

Before The
Federal Communications Commission
Washington, D.C. 20554

In The Matter Of)
)
Reexamination of the Comparative) MM Docket No. 95-31
Standards for Noncommercial)
Educational Applicants)

TO: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

STATION RESOURCE GROUP

JULY 10, 2000

Table of Contents

	Page
Summary	i
Introduction.....	1
A. Service to an Underserved Population Should be Treated as a Criterion Under the Point System, not as a Separate “Threshold” Issue.	2
B. The Commission Should Expand the Definition of a “Local” Applicant.....	5
C. The Commission’s Definition of “Statewide Network” should be Scrapped.	6
D. The Commission Should not Use Existing Authorizations and Mandatory Time-Sharing as Tie-Breakers.	10
E. The Commission Should Establish Criteria for Window Filings, Limit the Number of Applications that can be Filed by an Applicant, and Coordinate Filing Windows with Other Agencies	12
F. The Commission Should Establish Criteria for Accepting Amendments to Pending Applications.	14
G. The Commission Should Expeditiously Seek Legislative Authority for Implementing the Point System.	16
CONCLUSION.....	17

Summary

Station Resource Group applauds the Commission's decision to award construction permits among mutually exclusive (MX'd) applicants by means of a point system rather than by lotteries, first-to-file preferences, or comparative hearings. SRG seeks reconsideration of portions of the Commission's *Report and Order* in order to propose modifications of the point system that would produce fairer results, reduce the potential for further litigation, and allow the point system to be implemented more swiftly.

In particular, SRG recommends that the Commission award points to applicants who will serve unserved or underserved areas rather than treating such service as a threshold issue (triggered when MX'd applicants specify different communities of license); that the Commission expand its definition of a "local" applicant and scrap its definition of a "statewide network"; that the Commission not use existing authorizations and mandatory time-sharing as tie-breakers; that the Commission establish criteria for opening filing windows, limit the number of applications that can be filed by an applicant in a given window and coordinate filing windows with other federal agencies; that the Commission establish criteria for accepting amendments to pending applications; and that the Commission expeditiously seek the legislative authority needed to implement its point system.

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Station Resource Group (“SRG”), pursuant to Section 1.429 of the Commission’s Rules, hereby seeks reconsideration of portions of the Commission’s *Report & Order*, FCC 00-120 (released April 21, 2000) related to comparative standards for mutually exclusive noncommercial educational applicants (the “*MX Order*”).

[Introduction](#)

SRG is a membership organization of some of public radio’s leading broadcasters. SRG’s 47 members operate 168 public radio stations across the country, account for one-third of public radio’s audience and produce the majority of public radio’s national programming. SRG filed detailed comments and reply comments in the proceeding below.

SRG endorsed the use of a point system to award construction permits to one of several mutually exclusive (“MX’d”) applicants for noncommercial educational (“NCE”) full-service and translator stations and maintained that a

point system could be used to identify and advance basic principles of NCE broadcasting and to make rational distinctions among applicants. SRG contended that a point system possesses many of the virtues of a comparative hearing and lacked the defects of lotteries or first-to-file approaches, which abdicate rational decision making and encourage mass filings.

SRG applauds the Commission's efforts to articulate a workable point system and to build into it safeguards that will assure that the public interest benefits encouraged by the point system are actually achieved. SRG seeks partial reconsideration of the *MX Order* in the hopes that the point system adopted can be refined and that it can be implemented in an expeditious fashion.

A. Service to an Underserved Population Should be Treated as a Criterion Under the Point System, not as a Separate "Threshold" Issue.

The *MX Order* establishes a "fair distribution of service" criterion which it evaluates outside the point system. When MX'd applications for new FM stations propose to serve different communities, the Commission will first determine as a "threshold issue" whether grant of a particular application would substantially further the fair distribution of service goals enunciated in Section 307(b) of the Communications Act.

An applicant that provides a first or second NCE aural signal to at least 10% of the population within its 60 dBu contour and to at least 2,000 people, will be considered decisively superior to other MX'd applicants not proposing

the same level of service. If more than one applicant provides an equivalent level of first or second NCE service, the applicant providing the most people the highest level of service will be awarded a construction permit if it provides such service to at least 5,000 more people than the next best applicant. In both these circumstances, no point system would be applied. *MX Order*, paragraphs 20-27.

