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In re: KICG(FM), Perry, IA  
Fac. ID No. 78934  
File No. BPED-19951215ME  
Iowa State University of Science  
and Technology  
Group 95076E

KPBZ(FM), Spokane, WA  
Fac. ID No. 90216  
File No. BPED-19980224MA  
Spokane Public Radio  
Group 970823

Applications for Construction Permit  
Petitions for Reconsideration

Dear Counsel:

The Media Bureau, Audio Division ("Bureau") has before it Petitions for Reconsideration from American Family Association ("AFA"), which contests the Bureau's actions in two separate noncommercial educational ("NCE") comparative licensing cases. In the first case (the "Perry Proceeding"), the Bureau granted the application of Iowa State University of Science and Technology ("ISU") to construct a new NCE FM station at Perry, Iowa, over AFA's proposal for the same

community.<sup>1</sup> In the second case (the “Spokane Proceeding”), the Bureau granted the application of Spokane Public Radio, Inc. (“SPR”) to construct a new NCE FM station at Spokane, Washington, over AFA’s proposal for Rathdrum, Idaho.<sup>2</sup> In each of the Petitions<sup>3</sup>, AFA challenges the use of the Commission’s broadcast attribution rules to make NCE comparative licensing decisions.<sup>4</sup>

The matters before us stem from the Commission’s adoption, in 2000, of new NCE comparative standards consisting of a point system and a series of tie-breakers.<sup>5</sup> An applicant’s “attributable” interests in other stations and applications are taken into account in awarding points for diversity-based comparative criteria as well as in applying tie-breaker procedures. The ownership interests of an NCE applicant, its parent, subsidiaries, their officers, and members of their governing boards are treated as attributable.<sup>6</sup> As will be discussed more fully below, an attributable interest also can arise under the Equity/Debt Plus (“EDP”) rule when a party holds a significant equity and/or debt interest in a licensee and also either holds an interest in a same-market media outlet or supplies a substantial amount of programming to the licensee.

## I. BACKGROUND

AFA is an evangelical Christian educational organization headquartered in Tupelo, Mississippi. It contends that the attribution standards discriminate against “religious” broadcasters like itself which operate as networks<sup>7</sup> with centralized ownership structures,<sup>8</sup> and that the NCE comparative standards

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<sup>1</sup> See *Broadcast Actions*, Public Notice, Report No. 46515 (MB Jun 26, 2007) (announcing Bureau’s June 20, 2007 grant of ISU’s application and dismissal of AFA’s application). See also *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, 22 FCC Rcd 6101, 6133 (2007) (Commission’s comparative analysis which tentatively selected ISU over AFA).

<sup>2</sup> See *Broadcast Actions*, Public Notice, Report No. 46514 (MB Jun 25, 2007) (announcing Bureau’s June 20, 2007 grant of SPR’s application and dismissal of AFA’s application). See also *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, 22 FCC Rcd 6101, 6142 (2007) (Commission’s comparative analysis which tentatively selected SPR over AFA).

<sup>3</sup> We hereinafter refer to AFA’s Petitions for Reconsideration collectively as the “AFA Petitions” and individually as the “AFA Perry Petition” with respect to the Perry Proceeding and the “AFA Spokane Petition” with respect to the Spokane Proceeding.

<sup>4</sup> SPR and ISU each elected to construct at its own risk during the pendency of AFA’s challenge. SPR’s station is now operating as KPBZ(FM) and ISU’s as KICG(FM). The Bureau conditioned each station’s license upon final resolution of AFA’s challenge.

<sup>5</sup> Each applicant can receive a maximum of seven points: three points for “established local entities;” two points for either having “local diversity of ownership” or, in the alternative, for being a “state-wide network;” and one or two points for best “technical parameters.” See 47 C.F.R § 73.7003. The number of points for the top technical proposal depends on how much larger the proposed population and area to be served exceeds that of the next best applicant. The applicant receiving the most points is accepted for filing as a “tentative selectee,” triggering the opportunity for petitions to deny. If necessary, the Commission uses tie-breakers, favoring the applicant with the fewest existing stations and/or applications.

<sup>6</sup> See 47 C.F.R §§ 73.7000 and 73.3555(f).

<sup>7</sup> AFA uses the term “network” informally to describe groups of radio stations with some common programming from the same source. *E.g.*, AFA Spokane Petition at 5. For purposes of this decision, we also use the term in this (footnote continued)

favor networks controlled by “secular” organizations.<sup>9</sup> AFA owns or controls virtually all stations within its network. Each of these stations within the AFA network is attributable to AFA when it applies to acquire new stations. Thus, AFA could not receive points for diversity of ownership if it applied to build a new station with service contours overlapping those of another AFA-attributable station. For purpose of tie-breakers, which favor applicants with the fewest media interests, an AFA applicant would have attributable interests in many stations nationwide. Because the attribution rules view AFA as one large organization, AFA would be unable to qualify for points as an “established local applicant” at locations far from Tupelo even if, for example, it submitted the application under the name of a geographically local AFA subsidiary that would maintain a locally-staffed main studio.

AFA contends that the Commission’s attribution standards place it at a disadvantage when competing with applicants affiliated with public broadcasting networks such as those purchasing programming from National Public Radio (“NPR”) and/or receiving funding from the Corporation for Public Broadcasting (“CPB”) because those standards treat NCE licensee relationships with these entities as non-attributable. AFA argues that stations that become NPR members and/or which receive CPB funding should be treated as under the control of these entities and, therefore, should be attributed to the applicant entity.

