

**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
)

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 2001

Released: February 28, 2001

By the Commission: Commissioner Furchtgott-Roth issuing a statement

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I. INTRODUCTION

1. On April 4, 2000 we adopted a new simplified system to select among applicants competing to construct noncommercial educational (“NCE”) broadcast stations, thereby eliminating the lengthy traditional hearings which we had used for 30 years. The new approach uses a point system to select among mutually exclusive proposals to build FM, TV, and FM translator stations on channels reserved for NCE use. The system for awarding points is based on such factors as diversity, localism, signal coverage, and service to schools, with a permit awarded to the applicant with the highest score. When NCE entities compete on channels also available for commercial use, we concluded that adoption of auction procedures was statutorily mandated. We now consider seventeen Petitions for Reconsideration or Clarification, ranging from requests for minor clarifications to advocacy of vastly different policy results. Upon considering these views, we basically affirm our initial decision but clarify various details, provide additional information, and amend several rule sections.

II. BACKGROUND AND HISTORY

2. Due to the finite nature of and strong demand for broadcast spectrum, we often cannot authorize an NCE station to every qualified entity that wants to build one in a particular area. Rather, we frequently must choose among multiple applicants. From the earliest days of broadcasting, the Commission conducted traditional evidentiary hearings to make these selection decisions. The factors we considered in hearings depended upon which of two types of channels the applicants wanted to use. For “reserved” channels, which are for noncommercial educational use only, we considered “the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants.” *See New York University*, 10 RR 2d 215, 217-18 (1967). For “non-reserved” channels, which are for all types of broadcasting, commercial and noncommercial, we used several comparative criteria. For example, we considered diversity of ownership and the “integration” of ownership and management, which presumed that a station would offer better service if its owners were involved in the station’s day-to-day management. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In comparative contests between NCE and commercial applicants on non-reserved channels, the applicants were evaluated using the commercial criteria.

3. As discussed in greater detail earlier in this proceeding, several events in the 1990’s led to our eventual change of the comparative selection process both for NCE and commercial stations, and for both reserved and non-reserved channels. These events included the conclusion of the Commission’s Review Board that the NCE criteria had, over time, become “meaningless” in distinguishing between applicants, and a federal court’s finding that the core integration criterion used to evaluate non-reserved channel applications was “arbitrary and capricious, and therefore unlawful.” *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993) (*Bechtel*); *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). As a result of Commission proceedings soliciting public comment, and Congress’ decision on related matters in the Balanced Budget Act of 1997,¹ we implemented a system of competitive bidding for awarding permits on non-reserved channels² and adopted new point-based

¹ *Balanced Budget Act of 1997*, Pub. L. No. 105-33, 11 Stat. 251 (1997) (Balanced Budget Act).

² *Notice of Proposed Rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992); *Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5475 (1993); *Second Further Notice of Proposed Rulemaking*, GC Docket No. 92-52, 9 FCC Rcd 2821 (1994); *Notice of Proposed Rulemaking, Competitive Bidding for Commercial Broadcast and ITFS Service Licenses*, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 12 FCC Rcd 22,363 (1997); *First Report and Order*, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 13 FCC Rcd 15920 (1998), *recon. denied Memorandum Opinion and Order*, 14 FCC Rcd 8724, *modified Memorandum Opinion and Order*, 14 FCC Rcd (continued....)

comparative standards for reserved channel noncommercial educational proceedings.³ The NCE rules under review in this proceeding became effective on August 7, 2000.

III. NEW SELECTION PROCESS

4. Our NCE Order⁴ established that the nature of the channel, not the nature of the applicant, should govern selection procedures. We decided that we were required by statute to use auctions to select among all mutually exclusive applicants for non-reserved channels, because such channels can be used for commercial purposes. We designed a point system, described in greater detail below, to select among applicants on reserved channels. We determined that this bifurcated, channel-specific selection method is consistent with the Balanced Budget Act's dual directives to recover for the public the value of commercially available channels, but to use a different selection method for stations that cannot be used commercially. All requests for agency reconsideration or clarification focus on our point system decision for reserved noncommercial channels; none address our decision to apply auction procedures when NCE entities are among the applicants competing for non-reserved channels.⁵ Accordingly, in this order we revisit reserved channel procedures only.

5. The NCE Order requires reserved channel applicants to apply during specific filing windows to be announced by public notice. The staff will examine all applications received within the window, to determine whether any two or more of those proposals are mutually exclusive, *i.e.* to determine whether the proposed stations would cause prohibited interference to each other and thus cannot all be authorized. If a particular application is not mutually exclusive, and the applicant is subsequently found qualified, the staff will grant that application. For mutually exclusive applications received during the filing window, the staff will compare the proposals, considering which would best serve the public interest under our new point system.

6. When competing FM applications propose to serve different communities, a proposal would be considered best, as a threshold matter, if it would provide service to significant unserved or underserved populations.⁶ This threshold factor is considered pursuant to 47 U.S.C. § 307(b), which charges the Commission with ensuring fair distribution of broadcast service. This process does not apply to television

(Continued from previous page) _____
12,541 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir.2000) ("Competitive Bidding").

³ *Notice of Proposed Rulemaking, Comparative Standards for Noncommercial Educational Applicants*, MM Docket 95-31, 10 FCC Rcd 2877 (1995); *Further Notice of Proposed Rulemaking*, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) ("NCE Notice"); *Report and Order*, MM Docket No. 95-31, 15 FCC Rcd 7386 (2000).

⁴ *Report and Order, Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, 15 FCC Rcd 7386 (2000) ("NCE Order").

⁵ Currently, there are approximately 32 pending groups of non-reserved channel radio applicants, consisting of 192 applications, in which at least one applicant is an NCE entity. There are 5 such groups of non-reserved channel television applicants, consisting of 22 applications. Parties disagreeing with our decision to auction non-reserved channels, including National Public Radio and the State of Oregon, brought their challenge directly to the U.S. Court of Appeals for the D.C. Circuit rather than seeking agency reconsideration. *See National Public Radio, No. 00-1246* (filed June 12, 2000); *State of Oregon, No. 00-1255* (filed June 16, 2000). Although two petitioners, Spring Arbor College and Lay Catholic Broadcasting, originally sought agency reconsideration with respect to this issue, they subsequently withdrew those requests.

⁶ Specifically, an applicant would receive a decisive preference if it would provide first or second NCE aural service to at least 10% of the people within the proposed 60dBu (1mV/m) service contours, but not fewer than 2,000 people. If more than one applicant meets this standard, the differences between their proposals would be considered significant only if one provided first or second service to at least 5,000 more people than the other.

proceedings because fair distribution issues are addressed prior to application by the allotment of TV channels to particular communities in TV allotment proceedings.

7. Most mutually exclusive FM applications for reserved channels (*i.e.*, those not resolved on 307(b) grounds) and all such TV applications will be compared under a point system, in which we assign points to aspects of each proposal and select the applicant with the highest score. We would award points as follows: (a) 2 points for diversity of ownership, *i.e.* if there is no overlap of the principal community contour of the proposed station and any other station attributable to the applicant; (b) 1 to 2 points for the best technical proposal in terms of both area and population served; (c) 3 points for applicants that have been local to the community for at least two years; and (d) 2 points for certain state-wide networks providing programming to accredited schools. In the event of a tie, we would apply several tie breakers, first preferring the applicant with the fewest existing authorizations; and second, the applicant with the fewest pending applications. If applicants remain tied after all of these factors are considered, we would require tied full service applicants to share time equally. Among tied FM translator applicants, we would select the first applicant to file. We would apply these procedures both to pending applications and to applications received in the future.

8. After completion of this process, we would conduct a study of the tentative selectee's application to determine whether it meets all of our standards for acceptability. At that time we would also consider petitions to deny against the tentative selectee only. If the tentative selectee is found qualified in all respects, we would award a permit to that applicant. Applicants prevailing in the point system would be subject to a four-year holding period, permitting the station's license to be assigned or transferred during that period only to an entity qualifying for equal or greater points, and for consideration that does not exceed the assignor's expenses of filing and prosecuting its application and constructing its station's authorized facilities.

IV. REQUESTS FOR RECONSIDERATION AND CLARIFICATION

9. Existing and potential applicants ask us to reconsider or clarify various aspects of our filing and selection processes. A few petitioners question our fundamental choices, for example, advocating the use of lotteries instead of a point system. Most, however, endorse our adoption of a point system, and ask only that we change or clarify a particular portion of our decision. Some have concerns relating only to pending applications or to future applications, while others raise issues potentially affecting all applications. We consider each of these concerns.

A. Objections to Overall Process

10. Two petitioners object to the point system in its entirety. Broadcasting for the Challenged, Inc., a licensee providing programming for disadvantaged individuals, believes that a lottery would have been far preferable. Broadcasting for the Challenged argues that we did not sufficiently justify our decision not to use lotteries. Educational Media Foundation, which operates a nationwide network of 23 FM stations programmed from a religious perspective, does not advocate a particular alternative but considers our point system discriminatory. It argues that the point system favors some speakers over others, to the detriment of religious broadcasters.

1. Rejection of Lotteries

11. The Commission has authority to use random selection (lottery) procedures to choose among NCE applicants. 47 U.S.C. § 309(i). If we use such procedures, the statute requires us to weight the lotteries to provide substantial preferences to racial minorities and applicants with few other stations. *Id.* We considered using such lotteries, but found that a point system was preferable for several reasons. NCE Order, ¶¶ 11 – 15. We identified the primary benefits of lotteries as speed and simplicity. Against these benefits, we weighed three major disadvantages of lotteries: (1) greater potential for speculation; (2) no assurance of selecting the most qualified applicant; and (3) the likely delay from litigation over the

required lottery preferences. We determined that lotteries would achieve only part of our goal to improve the NCE selection process, and thus rejected lotteries in favor of a point system.

12. Broadcasting for the Challenged (“BFTC”) maintains that the Commission has not adequately justified rejection of lotteries, and should have supported each concern with empirical evidence, as it believes is required under *Bechtel*. BFTC disputes each of the three drawbacks that we included in our analysis. It disagrees with commenters concerned that lotteries would produce speculation, arguing that there is little potential for financial gain in NCE broadcasting, and that the Commission eliminated this potential by establishing a holding period. With respect to applicant qualifications, it argues that it is impossible to verify whether one qualified applicant will actually be better than another, and thus that we should consider all applicants as being equal if they meet our basic qualifications. Finally, BFTC does not believe that there is any legal impediment to our use of a weighted lottery, as required by statute, because we previously used such a lottery to select Low Power Television (LPTV) applicants.

13. We are not persuaded to reverse our policy judgment that a point system is preferable to a lottery for the award of NCE permits. First, BFTC’s reading of the requirements of *Bechtel* is overbroad. *Bechtel* holds simply that any predictive judgments used to select among broadcast applicants must have factual support. *Bechtel* does not, as BFTC argues, prevent the Commission from considering concerns presented in comments and applying its expertise to choose a selection method that it determines would best serve the public interest. Here, where both lotteries and point systems (a simplified form of comparative hearing) are presented to the Commission as options by statute, the Commission need not present empirical data to support the viability of either choice. Rather, we must select one of these options, offering a reasonable explanation that is supported by the record.⁷ Then, the value of any predictive factors included within the option selected must be explained and supported, as we did in adopting point factors. Further, BFTC’s suggestion that we erred in considering the potential for lotteries to spur speculation is based on its belief that NCE stations are immune to speculation either because such stations have limited monetary value or because they are subject to a holding period. Speculation, however, is not a concept limited to the quick “turn over” of stations for an inflated monetary value, something that our holding period addresses. NCE spectrum is a finite resource, with intrinsic value as an outlet for different educational viewpoints. Lotteries, due to their random nature, encourage mass filings of applications to increase the statistical “odds” that the applicant will obtain any station, anywhere. That too is speculation. Moreover, such practices are harmful to competing applicants because the random selection of an applicant that could have met its goals anywhere will preclude the selection of an applicant that can fulfill its mission in only one location, such as where its campus or school system is located.

14. We cannot agree with BFTC’s suggestion that an applicant’s basic qualifications are all that matter in an educational broadcasting context. The Commission has in NCE broadcasting always sought to select the best applicant, not just any qualified applicant. BFTC provides no reason for us to depart from that policy. Finally, we explained that a decision to use weighted lotteries would likely prompt lengthy litigation, thereby causing significant delays in initiation of new NCE broadcast service.⁸ It is reasonable for us to consider the potential for lengthy litigation in making policy choices.⁹ Our previous use of weighted lotteries in the LPTV service provides no comfort or certainty because those lotteries were held

⁷ See *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

⁸ *NCE Notice* at 7-8, n. 12 citing *Adarand v. Peña*, 515 U.S. 200 (1995) and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *petition for rehearing denied*, 154 F.3d 487, *petition for rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). See also *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1358 (D.C. Cir. 1988)(agency using lotteries must use race-based weightings provided by statute).

⁹ *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996) (“an agency may properly consider the avoidance of litigation-related delay when revising its rules”).

prior to the Supreme Court's decision in *Adarand v. Peña*, 515 U.S. 200 (1995), when there was a lesser likelihood of a challenge to weighted lotteries.