Although SRG endorsed the awarding of points to applicants who provide a first or second NCE service, it did not propose treating such services as a dispositive, threshold issue. SRG remains convinced that Section 307(b) of the Act does not compel such a result and that consideration of such service should be incorporated into a point system.

SRG's position is consistent with Commission precedent. In *New York University*, 10 RR 2d 215 (1967), the seminal case for applying Section 307(b) of the Act to NCE applicants, the Commission designated a standard 307(b) issue, but subsequently reconsidered the scope of the issues on its own motion. The Commission concluded that:

We are not persuaded that our traditional areas and populations, and other available service criteria, are appropriate in this instance. *Id.* at 216.

The Commission specified an issue as to other "available services," but directed the Presiding Judge to give whatever weight he deemed appropriate to that issue. Neither the Presiding Judge nor the Review Board, *New York University*, 19 FCC 2d 358, 362 (Rev. Bd. 1969), treated the 307 issue as a dispositive "threshold" issue.

Incorporating first or second service considerations within a point system is consistent not only with Commission precedent, but with the allocation system by which NCE frequencies are assigned. Unlike TV frequencies and non-reserved FM frequencies, FM frequencies reserved for NCE use are not allotted to particular communities. Accordingly, NCE applicants have no obligation to place a city grade contour over their nominal community of license. Any community within the 60 dBu contour of a proposed station can be designated as the community of license. See *1998 Biennial Regulatory Review*, FCC 99-55 (March 30, 1999).

MX situations between applicants specifying different communities of license often arise inadvertently because of a “daisy chain” of overlapping contours. The important issue raised by these situations is not the comparative needs of different “communities” served by the respective applications, but the delivery of new NCE service to *any* unserved or underserved areas. See *New York University, supra*.

The Commission tacitly acknowledges this principle by not basing its threshold determination on the needs of the respective communities, as in a traditional 307(b) analysis¹, but simply upon the number of persons who will receive the benefits of the proposed NCE service, regardless of which “community of license” the population served may be associated with.

Fair enough. The error is in elevating such a population count to a criterion that takes priority over all other criteria. While first or second NCE FM

¹ See *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

service is an important comparative criterion, it should be assimilated into the point system, and not treated as a “threshold” issue.

B. The Commission Should Expand the Definition of a “Local” Applicant.

SRG strongly endorsed the idea of awarding points to “local” applicants. The *MX Order* embraces this principle, but establishes an overly restrictive definition of “local.” *MX Order*, paragraphs 41-55. Pursuant to newly adopted Section 73.7000 of the Rules, “local” applicants are those “physically headquartered, having a campus, or 75% of Board members residing within 25 miles of the reference coordinates or the community to be served.”

The definition of a “local” applicant is too restrictive to give credit to situations where values of localism are clearly being advanced. For example, many NCE licensees have applied, or may wish to apply, for construction permits to construct “satellite” stations, or to convert an existing translator into a protected, full-service station. In both cases, the purpose of the station is to protect or extend the area served by an established NCE station. There can be no doubt that such applicants possess “expertise and accountability when it comes to serving the educational needs of the local community.” *MX Order*, paragraph 46. The definition of localism adopted fails to recognize the value of such applicants. Applicants seeking to establish a satellite station or upgrade an existing translator station – both often built with federal funds – are not treated as “local,” merely because the applicants propose to serve an area more

than 25 miles away from the parent station's community of license. Satellite stations by their very nature usually serve an area outside the parent station's service area. NCE FM translators also often extend the service area of an NCE station. See 47 C.F.R. 74.1232.

SRG urges the Commission to broaden the definition of "local" to accommodate situations in which existing NCE stations expand an established local service or create a state or local "network." SRG proposes a definition of "local" that will include applicants who have adopted a plan to serve a state in which they operate. If the Commission retains a definition of localism based upon the residence of the applicant's Board members, the relevant radius should be extended from 25 miles to 100 miles, as proposed by National Public Radio, the Corporation for Public Broadcasting, and America's Public Television Stations. Such a definition would advance the goals of localism without imposing overly restrictive limitations on applicants who may have little ability to modify the composition of their Governing Board in order to meet FCC criteria.