The attribution standards originated from the Commission’s need, in commercial broadcasting, “to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.”<sup>10</sup> Historically, the Commission has used the broadcast attribution rules to enforce local, national, and cross-ownership restrictions on commercial broadcast stations.<sup>11</sup> Such ownership restrictions do not apply to NCE stations but, as discussed above, several point system factors reflecting the Commission’s goals of localism and diversity depend upon the

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informal manner and need not determine whether any organization operates a “network” as that term is defined and used in the Communications Act. *See* 47 U.S.C. § 339(d)(3) (adopting network definition from the Copyright Act 17 U.S.C. § 119(d)(2)).

<sup>8</sup> According to AFA, such a structure is essential to religious networks because the Commission did not modify NCE eligibility rules to include religious broadcasters until 1977, by which time few frequencies remained available in major markets. AFA explains that centralization allows religious broadcasters to achieve economies of scale which are necessary to survive on listener support in small communities and without governmental or large foundation funding. AFA Spokane Petition at 5.

<sup>9</sup> The terms “religious” and “secular” are AFA’s. The Commission does not define applicants in this manner. Any non-profit educational organization that meets the requirements of the Commission’s rules can apply for a permit to construct an NCE station, without regard to its viewpoint or the spiritual affiliation or non-affiliation of its principals.

<sup>10</sup> *Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, n.1, 12579 (1999) (“*Attribution Order*”) citing *Attribution of Ownership Interests*, 97 FCC 2d 997, 999, 1005 (1984), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986).

<sup>11</sup> *See* 47 C.F.R. § 73.3555.

applicant's attributable interests. The Commission decided to rely on the commercial attribution standards, including the EDP rule, for NCE comparative licensing purposes.<sup>12</sup>

Under the EDP rule, the Commission will treat any person or entity providing more than 33 percent of an applicant's equity and/or debt as having an attributable interest if that entity also (1) supplies more than 15 percent of the station's weekly programming, or (2) has an attributable interest in another media outlet in the same market.<sup>13</sup> The Commission observed that EDP-cognizable situations had begun to appear in the NCE new station licensing context, *i.e.*, existing licensees were offering to finance construction of new NCE stations on the condition that the applicant air a majority of the existing licensee's programming.<sup>14</sup> AFA contends that under the EDP attribution rule the interests of NPR and CPB are non-attributable. AFA argues that this results in disparate treatment because AFA is no different from NPR and CPB in providing considerable programming and funding to large numbers of NCE stations but that AFA, as a religious broadcaster, cannot avail itself of a "loophole" that renders NPR and CPB programming and financial support "invisible."<sup>15</sup>

At the time of the Perry and Spokane Proceedings, AFA reported attributable interests in 227 stations.<sup>16</sup> In 2004, AFA challenged the NCE attribution standards and other aspects of the NCE comparative process in the U.S. Court of Appeals for the D.C. Circuit (the "Court"). The Court declined to consider AFA's challenge to the rationality of the NCE attribution rules because no party had raised the matter with sufficient clarity before the Commission which, as a result, had not had an opportunity to consider it.<sup>17</sup> The Court, however, upheld the NCE point system's rationality and constitutionality with respect to other statutory and constitutional challenges by AFA.<sup>18</sup> The Court also stated that AFA could

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<sup>12</sup> See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7419 (2000) ("*NCE Order*") clarified, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) ("*NCE Clarification*"), recon. denied, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) (subsequent history omitted). The attribution standards, in addition to their use in commercial broadcasting, had also been used previously in one educational service, the Instructional Television Fixed Service (now known as the Educational Broadband Service). In extending the standards to NCE broadcasting, the Commission acknowledged some differences between non-profit and commercial organizations, particularly the use of non-stock ownership forms and more frequent board turnover by non-profit entities, but addressed those differences with minor actions such as by requiring safeguards in governing documents for NCE applicants claiming points based on the attributes of individual board members.

<sup>13</sup> See *Attribution Order*, 14 FCC Rcd 12579.

<sup>14</sup> See *NCE Order*, 15 FCC Rcd at 7419.

<sup>15</sup> AFA Petitions at 8.

<sup>16</sup> AFA states that it generates local programming in 21 mid-sized communities and operates stations in smaller communities as satellites. AFA also states that it would maintain a local presence in Perry and Rathdrum and originate local programming in those communities. AFA Petitions at 5 -7.

<sup>17</sup> *American Family Assn., Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004), cert. denied 543 U.S. 1004 ("*American Family*") citing 47 U.S.C. § 405.

<sup>18</sup> For example, the Court rejected AFA's claims that the point system violated the First Amendment's free speech and free exercise clauses because "nothing on the face of the point system inherently favors nonreligious speakers." *American Family*, 365 F.3d at 1169.

seek review of individual point system determinations once the Commission started to apply the new rules.<sup>19</sup>

The Bureau granted ISU's and SPR's applications on June 20, 2007 and simultaneously denied AFA's mutually exclusive applications. SPR, the prevailing applicant in the Spokane Proceeding, is a non-profit corporation whose educational purpose is not of a religious nature. It operates a network of NCE FM and FM translator stations in eastern Washington state and western Idaho.<sup>20</sup> ISU, the prevailing applicant in the Perry Proceeding, is a public educational institution which operates radio stations in Iowa. AFA alleges that selection of these applicants over AFA exemplifies how the attribution standards disfavor religious networks when compared to secular stations that will receive funding from CPB and/or purchase programming from NPR. CPB is a private, non-profit organization which receives federal funds and distributes those funds to approximately 800 television and radio stations throughout the country, including those licensed to SPR and ISU.<sup>21</sup> CPB does not produce or distribute programming. CPB-funded stations must meet certain operational criteria, one of which restricts the degree to which recipients may carry programming of a religious nature.<sup>22</sup> Stations receiving CPB funds also receive funding from non-governmental sources such as listeners and underwriters.<sup>23</sup> SPR and ISU also are each members of NPR, to which they pay dues and from which they purchase national programming. NPR is a private non-profit organization that produces programming for member radio stations and distributes programming by satellite. NPR is funded by member stations which also elect NPR's board of directors.<sup>24</sup>

