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FOR IMMEDIATE RELEASE:
April 14, 2000

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FCC ADOPTS COMPARATIVE STANDARDS FOR NONCOMMERCIAL EDUCATIONAL BROADCAST STATIONS

Washington - The FCC has adopted new procedures and standards it will use to select among mutually exclusive applicants to construct new noncommercial educational (NCE) broadcast stations or to make major changes in existing facilities of such stations.

In a Report and Order, the FCC said the new process will use filing windows and a point system to select among mutually exclusive TV, FM, and FM translator applications on channels reserved for NCE use. It will be faster and less expensive than the former traditional hearing process, while continuing to foster the growth of public broadcasting as an expression of diversity and excellence. The Commission said that on channels that are not reserved for NCE use, the Commission will employ existing auction procedures to resolve application mutual exclusivity.

Under the new procedures, applicants proposing the use of a reserved channel will file their applications during "filing window" periods to be announced by public notice. The Commission will grant applications received within the window that are not mutually exclusive with other applications and that comply with Commission rules and policies in all other respects.

If the Commission receives mutually exclusive applications during a filing window, it will select the best applicants using a point system, intended to promote localism, diversity and wide availability of service. Points will be awarded as follows: (a) 3 points if the applicant is an established local entity (An applicant must be local for two years prior to application to be deemed "established."); (b) 2 points if the applicant owns no other local broadcast stations; (c) 2 points if the applicant is part of a state wide network providing service to accredited schools (This credit will be awarded only if applicant does not also claim the local ownership points.); (d) 1 to 2 points based on the technical parameters of the proposed facility.

To break ties, the Commission will select the applicant with the fewest existing stations. If that standard fails to break the tie, the Commission will select the applicant with the fewest pending applications. If these tie breakers do not result in selection of a prevailing applicant, the Commission will implement mandatory time sharing for full-service applicants. For FM translator applicants only, the final tie breaker will select the first applicant to file, similar to the existing translator-only process. The Commission will permit settlements at any time under current settlement rules which limit reimbursement to an applicant's reasonable and prudent expenses.

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To ensure that the public receives the benefit of the best proposal, the Commission established a four-year holding period, during which successful applicants must maintain the characteristics for which they received points.

Prior to completing four years of on-air operations, the successful applicant may assign or transfer control of the station's license, but only to a party eligible to receive a number of points equal to or greater than the number received by the proposed assignor or transferor. Consideration can not exceed reasonable and prudent application and construction expenses.

The point system will apply to existing groups of mutually exclusive applications for reserved NCE channels, and to future applications. In a future public notice, the FCC will announce procedures for applicants to supplement their existing applications to provide point system information.

To facilitate the transition to the new application process, the Commission announced a temporary freeze on the filing of applications for new NCE stations and major changes to existing NCE stations for reserved channels. Upon release of the text of the Commission's decision, and continuing until announcement of the first NCE filing window, the Commission will not accept NCE applications for new stations and major changes unless they are filed in response to an outstanding NCE FM or FM translator cut-off list. It will continue, however, to accept applications for minor changes to existing stations on a first-come, first served basis. Any applications filed before release of the order that have not been accepted for filing and placed on a cut-off public notice will be included in the first window opened for NCE applicants in the relevant service and considered in connection with applications filed during the window.

The Commission will not use the point system for channels that are available commercially, even if one or more noncommercial organizations apply for the channel. Such applications will be resolved by auction. In reaching that conclusion, the Commission conducted an in-depth analysis of conflicting directives in the enabling statute, and of Commission policies concerning allocation and use of the reserved and non-reserved channels.

In response to public comments that a non-reserved channel may sometimes be the only one available to an educator, the Commission expanded opportunities for future applicants to request that a non-reserved channel be allocated as a reserved channel. This would apply in limited circumstances where the need for an NCE station is shown to be greater than the need for a commercial station.

Action by the Commission April 4, 2000 by Report and Order, FCC No. 00-120, Chairman Kennard, Commissioners Ness, and Powell, with Commissioners Furchtgott-Roth and Tristani approving in part, dissenting in part, and issuing a joint statement, and Commissioner Tristani issuing a separate statement.

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STATEMENT OF COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI, DISSENTING IN PART

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

We would have found that Section 309(j)(2)(C) of the Communications Act precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial frequency. Since the statute is clear on its face, we are obligated to give it effect.[1]

The specific exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits its reach to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in Section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station.[2] To the contrary, our rules specifically address the situation in which noncommercial educational stations are licensed to operate on unreserved channels.[3]

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1 *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

2 *See* 47 C.F.R. § 73.503.

3 *See* 47 C.F.R. § 73.513.

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, we believe that Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage.[4] Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended.[5] We would not read this limitation back into the statute.