C. The Commission's Definition of "Statewide Network" should be Scrapped.

SRG strongly believes that private and public "networks," organized on a state-wide, regional or local basis, are of great value to the listening public. SRG does not, however, believe that the Commission's definition of a state-wide network bears any resemblance to this reality. The definition of a "network", set

forth in Section 73.7003(b)(3) of the Commission's Rules, is a throwback to an era when NCE radio was synonymous with instructional radio.

The Commission has decisively rejected such a myopic view of NCE radio. The breadth of the Commission's current view of NCE broadcast services is best illustrated by its recent decisions in *WQED Pittsburgh*, FCC 99-393 (December 29, 1999), where the Commission initially sought to clarify the distinctions between "educational, instructional and cultural programming." The Commission rapidly retreated from its own clarifications on grounds that the distinctions it proposed would involve the Commission in content-based inquiries and would create "less certainty rather than more." *Order on Reconsideration*, FCC 00-25 (January 28, 2000). There, the Commission stated:

In hindsight, we see the difficulty of minting clear definitional parameters for "educational, instructional or cultural" programming, particularly without the benefit of broad comment. Therefore, we vacate our additional guidance. We will defer to the editorial judgment of the licensee unless such judgment is arbitrary or unreasonable. Way of the Cross, 101 FCC 2d 1368, 1372, N.5 (1985), citing *Notice of Inquiry* in Docket No. 78-164, 43 Fed. Reg. 30842, 30844-45 (1978).

The proposed definition of a network would resurrect unsustainable distinctions between "educational, instructional and cultural" programming by awarding special preference only to applicants who offer a certain type of "educational" programs (i.e. programs which are provided to more than fifty accredited elementary or secondary schools, or to five or more accredited institutions of higher learning). The definition of "educational" programming would not be left to the "editorial judgment of the licensee," but would be

determined by the elaborate criteria set forth in Section 73.7003(b)(3). It is doubtful that any of the currently MX'd FM applicants – including Colorado Christian College, the designated proponent of the definition adopted, See *MX Order*, paragraph 57 – actually satisfy the definitional requirements.

SRG certainly does not question the value of either educational programming or NCE networks. It cannot, however, find any statutory basis for the definition of an educational “network” adopted by the *MX Order*. Although the Commission derives its formula in part from the number of television stations who receive CPB funding to produce educational material for schools, the Commission has not shown that the programming produced is actually broadcast by public television stations (as opposed to being distributed by videotape, over ITFS channels, or over the Internet). See *MX Order*, paragraph 58, note 41. Even more significantly, the Commission does not produce any data concerning radio programming produced for classroom use. There is no factual basis for concluding that NCE radio stations broadcast a significant amount of programming intended for classroom use, nor any basis for equating video production with audio broadcasts.

Setting aside the objection that the definition of a network has no basis in law or fact, the definition is arbitrary and capricious, even when evaluated by its own terms. Why would programming distributed to five college campuses constitute a “network” when the same programming distributed to five (or forty-five!) high schools or elementary schools would not? Why is the amount of programming provided and the size of the schools apparently irrelevant? Is it

rational to conclude that a half hour of weekly programming produced for five colleges with a total enrollment of 5,000 students would constitute a “network” and that ten hours of weekly programming distributed to 50,000 high school students in forty-five different high schools would not?

The irrational substantive results created by the adopted definition of a “network” are compounded by procedural conundra. How does an applicant for a new station verify that it “will regularly provide programming for and in coordination with” an educational institution, as required by Section 73.7003? Is the applicant’s statement of its intention sufficient? Must it produce a resolution of a school board to incorporate the applicant’s programming into its curriculum? Must it produce a contract with or grant from the schools? Are documents dated when the application was filed – perhaps three or four years ago – still valid? Should applicants who did not qualify as a “network” when their applications were filed be allowed to become a “network” now? The adopted definition of “network” will spawn a plague of such questions – to no good end.

SRG takes its hat off to educational programming and educational networks. Its quarrel with the Commission’s definition is that the definition would recognize only a fraction of the programming that serves an educational purpose, and few, if any, of the “networks” that will provide a valuable educational service.

SRG recommends that the Commission rescind its decision to award points to “state-wide networks” as that term has been defined and recognize

the real value of NCE networks by expanding the definition of localism, as proposed above.

One final point related to networks. SRG does not disagree with the principle that governmental applicants “would be local throughout the area which their authority extends.” *MX Order*, paragraph 54. SRG would, however, like to point out that this principle has not been incorporated into the definition of “local applicant” set forth in Section 73.7000.