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<sup>19</sup> *Id.* at 1168. AFA prematurely sought reconsideration of the Commission's tentative selections in 20 groups. The Bureau dismissed those filings because they were directed at non-final actions that did not grant or deny any application. See *Patrick J. Vaughn, Esq.*, Letter, 22 FCC Rcd 11165 (2007). 47 C.F.R. § 1.106(a) (1) (prohibiting petitions for reconsideration of interlocutory actions). AFA now focuses on the subsequent grant of the ISU and SPR applications.

<sup>20</sup> SPR Opposition at 2.

<sup>21</sup> See AFA Spokane Petition at 8 citing [www.npr.org/about](http://www.npr.org/about); AFA Perry Petition at 6 citing Minutes, Board of Regents, State of Iowa at 235 (Feb. 18-19, 2004).

<sup>22</sup> Corporation for Public Broadcasting, Fiscal Year 2013 Community Service Grant General Provisions and Eligibility Criteria at 4, 17 [available at [http://www.cpb.org/stations/grants/radio/generalprovisions/cpb\\_13RadioCSG\\_GeneralProvisions.pdf](http://www.cpb.org/stations/grants/radio/generalprovisions/cpb_13RadioCSG_GeneralProvisions.pdf) (accessed May 10, 2013)] ("*CPB Eligibility*").

<sup>23</sup> CPB does not fund initial construction. Some federal funding was formerly available through the Public Telecommunications Facilities Program ("PTFP") administered by the National Telecommunications Information Administration within the U.S. Department of Commerce. ISU indicated that it would rely on PTFP funding. AFA does not specifically reference PTFP funds, but SPR's Opposition defends a PTFP "Sectarian Policy Statement" once applicable to such funding. See SPR Opposition at 16, n.7 citing 60 Fed. Reg. 66491 (Dec. 22, 1995). Congress eliminated funding for the PTFP program in 2011. See Department of Defense and Full-Year Continuing Appropriations Act of 2011, P.L. 112-10 (Apr. 15, 2011).

<sup>24</sup> See *American Family*, 365 F.3d at 1161-62. NPR and other radio program producers can compete for a portion of CPB funding for program production. <http://www.cpb.org/aboutpb/faq/programming.html> (accessed May 10, 2013).

## II. DISCUSSION

### A. Facial Challenge of NCE Attribution of Ownership Standards.

AFA's facial challenge to the NCE attribution rules is essentially the same argument that the Court declined to consider in 2004.<sup>25</sup> AFA maintains that the attribution rules, in violation of the Administrative Procedure Act, arbitrarily favor public broadcasting networks like NPR over private religious networks like AFA. ISU contends that AFA has "missed" its chance to raise this argument. It notes that the Court declined to consider this argument in *American Family* because "no party raised it with sufficient clarity before the FCC."<sup>26</sup> ISU contends that AFA is now barred from raising the argument at the Commission. We disagree.

ISU cites no authority for its proposition that it is impossible to raise a substantive challenge to a Commission rule before the agency if no one challenged the rule on similar grounds in the original rulemaking proceeding. The Commission and reviewing courts have sometimes reached differing conclusions on whether substantive rule challenges are appropriately and timely raised in non-rulemaking proceedings, but the prevailing, longstanding weight of authority has allowed such challenges if brought in connection with a Commission action applying the rule.<sup>27</sup> An early case applying this principle is *Functional Music, Inc. v. FCC* which, in 1958, recognized an exception to the statute of limitations under such circumstances.<sup>28</sup> The Court explained that, "unlike adjudicatory orders, administrative rules and regulations are capable of continuing application," and as a result, "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by the rule an opportunity to question its validity." The Court affirmed this principle more recently, holding that, for the reasons cited in *Functional Music*, "we permit both constitutional and statutory challenges to an agency's application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired."<sup>29</sup> Additional court rulings thereafter have held that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, even if it had the opportunity but failed to bring a direct challenge within statutory time limits.<sup>30</sup>

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<sup>25</sup> *American Family*, 365 F.3d at 1166 citing 47 U.S.C. § 405. The matter is not *res judicata* or subject to collateral estoppel because the Court did not rule on the issue.

<sup>26</sup> *American Family*, 365 F.3d at 1166.

<sup>27</sup> On fewer occasions, the courts and Commission have expressed the position that rule challenges should not be entertained in individual adjudications absent an undisputable indication that the rule is illegal. See *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998), cited in *N.J. Dept of Environmental Protection v. NRC*, 561 F. 3d 132 (3<sup>rd</sup> Cir. 2009); *Milt Klein*, 3 FCC Rcd 956 (1988).

<sup>28</sup> *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("*Functional Music*"). Accord *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979). These cases do not, however, give applicants a "second bite at the apple" if, for example, they participated in litigation but failed to raise the argument before the court. *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd. 11166, 11176 (2000)

<sup>29</sup> *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997). In contrast, a party may not raise procedural attacks on a rule after the 60-day statutory appeal period has run. See *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994).

<sup>30</sup> See *Murphy Exploration and Prod. Co. v. Dept. of Interior*, 270 F.3d 957,958 (D.C. Cir. 2001); see also *Independent Community Bankers v. Fed. Reserve*, 195 F.3d 28, 34 (D.C. Cir. 1999).

