

**Before the
Federal Communications Commission
Washington, DC 20554**

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

To: The Commission

PETITION FOR RECONSIDERATION

Santa Monica Community College District ("SMCCD") hereby petitions for reconsideration of the *Report and Order* adopted in this proceeding.¹

Proposal

SMCCD requests that the Commission amend its rules to award either a two-point state-wide network credit or a separate equivalent credit to a community college which operates less than five (5) campuses but authorized and operating under a state community college system.

Santa Monica Community College District

1. SMCCD is the licensee of non-commercial educational FM stations KCRW(FM), Santa Monica, CA; KCRU(FM), Oxnard, CA; and KCRI(FM), Indio, CA, and the permittee of NCE-FM station KCRY(FM), Mojave, CA (application for license pending - File No. BLED-20000518AAZ).

2. SMCCD also operates Santa Monica College (the "College"), a community college located in Santa Monica, California. The College is a public institution of higher

¹ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, FCC 00-120 (April 21, 2000), 65 *Fed. Reg.* 36375 (June 8, 2000) ("*Report and Order*").

learning. SMCCCD is governed by a 7-member Board of Trustees whose members are elected for four-year terms by voters in the District, which serves Santa Monica and Malibu, California. The College is organized and operates under California state law as part of the California Community College system.

California Community College System

3. The California Community College system is governed by the 16-member Board of Governors appointed by the Governor of the State of California. The Board of Governors sets policy for and provides guidance for the seventy-two (72) community college districts and the one hundred seven (107) community colleges which constitute the California Community College system.

4. The Board of Governors selects the Chancellor. The Chancellor functions as the Chief Executive Officer of the Board. The Chancellor also chairs the Consultation Council, established by the Board, and thereby serves as the intermediary between the Council and the Board. The Council is an 18-member group organized by law to facilitate the participation of community college districts in the development of community college policy. The Consultation Council advises the Chancellor who makes recommendations to the Board on policy matters.

5. Of the seventy-two (72) community college districts in the State of California, fifty-two (52) of those districts operate only one (1) community college. Eleven (11) of those districts operate two (2) community colleges in their district. Seven (7) of those districts operate three (3) community colleges in their district. One of those districts operates four (4) community colleges. Finally, one of those districts – Los Angeles – operates nine (9) community colleges. Accordingly, a typical California community college operates with fewer than five campuses, and the majority operate with one campus.

NCE Selection System

6. Under the new selection system for NCE applicants set forth in Section 73.7003 of the Commission's rules, each mutually exclusive applicant receives points under four (4) broad categories: (a) established local applicant (3 points); (b) local diversity of ownership (2 points); (c) state-wide network (2 points), and (d) technical parameters (1 or 2 points). The applicant with the highest number of points becomes the tentative selectee. In the event of a tie, the Commission's new rule provides for a three-part tie-breaker mechanism.

7. The local diversity of ownership credit and the state-wide network credit are mutually exclusive. The local diversity of ownership credit is not available to an applicant that claims the state-wide network credit. The state-wide network credit is available only to an applicant that does not qualify for and does not claim the local diversity of ownership credit.

8. To receive the local diversity of ownership credit the applicant must not have an attributable interest (as defined in Section 73.7000) in any other broadcast station or authorized construction permit (comparing radio to radio and TV to TV) whose principal community contour overlaps that of the proposed station. Furthermore, the applicant's governing documents must require that such local diversity of ownership be maintained.

9. To receive the state-wide network credit, the applicant must be:

(a) an entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state, encompassed by the combined primary service contours of the proposed station and of the applicant's existing stations, if the existing stations are regularly providing programming to the schools in furtherance of the school curriculum and the proposed station will increase the number of schools the applicant will regularly serve; or

(b) an accredited public or private institution of higher learning with a minimum of five full-time campuses within a single state encompassed by the combined primary service contours of the proposed station and of the

applicant's existing stations, if the existing stations are regularly providing programming to the campuses in furtherance of their curriculum and the proposed station will increase the number of campuses the applicant will regularly serve; or

(c) an organization, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity described in (a) or (b) for use in the school curriculum.