D. The Commission Should not Use Existing Authorizations and Mandatory Time-Sharing as Tie-Breakers.

The *MX Order* adopts a series of tie-breaking criteria to be used in the event that MX'd applicants receive the same number of points under the point system. Under the first tie-breaker, a permit would be awarded to the applicant who, at the time of filing, had the fewest existing station authorizations (licenses and construction permits in the same service). As a secondary tie-breaker, the Commission would award the permit to the applicant with the fewest pending new and major change applications in the same service at the time of filing. If neither of these tie-breakers resulted in an award of the permit, the Commission would impose mandatory time-sharing. *MX Order*, paragraphs 69-74.

SRG supports the secondary tie-breaker, the preference to the applicant with the fewest pending applications, but does not support the first tie-breaker, the award of a preference to the applicant with the fewest authorizations, or the

use of mandatory time-sharing as a “tie-breaker of last resort.” *MX Order*, paragraph 33.

It is neither necessary nor desirable to penalize existing licensees by adopting the first tie-breaker. Such a penalty is inconsistent with the Commission’s recognition of “the benefits of centralized operations for noncommercial stations, given the limited funding available to these stations.” *Memorandum Opinion and Order*, MM Docket 86-406, 3 FCC Rcd 5024, 5027 (1988). To encourage such operations, the Commission regularly grants main studio waivers to state and regional public television and radio networks to operate “satellite” stations.

SRG continues to oppose the use of mandatory time-sharing as a means of breaking ties. The Commission mildly characterizes this option as “very unpopular.” *MX Order*, paragraph 74. In fact, it is bitterly opposed by most MX’d applicants and will prove completely unworkable. Mandatory time-sharing will forcibly yoke together applicants who are philosophically incompatible or who propose fundamentally different formats. The incompatibility of licensees, and the resulting confusion to listeners, will increase exponentially with the number of applicants forced to share a channel.

The use of mandatory time-sharing as a tiebreaker will have the opposite of the effect intended. It will not break ties and resolve Mx’d proceedings quickly, but will stimulate protracted litigation. Faced with the galling prospect of a mandatory time-share with heterogeneous entities, MX’d applicants will be

inclined to exhaust every form of administrative or judicial relief available. Rather than create “strange and unnatural” hybrids, *Bechtel v. FCC*, 957 F. 2d at 880, through mandatory time-sharing, the Commission should, as SRG recommended, apply an unweighted lottery to resolve, in a speedy and uncontroversial fashion, proceedings that the Commission has not been able to resolve by its point system.

E. The Commission Should Establish Criteria for Window Filings, Limit the Number of Applications that can be Filed by an Applicant, and Coordinate Filing Windows with Other Agencies.

Recognizing that the current application processing system has “apparently led to speculation,” *MX Order*, paragraph 84, the Commission adopted a filing window process for NCE applications. The process adopted did not, however, limit the number of applications that could be filed in a given window by a single applicant. SRG urges the Commission to limit to five the number of applications that can be filed in a single window. Absent such a limitation, speculators will continue to have a strong incentive to apply for every available frequency in the first filing window to open.

The reserved band is a precious and limited resource. The Commission should not provide incentives for the exhaustion of this resource in the shortest period of time. Consequently, SRG urges the Commission to reconsider the imposition of a reasonable limitation on the number of applications that may be filed in a given window. A limitation on the number of applications that may

be filed will be a simple spur to localism and an effective deterrent to speculation.

The Commission has delegated to the staff the authority to decide when to open filing windows and what procedures will be used to amend pending applications. See *MX Order*, paragraphs 86 and 91, respectively. Because the Commission apparently does not plan to seek further public comment on these matters, SRG takes this opportunity to offer its recommendations.

The purpose of this proceeding is not only to establish rules for resolving future MX proceedings, but for resolving the hundreds, if not thousands, of MX'd proceedings which are now pending.² Many applicants have been waiting years for the adoption and implementation of new comparative standards. In light of the uncertainty concerning the comparative standards to be adopted, settlements have been hard to achieve. The number of MX'd applications remains enormous. SRG urges the Commission to expedite the resolution of these proceedings by implementing revised comparative standards as quickly as possible. In particular, SRG recommends that within 60 days of the adoption of a final order with respect to the comparative standards, the Commission implement guidelines for awarding construction permits to MX'd applicants. It also recommends that MX'd proceedings be resolved in chronological order, with priority given to the earliest applications filed.