We find no circumstances in the current case that would preclude addressing AFA’s facial challenge to the attribution rule. In declining to consider AFA’s attribution-related concerns for lack of an agency record at a time when those rules had not yet been applied to AFA, the Court did not specifically preclude AFA from developing a record at a later date when the Commission applied the attribution standards to AFA’s then-pending Perry and Rathdrum Applications. The Court simply noted that it would not consider the issue while the Commission had not been afforded any opportunity to pass.<sup>31</sup> The Court seemed to anticipate the possibility of future facial challenges when it stated “we are not foreclosing any and all future challenges to the rationality of the state-wide network credit – *or for that matter, any aspect of the point system that relies on verifiable empirical predictions or assumptions.*”<sup>32</sup> This is potentially significant here where AFA, in proceedings in which the point system provisions at issue were applied to AFA, contends that application grants should be set aside because, *inter alia*, the relationship between the point system on which the grants were made and the attribution rules is irrational. Accordingly, we will consider AFA’s arguments.

AFA argues that the NCE attribution standard is irrational because it “ignores” the influence of large, national non-licensee organizations. In particular, the NCE attribution standard does not treat NPR as having an attributable interest in member stations and does not treat CPB as having an attributable interest in CPB-funded stations. In contrast, because AFA owns and controls virtually all of its affiliates, under the attribution rules AFA has attributable interests in all its stations. AFA maintains that the NCE attribution standard thereby fails to achieve its stated purpose of identifying parties with significant influence. AFA contends that non-licensees like NPR and CPB potentially influence or control station policy and that CPB’s funding exclusion for religious programs allows it to exercise “complete control” over CPB-funded stations.<sup>33</sup> AFA believes that the Commission purposefully created this “loophole” to benefit “secular” public broadcasting networks (by treating them as “small local educators” with few stations) over private “religious” networks (by treating them as “large national chains” with many stations).<sup>34</sup> Thus, AFA considers the NCE attribution rules to be unconstitutional viewpoint discrimination under the First Amendment. AFA believes it is especially illogical to treat AFA-funded applicants as having more broadcast interests than CPB-funded applicants given that AFA stations are generally located in smaller markets and reach only about four percent of the population nationwide while CPB-funded stations reach about 91 percent.<sup>35</sup>

ISU and SPR argue that the NCE attribution rules are content-neutral and viewpoint-neutral, with any alleged disparate treatment of AFA directly related to differences in organizational structure. ISU

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<sup>31</sup> *American Family*, 365 F.3d at 1166..

<sup>32</sup> *American Family*, 365 F.3d at 1166.

<sup>33</sup> AFA Petitions at 9.

<sup>34</sup> In establishing the NCE point system, the Commission acknowledged commenter concerns that “*small local educators* could be ‘squeezed out’ by *large national chains* of NCE stations” and stated it would address such concerns within the point system’s localism and tie-breaker components. *NCE Order*, 15 FCC Red at 7401 (*emphasis added*). AFA maintains that “large national chains” is a code phrase for religious broadcasters and “small local educators” a code phrase for secular broadcasters. See AFA Spokane Petition at 5-6.

<sup>35</sup> AFA Spokane Petition at 8 citing <http://www.cpb.org>.

and SPR contend that AFA mischaracterizes the structure, finances, and programming of public broadcasting stations. Each rejects the contention that either CPB or NPR exercises any control over stations to which they provide funding or programming, including those licensed to ISU or SPR. SPR argues that the NCE attribution rules are the same used for commercial broadcasters and that those rules are equally non-discriminatory when applied to NCE applicants. ISU contends that the Court determined that the NCE point system does not single out religious organizations and that AFA presents no verifiable empirical data to show that the NCE attribution standards penalize religious broadcast networks.<sup>36</sup>

As an initial matter, AFA is incorrect in asserting that the NCE attribution standard “ignores influence over a station that may be exercised by anyone who does not hold an FCC license.”<sup>37</sup> To the contrary, the definition of “attributable interest” used for NCE selection procedures explicitly incorporates the EDP Rule’s measures for defining control.<sup>38</sup> This rule makes attributable an equity and/or debt interest of a non-licensee entity if that interest exceeds the 33 percent benchmark and such non-licensee supplies fifteen percent or more of the programming to the station. Thus, there is no “loophole” excluding non-licensees from the NCE attribution rules. AFA’s contrary belief appears to reflect a misunderstanding of the attribution rules or to be based on unsupported claims regarding the way in which public broadcasting stations are owned and managed. AFA’s central premise is that the Commission designed the NCE attribution standards to favor secular applicants by rendering programmers and funders “invisible” if they are not also broadcast licensees. This cannot be so. The commercial attribution standards were adopted long before the current NCE comparative rules. Thus, these standards *could not* have been designed to discriminate against a particular class of NCE broadcasters. Furthermore, the attribution standards are applied to commercial and NCE stations in exactly the same manner.

AFA’s belief that the EDP portion of the attribution rules was adopted to exclude certain non-licensees appears to be based on a single sentence in the NCE rulemaking order. In that sentence the Commission expresses its belief that the NCE attribution rules, in fact, would not result in certain non-licensees having attributable interests in stations to which they have historically provided NCE funding or programming.<sup>39</sup> Although this statement can be selectively misread to exclude all non-licensees from

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<sup>36</sup> AFA Perry Petition at 6 citing *American Family* F.3d at 1173. Similarly, SPR argues that such a process to penalize religious entities would be ineffective because a religious broadcaster could qualify for the same treatment as NPR if it adopted the same structure as a program-producing entity, holding no stations itself, but making grants to local churches and community groups around the country. See SPR Opposition at 9, n.2. We observe that AFA appears to have experimented with a possible program-producing role in recent years, potentially syndicating its news programming to non-AFA stations through an AFA project called One News Now. See <http://www.onenewsnow.com/general.aspx?id=1226> (accessed Oct. 17, 2011 and no longer accessible). However, One News Now currently appears to function primarily as an online news source.