10. Under this new NCE selection system SMCCD could not successfully claim, and the FCC would not likely award SMCCD, the two-point local diversity of ownership credit if SMCCD applied for a construction permit for a new NCE station whose principal community contour overlapped any principal community contour of SMCCD's existing stations. Under these circumstances, the FCC would then proceed, under Section 73.7003(b)(3), to determine whether or not it could award SMCCD a two-point state-wide network credit.

11. However, given the current wording of Section 73.7003(b)(3) of the rules, it does not appear that SMCCD could receive the Commission's state-wide network credit, notwithstanding that SMCCD is part of the California Community College system of 107 community colleges located in 72 community college districts. More specifically, SMCCD does not have authority over or provide programming for elementary or secondary schools. Although the College is an accredited public institution of higher learning, SMCCD does not operate five full-time campuses in its District or elsewhere in the State of California. Nor does SMCCD provide programming for any institution of higher learning with five or more campuses.² SMCCD radio stations do, however, provide non-commercial educational FM radio service to the residents of California community college districts other than the Santa Monica Community College District.

² The Commission adopted the five-campus threshold "based on our view that Colorado Christian College was reasonable in believing that broadcast service to five such campuses was similar to a state government's network." *Report and Order* at n. 42.

12. As written, Section 73.7003 creates an incentive for SMCCD to apply for a facility that avoids overlap of the 3.16 mV/m contours of the proposed station and of SMCCD's four existing stations. Based upon a reasonable reading of the *Report and Order*, the Commission might approve of such a strategy; however, that strategy does not advance the educational plan of the State of California in creating its Community College system.

Background of State-Wide Network Preference

13. In the *NPRM* in this proceeding,³ the Commission requested comment on the nature of a state-wide network. Therein, the Commission stated as follows:

We are concerned about whether weighting of lotteries in favor of applicants owning few other stations would affect state-wide educational networks operating pursuant to state education plans. We view the development of these networks as positive. *See, e.g.* 47 C.F.R. § 73.502. However, if these stations are under common control, they might be placed at a disadvantage in a lottery by reducing or eliminating any preference for media diversity. Accordingly, we ask commenters to provide us with information about whether stations that are part of state-wide educational plans are generally under common control. Would the applicants for such stations generally be state-controlled entities, or independently controlled entities that might qualify for a diversity preference in their own right? To the extent that they would be deemed a single entity not entitled to a diversity preference, is this a factor that should deter us from use of a lottery?

Id. at 21173-74.⁴ In the *NPRM*, the Commission proposed to award points for "Local Diversity" and stated that "state networks generally would not be disadvantaged under

³ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 13 FCC Rcd 21167 (1998) ("*NPRM*").

⁴ Section 73.502, cited by the Commission, provides as follows:
(footnote 4 continued from previous page)

Statewide plans. In considering the assignment of a channel for a noncommercial educational FM broadcast station, the Commission will take into consideration the
(footnote continued on next page)

such an analysis” because the preference would be limited to local diversity. The Commission also invited comments on whether or not to include in the point system a “State-Wide Plan Credit” for “stations that would be part of an existing education plan of a state or municipality.” *Id.* at 21177-79.

14. The FCC did not receive many comments on the issue of establishing a state-wide network credit. Those who did comment focused primarily on whether the credit would be available to both government supported networks and private networks. In the *Report and Order* the Commission decided to favor “a larger class of applicants than originally proposed” and to make available the two point State-Wide Network credit to both public and private entities. *Report and Order* at Para. 58.

15. The Commission established the credit for state-wide networks so that such educational institution applicants, who might be unable to design their networks to avoid signal contour overlap, would not find themselves at a competitive disadvantage in the licensing process. The Commission stated that

without a credit recognizing the merits of such [state-wide network] applicants, an entity serving multiple schools, such as a state university system, might not be able to effectively compete in a point system

and that:

extent to which each application meets the requirements of any state-wide plan for noncommercial educational FM broadcast stations filed with the Commission, provided that such plans afford fair treatment to public and private educational institutions, urban and rural, at the primary, secondary, higher, and adult educational levels, and appear otherwise fair and equitable.