2. Constitutional Concerns

15. Educational Media Foundation (“EMF”) argues that our point system violates the First and Fifth Amendments to the U.S. Constitution, which limit government intrusion on free speech and on the free exercise of religion, and provide for equal protection under the law.¹⁰ EMF acknowledges that the Commission expressed content neutral and speaker neutral reasons for adopting the point system. Nevertheless, EMF argues that the government's professed content and speaker neutrality does not necessarily make a rule constitutional, if the rule's effect is to discriminate against certain speakers or content. Petition of EMF at 21 citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643, 645 (1994). While recognizing that no party has an absolute right to receive an NCE license, but rather has, at most, a right to compete for a license, EMF argues that comparison must be fair and nondiscriminatory. EMF argues that our point system is unfair. It charges that the Commission engaged in results-oriented rulemaking with the explicit intention of discriminating against private speakers airing religious content and in favor of government speakers airing secular content. Thus, it argues that under “strict scrutiny,” we must demonstrate that our point system is narrowly tailored to serve a compelling government interest.¹¹ EMF bases its arguments almost entirely on its conclusion that it and six other religiously oriented NCE broadcasters would not be selected in a point system if competing against government entities. It maintains that because religious broadcasters generally run national networks, do not provide programming to schools, and have many other existing stations and applications, such broadcasters could not likely qualify for points based on localism or state-wide networks, and would not fare well in tie breakers.¹²

16. The Center for Media Education (“Media Education”) disputes EMF's constitutional arguments. It argues that there is no constitutional right to a broadcast license and that EMF's reading of *Turner* as requiring strict scrutiny is incorrect. Media Education cites to language in *Turner* which states “such heightened scrutiny is unwarranted when the differential treatment is ‘justified by some special characteristics’ of the medium being regulated.” Media Education Opposition at 4 citing *Turner Broadcasting v. FCC*, 512 U.S. 622, 660-61 (1994). It further states that the Supreme Court traditionally considers broadcast cases under a more relaxed review, due to the special attributes of broadcasting. *Id.* at 5 citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997). In any event, it maintains that because our point system does not require or prohibit the carriage of a particular point of view, it is content neutral, and would be subject to lesser scrutiny. *Id.* citing *Time Warner Entertainment v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000). Media Education believes that the implication that the Commission has an “anti-religion agenda” is baseless, as evidenced by the Commission's grant of large numbers of licenses to religious broadcasters.¹³

¹⁰ We note that another broadcaster raised similar arguments in an appeal filed directly with the U.S. Court of Appeals for the D.C. Circuit. See American Family Association, No. 00-1310 (filed July 14, 2000).

¹¹ Petition of EMF at 16-17 citing *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972); and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

¹² See Petition of EMF at 19-20.

¹³ Media Education, citing an independent report, states that there are 1,731 radio and 285 television stations licensed to religious broadcasters, of which over 700 radio and 23 television stations are on reserved NCE channels. Opposition of Center for Media Education at 6, n. 3 citing Jerold M. Starr, *Signal Degradation*, AMERICAN PROSPECT, Aug. 14, 2000, at 22.

17. We do not believe that there is any constitutional infirmity in our point system. Each factor within the point system is speaker and subject matter neutral. If, as EMF claims, it will be disadvantaged by the rules, it is not because the rules favor secular applicants over religiously affiliated applicants. Rather it is because EMF is a national organization that is already the licensee of many NCE stations, while the Commission sought in the rules to encourage localism and diversity of ownership. A secular national organization licensed to operate many NCE stations would have the same disadvantage under the point system. EMF's religious focus has no bearing on the operation of the rules. In the NCE Order we explained:

We have considered, but disagree with, the minority viewpoint that a credit for localism would adversely impact religious organizations or small organizations. A localism credit is religion-neutral and size-neutral. Whether religious or secular, large or small, an organization based in the local community would qualify for the credit. Moreover, organizations both with and without religious affiliation, and of varying sizes support a credit for localism.

NCE Order ¶52.

18. Because the point system does not reflect a government preference for the content or viewpoint of a particular speaker, strict scrutiny does not apply. See *Turner Broadcasting v. FCC*, 512 U.S. 622, 656-59 (1994); *Time Warner Entertainment v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000) (*Time Warner*). A content neutral regulation passes intermediate scrutiny if it advances important governmental interests, unrelated to the suppression of free speech, and does not burden substantially more speech than necessary to further those interests. *Time Warner*, 211 F.3d at 1318. A more deferential standard of review has been applied to broadcast regulation. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). Our point system advances important government interests in local broadcasting and education.¹⁴ Further, the point system is not a new burden on any particular speaker, but rather a system that incorporates several longstanding policy goals into one cohesive method for selecting among mutually exclusive applicants. For example, the importance of localism in noncommercial educational broadcasting is longstanding and reflected in the statute. NCE Order ¶¶44-51. Similarly, the Commission's decision to award a permit in the event of a tie to the applicant with the fewest existing authorizations, is consistent with our longstanding focus on diversity of ownership of broadcasting stations. Our decision to award points to applicants that are part of state-wide networks is consistent with our longstanding policy of considering an NCE applicant's participation in state-wide education plans.¹⁵

19. As EMF acknowledges, there is no constitutional right to a broadcast license. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969). Given the nature of spectrum licensing, our grant of one mutually exclusive broadcast application under any selection method will inevitably mean our denial of another application. Whether our selection decision is made pursuant to a point system or some other method, it is well established that denial of an application for a broadcasting license "if valid under the [Communications] Act, is not a denial of free speech." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943).

¹⁴ See *Turner*, 512 U.S. at 663 (the importance of local broadcasting can scarcely be exaggerated); *Cable Television Consumer Protection and Competition Act of 1992*, Pub.L. 102-385, 106 Stat. 1460, § 2(a)(8)(A) ("[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens").

¹⁵ Consideration of state-wide plans prior to adoption of the point system was codified in Section 73.502 of our rules, stating that "the Commission will take into consideration the extent to which each application meets the requirements of any state-wide education plan for noncommercial educational FM stations. . ." That rule has been superseded by the more specific state-wide network credit. See NCE Order at para. 61.

20. EMF claims that the Commission had some unstated goal to disadvantage religious broadcasters. That is simply not so. Indeed, the record indicates that the Commission was responsive to the concerns of NCE organizations with religious affiliations as well as those without such affiliations. For example, we expanded the definition of state-wide network, which was originally expressed in terms of participation in government educational plans, to also include private networks offering significant service to schools. NCE Order at ¶ 59. We indicated that religious organizations that operate schools, such as the Catholic Archdiocese or religious universities, might qualify for state-wide network points. *Id.* at ¶¶ 57-59. Given that our decision concerned award of permits to provide noncommercial educational broadcast service, we believe that it was eminently reasonable to encourage, though not require, service to schools.

21. Accordingly, we reject the constitutional challenges to our use of a point system. Having found that our choice of a point system over other options is sound overall, we now will examine various aspects of our decision to determine whether modifications or clarifications of that system would be useful.

B. Time for Calculating Points/Enhancement of Proposals

22. Generally, the NCE Order provided that we would award points for the relative merits of an applicant's proposal as of the time of filing, provided that the applicant maintains the qualities for which points are awarded.¹⁶ Several petitioners, including Colorado Christian University and Jimmy Swaggart Ministries anticipate timing concerns not specifically addressed in our decision or rules and request clarification. Of particular concern is how the Commission will view changes that occur after the time of application, such as an applicant's attempt to enhance its proposal or changes in census data that occur naturally over time. This issue is relevant to all NCE proceedings, but is especially of concern to organizations with pending applications.¹⁷ In order to address apparent uncertainties regarding both current and future applicants, we here clarify with more specificity the process for counting points in future proceedings and the similar, but somewhat modified, process that will govern pending applications.

1. Timing for Future Applications

23. In the NCE Order we established the "time of filing" as the time for determining points. We did not provide an in-depth discussion of that choice, however, and we now elaborate in order to clarify our decision. We selected the time of filing so that there would be no need for the staff and applicants to constantly recalculate points and to minimize one-upsmanship. Applicants may not continuously amend their proposals and qualifications in attempts to surpass other mutually exclusive applicants, but rather must present initially, their proposal to provide the best possible service to the public regardless of whether or what any competing applicants may file. An applicant's characteristics at the time of filing establish a "snap shot" that we will generally use to determine the applicant's maximum points and its maximum position in a tie breaker. However, points can be lost through changes that detract from the original proposal.

24. Our rules require applicants to inform us of material changes in their applications after the time of filing, which, in the context of a point system, will include all changes that negatively affect its claimed points and tie breaker position. 47 C.F.R. § 1.65. A future applicant's maximum points and its standing in a tie breaker can thus go down, but not up as a result of changes made after filing. For

¹⁶ See 47 C.F.R. § 73.7003 (localism points and tie breaker factors considered as of date of filing); NCE Order, Appendix A (technical parameters considered as of close of filing window); NCE Order at ¶ 40 (technical factors must be maintained).

¹⁷ Currently pending are 1,369 reserved channel radio applications and 67 reserved channel television applications.

example, if an applicant loses its transmitter site and amends its application in a way that results in lost points, the applicant will only be allowed to claim the amended points. In this way, the applicant will not benefit from any early proposals that it is unable to honor. However, if the applicant amends and attempts to enhance points, the applicant will only be allowed to claim its earlier lesser points. In this manner, applicants with superior initial proposals will not be disadvantaged by any competing applicant's later attempts at enhancement. This will also encourage applicants to come forward with the best possible proposal and minimize the potential for any manipulation of the system. In addition, we believe that a proposal crafted without knowledge of competing proposals is a more reliable indicator of future service than one crafted with an eye to outdoing a competing applicant.

25. Similarly, for tie breakers, the applicant's best position is established at the time of application, but can be reduced. For example, in our primary tie breaker, which selects the applicant with the fewest number of broadcast authorizations at the time of filing, an applicant cannot enhance its position by selling one of its existing stations, but can diminish its position by acquiring an additional station. Thus, an applicant with no existing stations at the time of application will benefit from its "zero" stations in tie breakers only until such time as it receives a first authorization. It will be required, pursuant to 47 C.F.R. § 1.65, to update its pending applications and so will not be able to continue claiming zero authorizations, when it has, in fact, already had applications granted in several proceedings, perhaps now surpassing a tied competing applicant in terms of stations authorized.¹⁸

26. When future applicants report population and other stations serving an area, as they might for fair distribution purposes under 47 U.S.C. § 307(b),¹⁹ they should use the data that is the most current at the close of any filing window. It is inevitable that there will be shifts in population and in number of services authorized in a region between close of a window and the time we act on an application. However, such inevitable changes will not reduce a future applicant's standing, and thus we will not require such applicants to notify us if these expected changes occur after the close of the window. Of overall concern to us in this area is that we are comparing applications that use the same data. Reliance on information as of the close of the window will ensure that applicants have essentially a common reference date. With a common reference date and a common method of calculating population²⁰, the staff will analyze applicants on a similar basis.

2. Timing and Enhancement for Pending Mutually Exclusive Applications

27. Applicants with pending applications filed prior to adoption of the point system must supplement their application to provide us with additional information needed to consider their applications under the new comparative standards. As we will be unable to consider any pending application that does not contain the new information, we will assume that any applicant that fails to file a supplement is no

¹⁸ Under 47 C.F.R. § 1.65 an applicant has an obligation to report any material changes in its pending application. For example, with respect to authorization count, which can change frequently, applicants must update their applications upon occurrence of a change that could reduce their position. We stress that the applicant has an affirmative Section 1.65 obligation to report any change potentially affecting their eligibility for points or position in a tie breaker, even with respect to matters on which the Commission itself has acted.

¹⁹ See ¶ 6 *supra*.

²⁰ Population will be calculated using a block level centroid retrieval method, in which the applicant uses "centroid" points representing population at designated coordinates as identified by the U.S. Census Bureau, to determine the population within the applicant's proposed service area. See NCE Order at ¶¶ 26 and 40.

longer interested and dismiss its application.²¹ We now clarify the procedures for filing these supplements, which will depend upon whether the applicant is in a group that is considered “closed” or “open” in terms of whether it is subject to future competition from additional parties.

a. Closed Groups

28. Due to a processing freeze that has been in place while we establish and review the NCE comparative criteria,²² there are some groups of mutually exclusive applications which have been pending for a considerable time, and which are no longer subject to additional competing applications. These groups are referred to as “closed” groups. As stated in the NCE Order, existing applicants in these “closed” groups will need to file supplements to claim points so that we can compare them under the new system. We delegated to the Mass Media Bureau responsibility to announce the procedures for filing these supplements. We did not specify whether longstanding applicants might enhance their proposals and claim points for changes made in response to the NCE Order. Colorado Christian University asks us to “freeze” an existing applicant’s points at a particular point in time, to avoid the potential for pending applicants to become “moving targets.” Jimmy Swaggart Ministries suggests that we examine an existing applicant’s points as of the date of application to avoid uncertainties associated with applications that have been pending for a considerable time. For example, it argues that, for purposes of our fair distribution analysis, which considers whether applicants will provide a first or second NCE radio signal to an underserved area, pending applicants that proposed first or second service at the time of application should benefit, even if the Commission since has authorized additional stations.

29. Educational Media Foundation notes that, for some pending closed mutually exclusive groups, we have not issued B cutoff notices.²³ EMF further notes that under the A/B cutoff procedures that existed prior to adoption of the point system, applicants could amend as a matter of right until issuance of a “B” cutoff notice, and the Commission considered these amended proposals, rather than the original proposals, in comparative hearings. See 47 C.F.R. § 73.3522(b). Based on this line of reasoning, EMF believes that we should permit all types of enhancing amendments to existing applications, including technical amendments. The National Federation of Community Broadcasters argues that, with respect to changes in technical proposals, applicants should only be able to enhance their points by making changes considered “minor” under our rules.

30. We have attached as Appendix D a list of closed mutually exclusive groups, *i.e.* groups in which we issued an “A” cut-off list under the old rules and for which the time for filing responsive, competing applications has closed. Most of the point principles enunciated above for future applications will govern our treatment of applications in these pending “closed” groups. However, we will make several adjustments to account for the fact that these older applications did not contain point information as

²¹ However, the failure to file a point supplement because the applicant has instead filed a settlement consistent with paragraphs 96 to 99 *infra* will not result in dismissal. Only in the event that the settlement is denied, and the applicant thereafter fails to file a supplement by a new date would such failure to file a settlement result in dismissal.

²² See Public Notice, *FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055, *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 2877, 2879; 10 FCC Rcd 12182 (1995).