<sup>37</sup> AFA Perry Petition at 8.

<sup>38</sup> See 47 C.F.R. § 73.7000. The D.C. Circuit has upheld the EDP standards in a commercial cable television context. See *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001).

<sup>39</sup> “We believe that this method of attribution is compatible with and should not have any impact on traditional NCE funding and programming relationships, because traditional sources of NCE funding, (such as the Corporation for Public Broadcasting, financial institutions, and major donors) and of NCE programming, (such as the Public Broadcasting Service) are not generally broadcast licensees and thus will have no broadcast interests to attribute.” *NCE Order*, 15 FCC Rcd at 7420. AFA considers Commission use of the word “traditional” a code word for secular broadcasting. E.g., AFA Spokane Petition at 5.



attribution, such an interpretation is inconsistent with the plain language of Section 73.7000. To the extent that AFA's objection to the sentence at issue is that EDP attribution does not impact established licensee relationships with CPB and NPR, AFA is correct but has shown no discrimination. The EDP Rule is designed to make attributable otherwise non-attributable equity and/or debt interests "where there is the potential for certain investors or creditors to exert significant influence over key licensee decisions."<sup>40</sup> Neither CPB nor NPR holds either equity or debt interests in any broadcast station, and thus, their relationships to applicants and licensees fall outside the scope of the rule. The Commission's attribution standards do not "ignore" CPB and NPR because they have no religious mission, but rather because these organizations have not exerted a level of influence sufficient to trigger attribution for any funder or programmer.

Contrary to AFA's portrayal of the NCE rulemaking proceeding and the single sentence therein, the Commission did not decide to incorporate the EDP standard into the NCE attribution standards to bring about some alleged comparative benefit for CPB-funded "secular" applicants. The language at issue arose while the Commission was considering whether inclusion of EDP principles in NCE attribution would potentially disrupt the flow of capital to NCE broadcasters. The ability of NCE organizations to finance station construction and operations, in the absence of any ability to sell airtime, is a challenge for many NCE broadcasters, regardless of their content or viewpoints. The Commission considered and expressed concern that the primary existing sources of funding that have been used by all types of NCE licensees should remain available, including major funding sources and lenders, not merely organizations like CPB. It concluded that major sources of capital would not likely be affected by adoption of the EDP standard in the NCE context. For example, while a bank might meet the 33 percent debt prong of the EDP test it would be unlikely to provide any programming or to hold an attributable interest in a same-market station.

Although AFA frames most of its arguments in terms of perceived flaws in the Commission's NCE attribution rules,<sup>41</sup> it appears that its primary concern is really not with our attribution rules at all, but rather with questions of control over public broadcasting stations. AFA's chief argument appears to be that all CPB-funded stations are controlled by a non-local third party. AFA paints a monolithic picture of public broadcasting in which CPB and NPR are the chief sources of funding and programming, are in "complete control," and are "real-part[ies]-in-interest" that blanket . . . area[s] with multiple signals."<sup>42</sup> Accordingly, AFA believes that the Commission should view the relationship between CPB and its grantees, and NPR and its individual member stations, no differently than the relationship between AFA and the stations under AFA's central control. Traditionally, the Commission has treated this sort of allegation as a "real party in interest" claim. A petitioner may raise such an issue at the application stage to establish undisclosed and/or impermissible third-party control of an applicant.

If we assume *arguendo* that AFA's view of public broadcast operations is correct, we would share AFA's concerns under existing rules and policies. The Commission expects applicants to disclose

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<sup>40</sup> *Attribution Order*, 14 FCC Rcd at 12582.

<sup>41</sup> It is difficult to apprehend the connection between the alleged flaws in the attribution standard and to the injury which AFA claims. That is, AFA fails to explain how the attribution of NPR's and/or CPB's interest would change the comparative analysis in either of the two subject application proceedings.

<sup>42</sup> AFA Petitions at 9; AFA Spokane Reply at 3. For a description of public broadcasting structure see *American Family*, 365 F.3d at 1161-62.

all parties to the application. If an applicant conceals that another party has *de facto* or *de jure* control over the applicant, we will take appropriate action such as dismissal of applications and/or disqualification of applicants.<sup>43</sup> Later in this decision, we consider whether CPB and NPR are real parties in interest behind the applications of ISU and SPR as a result of any factors specific to those individual relationships. With respect to AFA's overall argument however, that NPR and CPB control and are real parties in interest behind the applications of all public broadcasting applicants nationwide, we find that claim unsubstantiated. The Commission has traditionally looked beyond legal title and financial interests, *i.e.*, *de jure* control, to determine who actually holds operational control *i.e.*, *de facto* control, of an applicant or a licensee.<sup>44</sup> Accordingly, AFA's contention that Commission policies ignore the potential control by non-licensees of licensee entities is wholly without merit. For broadcasters in particular, we examine the policies governing station programming, personnel, and finances. A broadcast entity's surrender of control over any one of these indicia to another is sufficient to find that the other entity has *de facto* control.<sup>45</sup> An entity or party with control over an applicant, whether *de facto* or *de jure*, would necessarily have an attributable interest.<sup>46</sup> Thus, if NPR or CPB had actual operational control over all or most public broadcasting stations, as alleged, the Commission would recognize that control regardless of the specific ownership relationships and EDP interests identified in the NCE attribution rule. AFA's allegations of NPR and CPB control over public broadcast stations focus on programming and finances.<sup>47</sup> AFA's portrayal of the relationship of NPR and CPB to public broadcast stations is, however, incorrect. First, not all secular NCE broadcasters belong to NPR or are eligible to receive funds from CPB.<sup>48</sup> CPB is just one funding source and is not the largest source of station revenue.<sup>49</sup> Likewise, NPR is just one