In 1952, the Commission said that one of the purposes of this rule was “to encourage the establishment of statewide plans for noncommercial educational FM broadcast service.” *State of Wisconsin-State Radio Council*, 16 FCC 459, 7 RR 968, 969 (1952). In the *Report and Order* the Commission repealed §73.502 and said that §73.502 appeared to use the term “state-wide plan” in a “narrower sense than the state-wide network credit we are adopting today.” *Report and Order* at Para. 61.

applicants who will provide educational service to many schools, but who cannot achieve that goal without some signal contour overlap and resulting loss of the local diversity credit, will not be placed at a disadvantage in comparison to applicants serving a smaller number of schools.

Report and Order at Paras. 56 and 60.

Requested Rule Revision

16. The Commission certainly has latitude in devising a process for selecting among mutually exclusive applicants. However, the Commission cannot adopt and employ a system that contains arbitrary and capricious elements. *Bechtel v. FCC*, 10 F.3d 875 (DC Cir. 1993), particularly given the First Amendment implications and consequences of the FCC's licensing processes.⁵

17. In adopting the *Report and Order* the Commission recognized that certain institutional applicants could be at a competitive disadvantage in the new point-based selection system, because other applicants could structure their proposals to secure the 2-point local diversity of ownership credit. For that reason, the Commission adopted the state-wide network credit and enlarged the class of applicants that would be eligible to receive that credit to include private networks. However, in doing so, the Commission did not take into consideration the various ways that the fifty states choose to provide educational services to its residents.

18. The State of California, as but one example, has two (2) well-known state-wide university systems – the California State University system and the University of California system – both of which have multiple campuses throughout the state. In

⁵ Content-neutral regulations are subject to intermediate First Amendment scrutiny and will be sustained if they advance important governmental interests unrelated to the suppression of free speech and do not burden substantially more speech than necessary to further those governmental interests. *Turner Broadcasting System, Inc. v. FCC*, 520 US 180, 189 (1997).

addition, the State of California has a perhaps less well-known but equally important Community College system designed to meet the needs of other residents of the State of California. One of the many functions of the California Community College system is to serve as a “feeder” system to the two state-wide university systems.

19. The language of the FCC’s state-wide network credit encompasses the two California university systems, but it appears to exclude the California community college system without a basis in the record and without an explanation. Such an exclusion of the community college system would undermine the decision by the State of California on the delivery of higher education in the State and hinders the provision of radio services to support that educational mission.

20. In the other 49 states, the community college system may not be structured and may not operate precisely as the California Community College system. However, community colleges that are organized and operate under a state system equally help ensure “that educational programming is available throughout the a specific area in a coordinated and organized manner most appropriate to that area, and especially to schools,”⁶ just like a state university system with five or more separate campuses. A State’s decision to decentralize governance of community colleges and make them more community based does not diminish the community colleges’ status as being part of a state system and or as a state-wide network of higher education.

21. Given the Commission’s decision to *broaden*, and not contract, its support for state education plans, there is no basis in the FCC record to exclude from the state-wide network credit a community college that is organized and operates under a state community college system.

⁶ *Report and Order* at Para. 56.

WHEREFORE, SMCCD requests that the Commission either revise, clarify or expand the state-wide network credit, or adopt a new equivalent credit, for a community college organized and operating under a state community college system, if that community college cannot claim a credit for local diversity of ownership.

Respectfully Submitted,

**DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP**
2101 L Street, NW
Washington, D.C. 20037-1526
202-785-9700
202-887-0689 (FAX)

Attorneys for
Santa Monica Community College District

By: Harold K. McCombs
Lewis J. Paper
Harold K. McCombs, Jr.

July 10, 2000