²³ Under the former A/B cutoff procedures, the staff issued an “A” list announcing the filing of an initial “A” application. That list established an “A” cut-off date, 30 days later, by which any applications competing against the “A” application were due. If the staff, after study, determined that competing applications were received, it would issue a “B” list, identifying all mutually exclusive applications and inviting petitions to deny. However, given that the current proceeding proposed to change the criteria used to evaluate competing applications, issuance of “B” lists inviting petitions under the old criteria would have been an inefficient use of resources both for the staff and potential petitioners. Therefore, among the applications on file, are closed groups of applications for which no “B” list was issued.

filed, and that applicants must now file supplements to claim points. To the extent possible, we will use a recent date for purposes of taking a “snap shot” of applicant qualifications. As a result, we will be able to consider recent information rather than information that may be several years old. A recent “snap shot” date will also give pre-point system applicants an opportunity to incorporate into their proposals point factors that we adopted and clarified after their original filing date, and which we have since indicated are desirable and in the public interest. Specifically, the date that pending applicants must use for reporting population/service data for 307(b) determinations and for most point data is the “supplement date,” a date after release of the current decision that the staff will announce by public notice, and by which pending applicants must file supplements to claim points. By the supplement date, applicants in closed groups must file either settlement agreements, as discussed *infra* at paras 96-99, or supplements. Those filing neither will be dismissed. We will use the supplement date to examine all data, except for the applicant’s technical proposal, for which we will use the earlier date discussed further below. So as not to unduly delay this proceeding, the staff should set a due date for supplements that is approximately 30 days after the public notice. The staff will evaluate any non-technical changes to an applicant’s proposal pursuant to the criteria established in the point system. For example, if an applicant unconditionally withdraws previously filed applications or consummates approved assignments of authorized stations to other entities prior to the supplement date, those stations would not count against the applicant for purposes of a tie breaker, regardless of how many applications or authorizations they may have held at the time of original application.²⁴ An applicant that changed its board composition or established a local campus in response to our point system, however, would not be able to claim points as an established local applicant because our point system recognizes such local indicia only if they have been maintained for at least two years.

31. With respect to the applicant’s technical proposal, we will calculate points based on an earlier date. We are compelled to reach this result because the staff has already fully studied all applications in closed groups based on earlier claimed coverage to determine which applications are mutually exclusive. Technical changes now would cause undue delay, requiring reexamination of new technical proposals for potential conflict with over a thousand applications on file, not just with respect to other applications within each closed group.²⁵ For closed groups in which both “A” and “B” cut-off notices have issued, we will calculate technical points as of the date of the “B” notice, which announced applications in the mutually exclusive group and cut off the opportunity to file amendments as of right under the rules then in effect. Thus, these applicants will have the same amendment as of right period that they would have received under our previous rules. For closed groups in which no “B” cut off notice has issued, we will examine technical proposals as of April 21, 2000, the release date of the NCE Order. We ceased issuing “A” and “B” lists as of that date. Applicants in this category will thus also have had some time to make technical amendments as of right, albeit less than they might have received had the Commission not eliminated its use of cut-off lists. After the relevant date, applicants may not amend their proposals except for good

²⁴ Applicants may not enhance their position based on matters that require additional Commission or applicant action. For example, they must consider as pending any applications for which their requests for withdrawal are conditioned on our approval of a settlement agreement. Similarly, they must include as existing authorizations any station for which an assignment of license has not yet been consummated, even if an application to assign has been filed or approved.

²⁵ To ensure efficient processing of NCE FM applications, we waive the city grade coverage requirement recently adopted in MM Docket No. 98-93 for all mutually exclusive radio applications subject to the comparative procedures adopted herein. Absent a waiver, these radio applicants would have been required to amend their applications by February 19, 2001 to provide a predicted 60 dBu strength signal to at least 50% of their communities of license or to 50% of the population of the community. See *Streamlining of Radio Technical Rules*, MM Docket No. 98-93, FCC 00-368, ___ FCC Rcd ___ (released November 1, 2000), 65 Fed. Reg. 79773 (December 20, 2000). Moreover, we will not accept amendments to those applications filed under the “good cause” standard where such amendments are intended to establish compliance with the new community coverage requirement. We note that petitions for reconsideration of this issue were filed in MM Docket No. 98-93, and we will act on those petitions in a subsequent order in that proceeding.

cause pursuant to 47 C.F.R § 73.3522(b), such as an applicant's involuntary loss of its transmitter site. With respect to good cause amendments, applicants will not receive additional points, and may lose points for any such amendments that decrease the applicant's proposal. A technical amendment that removes a mutual exclusivity, thereby permitting our grant of an application, would be considered a good cause amendment.

32. We do not agree with Jimmy Swaggart Ministries that we should use data that dates back many years in analyzing fair distribution issues for applicants in closed groups. Traditionally, in examining fair distribution pursuant to Section 307(b) of the Communications Act, proposals are analyzed as of the date that 307(b) information is requested. For many NCE applicants, we have not yet requested any 307(b) information. It would not be appropriate or practical to ask such applicants to now submit such information as of a date long passed, because this would require applicants to undertake a more difficult process in order to provide the Commission with less accurate information. For some other NCE applicants, we may have requested 307(b) information in hearings that were conducted under old standards and that were not dispositive. In the NCE Order we established new standards for conducting Section 307(b) analyses, and any information submitted under the old standards would be inadequate or incomplete under the new standards. Thus, even applicants that previously submitted 307(b) information will need to submit different 307(b) information as of the "supplement date." Accordingly, the supplement date will serve as the "snap shot" date for 307(b) information. Applicants supplementing their applications with population data should use the 2000 census, if available by the supplement date.

b. Pending Applications Subject to Future Competition

33. West Coast Public Radio ("West Coast") seeks special consideration for a specific type of pending application, *i.e.*, those that are still subject to competing applications because they were neither filed in response to an "A" notice nor themselves placed on an "A" notice. We stated in the NCE Order that, because the opportunity to file competing applications has not yet run, we will consider these pending applications in the first filing window, along with any additional applications filed during that window. This result creates a timing issue with respect to when to calculate the points of the pending applications and the future applications with which they will be competing.

34. West Coast is particularly concerned that future applicants filing in the first window may attempt to tailor mutually exclusive proposals to claim more points than existing applicants who must also compete within that window. West Coast bases this belief on the assumption that existing applicants will claim points as of their original date of application, whereas the future applicants with whom they will compete will be able to claim points as of a date within the window. It suggests that we award additional points to the existing applicants so that they will be able to compete effectively with future applicants. We decline to do so. We clarify, however, that such existing applicants may be able to claim more points than those for which they qualified at the time of their original application. They have two options available to them. First, they may choose to amend their pending applications during the first filing window to enhance their proposals and provide comparative information. Alternatively, they may withdraw their pending applications prior to the first filing window and file new proposals in the first filing window. In either case, existing applicants that are subject to competition will have the same opportunity as new applicants to submit their best proposals during the first filing window.

C. Fair Distribution of Service as a Threshold Issue (Radio Only)

35. Several parties ask for clarification of our fair distribution process. We decided in the NCE Order that, if mutually exclusive NCE radio applicants specify different communities, we would first consider, pursuant to Section 307(b) of the Communications Act, whether grant of one proposal over the other is warranted based on fair distribution of service principles. An applicant would receive a decisive preference, as a threshold matter, if it would provide a first or second NCE aural service to 10% of the people within the proposed station's 60dBu contour, but to no fewer than 2,000 people. If more than one applicant meets this standard, we would award a preference only if one proposal provides first or second

service to 5,000 more people than the other. This standard is similar in some respects to the 307(b) standard previously applied in traditional NCE hearings, but borrows some factors used in the 307(b) analysis of commercial applications.²⁶ To maintain the benefits of fair distribution, we stated that applicants selected based on NCE fair distribution standards would not be permitted to downgrade service to the area on which the credit was based. Because applicants chosen through fair distribution would not be subject to a point system, however, they would not be subject to four year holding period provisions, which require applicants to maintain factors for which they received points and limit the terms on which the applicant may transfer the station to another party.

36. Jimmy Swaggart Ministries argues that the fair distribution analysis should be expanded to all mutually exclusive applications, not just those proposing to serve different communities. In contrast, Station Resource Group (“SRG”), an association representing NCE licensees, argues that 307(b) considerations should be given lesser importance, examined as part of a point system, and not as a threshold issue. SRG argues that Section 307(b) of the Communications Act does not compel us to consider fair distribution as a threshold issue, and maintains that in traditional comparative hearings this factor was given less weight.

37. The scope of our fair distribution analysis was an issue fully considered in the NCE Order. By the express terms of 47 C.F.R. § 73.7002(a), adopted therein, the 307(b) analysis is conducted only if applicants propose to serve different communities. Differences in coverage among proposals to serve the same community are adequately considered within the point system, which includes a consideration of technical parameters. Differences in area and population served within the same community are considered by awarding points for technical parameters. *See also* paras 75-76 *infra*. Our decision is entirely consistent with our responsibility under Section 307(b), as long interpreted by the courts and the Commission. The statute is explicit that the Commission must distribute broadcast licenses “among the several States and the communities so as to provide a fair, efficient, and equitable distribution of radio service to each of the same,” but does not mandate a particular procedure that the Commission must follow. *See Competitive Bidding*, 13 FCC Rcd 15920, 15963 (1998). While Swaggart urges us to expand the 307(b) threshold to encompass all applications with different reception areas as well as different communities of license, nothing in the language of the statute, with its explicit reference to “communities” supports such an extension. Nor does Swaggart cite any Commission-level precedent in which any applicant received a preference for such matters. The Commission’s use of a threshold 307(b) determination in NCE cases was thus fully consistent with the statute, as interpreted by the Commission and the courts. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977); *Competitive Bidding*, 13 FCC Rcd 15920, 15963 (1998).

38. With respect to the question of whether to consider fair distribution individually or to integrate it into a point system, we concluded that we should give this factor decisive weight prior to any point system. NCE Order at ¶ 24. There is no merit to SRG’s suggestion that our approach is inconsistent with agency precedent. It relies on *New York University*, 10 RR 2d 215 (1967), the first NCE comparative case. SRG alleges that the modified hearing designation order in that case afforded the Administrative Law Judge discretion to give whatever weight he deemed appropriate to the 307(b) issue and that the judge did not give that issue dispositive “threshold” weight. However, the Review Board’s subsequent opinion in that case makes clear that 307(b) issues can be dispositive, as long as the differences are not slight, as they were in that proceeding. *New York University*, 19 FCC 2d 358, 370-71 (Rev. Bd. 1969).

²⁶ To the extent that the 307(b) standards we will use for NCE stations are more stringent than those applied to commercial stations, we noted that areas underserved in terms of NCE service are not likely to be true “white” or “gray” areas, because areas with few NCE signals will likely receive additional service from commercial stations NCE Order at n. 16. We also noted that the outcome of a successful 307(b) analysis in commercial TV and FM proceedings is the allocation of a channel to a community but not to any particular licensee, whereas in an NCE analysis the outcome is award of a license.

By means of the formula prescribed in 47 C.F.R. § 73.7002(b), we have ensured that only significant 307(b) differences are decisional, just as the Review Board envisioned in *New York University*. When two applicants have only small differences under 307(b), we proceed to consider them pursuant to a point system. Differences among applicants for the same community are considered under the point system's technical factor, if significant in terms of both area and population.

39. We do, however, note that our discussion of 307(b) in the NCE Order did not contemplate the possibility that two applicants offering similar levels of new NCE service pursuant to 307(b), and therefore proceeding to consideration under a point system, could be part of a larger mutually exclusive group with applicants proposing to provide service not deserving a 307(b) preference or deserving a lesser 307(b) preference. We clarify that under such circumstances, only the applicants that are entitled to equal Section 307(b) preferences will proceed to consideration under a point system.²⁷ The other applications, which are entitled either to lesser or no preferences under Section 307(b), will not be considered along with those applicants in a point system, consistent with our determination that fair distribution of service should be given decisive weight.

40. Colorado Christian University asks whether the new fair distribution standard developed for NCE stations will be based only on first or second service received or also, as in commercial allocations proceedings, on first transmission service licensed to a community. It is concerned about potential abuses that may occur if first licensed transmission service is applied in an NCE context. Station Resource Group also shares this concern. It believes that an applicant proposing to provide a first or second NCE reception service is providing a more important service than an applicant merely licensed to a community. In particular, SRG observes that under the rules applicable at the time of its comments, reserved channel NCE-FM stations had no obligation to place a city grade contour over their nominal communities of license, and could designate any community within the 60dBu contour as the community of license.

41. The fair distribution standard that we adopted was based only on provision of the first or second NCE reception service for a significant population. Applicants would receive no preference by proposing the first station to be licensed to a city or town, when that community already receives two or more NCE signals. First aural service licensed to a community is considered in commercial broadcasting, which has longstanding community coverage requirements, but has not played any significant role in NCE broadcasting which until recently had no community coverage requirements and now has requirements that are significantly less stringent than those applicable to commercial broadcasters.²⁸ We do not believe that consideration of first service licensed to a community would serve the same purpose in NCE broadcasting as it does in commercial broadcasting. Further, as commenters stated earlier in this proceeding, our crediting only service received reduces the potential for abuse. Otherwise, NCE applicants might identify small communities that they would not fully serve, receiving a decisive preference over applicants with nearly identical service areas but that propose to be licensed to larger communities. NCE Order at ¶ 22. Accordingly, our NCE fair distribution analysis is based on new service received, not on first transmission service licensed to a particular community.

42. Next we consider the views of Munn-Reese Engineering Consultants and the University of

²⁷ For example, in a group of three applicants serving different communities, if two of the applicants would provide first NCE service to similarly sized populations, while the other applicant proposes only a second or third NCE service, we would conduct a point "hearing" only among the applicants proposing first service. We would dismiss the third applicant because either one of the remaining applicants would have prevailed over that applicant in a 307(b) determination.

²⁸ NCE FM stations must provide a predicted 60 dBu signal to at least 50 percent of the area or population of the community of license, whereas commercial stations must provide a 70 dBu signal to the entire community of license. See *Streamlining of Radio Technical Rules*, MM Docket No. 98-93, FCC 00-368, ___ FCC Rcd ___ (released November 1, 2000). See also note 25 *supra*.

Northern Ohio, which ask us to clarify whether, for purposes of our 307(b) analysis, stations operating noncommercially in the non-reserved portion of the FM band or in the AM band will count as NCE aural signals received. If so, they ask what factors we would use to determine whether such a station provides NCE service. Munn-Reese notes, for example, that although stations can operate noncommercially in the non-reserved portion of the band, some are licensed as commercial stations subject to filing fees, while others are licensed as noncommercial stations and are exempt from filing fees.