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<sup>43</sup> See *Helpline, Inc.*, Letter, 23 FCC Rcd 12665(MB 2008) (dismissal of NCE applications for exceeding ten-application filing cap when applicant filed ten applications of its own and ten more on behalf of a corporation over which it maintained *de facto* but not *de jure* control; applicant remained qualified for consideration of its first ten applications upon finding that neither corporation was a sham established to circumvent the rules). Compare *Ronald Brasher*, Decision, 19 FCC Rcd 18462, 18477-80 (2004) (disqualification of applicant who used his sisters as surrogates to claim preferences once available to female-owned businesses and used names of deceased relatives to exceed the number of wireless authorizations that could be issued to one person).

<sup>44</sup> See *WHDH, Inc.*, Memorandum Opinion and Order, 17 F.C.C. 2d 856, 863 (1969), *aff'd sub nom.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

<sup>45</sup> See, e.g., *Hicks Broadcasting of Indiana, LLC*, Hearing Designation Order, 13 FCC Rcd 10662, 10677 (1998) ("Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.").

<sup>46</sup> See *Piedmont Television of Springfield*, Letter, 22 FCC Rcd 13910, 13913 (MB 2007).

<sup>47</sup> It does not allege any CPB or NPR connection with station personnel matters.

<sup>48</sup> See SPR Opposition at 13-14. Compare AFA Perry Petition at 12 (positing that there are only two kinds of NCE radio applicants: (1) secular organizations that receive CPB funding and NPR programming, and (2) centrally controlled religious applicants).

<sup>49</sup> The Commission, in the process of eliminating many NCE regulations in the early 1980s, noted that many funding and programming options exist for public broadcasters. See *Revision of Programming Policies and Regulations Related to Public Broadcasting Licensees*, Notice of Proposed Rulemaking, 87 FCC 2d 716 (1981). More recently, NPR identified eight categories of public radio funding sources, of which the largest category, accounting for 39 percent of funds nationwide, is individual donors. CPB funding is the third-largest at 11.4 percent. See *Percentage* (footnote continued)

programming source. Each NPR member station individually determines which NPR programming it wishes to purchase, which programming it prefers to acquire from other sources, and which programming it will produce itself.<sup>50</sup> Given the highly competitive NCE programming marketplace, NPR cannot exert the sort of influence that would enable it to exercise *de facto* control of stations purchasing NPR programming. As the Court stated, NPR is not in a position to direct the content that its members broadcast because NPR merely distributes programming and does not own any stations.<sup>51</sup> As the Court further noted, “nothing in the [point system] rule requires NPR . . . affiliates to select programming from a uniform source. Any such uniformity results instead from individual choice.”<sup>52</sup> This treatment also fully accords with the general policy of not attributing “mere” program suppliers. AFA’s argument that CPB controls programming is based solely on eligibility standards CPB established for its Community Service Grants. Applicants that devote a majority of their programming to in-school instruction or to furthering political or religious viewpoints are not eligible for these grants.<sup>53</sup> This alleged restriction is quite narrow and does not remove a licensee’s discretion to present or refuse any particular programs, including a certain amount of religious programming.

CPB control, as alleged by AFA, would contravene Congressional intent that CPB exist to “afford maximum protection from extraneous interference and control.”<sup>54</sup> Congress specifically prohibited CPB from owning or operating any broadcast station or network to prevent CPB from exercising control over any station it financed.<sup>55</sup> The Carnegie Report on which CPB’s creation was premised stated that CPB

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of Public Radio Station Revenue by Category FY 2010, <http://www.npr.org/about/aboutnpr/publicradiofinances.html> (accessed May 6, 2013).

<sup>50</sup> Public radio stations receiving CPB funding, taken as a whole, produce about 40 percent of their own programming, get nearly 25 percent from NPR, and receive over 35 percent from Public Radio International, American Public Media and other producers and distributors, including programs obtained directly from independent producers and other public radio stations. See <http://www.cpb.org/aboutpb/faq/programming.html> (accessed May 10, 2013). There is no information in the record suggesting whether the 25 percent NPR programming figure fits ISU or SPR specifically. If so, we could consider such matters under the second-prong of the EDP test, but only upon first determining the existence of a corresponding first-prong financial interest of at least 33 percent.

<sup>51</sup> *American Family*, 365 F.3d at 1170.

<sup>52</sup> *Id.* at 1172.

<sup>53</sup> A substantial majority of a station’s daily total programming hours must be devoted to CPB-qualified programming, which is defined as general audience programming that serves demonstrated community needs of an educational, informational, and cultural nature. Programs “that further the principles of particular political or religious philosophies or that are designed primarily for in-school audiences” are not considered CPB-qualified programming. See *CPB Eligibility* at 4.

<sup>54</sup> 47 U.S.C. § 396(a)(10). CPB itself acknowledges its lack of control: “Congress placed control of programming with local stations rather than CPB. It ensured this autonomy by prohibiting CPB from owning or operating any television or radio station, system, or network, and barring it from producing, scheduling, or disseminating programs to the public.” See <http://www.cpb.org/aboutpb/faq/programming.html> (accessed May 10, 2013).

<sup>55</sup> See 47 U.S.C. § 396(g)(3)(A).

