block certification and, in addition, a place for the corroborative documentation to be supplied.

When it comes to the point system, the documentation requirements are vague, and perhaps left for resolution on another day:

> Each mutually exclusive application will be awarded one point for each of the following criteria, based on certifications that the qualifying conditions are met and submission of any required document. [Revised Section 73.872(b)]

The documentation issue is most serious with the "established community presence" point, revised Section 73.872(b)(1). In the counterpart NCE practice, using the Form No. 340, applicants have been required to provide documentary evidence of the required existing status, and in addition evidence through copies of governing documents that the status will be maintained. We would have no problem with the absence of a proof of enduring commitment, because an LPFM is unlikely to forsake its local area in any case. But the documentation of the pre-existing status is vital and should include, in any case claiming board member residency, the local residential addresses of said board members.[6]

4. Partial Settlements Need to be Limited, to Foreclose Unqualified or Anomalous Winners Contrary to the Public Interest.

The Commission has decided not to disturb the existing rule, whereby more than one tied applicant on points can merge and aggregate their points, Section 73.872(c) of the Rules, and then prevail over all others. We want to be certain that this practice does not by pass procedural safeguards. When a winner is declared on points, it becomes the tentative selectee and there follows a 30-day protest period, allowing for petitions to deny. If a partial settlement can break out of a daisy chain and create a singleton, the freed application becomes grantable with no stage of tentative selection nor petitions. With a merger of less than all in the group, only for the purpose of aggregating points, we

6The "local program origination point" is based solely on a pledge of future performance and would not require documentation. In the case of the "main studio" point, the Commission has said it will require the submission of a proposed address and telephone number for the facility, so an exhibit will be required. A Tribal Applicant will need to document its legal status and its location in an exhibit.

are unclear what happens next. A point-system flaw in one of the applicants would negate its tie and bar a merger, and competing applicants must have the opportunity to raise an issue. Merely placing the merger document in CDBS (Order, para. 195) does not suffice. We assume and would like the Commission to clarify that such aggregating settlement proposals, if they amass the points to prevail, will be placed on notice as tentative selectees as legally required, with the opportunity for qualifying and comparative credentials to be tested in a proper case.

Additionally, the Commission appears not to have considered the interaction between this old merger opportunity and the structure of the new point system. Let us consider a hypothetical merger of two applicants, each proposing points for local program origination and main studio. A local origination pledge implies a minimum of eight hours per day, Sec. 73.872(b)(2). Yet, with any sentient program director, the public benefit of the sixteenth hour of a program day is obviously less than the public benefit of the eighth hour. Meanwhile, it would appear that the merged entity can satisfy the main studio requirement (at least 20 hours per week) by delegating operations during the same 20 hours jointly and concurrently.[7] As two licensees, they will do nothing more about the main studio than one licensee. Finally, each is entitled to a bonus point for the combined local origination and main studio. Bottom line: this entity prevails with a total of six points, over against every applicant that is not a Tribal Entity, claiming the maximum of the other five points. Quite simply, this anomaly should not be happening. No such partial merger should be allowed, unless the merging entities claim a minimum of five or six (with Tribal entity) points individually.

5. <u>In Each Mutually Exclusive Group, the Commission Should Make as Many Grants as it Possibly Can.</u>

The current point system for noncommercial applicants was created by a Report and Order in 2000, 15 FCC Rcd 7368 (2000), MM Docket No. 95-31. On June 5, 2000, the University of Northern

7 "Staff may be paid or unpaid, and staffing may alternate among individuals. We will not require stations to have management staff present during main studio hours." Para. 185.

Iowa ("UNI") filed a *Petition and Request for Clarification*. UNI presciently described the situations commonly known as "daisy chains" --

> We note that many NCE applications are mutually exclusive with local applications and with applications that are co-channel at considerable distances. In some cases, the distant applications are in conflict with other distant applications that are mutually exclusive with the local applications. Therefore, if the local application conflicts are resolved before the distant conflicts are resolved it is possible that all the local applicants could be eliminated in favor of the distant applicant and then the distant applicant could be eliminated in a future comparison. The result would then be to eliminate all applicants within a certain area even though the application that eliminated them was itself eliminated. [*Petition*, p. 3]

Unfortunately, UNI went on to propose a legally unsound solution:

> Therefore we suggest that the Commission needs to review all chained applications to select a processing order that will result in the maximum distribution of radio frequencies. If it can be determined that a mutually exclusive chain of applicants could provide more than one service, the Commission should first process those applications which resolve conflicts in the chain involving key stations that would block the existence of more than one station being granted.

The problem is, any such selection of "key stations" as the starting point inherently is arbitrary. On reconsideration, the Commission ruled against this approach:

> We will process applications in a manner that will be most administratively efficient and that will be most likely to result in selection of the best qualified applicants as judged by the point system adopted in this proceeding. In that regard, we note that, while the "upside" of Northern Ohio's [sic.] "geographic" proposal is that it may permit the selection of more than one applicant from any single mutually exclusive group, it also has a clear "downside." Specifically, after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they are mutually exclusive with the primary selectee.

Reconsideration Order at 5105, ¶ 90.[8] In avoiding that result, however, the Commission appears to have created an equally perverse result. The Commission said,

> Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window. (*Id.*)

Repeatedly, ever since, the Commission or staff have made a selection form any MX group, and upon

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8 16 FCC Rcd. 5074 (2001) ("*Reconsideration*"), partially reversed on other grounds, *NPR v. FCC*, 254 F. 3d 226 (D.C.Cir., 2001).

that selection having become final, declined to re-screen the MX group for secondary grantees, and have dismissed all others, sometimes dozens of others.

We submit that, to the contrary, the Commission should make clear that every MX group needs to be carefully reviewed, if necessary through multiple layers of grants, to yield as many authorizations as possible. Indeed, it has been 12 years since the last LPFM filing opportunity, and the privilege to "file again in the next filing window" has become meaningless, at least for individuals who follow the demands of a normal actuarial mortality table. As noted in the Order here, ". . . the voluminous record in this proceeding testifies to the unmet demand for community radio stations." (para. 153) Once a group is screened by staff for initial point system comparison purposes, additional post-grant screens and additional grants impose a minimal demand on staff. The public benefit is great.

5. Conclusion.

Petitioners thank the Commission for moving the LPFM project forward, overcoming great obstacles to do so. We look forward to seeing an LPFM filing opportunity at an early date, and hope that the above comments might facilitate the process leading to authorizations in the public interest.

Respectfully submitted,

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