43. In determining whether a significant population receives NCE aural service, *i.e.*, whether it is unserved or underserved by existing NCE stations, we will count as first and second signals only reserved channel NCE-FM stations. Historically, the Commission has only considered stations operating on reserved channels to determine the level of NCE service already received, and we see no reason to change that practice in this context. See *New York University*, 10 RR 2d 215 (1967). As we noted in the NCE Order, stations operating on non-reserved channels voluntarily choose to provide NCE service, but can readily become commercial stations by filing a simple form with us. In contrast, noncommercial service on reserved channels is mandatory and permanent. Due to this potential for rapid change in the nature of non-reserved channel stations, we do not believe that the NCE service provided by these stations is sufficiently fixed to be counted in our analysis. Thus, in an NCE fair distribution analysis, we would grant an application proposing to provide the first reserved channel FM service a preference, without regard to whether nearby AM and non-reserved channel FM stations currently operate with noncommercial educational formats.

44. Colorado Christian University raises additional fair distribution concerns, asking us to apply all aspects of our four-year holding period to applicants receiving their permits as a result of a fair distribution preference. Colorado Christian acknowledges that we already prevent technical downgrades to the area on which we granted a fair distribution preference, but believes that other holding period restrictions should apply as well. It argues that there is the need to prevent speculation by all successful applicants, not only those awarded by a point system. It further maintains that because an applicant receiving a 307(b) preference has a decisive advantage over other applicants, it is especially important to hold such applicants to every part of their proposals. We disagree with this reasoning. To uphold the integrity of the point system and prevent speculation, we require each point system selectee to operate the station for four years either itself or by assigning the station to another party with equivalent point credentials for consideration not to exceed reasonable expenses. If an applicant is selected on the basis of fair distribution criteria, its point claims are not relevant and are never examined. Thus, a requirement that any successor in interest have “equal points” would not be especially meaningful and not necessary to preserve the integrity of our process. We believe that it would be overly restrictive to require applicants to maintain attributes for which they claimed points if those attributes are not decisional. What matters in the fair distribution context is that any successor in interest continues to provide service to the area for which the original applicant received its fair distribution preference, as our current rules already require. The particular weight given to 307(b) considerations does not in itself justify placing additional non-307(b) obligations on the applicant.

D. Point System Factors

1. Established Local Applicants

45. Our point system awards the largest percentage of points to established local applicants. Initially, we expressed concern that awarding credits in a point system for an applicant’s local characteristics might be difficult to support under the standards enunciated in the *Bechtel* case. As discussed previously, that case invalidated the use of the “integration” credit, which awarded a significant comparative advantage to commercial broadcast applicants proposing to work at their proposed stations as owner-managers. The court found that there was no empirical evidence supporting the use of this criterion. We reexamined our concern, however, in response to strong commenter support for localism points, including some that provided statistical and historical evidence of the important role that localism plays in educational broadcasting. Ultimately, we found the comments sufficiently convincing that we

chose localism as the single most important factor in our NCE point system. Under the point system, an applicant that has been local for at least the two years immediately preceding application, *i.e.*, that has continuously maintained its headquarters, campus, or the primary residences of 75% of its board members within 25 miles of the central coordinates of its community of license, receives three points out of a possible seven. We stated that governments would be considered local within their areas of jurisdiction.

46. Broadcasting for the Challenged (BFTC) argues that the Commission's decision is contrary to *Bechtel*. According to BFTC, our decision was not supported by empirical evidence that an applicant that is local before filing an application is superior to an applicant that becomes local after its application is granted. In response to the Commission's reliance on the 1967 Carnegie Report as historical evidence, BFTC argues that the Report's use of the term "local stations" did not mean only those built by local groups.²⁹ It maintains that a national group can build a local station and become very involved in the community. Similarly, Educational Media Foundation maintains that there is no nexus between where a station's board members live or where its headquarters is located and the type of programming it will carry. It notes, for example, that the Commission has not set any required amount of time that a local licensee must devote to locally produced programming or local issues. EMF argues that the Commission should not favor local broadcasters based on a belief that national NCE broadcasters can apply elsewhere, because national NCE broadcasters will likely be competing against a local broadcaster in every market.

47. We affirm our decision in the NCE Order regarding localism for the reasons discussed therein. In brief, a localism credit is fully consistent with the *Bechtel* court's concerns. Commenters provided convincing empirical evidence of public benefits resulting from localism in NCE broadcasting.³⁰ They also demonstrated that localism is a factor that has historically been considered the lynchpin of excellent NCE service because local NCE licensees are knowledgeable of the community's educational needs, responsive, and accountable to the community.³¹ In response to EMF's concern, we clarify that being knowledgeable and responsive does not necessarily require that a local NCE licensee must air programs produced by local citizens, especially if, in the informed judgment of the licensee, other programs are better suited to meeting the station's educational goals. Local organizations are, however, more likely to be aware of locally produced programs that are available and thus to consider such programs. We do not imply that a non-local organization that receives a broadcast authorization and begins operating within a community may not, with time, acquire the knowledge of the community to be responsive to its educational needs and to become such a part of the community as to have local accountability. But an organization that has already been local for two years or more, as required for the credit, has those qualities prior to its very first broadcast and can thus "hit the ground running." We also continue to believe that it is efficient to meet the spectrum needs of NCE applicants in the local areas surrounding their headquarters and campuses because distant locations may be unsuitable for their needs. In observing that some non-local applicants with broad goals will be able to apply elsewhere if they do not prevail in a particular community, we indicate merely the additional opportunities available to such applicants. We do not, as EMF indicates, assume that it will always be easy for such applicants to prevail elsewhere. Finally, we stand by our

²⁹ In describing to Congress the vision for educational television, the Carnegie Report identified "local stations," as having the "heart of the system . . . in the community," and maintaining "a firm grasp on the nature and needs of the people it serves." NCE Order at ¶ 44.

³⁰ See NCE Order at ¶ 47 citing *Joint Comments of National Public Radio, Association of America's Public Television Stations and the Corporation for Public Broadcasting*.

³¹ In this sense, we clarify that NCE licensees and the stations they operate, may be viewed as similar in many ways to school boards and the schools they operate. Our nation's schools are primarily locally controlled, with each public school board or private board of trustees having sufficient knowledge about its respective communities to run schools in a way that responds to that community's educational needs. Indeed, such boards have vested interests in being responsive because they will be held accountable to their communities for schools that do not live up to their community's standards.

decision to award 3 out of a possible 7 points to established local applicants. This weighting reflects the importance of localism in NCE broadcasting. Further, as we noted in the NCE Order, this proportion is similar to one used in the Instructional Television Fixed Service, another educational communications service in which localism is strongly encouraged.

48. Having affirmed our three-point credit for established local applicants, we next consider the proposal of several petitioners that we broaden the class of applicants that would be considered local. West Coast Public Radio and Station Resource Group both ask us to expand the measure by which an applicant's headquarters, campus, and board members are considered local, replacing our 25-mile standard with a 100-mile benchmark. According to West Coast, the 25-mile standard is used as a basis for main studio location³² but only because of concerns about studio accessibility, and does not necessarily reflect what the community considers local. It states that TV and Class C FM stations may cover as much as 50 miles. The National Federation of Community Broadcasters ("NFCB") similarly proposes a standard of localism based on each station's coverage area, noting that rural stations may serve larger areas than urban stations.

49. West Coast and SRG both also ask us to incorporate into 47 C.F.R. § 73.7000 the concept that government applicants are local within their jurisdiction. Real Life Educational Foundation proposes that an organization should be considered local if a majority (instead of 75%) of its board consists of local residents, because control rests with a majority of the board. It further asks us to clarify whether a new organization would qualify for points if board members who have been local for two years form it. Real Life maintains that we should give credit to long time residents regardless of the length of time that their organization has been in existence, arguing that to do otherwise is arbitrarily giving credit only for "brick and mortar." Real Life also asks us to clarify how we will apply our localism criteria to organizations that have had applications pending for substantial periods.

50. We affirm but clarify the standards for localism announced in the NCE Order. Applicants with a headquarters, campus, or 75% of board member residences within 25 miles of the reference coordinates of the community of license will be considered local. Governmental units will be considered local as well within their areas of jurisdiction. In the NCE Order, we specifically rejected as too broad a proposal to use 100 miles rather than 25 miles as our localism standard. We continue to view 25 miles as a reasonable distance applicable to all full service NCE broadcast stations for the reasons discussed therein. We decline to individualize the definition of "local" to vary with a particular station's technical capabilities, finding it preferable to apply uniform mileage standard. In this manner, an applicant needing to replace a resigning member of its local governing board will be able to make that decision based on easily understood mileage standards, without having to determine how the technical capabilities of the proposed station affects the localism of the new board member. The only instance in which the NCE Order individualized localism standards concerned governmental entities, in recognition of their broad accountability throughout their areas of jurisdiction. Due to recognizable extrinsic factors, such as where a person pays taxes and what school district he lives in, the government entity can readily identify whether board members live within the area of jurisdiction. As several petitioners note, however, our stated policy that governments are considered local throughout their jurisdiction was not incorporated into any rule. We agree that it would be useful to codify this policy into a rule, and hereby modify Section 73.7000 of our rules accordingly.

51. We disagree that it is too stringent to require an applicant without a local headquarters or campus to have 75% of its governing board members comprised of local residents to qualify for localism points. The Commission has discretion to exercise judgment in setting thresholds and drawing appropriate lines. Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150, 14 FCC Rcd 12,559,

³² See 47 C.F.R. § 73.1125(a)(3) (establishing 25 miles from the reference coordinates of the center of the community of license as one of three acceptable locations for a broadcast station's main studio).

12,590 (1999). We acknowledge that a percentage as low as 51% could constitute a voting majority and therefore exercise legal control of an organization. That is why we permit NCE television applicants that are not governments or schools to establish their basic eligibility by demonstrating that a simple majority of their board is composed of representative community elements.³³ Our point system, however, must distinguish between minimally qualified applicants and exceptionally qualified applicants. Reducing our comparative standard to a 51 % local board would, in the case of television applicants, result in the award of points to all minimally qualified applicants, making the localism credit meaningless in television proceedings. Further, we believe that it is reasonable to require a high level of local Board membership - a super-majority rather than a bare majority - to qualify the applicant for a preference as an established local applicant. In our judgment, an NCE applicant Board comprised of 75% established local residents is likely to be familiar with local needs and interests, and also have extensive ties to the community that will facilitate continuing interaction with the community. Equally important, that level of local Board membership is likely to assure a sufficient level of influence and control over policies and direction of the licensee such that the local Board members' familiarity with local needs and interests and continuing interaction with their community will be reflected in the station's policies and programming. With a 75% local Board, local members are likely to control station decisions even if one local board member is absent or abstains from a particular decision. Finally, we note that it is far easier for an applicant to establish local credentials by appointing local residents to its board than by maintaining a physical presence by means of a school or headquarters. Thus, there is a greater potential for abuse of the point system among applicants that establish their credentials by appointing local board members. Requiring 75% local board members, rather than a mere majority, reduces the potential for abuse of our process. Thus, we decline to reduce the level of local Board membership required to qualify for points as an established local applicant where the applicant has no local school campus or headquarters and is not a local government authority.

52. With respect to new organizations formed by local citizens, an organization in existence for less than two years prior to our “snap shot” date may be “local” but cannot be considered “established.” Thus, it would not receive points as an “established local applicant.” Comments received earlier in this proceeding indicated a concern that if the Commission did not set a minimum period of time for which an organization itself must be local, non-local organizations would likely engage in abuse by “renting” local citizens for their boards, or by setting up new local corporations with “straw-men” local incorporators. It would be too difficult without a lengthy hearing process for the Commission to distinguish between such abusive “local” applications, and legitimate local applications. Thus, in adopting the requirement that organizations be “established” in the NCE Order, we stated that this requirement would serve to limit the feigning of local qualifications, to establish the applicant’s educational credentials in a particular locality, and to foster participation by truly local entities in noncommercial educational broadcasting. Accordingly, we affirm our decision to grant localism points only to organizations that have been established in the community for at least two years prior to application, similar to the standard adopted for Low Power FM applications.³⁴ Regarding applications currently on file, the applicant must have qualified as a local applicant continuously for two years prior to the supplement date to be considered for points as an established local applicant. It cannot claim such a credit now by virtue of adding local citizens to its board, regardless of the length of time those citizens have lived in the community.

³³ See Ascertainment of Community Problems by Broadcast Applicants, 41 Fed. Reg. 1372, 1384 (January 7, 1976). Although we no longer require formal ascertainment, the elements articulated in a “community leader checklist” continue to be used to determine whether NCE television applicants are broadly representative. See NCE Notice at n.27.

³⁴ *Creation of Low Power Radio Service*, MM Docket No. 99-25, *Report and Order*, 15 FCC Rcd 2205, *mod’d on other grounds, Memorandum Opinion and Order*, 15 FCC Rcd 19,208 (2000).

2. Technical Parameters

53. We adopted a credit for the applicant with the best technical proposal. Specifically, we determined that the applicant proposing to cover the largest area and population of all those in a mutually exclusive group would get 1 point if its proposed area and population is 10% greater than the next best proposal or 2 points if 25% greater than the next best proposal. Connecticut College Broadcasting Association asks if and how this standard will be applied to applications seeking modifications of existing facilities. In particular, it asks whether, among two applications for major modification, we would compare only the newly proposed coverage of the stations or their total coverage areas (existing coverage as well as proposed).

54. We clarify that factors in the point system are applicable to applications for major modifications of existing stations as well as to applications for new stations. When we examine a station's technical parameters, we will focus on the applicant's proposal. For modification applications, the proposal is the area of newly added service only. For new stations the proposal is the entire area to be served by the new station. We recognize that, as so viewed, a proposal for new service is much more likely to receive points for its technical parameters than a competing proposal to modify existing facilities. This result is consistent with our desire to provide additional service to as many people, living in as broad an area, as possible. Specifically, our grant of an application to construct a new station will bring a new signal to the entire area and population within the new station's service area, whereas our grant of a major modification brings new service to only a portion of the population within the modified station's service area.