“will exist to serve the local station but will neither operate it nor control it . . . . Programs financed by the Corporation will be made available to all stations, but each station will decide whether and when it will use the program.”<sup>56</sup> Given these constraints, the rules correctly treat these station-CPB relationships as non-attributable. In contrast, stations within AFA’s network are centrally owned and operated by AFA or an AFA subsidiary. Attribution in this context is indisputably warranted because AFA fully controls stations through this organizational structure.<sup>57</sup>

Accordingly, we find that the NCE attribution rules are rational, and logically connected to their intended content-neutral goals of localism and diversity.

## **B. As Applied Challenge of the NCE Attribution Standard**

AFA’s “as applied” arguments are brief, and center on the ability of ISU and SPR, and inability of AFA, to qualify for points as an established local entity. AFA argues that even if the attribution rules appear neutral on their face, the Commission used the relationship between the attribution rules and established local entity points in the Spokane and Perry Proceedings to favor secular applicants over religious broadcasters. After considering AFA’s arguments, we conclude that the Commission’s selections of applicants in the two proceedings at issue were due to a proper application of the NCE comparative qualifications and were unrelated to applicants’ viewpoints.

**Perry Proceeding.** AFA did not qualify for any points in the Perry Proceeding.<sup>58</sup> ISU received a total of three points as an established local entity.<sup>59</sup> AFA believes that this comparison was flawed because it did not take into account that ISU stations purchase NPR-produced programming and receive CPB funding. AFA contends that ISU would not have been able to qualify as a local applicant had the Commission taken into account ISU’s relationship to these national programming and funding organizations. AFA claims that the grant of ISU’s application is unconstitutional because it “is the fruit of a system designed to favor secular speakers over religious speakers” abridging AFA’s right to equal protection, as secured by the Due Process clause of the Fifth Amendment to the U.S. Constitution.<sup>60</sup>

ISU responds that AFA “lost” to ISU because ISU qualified as an established local applicant, a reason it considers wholly unrelated to the attribution rules.<sup>61</sup> ISU argues that it qualified for localism

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<sup>56</sup> Carnegie Commission on Educational Television, *Public Television: A Program for Action*, Recommendation 2 (1967), available at <http://www.current.org/wp-content/themes/current/archive-site/pbpb/carnegie/CarnegieSummary.html> (accessed May 10, 2013). Congress envisioned a public broadcasting system comprised of independently controlled stations that would produce much of their own programming but that would be affiliated with a non-profit network able to supply the “more ambitious” types of programming. *Id.* at Introductory Note, *What Public Television Is*.

<sup>57</sup> See generally *American Family*, 365 F.3d at 1170 (structural differences warrant different treatment of “large national chains” for other purposes).

<sup>58</sup> See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 22 FCC Rcd 6102, 6133 (2007) (“*Omnibus Order*”).

<sup>59</sup> *Id.* See 47 C.F.R. § 73.7000.

<sup>60</sup> AFA Perry Petition at 14.

<sup>61</sup> ISU Opposition at 2.

points as a governmental entity within its area of jurisdiction and contends that AFA's failure to qualify is not due to any flaw in the attribution standard but rather to AFA's lack of an established connection to Perry, Iowa. AFA clarifies its position in its Reply. AFA explains that the Commission uses the NCE attribution rules to determine whether the nominal applicant will be controlled indirectly by another entity and that an otherwise "local" applicant may not qualify for localism points if controlled by a non-local third party.<sup>62</sup> AFA argues that the Commission might have found that a non-local party would control ISU's station had the Commission scrutinized the application under a different attribution definition.

As the *American Family* Court explained, a party that seeks to establish that a policy is arbitrary and capricious in an "as applied" challenge must show that the policy does not "actually produce the benefits the Commission originally predicted they would."<sup>63</sup> We find that AFA has failed to do so. To qualify as a local applicant, the applicant must *inter alia* be a government entity operating within its area of jurisdiction or have had a headquarters, campus, or residences of at least 75 percent of its board members within 25 miles of the proposed community of license. ISU met that standard in Perry, Iowa, because it is a governmental entity and Perry is within its area of jurisdiction. AFA, a non-governmental entity, without any campus or local board members, and with a headquarters located approximately 750 miles away in Tupelo, Mississippi, did not. Viewpoint and mission differences between AFA and ISU respective were not considered in the localism point determinations in the Perry Proceeding. We find that the comparative analysis rationally distinguished between these two applicants in a manner which advanced stated policy goals. AFA presents no information concerning the relationship between CPB, NPR, and ISU specifically, concerning programming, personnel, or financial decisions, to alter our general conclusion above that those organizations would not be in a position to sufficient exert control or influence to be considered real parties in interest.

**Spokane Proceeding.** In the Spokane Proceeding, the Commission compared AFA's proposal to five others including one from SPR. AFA received two points for diversity of ownership and one point for best technical proposal. SPR received three points as an established local applicant. AFA and SPR thus tied with a total of three points each, and proceeded to a tie-breaker round considering the applicants' interests in other radio stations. AFA reported attributable interests in 227 stations and SPR in 9 stations. SPR prevailed because it had fewer attributable station interests.<sup>64</sup>

AFA contends that the Commission acted arbitrarily and in violation of the Administrative Procedure Act by ignoring SPR's relationships with NPR and CPB.<sup>65</sup> Essentially, AFA argues that it should have won with three points and that SPR should not have received any points because SPR is part of a large commonly controlled national chain of NPR programmed/CPB funded stations.<sup>66</sup> In support, AFA cites SPR's statement on its application that it would operate the proposed station "in accord with its

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<sup>62</sup> See AFA Perry Reply at 2.