² In the Notice of Proposed Rule Making that initiated this proceeding, the FCC noted that some 445 applications for new NCE stations had been filed in 1997 and predicted that 750 applications would be filed in 1998. Most of these applications are MX'd. If application filings continued at the 1998 rate in 1999 and 2000, there are now well over 1,000 and perhaps as many as 2,000 pending MX'd applications.

It is important that the Commission carefully schedule the opening of filing windows. Applicants for new NCE stations frequently apply for federal funds awarded by the Public Telecommunications Facilities Program (“PTFP”) of the National Telecommunications and Information Administration. PTFP typically accepts applications only once a year, usually in January or February, and announces grants in August or September. Applicants for PTFP grants to construct new broadcast facilities are required to certify that they have filed the relevant FCC application. Considerations of comity dictate that the FCC accommodate PTFP procedures by opening at least one filing window per year, at least 30-60 days before PTFP applications are due. SRG also urges the Commission to grant processing priority to MX’d proceedings in which one or more of the applicants seek PTFP funding. Unless an FCC decision is issued before PTFP grants are announced, PTFP applicants will not be awarded a PTFP grant until the next grant cycle. New NCE service to the public will be delayed by as much as a year.

F. The Commission Should Establish Criteria for Accepting Amendments to Pending Applications.

Although the *MX Order* contemplates that “existing applicants will be required to supplement their applications to make those applications consistent with the standards adopted.” *MX Order*, paragraph 91, the *MX Order* says nothing about the criteria to be used in determining what amendments will be acceptable. *Id.* SRG believes that some guidance is in order.

Ranked in order of restrictiveness, the options are: (a) to disallow amendments that would improve the comparative position of the applicant; (b) to permit “minor” changes even if these would qualify the applicant for additional points; and (c) to impose no limitations on the scope of amendments.

SRG believes that options (a) and (c) would produce inequitable results. In the days of comparative hearings, applicants were prohibited from post-cut-off amendments that would improve their comparative position. Such a rule is quite sensible if the comparative criteria were known at the time of filing. The *MX Order* establishes new comparative criteria, of which applicants were not aware when their applications were filed. It would therefore be inequitable to prohibit applicants from making modest adjustments to pending applications, to bring those applications in line with the new criteria.

On the other hand, permitting unlimited amendment privileges would produce similarly inequitable results. An unrestricted right to amend would stimulate gamesmanship and prejudice many institutional applicants. All applicants do not have an equal degree of freedom to amend their applications. Colleges and universities may use criteria for picking trustees or directors that bear little or no relation to the FCC’s point system. In some cases, the directors of public institutions are publicly elected or politically appointed. The institution may have no ability to fashion a Board that will assure that the applicant is “local” as the Commission has defined that term. Granting unlimited discretion to amend applications would disadvantage such

applicants vis-a-vis applicants who have self-elected Boards and who can thus easily reorganize to harvest the maximum number of points.

SRG recommends a middle ground that would limit all amendments as of right to “minor” changes. If changes of more than a majority of Board members have occurred because of the passage of time, or if an FM applicant seeks to change its service contour by more than 50%³ an amendment proposing such a change should be accepted only upon a showing of “good cause.”

G. The Commission Should Expeditiously Seek Legislative Authority for Implementing the Point System.

As the Commission recognizes, *MX Order*, paragraph 80, the Commission currently lacks authority to delegate responsibility for administering an NCE point system to its staff. Until appropriate legislation is enacted, all construction permits awarded by the point system must be issued by the Commission. Because this procedure is likely to delay the issuance of construction permits further, SRG urges the Commission to seek the necessary legislative authority as soon as practicable.

³ Until March 30, 1999, when the Commission revised the definitions of a “major change” for FM full-service and translator stations operating on reserved frequencies, as major change was defined as a change in 50% of service area. See *1998 Biennial Regulatory Review, supra*.

CONCLUSION

SRG applauds the Commission's decision to adopt a point system that will award construction permits to the applicants who will best advance fundamental principles of noncommercial broadcasting. SRG, however, urges the Commission to adopt SRG's proposed refinements and to implement a revised point system as rapidly as possible.

Respectfully submitted,

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