3. Diversity of Ownership

55. Our point system awards two points for local diversity, *i.e.*, if the proposed station's principal community (city grade) contour³⁵ does not overlap such contours of any other station in which the applicant, its parent, subsidiaries, or members of their governing boards, have any attributable interests. We stated that this point factor would enable the listening public to receive the viewpoints of different NCE broadcasters. We recognized that the governing boards of NCE entities change frequently, and that differences in attributable broadcast interests of incoming and outgoing board members create an uncertainty about whether an organization that qualifies for the credit today will be able to maintain diversity into the future. Accordingly, we stated that we would award credit for diversity only to applicants whose own governing documents require that diversity of ownership is maintained.

56. Two petitioners ask us to clarify the governing document requirement. First, Jimmy Swaggart Ministries asks us to clarify whether pending applicants can amend their governing documents now, and thus be considered for diversity points even if their governing documents did not contain such provisions at the time of application. As established above, for pending applicants, we will calculate the applicant's maximum points as of a "supplement date" to be announced by public notice. A pending applicant can claim points for diversity if, as of that supplement date, it has no stations with overlapping principal community contours, and it has included in its governing documents a provision to maintain that diversity in the future.

57. Next, we consider a question from the University of Kansas ("Kansas"), which asks us to clarify how an organization without traditional governing documents will be able to meet the governing document requirement. This question is relevant both to pending and future applicants. Unlike NCE corporations, governed by a constitution and bylaws that members or a board can readily amend, Kansas

³⁵ With respect to radio, the principal community (city grade) contours are the 5 mV/m for AM stations under Section 73.24(I), and the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c). With respect to television, a station's principal community (city grade) contour is either the 74, 77, or 80 dBu contour, depending on the particular channel on which it operates, as described further in Sections 73.684 and 73.685.

is organized by a state charter passed in 1863, and its operation is, in part, governed by state statute. Kansas maintains that any change would require an act of the state legislature. It requests an exemption from the governing document safeguard, and offers instead to certify that it will not apply for any facilities that create contour overlap with other facilities for which it has applied or has been authorized. It would agree that any failure to meet this requirement would result in dismissal of its future applications. It further argues that the governing documents provision is overbroad, because it could prevent applicants from applying for stations in proceedings where it is not seeking any diversity credit.

58. The governing document safeguard aims to maintain governing board characteristics for which the applicant received credit, even if the composition of that board and its attributable broadcast interests change due to resignation and replacement of board members. We do not believe that the requirement is overbroad. Applicants may word the language as they deem best for their organization. For example, they may specify that this future safeguard provision will become effective only if the applicant claims a credit for diversity and receives an authorization as a result of that claim. Kansas' proposal to certify that it will not apply for additional stations does not fully address the purpose of the governing document requirement, because Kansas does not address the potential that future members of its governing board may hold or acquire attributable interests in broadcast stations licensed to others. We do, however, recognize that it might be very difficult for state-chartered organizations, like the University of Kansas, to obtain legislative amendments to their charter. While we will not exempt such organizations from providing a safeguard, we will consider alternative safeguards from such organizations if they reasonably assure that board characteristics will be maintained during the four-year holding period. For example, the University of Kansas states that it is governed by a Board of Regents appointed by the governor. We would consider a certification from University making a commitment to maintain the Board characteristics on which it bases its diversity claim, accompanied by a description of procedures it has in place to effectively notify appointing officials and board members, both current and future, of their need to act consistently with the University's diversity representations to the Commission. While it would be preferable and simpler to have the commitment in the organization's charter, if possible, we believe that in circumstances such as those that Kansas describes we can rely on appointing officials, who know of the organization's representations to the Commission, to make appointments consistent with those representations. We specifically limit the availability of this option to entities whose governing documents cannot be amended without legislative action.

4. State-wide Networks

59. The Commission has long recognized the value of state-wide networks of NCE stations operating pursuant to state-wide educational plans. State-wide networks have been pioneers in NCE broadcasting, particularly in television, ensuring that educational programming is available throughout an area in a coordinated and organized manner, especially to schools. We adopted a two-point credit in the NCE Order for state-wide networks serving large numbers of accredited schools, and repealed a rule that required more general consideration of applicant participation in state-wide plans. See NCE Order at ¶ 61 *citing* 47 C.F.R. § 73.502. We recognized that, due to the locations of the multiple school campuses or school districts they serve, state-wide networks may be unable to avoid overlapping signals, and thus may not be able to qualify for diversity of ownership points. By awarding an equal two-point credit for state-wide networks whose service to schools disqualifies them for diversity of ownership points, we intended to level the playing field. Thus, applicants providing service to many schools, that cannot do so without some signal contour overlap and resulting loss of the diversity credit, would not be placed at a disadvantage in comparison to applicants serving a smaller number of schools or serving general listeners in locations that, unlike schools, are not site-specific. The credit is available to public and private state-wide networks, as defined in 47 C.F.R. § 73.7003(b)(3). That rule generally requires that the applicant's stations will provide programming to 50 accredited full time elementary/secondary schools, or five accredited full time college campuses in a single state, in furtherance of the school curriculum. Several petitioners urge us to either eliminate or modify our credit for state-wide networks. They object primarily to our inclusion of school curriculum in the definition of state-wide network and to the large number of schools that applicants must serve to qualify for the credit.

a. Curriculum

60. Educational Media Foundation (EMF) and Station Resource Group (SRG) seek elimination of the state-wide network credit. EMF believes that the credit amounts to a value judgment that instructional programming is better than general educational programming. It believes that the Commission is trying to limit the programming that an NCE station can broadcast, contrary to a recent decision in which the Commission withdrew advice on the types of programming that are educational. Station Resource Group opposes the credit on different grounds, arguing that virtually no radio broadcaster would qualify for the credit as currently defined, and that it would be preferable to substitute different, more readily available, credits. Colorado Christian University and West Coast Public Radio would retain the credit for state-wide networks, but would delete the requirement that programming be used in furtherance of a school curriculum. According to Colorado Christian University, 65% to 75% of its adult students enroll at the college after listening to non-curriculum programs on the radio. Several commenters argue that the credit is of more value to television applicants than to radio applicants because radio stations are not as readily used as an instructional medium as television stations.

61. As indicated, we adopted points for state-wide networks to recognize a compelling educational reason that some NCE applicants may not be able to achieve the desirable goal of local diversity, and to avoid disadvantaging those applicants under our point system. When service to large numbers of schools is the reason for an educator's inability to qualify for the "diversity" credit, our point system values service to schools equally with diversity of ownership. We disagree with EMF's view that favoring school-based education on educational broadcast channels favors government speakers over private and religious speakers. A wide range of speakers, public and private, religious and secular, operate schools. A wide range of broadcast programming can further the curriculum of such schools. Perhaps, as some parties note, some applicants that operate schools will not qualify for this credit, because they target their broadcast service at the broader public, do not use their stations in connection with their school curriculum, or operate only one school. Perhaps, as others contend, television applicants will be more likely to qualify than radio applicants will. None of these factors would diminish our commitment to this credit. We did not expect this to be a widely available credit, but rather a tailored credit meant specifically to counterbalance the disadvantage otherwise suffered by applicants that lose diversity points because they regularly provide curriculum service to large numbers of schools. If fewer radio licensees will qualify for the state-wide network credit, that is only because fewer such entities will suffer the disadvantage under our point system for which this credit is intended to compensate. State-wide networks have played a more prominent role in television than in radio, and thus it is not surprising that more television than radio applicants would qualify. Moreover, television applicants serving schools may need this credit more than radio applicants may because television stations cover greater distances and have greater potential for overlap with co-owned stations.

62. We will not eliminate the inclusion of curriculum in our definition of state-wide networks. Under the non-curriculum-based credit urged by some commenters, any large system of schools or colleges would get the credit, regardless of whether its stations play any role in student education. The compelling reason for the applicant's inability to qualify for the diversity credit -- the applicant's need to serve the schools -- would no longer exist. The proponents of the alternative definition do not demonstrate that large schools that want to operate multiple stations for non-curriculum purposes should be treated any differently from other NCE applicants that want to operate multiple stations for non-curriculum purposes.

63. Connection to a school curriculum must be more than, as one petitioner suggests, a potential recruitment tool to attract students to attend a university. However, programming that furthers a curriculum need not be solely "instructional" *i.e.*, a broadcast of a teacher in a classroom. A college radio station operated by students as part of a class on broadcasting could also qualify regardless of the type of programming the students select. News or public affairs programming could further a curriculum if designed for use in a school to teach journalism or current events. Music and drama programs could be scheduled for use in a music or art appreciation curriculum.

b. Number of Schools Served within Contours of Overlapping Stations

64. Petitioners also ask us to adjust the number of schools that an applicant must serve to be considered for the credit. Station Resource Group believes that our numbers are arbitrary, failing to account for different sizes of student populations. It states, for example, that an applicant providing service to five small colleges would qualify for the credit, while an applicant providing service to 45 large high schools would not qualify, even if the high schools had more students than the colleges.

65. Colorado Christian University similarly asks that we loosen a requirement in the state-wide network credit concerning station contours. As adopted, the combined contours of the applicant's authorized stations and the one proposed station, must encompass the schools to be served. Colorado Christian asks that we consider the contours of all of the applicant's pending proposals. It maintains that applicants may want to serve large numbers of campuses, but that stations needed to cover those schools have not yet been authorized due to their mutual exclusivity with stations proposed by other applicants.

66. With respect to identifying an applicant's stations that will count as serving schools in our analysis, we will consider only existing authorizations, and the one proposed station under consideration. The diversity credit that we seek to counterbalance limits consideration to these same stations. As an applicant would not be disadvantaged by any other proposed stations for purposes of the diversity credit, we will not consider such proposals for purposes of the state-wide network credit. Further, while an educator may have applications pending to construct additional stations that could serve more schools, it may or may not ever be authorized to operate such stations.

67. We clarify that the schools to be served need not be of a particular size, because the size of the student population served is not necessarily related to the applicant's inability to avoid overlapping service contours. We recognize, as SRG predicts, that there may be individual instances in which an applicant serving fewer students will receive a credit as a state-wide network over an applicant serving more students. Such a result is not troublesome because the state-wide network credit is not, for example, intended to promote service to colleges with large enrollments over colleges with small enrollments. Rather, we are making a distinction based on the number of campuses receiving broadcast service. A college that operates multiple stations to provide broadcast signals to each of its many campuses is more likely to experience overlap of its signals than another college in the same state seeking to provide broadcast service to fewer campus locations. Accordingly, to counteract any disadvantage in qualifying for a diversity credit, it is appropriate for the state-wide network credit to consider number of campuses rather than student population.

c. Small Institutions/Aggregation of Stations Licensed to Different Entities

68. We also clarify that even small schools and colleges with few campuses can qualify for the state-wide network credit if, through consortia arrangements, they will provide curriculum programming to schools in addition to their own. We make this clarification in response to concerns of Santa Monica Community College District ("Santa Monica") and the American Association of Community Colleges ("AACC"), which represents over 1,100 community colleges nationally. For example, AACC notes that although Rhode Island and Delaware community colleges operate pursuant to state-wide educational plans they each have fewer than five campuses. AACC also states that community colleges often are not part of the state university system, and that because the degree of centralized authority at the state level varies, there is some uncertainty over which schools individual community colleges could count within their network.³⁶ For example, Santa Monica operates only one college campus. It is concerned that it might

³⁶ AACC identifies four categories of community colleges: (1) those that are part of the state university system; (2) those under the direct control of state community college board; (3) those in which control is divided between state boards and locally elected or appointed officials; and (4) those in which a local board has all (continued....)

not receive a state-wide network credit for future stations, because Santa Monica does not have authority over campuses licensed to other districts within California, and does not provide programming to any single institution with more than five campuses.

69. Community colleges or other small entities are not by virtue of size or organizational structure precluded from qualifying as state-wide networks, but the manner in which any particular organization might qualify for the credit will vary depending on such factors. First, if a central community college board or similar entity exerts control over individual districts, in the same manner that a parent entity controls subsidiaries that have their own governing boards, the stations of any community college district in the state would be attributable to the same parent entity. If the applicant's stations encompass five campuses with a common parent entity, and are used in the curriculum of those campuses, it could qualify for the state-wide network credit. This might occur, for example, if one district has a particular expertise in broadcasting, and therefore sister districts choose to use the service of this district rather than to operate their own stations.

70. Alternatively, an applicant could qualify for the credit if its multiple stations are used in the curriculum of its own single campus and those of four separately operated college campuses, through an agreement with the separate colleges. For example, public and/or private four-year universities might regularly use a community college's broadcast programs that also relate to their curriculum. Similarly, a school district with fewer than 50 elementary and secondary schools could qualify for the state-wide network credit if it also will provide programming to a neighboring school district, if the requisite number of schools in both districts combined will use the programming in their respective curricula. Accordingly, we clarify that consortiums of schools coordinating broadcast programming for use in their respective curricula, and non-schools serving such consortiums, can qualify for the state-wide network credit pursuant to 47 C.F.R. § 73.7003(b)(3)(c),³⁷ if in the aggregate they serve five college campuses or 50 elementary and/or secondary schools. Applicants cannot, however, aggregate colleges and elementary/secondary schools served. For example, an applicant serving four college campuses and ten high schools, will not be treated as equivalent to an applicant serving five college campuses. As colleges tend to be spaced further apart than lower level schools, it is not unanticipated that there would be several elementary/secondary schools within the vicinity of a college and vice-versa. Serving these additional schools would not generally require the applicant to cover a significantly larger area, and thus would not affect its ability to receive a diversity credit. Additionally, if the applicant is simply operating multiple radio stations to serve its own single campus and to reach the general public beyond its campus, without being used in a curriculum by the requisite number of schools, it would not be able to receive a state-wide network credit regardless of the number of schools that might happen to be located within its service area. In sum, applicants that provide curriculum service to the requisite number of schools, through arrangements with those schools, can claim a state-wide network credit even if all of the schools are not under one common authority.

E. Point Factors Not Selected/New Point Proposals

71. In the NCE Order we considered, but decided not to adopt, several other point system factors. A few petitioners urge us to reconsider factors previously rejected, or to consider adding new factors to the point system.