<sup>63</sup> *American Family*, 365 F.3d at 1166 quoting *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

<sup>64</sup> See *Omnibus Order*, 22 FCC Rcd at 6143.

<sup>65</sup> AFA Spokane Petition at 12 citing 5 U.S.C § 706(2).

<sup>66</sup> *Id.* at 12.

membership in National Public Radio (NPR) and funding from the Corporation for Public Broadcasting (CPB).”<sup>67</sup>

SPR, in contrast, views the Spokane Proceeding as a close contest between evenly matched parties, each impacted negatively by the attribution rules. For example, SPR states that it received no points for diversity of ownership due to SPR’s attributable interests in overlapping stations, whereas AFA qualified for such points. SPR contends that it received three points to tie with AFA because SPR is a prime example of localism, not because it is an NPR member and AFA is a religious broadcaster.<sup>68</sup> SPR states emphatically that it is not under the control of NPR or CPB, and that SPR’s board and management are not constrained by CPB rules in making decisions about the station’s programming.<sup>69</sup> SPR contends that AFA took its statement about NPR membership and CPB funding out of context, that it intended that statement as a general description of SPR’s qualifications, and that it provided more specific information elsewhere in the application.

We find, again, that AFA’s challenge fails. AFA has not shown that the NCE attribution or comparative rules, as applied in the Spokane Proceeding, arbitrarily and capriciously disfavored AFA.<sup>70</sup> For the same reasons discussed above generally and in the Perry Proceeding, AFA has not demonstrated that CPB or NPR has a controlling or otherwise cognizable interest in the proposed SPR station. SPR received points as an established local applicant because it has functioned within 25 miles of Spokane since 1980. AFA made no similar showing with respect to its proposed community of Rathdrum, Idaho. Applicant viewpoint was not relevant to this analysis. AFA’s claim that it would have maintained a studio and produced local programming in Rathdrum, if selected, is immaterial. The Commission specifically excluded local program production from the factors that define a local applicant and a local applicant is not eligible for points unless it also has been established in the community at least two years prior to application.<sup>71</sup> It is reasonable to award established local applicant points to SPR, an entity governed from Spokane since 1980. In contrast, AFA is an entity headquartered in Tupelo and without an established presence in Rathdrum, over 2,000 miles away. The Court has previously affirmed that the connection between local accountability and education is rational given the strong tradition of local control in NCE broadcasting and expectation that local residents are in the best position to judge their own educational needs.<sup>72</sup> The only specific fact that AFA provides as support for its conclusion that control over SPR is non-local is that SPR voluntarily mentioned within the application its membership in NPR and funding from CPB. Such a voluntary statement can hardly be considered an *undisclosed* interest. Moreover, as discussed previously, an organization must have a much more significant role in an

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<sup>67</sup> *Id.* at 8 citing File No. BPED-19980224MA, Exhibit L2, Section II, Question 4.

<sup>68</sup> SPR Opposition at 4.

<sup>69</sup> *Id.* at 11, 18.

<sup>70</sup> AFA focuses on the localism component of the Spokane Proceeding, and does not challenge the tie-breaker which ultimately resolved the proceeding. We observe for the sake of completeness that the tie-breaker correctly included only SPR’s attributable interests and not all stations nationwide that happen to receive funding from CPB and/or programming from NPR.

<sup>71</sup> See *NCE Order*, 15 FCC Rcd at 7414-15; 47 C.F.R. § 73.7000.

<sup>72</sup> See *American Family*, 365 F.3d at 1163.

applicant's finances, programming, or personnel decisions to be considered in control. Accordingly, AFA's conclusions that SPR is under NPR and/or CPB control and that NPR and/or CPB are the real parties in interest behind SPR's application are speculative and without merit.

### III. ORDERING CLAUSES

Accordingly, IT IS ORDERED, That each decision involving a mutually exclusive group in this *Letter* shall be deemed a distinct and separate decision for purposes of applications for review, review on the Commission's own motion, petitions for reconsideration, and appeals.<sup>73</sup> If any decision in this *Letter* is declared invalid for any reason, the remaining portions shall be severable from the invalid part and SHALL REMAIN in full force and effect to the fullest extent permitted by law.

**Spokane Proceeding.** Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by American Family Association concerning the grant of an application by Spokane Public Radio IS DENIED. IT IS FURTHER ORDERED that grant of a permit to Spokane Public Radio (File No. BPED-19980224MA) to construct KPBZ(FM), Spokane, Washington IS AFFIRMED and that the mutually exclusive application of American Family Association (File No. BPED-19970820MA) IS DISMISSED. Finality of this decision shall nullify Condition 3 on the license of KPBZ(FM) (File No. BLED-20100621AAA).

**Perry Proceeding.** IT IS ORDERED, That the Petition for Reconsideration filed by American Family Association concerning the grant of an application by Iowa State University of Science and Technology IS DENIED. IT IS FURTHER ORDERED that grant of a permit to Iowa State University of Science and Technology (File No. BPED-19951215ME) to construct KICG(FM) Perry, Iowa IS AFFIRMED and that the mutually exclusive application of American Family Association (File No. BPED-19950711MB) IS DISMISSED. Finality of this decision shall nullify Condition 3 on the license of KICG(FM) (File No. BLED-20130129AGW).

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>73</sup> See 5 U.S.C. §§ 702, 704, 706; 47 U.S.C. §§ 309(d), 402(b), 405; 47 C.F.R. §§ 1.106-08, 1.120, 73.7004. In cases that involve separate mutually exclusive groups but present common issues, the petitions or appeals may be filed jointly or may be consolidated at the discretion of the Commission or a reviewing court. See, e.g., FED. R. APP. P. 3(b).