The majority's reasoning to the contrary is unpersuasive. Although the majority tries to paint itself as caught between two "conflicting statutory directives," para. 106 (juxtaposing sections 309(j)(1) & (j)(3)(C) with section 309(j)(2)(C)), this characterization of section 309 is just not tenable. The statutory language is not in equilibrium, leaving the Commission free to choose one side or the other, but clearly weighs in favor of exempting NCEs from auctions across the board.

The directive in section 309(j)(1) to auction all mutually exclusive applications, on which the majority places such reliance, is by its clear terms subject to the exemptions set forth in the very next subsection. That subsection, of course, includes the exemption for noncommercial stations. *See* 309(j)(1) ("If . . . mutually exclusive applications are accepted for any initial license or construction permit, then, *except as provided in paragraph (2),* the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding. . . .). Section 309(j)(1) is simply not an order to auction all mutually exclusive applications, as the majority suggests, and cannot be relied upon as such. Furthermore, the directive in section 309(3)(C) is simply to "seek to promote" – not to accomplish at all costs, and surely not where inconsistent with the actual statutory scheme – recovery of the value of spectrum made available for commercial use.

On the other side of the scale, there is section 309(j)(2)(C), which follows immediately the mandate to auction mutually exclusive applications except in certain situations. It provides that one of those situations is where "licenses or construction permits [are] issued by the Commission for stations described in section 397(6) of the Act." This exemption speaks *specifically* to the question of how to treat NCE applicants in a mutually-exclusive application situation. Accordingly, under the canon of construction that the specific governs the general, *see, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), we think it should trump whatever directives one might find in sections 309(j)(1) and (2)(C). As explained above, however, section 309(j)(1) is not an absolute mandate to auction all commercial spectrum and the hortatory "seek to promote" language of section (j)(C)(3) must give way to the mandatory language of the statutory exemption for NCEs.

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[4] *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1).

[5] *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

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

While I generally support the point system adopted in the Order, I would have given an additional boost to stations that promised to provide a minimum level of locally-originated programming. Local-origination programming is one of the foundations on which the noncommercial educational service was built. As the Order notes, the 1967 Carnegie Report, which Congress relied upon to develop and improve noncommercial educational television stations, provided that:

> The heart of the system is to be the community . . . [T]he overwhelming proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.[6]

Congress and the Supreme Court have repeatedly endorsed the preservation of local-origination programming as a legitimate and substantial governmental interest. In its official findings underlying the 1992 Cable Act, Congress stated: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial government interest in ensuring its continuation."[7] In *Turner*, the Supreme Court expressly cited this finding in rejecting the argument that Congress' "legitimate legislative goals" would be satisfied by the preservation of a truncated broadcasting industry providing a minimum level of service.[8] Similarly, in *Midwest Video*, the Court upheld an FCC requirement that cable operators make facilities available for local programming production as reasonably furthering the goal of "increasing the number of outlets for community self-expression."[9]

In the Community Broadcasters Protection Act of 1999 ("CPBA"), Congress recently reaffirmed the value it places on local-origination programming. In the CPBA, Congress provided additional "Class A" protection to certain low-power television

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[6] Carnegie Commission on Educational Television, *Public Television: A Program For Action* 87 (1967).

[7] *Cable Television Consumer Protection and Competition Act of 1992*, 102 P.L. 385 (1992) Sec. 2(a)(10).

[8] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). *See also Chicago Cable Communications, et al. v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989).

[9] *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 (1972). *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 203 (1943) ("A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.").

stations who have "operated their stations in a manner beneficial to the public good." One of the primary qualifications for Class A status is that the station must broadcast at least 3 hours a week of locally-produced programming. Similarly, in the Commission's recent Order on low power radio, it gave additional points to applicants who would air at least eight hours a day of local-origination programming.

The majority argues that the examples of Class A LPTV and LPFM are inapposite because they involve services that are highly localized, unlike full-service NCE stations that have broader goals and a wider signal range. In adopting the LPFM local program origination rule, however, the Commission expressly stated that "[t]his criterion derives from the service requirements *for full-service broadcast stations*, which are required to maintain the capacity to originate programming from their main studios."[10] Thus, awarding additional credit for local-origination was *not* based on the localized nature of the service, as the majority now asserts, but on the obligation of full-power stations to maintain the ability to produce local programming.

In sum, awarding additional points for local-origination programming would: (1) promote the purpose of the noncommercial educational service; (2) advance Congress' goal of preserving local origination programming; and (3) pass muster in court. The majority's argument against adoption is specious. I therefore dissent.

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[10] *Report and Order*, MM Docket 99-25, para. 144 (rel. January 27, 2000) (emphasis added).