(Continued from previous page) _____
governing authority, with a state board serving a general coordination and policy function. Comments of AACC at 5.

³⁷ This rule section establishes the eligibility of "an organization, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with [entities with the required number of schools/campuses] for use in the school curriculum." 47 C.F.R. § 73.7003(b)(3)(c).

1. Local Program Origination and Other Localism Points

72. Broadcasting for the Challenged and National Federation of Community Broadcasters believe that we should provide credit for additional local factors beyond the established local applicant credit discussed above. BFTC states that it is inconsistent to award a credit for established local applicants, but not for local program origination by non-local applicants. It urges us to give three points to non-local applicants that intend to involve the local community in their stations, as a way to recognize that, in BFTC's opinion, community-minded non-local broadcasters are equivalent to those already present in the local community. Specifically BFTC urges us to award credits for applicants that would (a) establish local advisory boards; (b) employ 80% local employees; (c) train local interns and students; and (d) provide at least 50% locally produced programming. NFCB supports credits for local program origination as well. It notes that LPFM stations can receive points for local program production, and states that LPFM service is not a substitute for full service local programming. NFCB argues that a credit for locally produced programming would be consistent with Commission and court cases supporting local program origination and believes that the NCE Order does not adequately explain the reason for departure from an existing policy. Further, NFCB would award points to stations that are locally funded, which it believes is a good indication of community support, and for use of local talent or provision of airtime to local residents, which it believes will increase diversity of viewpoint. Community Television, Inc. opposes these suggestions. It views our existing localism points as disfavoring religious-oriented broadcasters, and argues that adding more localism factors would be entirely unworkable.

73. With respect to BFTC's suggestion of awarding points to a non-local applicant planning to provide community service, we note that the various steps that BFTC identifies may be helpful to non-local applicants in efforts to learn about the community's educational needs and to maintain good community relations. We decline, however, to award points based on an applicant's mere intention to implement such procedures. BFTC's suggestions involve plans for the future, and are not readily verifiable upon application. An applicant with the best of intentions may fail to live up to such promises if, for example, it finds that there are insufficient local residents skilled in broadcasting and thus it cannot fulfill its earlier plan to hire locally. We believe that it is better policy to award points for factors that can be verified at the time of application. Further, the record before us does not identify non-local NCE licensees that have instituted such policies in the past or provide information about the service records of any such stations. Thus we do not have a sound basis on which to conclude that non-local applicants would provide service equivalent to local applicants if the former were to establish local advisory boards, employ local residents, or train local interns and students. Nor does it appear to us that any of those mechanisms would ensure that a station's service is responsive to local community needs and interests to the same extent as if the licensee were awarded to a locally based organization. Accordingly, we will not adopt BFTC's suggestion.

74. NFCB's proposed credits for local programming, public access, and local funding are similar to proposals considered but rejected in the NCE Order. We decline to adopt those factors for the reasons stated therein. Given the difficulties in receiving financial backing for a non-profit venture like construction of an NCE station, applicants should have the flexibility to finance construction using whatever sources, local or non-local, are available. Similarly, full service NCE applicants should have the flexibility to air the programming that they conclude will best serve the needs and interests of the community, whoever produces it, and wherever that production takes place.

2. Radio Reading Services

75. West Coast Public Radio suggests that we award two points to FM applicants that would make their subcarrier frequencies available to organizations that provide reading services for the blind. NFCB, while acknowledging the good work of radio reading services, opposes this suggestion because the proposal does not take into account whether reading services in an area need more outlets to transmit their services, or whether existing options are already adequate. We agree with NFCB's critique. We also note that radio reading services are but one of many possible ways which FM subcarrier frequencies might be used to address a community need. For example, such frequencies can also be used to provide

foreign language programming. Further, regardless of whether subcarriers are used for radio reading services or other worthwhile endeavors, subcarrier signals are not received by the general public, but only by a distinct subset of listeners with specially designed receivers. Therefore, to establish a credit for radio reading services, we would need to conclude that reading services are superior to all other possible subcarrier uses, and that subcarrier service requiring special receive equipment deserves points similar to radio service that everyone can receive. Such conclusions are not supportable under the current record. Thus, we will not award any points for this factor.

F. Tie Breakers

76. In the NCE Order we recognized that some mutually exclusive applicants might qualify for equal points. For such scenarios we established tie breaker mechanisms. If applicants differ in terms of their number of existing authorizations, we would award the permit to the applicant with the fewest authorizations. If that factor fails to break the tie, we would select the applicant with the fewest pending applications. If applicants nevertheless remain tied, and are unable to settle among themselves, we instituted mandatory time sharing as a tie breaker of last resort for full service stations.

77. Several commenters object to our tie breakers. Broadcasting for the Challenged argues that an applicant's distant stations and applications are irrelevant because they have no impact on the proposed station or local listeners. Station Resource Group argues that our tie breakers are inconsistent with our recognition elsewhere of the benefits of centralized NCE operations, and with our grant of main studio waivers. Educational Media Foundation is concerned that a speculative applicant without any existing stations would prevail over an existing broadcaster with stations in a different part of the country. It also questions the propriety of counting stations without considering the size of the communities served. It gives as an example, a tie breaker between an applicant with one existing station serving a million people, and a competing applicant with two stations serving rural areas with far fewer people combined. EMF argues that we should not favor the first applicant just because it has fewer stations, as it would be inaccurate to consider the first applicant as having a more limited opportunity to air its viewpoint to the public. NFCB, while supporting our tie breakers based on authorizations and applications, objects to use of time sharing as a tie breaker of last resort. It views mandatory time sharing as an abdication of the Commission's responsibility for choosing among applicants, which aims to force applicants into private negotiations among themselves.

78. We acknowledge that the tie breaker selection factors highlight relatively minor differences between applicants. We also acknowledge that mandatory time sharing is unpopular and can be difficult for applicants with different missions, philosophies, or formats. Thus, these factors are considered only as tie breakers among applicants that are equally qualified under the primary selection factors. As tie breakers, these factors are fair. An applicant with more stations than its competitor already has more outlets to air its viewpoint and programming. It would be unnecessarily complex to compare for tie breaking purposes whether any of those stations are superior to others in terms of coverage or population served. Moreover, it is an efficient use of limited spectrum to award a permit to the applicant that applies in a few carefully chosen areas most suitable to its educational goals. An equally qualified applicant that has additional applications pending for other locations has more options available to it. As a last resort, time sharing recognizes the equal qualifications of applicants that have survived several tie breakers by giving the applicants partial, but equal, authority to broadcast. It has been a longstanding Commission practice to use time sharing to break ties in comparative broadcast cases, and we do not consider it an abdication of responsibility. *See, e.g., Southeastern Bible College, Inc.*, 85 FCC 2d 936 (Rev. Bd. 1981).

79. Whatever shortcomings our tie breakers may have, the petitioners suggest no better alternatives. The only alternative presented is a tie breaker lottery. As noted in the NCE Order, the statute governing our use of lotteries requires that substantial preferences be given in lotteries for minority control, a requirement that may well be challenged on constitutional grounds, resulting in litigation that would delay the award of licenses under our new procedures. Such additional delays would be particularly

intolerable after the prolonged delays in processing NCE applications due to the comparative hearing freeze. Further, we do not see how use of a lottery, a process of random selection, is likely to result in the licensing of the applicant best qualified to serve its proposed audience, the factor that the petitioners argue is lacking in our chosen tie breaker system. Accordingly, we affirm our tie breaker system.

G. Attribution of Full Service and Translator Stations

80. Because several factors in the NCE point system, including diversity of ownership, localism, and tie breakers, are based on whether the applicant also has interests in other broadcast stations, we established attribution rules for NCE organizations. These rules are similar to those applicable to commercial broadcasters, attributing the interests of the applicant, its parents, and its subsidiaries, their officers and members of their governing boards. To implement these attribution standards we modified Section 73.3555 of our rules concerning ownership. The rule, which previously stated that none of its provisions applied to NCE applicants, now says that the rule, including its attribution provision, is applicable to NCE applicants to the extent that they are compared pursuant to Subpart K, which sets forth our new comparative criteria.

81. DeLaHunt Broadcasting states that the relevance of attribution to NCE applicants is not limited to the point system in Subpart K. For example, it notes that Subpart G, which governs the low power FM (LPFM) service, provides that a party with an attributable broadcast interest cannot hold an attributable interest in a low power FM (LPFM) licensee. DeLaHunt also believes that Subpart I, governing auctions of non-reserved channels, counts attributable interests in noncommercial stations for determining whether an applicant qualifies for a noncommercial bidding credit. In amending the notes to Section 73.3555, we meant to clarify that commercial attribution standards also apply to NCE stations, to the extent that attribution is relevant to such stations. Attribution is certainly relevant for Subpart K, but we should have included it as an example only. Accordingly, we will now modify Section 73.3555 to use Subpart K as an example only. Whenever attribution issues are relevant for NCE purposes, the standards in Section 73.3555 will apply.

82. Educational Communications of Colorado Springs asks whether the Commission will provide attribution relief similar to that provided to commercial entities, in considering the attributable interests of officers and directors whose responsibilities are wholly unrelated to broadcasting.³⁸ For example, it notes that an officer of an NCE applicant may sit on the board of a university or church whose primary mission is distinct from broadcasting, but which may have a broadcast station. Educational Communications of Colorado Springs believes that the officer should be relieved from attributable interests if he is willing to recuse himself from the secondary broadcast-related business of the other organization. As a safeguard, it proposes that an officer no longer willing to recuse himself on one board, must resign from the other.

83. We clarify that the commercial attribution principles contained in the notes to Section 73.3555 are generally applicable to NCE applicants for comparative purposes. The specific provision to which the petitioner refers, 47 C.F.R. § 73.3555, n.2(h), establishes that if an entity engages in a primary business other than broadcasting, applicants may request that the Commission waive attribution for any officer or director of the company whose responsibilities are wholly unrelated to broadcasting. NCE applicants may similarly request waivers, asking us to find as non-attributable an officer's position with another entity because it has demonstrated that the officer's duties and responsibilities with that entity are wholly unrelated to that entity's broadcast business. Applicants should indicate the points for which it would qualify both if the waiver were granted and if the waiver were denied, so that we will not need to request additional information from the applicant.

84. We also clarify *sua sponte*, the extent to which applicants should count translator stations in

³⁸ See 47 C.F.R. § 73.3555, n.2(h).

determining local diversity and tie breaker matters. The text of the NCE Order and the full service rules adopted therein, generally reflect our intent that for determining local diversity points we will consider overlap of the proposed station with attributable NCE and commercial stations, “comparing radio to radio and television to television.” NCE Order at ¶ 35; 47 C.F.R. § 73.7003(b)(2). Similarly, for tie breakers, they state that we would consider the number of an applicant’s existing authorizations and applications “in the same service (radio or television).” NCE Order at ¶72; 47 C.F.R. § 73.7003(c)(1). See also 47 C.F.R. § 73.7003(c)(2) (“same service”). We note, however, that tie breaker language elsewhere in the document could give a mistaken impression that we intended translator stations to have no tie breaking impact on full service stations and vice versa. See NCE Order, n.59; Appendix A (Tiebreaker A); 47 C.F.R. § 74.1233(e)(3).³⁹ Accordingly, as discussed below, we clarify our intent.

85. In applying for a reserved channel station, whether full service or FM translator, the radio applicant generally should include its translators for purposes of determining diversity points and tie breakers. It would report all attributable commercial and noncommercial radio stations: AM, FM, and non-fill-in FM translators, *i.e.*, translators that extend the area of a full service station.⁴⁰ We will recognize an exception to this principle, however, for any radio translator licensee that, in the particular application involved, is seeking a full service station to replace its existing translator station(s). Such applicants may exclude, on that application, any existing translator station that will cease operating when the proposed full service station commences operation. We will, however, permit full service television applicants to exclude TV translators and Low Power Television (LPTV) stations when reporting attributable commercial and noncommercial TV stations. As a result of the transition from analog to digital television, translators may be an important resource in resolving interference issues, and we do not wish to preclude that possibility until that matter has been addressed. Due to the impact the transition to DTV has on LPTV and TV translator stations, we will not require full service television applicants to count LPTV or TV translators. Accordingly full service TV applicants applying for reserved channels should report all attributable commercial and noncommercial television stations: UHF and VHF, and Class A, but excluding TV translators and LPTV stations.

H. Application Processing Issues

1. General Procedures

86. The manner in which we will process applications is relevant both to pending applications and future applications. For pending reserved channel applications in closed groups, which are not subject to additional competing applications, the staff has already reviewed these proposals for mutual exclusivity only and has determined the members of each closed group.⁴¹ As described previously, these applicants

³⁹ Footnote 59 and rule section 74.1233(e)(3), could be understood as considering translators other than fill-in stations for purposes of tie breakers only in connection with an application for another non-fill-in translator station. The tie breaker summary in Appendix A might be read to exclude translator and AM stations.

⁴⁰ It generally should not count fill-in FM translator stations, which simply fill dead spots in the contours of the applicant’s full service station. Only if the radio applicant is specifically seeking a fill-in translator station should the applicant report its number of other fill-in stations, to be used in the event that we receive mutually exclusive fill-in proposals.

⁴¹ Specifically, there are 439 groups of reserved channel full service FM applicants, consisting of 1,356 applications, and 31 groups of reserved channel television applicants, consisting of 89 applications. There are 43 groups of FM translator applicants, consisting of 97 applications. Our preliminary studies only identify mutual exclusivity between applications of the same type, and not, for example, whether proposals in FM translator applications are consistent with facilities proposed in full service FM applications. Additionally, full service FM applications were studied based on technical rules in place at time of filing. Specifically, the staff did not consider technical changes in the protection ratios adopted in *Streamlining or Radio Technical Rules*, MM Docket No. 98-93, FCC 00-368 (November 1, 2000), untimely amendments, or post April 21, 2000 amendments.

will need to supplement their applications to provide point information. As to future applications, in the NCE Order we decided to open short filing windows periodically. These applications will be filed on a new Form 340, which asks for the information needed to determine the points for which an applicant would qualify. All applications received during a particular window will be examined initially for mutual exclusivity only. As described above, and for the first filing window only, the staff will examine for mutual exclusivity any applications filed prior to adoption of the NCE Order which are still subject to competing applications, along with applications filed within the first window.

87. After analyzing mutually exclusive applications under our new comparative standards, the Commission will issue an order or decision letter announcing the tentative selectee in a particular proceeding.⁴² As we will have initially examined applications for mutual exclusivity only, we will consider whether any tentative selectee's application (FCC Form 340 or 349) has defects. If found acceptable, we will announce that fact by a public notice generated by the Consolidated Database System (CDBS) entitled "Broadcast Applications." Petitions to deny the application must be filed within 30 days following release of the Broadcast Applications Public Notice announcing acceptance of the application at issue. Interested parties should monitor these Broadcast Applications public notices. If a tentative selectee's application has acceptability defects, it will be returned so that the applicant may have one opportunity to cure the defect. If the defect is cured consistent with the standards for acceptable applications the staff will generate a public notice via CDBS, triggering a 30-day period for petitions to deny. Failure to correct the defect, however, will render the application unacceptable and we will proceed to tentatively select the applicant with the next highest number of points. So that interested parties may verify or dispute the tentatively selected applicant's point tally, we would require applicants to file documentation of their point claims at the time of application both in their local public inspection files and with the Commission. The staff also would conduct random audits of points claimed. Other than specifying these broad guidelines, we did not establish processing procedures either for pending or future applications, instead delegating that responsibility to the Mass Media Bureau. Several petitioners ask us to clarify or establish additional processing requirements and guidelines, which would be generally applicable both to pending and future NCE applicants.

88. First, we consider a request from Spring Arbor College, which asks us to clarify that we will enable competing applicants to act as private attorneys general, disputing a tentative selectee's claims, rather than just conducting random audits. We clarify that the applicant's documentation, as specified and submitted in accordance with the instructions to the NCE application, Form 340, will be available for public review. Interested parties can provide useful analysis of such information in the context of petitions to deny or informal objections filed in response to public notices announcing our choice of tentative selectees. For example, if our tentative selectee claimed points as a state-wide network, it would have been required to provide information about the schools to be served. Interested parties will be able to examine the basis for the applicant's certification, and thus may independently verify, for example, whether the schools served operate full time and are accredited, as required. In addition, the Commission will randomly conduct audits of the information submitted. The process adopted thus provides reasonable assurance that the statements made will be verified for accuracy, either by competing applicants, the Commission, or the general public.

89. Next, we consider two petitions asking us to specify the processing order of applications. Station Resource Group, which focuses on pending applications, suggests a chronological order, resolving the earliest groups to file before considering later filed pending groups. University of Northern Ohio

⁴² As discussed in the NCE Order, use of the point system is considered a simplified hearing and the Communications Act does not yet allow the Commission to delegate authority over NCE point hearings to the staff. See 47 U.S.C. § 155(c). Thus, initially, these matters will be referred to the Commission. The Commission, as suggested by Station Resource Group, will request Congressional authority to delegate these matters to the staff similar to that received when point systems were used in the Instructional Fixed Television Service.

(“Northern Ohio”), whose views raise issues relevant to all applications, suggests geographical processing, and would only use chronology if there were two groups of applications for the same city. In support of this position, Northern Ohio states that local competing applications may be in conflict with a distant co-channel operation and that, by approaching the applications geographically, we could maximize the number of licenses awarded. For example, it maintains that in a situation where there is a chain of mutually exclusive applications, it is possible that applications at either end of the chain would not be mutually exclusive with each other, except for the existence of the middle applicant(s). Northern Ohio asks us to resolve the middle applications first, and then, if the resolution of that situation removes a conflict with another proposal, to grant that other proposal as well.

90. We do not believe that it is appropriate or necessary at this time to specify in the abstract a particular processing order, *i.e.*, the order in which we will resolve the mutually exclusive groups of NCE applications on file or the order in which we will analyze any particular applications within those groups. 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 “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. 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.

2. Procedural Issues For Future Window Applications

91. Station Resource Group and West Coast Public Radio raise processing issues relevant specifically to applications filed in future windows. First, to limit potential speculation, they ask us to limit to five or ten the number of applications that any organization may file in a single filing window. Second, they ask us to commit to open at least one window, scheduled to coincide with the due date of funding requests to the Public Telecommunications Funding Program (PTFP), which is administered by the National Telecommunications Information Agency (NTIA), and upon which many NCE applicants rely. Because NTIA accepts funding requests only once a year, and requires their applicants to indicate that they have filed a broadcast application with the Commission, some organizations are concerned that they may lose the opportunity to apply in an NTIA funding cycle if we do not open an application filing window immediately before NTIA applications are due.

92. The suggestion to limit the number of applications submitted in any particular filing window is essentially the same as one that was considered but rejected in the NCE Order. NCE Order at ¶¶ 85-86.

We did not believe that such limits were needed to prevent speculative applications, because other aspects of our new procedures, including the window procedure itself and a four-year holding period, serve to discourage speculation. Further, the tie breaker mechanism favors applicants with fewer applications. We do, however, reserve the right to establish such a limit in the future by public notice, if the number of applications filed exceeds our expectations. Petitioners do not provide persuasive reasons for changing our decision at this time.

93. With respect to funding, we appreciate concerns of commenters that need to apply to the Commission in time to also apply for funding available from another agency. The Commission and its staff are well aware of the importance of PTFP funding, especially to smaller organizations that could not construct a station without this program’s financial assistance. Our staff therefore has always coordinated closely and in a timely manner with NTIA staff to ensure that both agencies can fully consider the applicants’ related proposals. We expect that coordination between the Commission and NTIA will continue and will result in the opening of sufficient Commission filing windows for applicants to meet the

requirements of NTIA.

3. Terminated Hearing Proceedings

94. In the NCE Order, we terminated “any traditional comparative hearing proceedings to which a noncommercial educational applicant is a party.” NCE Order at ¶ 129. Jimmy Swaggart Ministries (“Swaggart”) and Real Life Educational Foundation of Baton Rouge, Inc. (“Real Life”), which are mutually exclusive with each other and have already been through a comparative hearing in MM Docket No. 88-308, ask for clarification of the process that will apply to former hearing applicants. Real Life believes that the prior hearing process has been replaced by a point system which will apply to such applicants, while Swaggart maintains that it would be inefficient and unfair to completely discard the results of hearings that have already taken place.

95. We believe that the proceeding between Real Life and Swaggart is the only pending proceeding that was once subject to a full evidentiary hearing. That case is essentially before us for a new initial selection among the applicants. We will apply a point system to that proceeding, identical to that applied to all other pending applications for which no initial selection was made prior to the effective date of the point system.⁴³ Although not specifically suggested by Swaggart or Real Life, we considered the possibility of using the old hearing results as a final tie breaker, in the event that the hearing parties are found otherwise equal under the point system and the usual tie breakers set forth in 73.7003(c) do not result in a winner. However, given the vagueness of our former hearing standards, we cannot say with a certainty that such result would be better than time sharing, the ultimate tie breaker that would otherwise resolve the matter. In fact, the hearing case between Real Life and Swaggart was one which was an impetus for revamping the standards for comparing NCE applicants, with the Review Board finding very little distinguishing among their proposals under the vague hearing criteria then in effect.⁴⁴ Accordingly, the pending Real Life and Swaggart applications will be considered under the new point system in all respects.⁴⁵

I. Settlements

96. We briefly discussed settlements in the NCE Order. We stated that settling parties would be limited to reimbursement of their reasonable and prudent expenses. We also stated that we would not “adopt a formal settlement period, so as not to unduly delay the award of points in cases where the parties are not interested in settlement, but stress that parties are free to settle at any time during the process.” NCE Order at ¶ 74. See 47 C.F.R. § 73.7003(d). Although pending NCE applicants have been able to settle with each other for a considerable time, both before and after the NCE Order, few have filed settlements. To foster settlements, the University of Kansas believes that we should provide for existing applicants to amend out of a mutually exclusive group by specifying any other available channel for which no one has applied. It asks us to modify Section 73.3573 of our rules to consider such action as a minor change. Kansas believes that such action would be consistent with 74.1233(e)(2) used to resolve mutually

⁴³ We generally will not apply the point system to any comparative FM translator proceedings for which we made initial selections before the August 7, 2000 effective date of the point system. Any requests for reconsideration of those decisions will be examined under the rules in effect at the time of the initial selection.

⁴⁴ See NCE Order at ¶ 5, citing *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991).

⁴⁵ See *Community Television, Inc. v. Federal Communications Commission*, 216 F.3d 1133, 1143 (D.C. Cir. 2000); *Chadmoore Communications, Inc. v. Federal Communications Commission*, 113 F.3d 235, 240-241 (D.C. Cir. 1997) (application of rule changes to pending applications is not considered retroactive rulemaking).

exclusive FM translator applications.

97. We do not adopt Kansas's proposal because it would preclude other full service applicants from applying for the available frequencies in the next filing window. Under existing rules, an applicant may make engineering changes to bring about a settlement if the change is "minor", *e.g.*, proposing to move to an adjacent channel. 47 C.F.R. § 73.3573. Because existing stations can also file applications for minor changes outside of filing windows, minor changes to pending applications made outside of filing windows do not adversely affect the rights of existing licensees. In contrast, the settlements based on major changes that Kansas proposes could preclude existing stations from filing major changes in the next window. We will not permit this. If the applicant that desired to make the major change to its proposal does not prevail in a point proceeding, it may file its alternate proposal in the next filing window, subject to competition from any additional applicants with similar plans for that channel. We recognize that our rules are more lenient, in this regard, for FM translator stations. Translators are secondary services, however, and thus allowing a translator to amend to another channel does not have a preclusive effect on future applicants for full service stations.

98. We will, however, provide additional clarification of the settlement policies that will apply to mutually exclusive NCE groups.⁴⁶ Settlement of NCE proceedings can be beneficial both to applicants and to the Commission. Applicants are able to achieve a solution that is most acceptable to the parties, and the Commission is able to conserve the resources we would spend to select among them. Two types of settlement agreements will be acceptable: universal settlements and technical settlements, each of which allows immediate grant of an authorization. Universal settlements resolve the claims of all applications within a mutually exclusive group. Technical settlements make it possible, by means of minor engineering changes, for one applicant to remove itself from the group on the four corners of its own application without affecting the viability of any other applicants. Thus, through a technical settlement, the Commission can authorize one applicant immediately, while also considering later which of all of the other applicants should build a second NCE station. An example is a unilateral action or agreement between applicants at the end of a chain, making it possible to grant one of those applicants, while not affecting the rights of the others to compete. We will not accept partial settlement agreements such as those in which applicants withdraw from one proceeding in return for the promise of a competing applicant to withdraw from another proceeding, but fail to achieve any grantable application or to settle with the remaining applicants in each group. Such settlements potentially prejudice the remaining non-settling applicants. Partial settlements also encourage applicants to eliminate the best competing proposals without any resulting public benefit such as faster initiation of service. Considering proceedings with partial settlements would not take any less time, and could actually take longer because the settlement creates a two-step process for the Commission (acting on the settlement and comparing the remaining group or groups of applicants) instead of the one-step process of comparing all of the applicants.

99. Finally, for a short period ending with the date on which existing groups of mutually exclusive NCE applicants must file supplements to claim points, we will entertain settlement agreements that exceed the applicant's reasonable and prudent expenses. We have been unable to process mutually exclusive

⁴⁶ The settlement discussion herein does not affect the rights of any NCE television applicants that by July 17, 2000, filed settlements pursuant to the procedures set forth in DA 99-2605 (as extended by DA 00-536), which permitted applicants on television channels 60-69 and applicants in television freeze areas to settle their mutually exclusive applicant groups, to file petitions for rulemaking specifying a new "core" television channel (between 2 and 51) and/or to amend their applications to provide the requisite interference protection to the digital television Table of Allotments. For those applicants, we will consider the settlement agreements and technical proposals already on file. See "Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotments Petitions for New Analog TV Stations," *Public Notice*, DA 99-2605, released November 22, 1999; and "Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations Extended to July 15, 2000," *Public Notice*, DA 00-536, released March 9, 2000.

NCE applications since 1995 due to the lack of workable NCE comparative standards. Under similar circumstances, we permitted competing ITFS applicants to settle without any limitations on payments to withdrawing applicants. See First Report and Order, Competitive Bidding, 13 FCC Rcd 15920, ¶ 206 (1998). We believe that our consideration of such settlements among closed groups of NCE applicants will facilitate resolution of these long-frozen comparative initial licensing proceedings. Thus, by the date that the staff announces for the acceptance of supplemental filings, applicants will file either supplements to claim points, universal settlements resolving the entire group, or technical settlements providing for the grant of an application as a result of minor engineering changes. Any applicants that have settlement agreements already on file pursuant to previous settlement policies may continue to pursue those settlement agreements, but have an affirmative obligation to submit a written statement to the staff by the supplement date referencing the pending settlement. Applicants with neither a settlement nor supplement on file by the supplement date will be dismissed. For settlements received by the supplement date, the Commission will waive any of its rules, such as 47 C.F.R. § 73.3525(a)(3), that preclude the receipt of any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal of an application, but due to the nature of the NCE service we will not waive our policy against “white knight” settlements involving non-applicant third parties. This is a one-time opportunity. We do not envision waiving our rules beyond the period provided herein. Thus, while we always encourage settlements among NCE applicants, any settlements filed after the deadline for point supplements will be subject to the monetary limits in our rules.

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

100. As required by the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, a Supplemental Final Regulatory Flexibility Analysis has been completed and is attached as Appendix C hereto.

101. Authority for issuance of this Memorandum Opinion and Order is contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405.

102. The actions taken in this Memorandum and Order have been analyzed with respect to the Paperwork Reduction Act of 1995, and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

103. Accordingly, IT IS ORDERED that the petitions for reconsideration and clarification listed in Appendix A ARE GRANTED to the extent provided herein and otherwise ARE DENIED pursuant to Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405, and Section 1.429(i) of the Commission’s rules, 47 C.F.R. § 1.429(i).

104. IT IS FURTHER ORDERED that the Commission’s Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Memorandum Opinion and Order including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

105. IT IS FURTHER ORDERED that the Commission’s rules ARE AMENDED as set forth in Appendix B. IT IS FURTHER ORDERED that the provisions of this Memorandum Opinion and Order and the rule amendments set forth in the Appendix SHALL BE EFFECTIVE 30 days following publication in the Federal Register.

106. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

107. For additional information concerning this proceeding, contact Irene Bleiweiss, Mass Media Bureau, Audio Services Division, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

**In re Reexamination of the Comparative Standards for
Noncommercial Educational Applicants
Memorandum Opinion and Order in MM Docket No. 95-31**

I write today to acknowledge the constitutional concerns expressed by religious broadcast advocates, such as the Educational Media Foundation, in this proceeding. As I have stated before, the Commission must be diligent in crafting rules that fully respect the spectrum of freedoms guaranteed to all Americans under the First Amendment of the United States Constitution. While the point system refinements adopted by the Commission today are not perfect, they are in the main, speaker and subject matter neutral. Suffice it to say, the point system is far more preferable, and less constitutionally suspect, than the comparative hearing process, a lottery system, or any other existing regulatory mechanism in selecting among competing applicants for broadcast services on channels reserved for noncommercial educational use.

APPENDIX A

List of Participants

American Association of Community Colleges
Broadcasting for the Challenged, Inc.
Center for Media Education, et al.
Colorado Christian University
Community Television, Inc.
Connecticut College Broadcasting Association, Inc.
De La Hunt Broadcasting
Diocese of St. Augustine
Educational Communications of Colorado Springs, Inc.
Educational Media Foundation
Jimmy Swaggart Ministries
Lay Catholic Broadcasting Network
Munn-Reese, Inc.
National Federation of Community Broadcasters, et al.
Real Life Educational Foundation of Baton Rouge, Inc.
Santa Monica Community College District
Spring Arbor College
Station Resource Group
University of Kansas
University of Northern Iowa
WAY-FM Media Group, Inc.
West Coast Public Radio, et al.

APPENDIX B
RULE CHANGES

Parts 73 and 74 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read:

Authority: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.3555 is amended by revising the last sentence of paragraph (f) to read as follows:

§ 73.3555 Multiple ownership.

(f) * * * However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to Subpart K.

3. Section 73.7000 is amended by adding a final clause to the definition of Local Applicant to read as follows:

§ 73.7000 Definition of Terms (as Used in Subpart K only).

Local Applicant: an applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served, or a governmental entity within its area of jurisdiction.

4. Section 73.7002 is amended by revising paragraph (b) to read as follows:

§ 73.7002 Fair distribution of service on reserved band FM channels.

(b) In an analysis performed pursuant to paragraph (a), a full service FM applicant that will provide the first or second reserved channel noncommercial educational (NCE) aural signal received by at least 10% of the population within the station's 60dBu (1mV/m) service contours will be considered to substantially further fair distribution of service goals and to be superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant. First service to 2,000 or more people will be considered superior to second service to a population of any size. If only one applicant will provide such first or second service, that applicant will be selected as a threshold matter. If more than one applicant will provide an equivalent level (first or second) of NCE aural service, the size of the population to receive such service from the mutually exclusive applicants will be compared. The applicant providing the most people with the highest level of service will be awarded a construction permit, if it will provide such service to 5,000 or more people than the next best applicant. If none of the applicants in a mutually exclusive group would substantially further fair distribution goals, all applicants will proceed to examination under a point system. If two or more applicants will provide the same level of service to an equivalent number of people (differing by less than 5,000), only those equivalent applicants will be considered together in a point system.

5. Section 73.7003 is amended by revising adding two new sentences to the end of paragraphs (b)(2) and (c)(1) and adding new paragraphs (e) and (f) to read as follows:

§ 73.7003 Point system selection procedures.

(b) ***

(2) *** Radio applicants will count commercial and noncommercial AM, FM, and FM translator stations other than fill-in stations. Television applicants will count UHF, VHF, and Class A stations.

(c) ***

(1) *** Radio applicants will count commercial and noncommercial AM, FM, and FM translator stations other than fill-in stations. Television applicants will count UHF, VHF, and Class A stations.

(e) For applications filed after April 21, 2000, an applicant's maximum qualifications are established at the time of application and will be reduced for any post-application changes that negatively affect any evaluation criterion.

(f) For applications filed on or before April 21, 2000, applicants will establish their qualifications according to the following: (1) If the applicant is in a group for which a "B" cutoff notice issued prior to April 21, 2000 its maximum non-technical qualifications are established as of the date by which applicants must supplement their applications to supply point information, and its maximum technical qualifications are established as of the date of the "B" cut-off notice; (2) If the applicant is in a group for which an "A" cutoff notice issued prior to April 21, 2000 but for which no "B" cutoff notice issued, its maximum non-technical qualifications are established as of the date by which applicants must supplement their applications to supply point information, and its maximum technical qualifications are established as of April 21, 2000; (3) If the applicant was neither placed on an "A" cut-off list prior to April 21, 2000 nor filed in response to such an "A" cutoff list, it is subject to competition from applications filed within the first filing window, and its maximum technical and non-technical qualifications will be determined as of the close of the first filing window. After the relevant date for determining an applicant's maximum points, points will be reduced for any changes that negatively affect any evaluation criterion.

PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

1. The authority citation for part 74 continues to read:

Authority: 47 U.S.C. 154, 303, 334, and 554.

2. Section 74.1233(e)(3) is amended by revising subparagraph (e)(3) to read as follows.

§ 74.1233 Processing FM translator and booster station applications.

(e) * * *

(3)***

- (i) Existing Authorizations. Each applicant's number of existing radio authorizations (licenses and construction permits for AM, FM, and FM-translators but excluding fill-in translators) as of the time of application shall be compared, and the applicant with the fewest authorizations will be chosen as tentative selectee. If each applicant is applying for a fill-in translator only, and consideration of its other radio stations is not dispositive, its number of existing fill-in translator authorizations will also be considered, and the fill-in applicant with the fewest fill-in authorizations will be chosen as tentative selectee.
- (ii) Existing Applications. If a tie remains, after the tie breaker in section (i), the remaining applicant with the fewest pending radio new and major change applications (AM, FM, and non fill-in FM translators) will be chosen as tentative selectee. If each applicant is applying for a fill-in translator only, and consideration of its other radio stations is not dispositive, its number of existing fill-in translator applications will also be considered, and the fill-in applicant with the fewest fill-in authorizations will be chosen as tentative selectee..

APPENDIX C

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act ("RFA"),⁴⁷ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the Further Notice of Proposed Rulemaking and a Final Regulatory Flexibility Analysis (FRFA) was incorporated in the Report and Order.⁴⁸ This present Supplemental Final Regulatory Flexibility Analysis ("Supplemental FRFA")⁴⁹ conforms to the RFA.⁵⁰

Need For and Objectives of the Memorandum Opinion and Order:

In the Report and Order, the Commission established a point system, a type of simplified paper hearing, to select among applicants competing to construct new noncommercial educational (NCE) broadcast stations on channels reserved for NCE use. The Commission received petitions requesting reconsideration and clarification of a variety of issues. This Memorandum Opinion and Order affirms the use of a point system and the elements therein, but makes the following clarifications: (1) attribution standards applicable to NCE stations are clarified, (2) the stated policy that government entities are considered local throughout their areas of jurisdiction is incorporated into the rules, (3) it is clarified that first and second NCE aural signals received, rather than those licensed to a community, will be considered for the threshold fair distribution analysis and that, if fair distribution is not decisive only equivalent mutually exclusive applications with respect to fair distribution will proceed to be considered under a point system, (4) the manner in which applicants will claim points is clarified, (5) the manner in which to count translator stations is clarified. Additionally, the Memorandum Opinion and Order gives applicants in pending closed groups of mutually exclusive applications a limited opportunity to settle for more than reasonable and prudent expenses.

Summary of Significant Issues Raised by the Public Comments in Response to the FRFA:

No comments were received in **direct** response to the FRFA in MM Docket No. 95-31. Two Petitioners for Reconsideration, while not addressing the FRFA, ask for clarification of whether small community colleges with fewer than five campuses can qualify for state-wide network points. The Memorandum Opinion and Order clarifies that small colleges that form consortiums with other colleges, so that at least five campuses are served, can so qualify. See infra.

Description and Estimate of the Number of Small Entities to Which Rules will Apply: The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities

⁴⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104- 121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

⁴⁸ *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, *Further Notice of Proposed Rule Making*, 13 FCC Rcd 21167 (1998) (Further Notice); *Report and Order*, 15 FCC Rcd 7386 (2000).

⁴⁹ This FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

⁵⁰ See 5 U.S.C. § 604.

that will be affected by the rules.⁵¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small organization,” “small business,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. See 5 U.S.C. § 601(3); 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).⁵² A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”⁵³ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁵⁴ “Small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”⁵⁵ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

The rules adopted in this Order will apply to television and radio stations licensed to operate on channels reserved as “noncommercial educational.” Specifically, the rules will affect reserved channel FM, FM translator, and TV stations that apply to make major changes to those existing stations and to applicants for permits to construct new reserved channel FM, FM translator, and TV stations. Stations that operate on non-reserved channels, such as TV translator stations and AM stations are not affected. Stations in low power services (LPTV and LPFM) also are not affected.

With respect to television stations, the Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Television stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are other establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

For 1992 the total number of television stations that produced less than \$10.0 million in revenue was 1,155 of the 1,509 television stations then operating, both commercial and noncommercial, or 77 percent. As of February 1, 2001, of the 1,667 total television stations, 374 were noncommercial educational. Thus, we estimate that the proposed rules will potentially affect 288 (77 percent of 374) noncommercial educational television stations that are small businesses. These existing stations would only be affected if they file an application for major modification of their existing facilities, and if another applicant files a mutually exclusive application. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies. On the other hand they may understate the number of small entities, because we believe that a larger percentage of noncommercial educational stations are small businesses than the percentage applicable to the television industry as a whole. We recognize that the proposed rules may also affect minority and women owned stations, some of which may be small entities. In 1997, minorities owned and

⁵¹ 5 U.S.C. § 603(b)(3).

⁵² Small Business Act, 15 U.S.C. § 632 (1996).

⁵³ 5 U.S.C. § 601(4).

⁵⁴ 1992 Economic Census, U.S. Bureau of Census, Table 6 (special tabulation of data under contract to Office of Advocacy of U.S. Small Business Administration).

⁵⁵ 5 U.S.C. § 601(4).

controlled 38 (3.2%) of 1,193 commercial television stations in the United States. Comparable figures are not available for noncommercial stations. According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and noncommercial television stations in the United States. The proposal would also affect pending and future mutually exclusive applications for noncommercial television stations. As of February 2001, there are currently 89 pending applications for 31 channels reserved for noncommercial educational television usage.

The rules would also affect noncommercial educational radio stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.⁵⁶ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.⁵⁷ Radio stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are entities which primarily are engaged in radio broadcasting and which produce radio program materials. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number. The 1992 Census indicates that 96 percent of radio station establishments produced less than \$5 million in revenue in 1992.⁵⁸ Official Commission records indicate that 11,334 individual radio stations were operating in 1992.⁵⁹ As of February 1, 2001, Commission records indicate that 12,751 radio stations were operating. Of that radio station total, 2,170 stations were noncommercial educational FM radio stations. Thus, we estimate that 2,083 (96%) of these noncommercial educational stations are small businesses, possibly more because we believe that a greater percentage of noncommercial educational stations are small businesses than of the radio industry overall. These existing stations would only be affected by the proposal if they choose to file applications for major modification of facilities and if their applications are mutually exclusive with the application of another noncommercial entity. Applicants for new NCE radio stations would also potentially be affected. As of February 2001 there were 439 pending mutually exclusive groups of 1,356 applications, for new noncommercial FM radio stations. We also note that this proposal will affect future full service FM applications. It also will affect pending and future noncommercial FM translator applicants. As of February 1, 2001 there were 43 pending mutually exclusive groups of 97 applications for reserved channel FM translator stations.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Most of the provisions of the Report and Order are unchanged by the Memorandum Opinion and Order. As noted in the Report and Order, the point system is expected to reduce the overall administrative burden of the Commission's application processes on applicants and the Commission. Use of a point system will eliminate the expense of preparing for and appearing at lengthy traditional hearings. Applicants should also receive decisions faster, because the Commission will make numerical calculations instead of preparing detailed hearing decisions. These savings should more than offset the time that would be required for applicants to gather and submit documentation supporting the points claimed. No additional professional services are required by applicants filing under these revised rules. Further, the cost of compliance will not vary between large and small entities.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

⁵⁶ 13 C.F.R. § 121.201, SIC code 4832.

⁵⁷ 1992 Census, Series UC92-S-1, at Appendix A-9.

⁵⁸ The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each colocated AM/FM combination counts as one establishment.

⁵⁹ FCC News Release, No. 31327 (January 13, 1993).

All significant alternatives presented in the petitions and responsive comments were considered. The alternatives considered generally would affect all reserved channel applicants, regardless of whether they are small or large entities, and whether they are seeking to construct small or large stations. For example, the Commission considered but did not adopt suggestions to use lotteries rather than a point system, to adjust the previously established qualifications needed to receive various points, and to adopt points for new factors such as radio reading services. While generally affirming the choices made previously in its Report and Order in this proceeding, MM Docket No. 95-31, 15 FCC Rcd 7386 (2000), the Commission clarified various matters. Only one clarification specifically affects small entities. In response to a concern raised by community colleges, the Commission clarified that existing rules permit applicants with fewer than 5 colleges/50 secondary schools of their own to qualify as state-wide networks if through a consortium or similar arrangement they are also able to count schools under the authority of other educators to which they regularly provide curriculum programming. This option may benefit small entities. We expect that there is no significant economic impact on small entities as a result of this clarification. We will continue to consider small entities favorably in the point system, in that they are more likely than large entities to qualify for the points awarded for diversity of ownership, established local entity, and in a tie breaker for number of existing authorizations and applications.

Report to Congress

The Commission will send a copy of the *Memorandum Opinion and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. See 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this *Memorandum Opinion and Order*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and Supplemental FRFA, (or summaries thereof) will also be published in the Federal Register pursuant to 5 U.S.C. § 604(b).