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November 8, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Comparative Consideration of 76 Groups, NCE MX Group 880611, File No. BPED-19900129MH, Redding, CA

Dear Ms. Dortch:

On behalf of the State of Oregon, Acting by and through the State board of Higher Education for the Benefit of Southern Oregon University ("Oregon"), we hereby file an original and four copies of the attached Petition for Reconsideration of the October 3, 2007 Letter Decision by the Audio Division. Letter from Peter Doyle, FCC Audio Division, to The State of Oregon, FCC 07-4136, ___ FCC Rcd _____ (Released October 3, 2007). The Public Notice of that decision was published on October 9, 2007.

Please let me know if you have any questions about this filing.

Sincerely,

Ernest T. Sanchez
Special Assistant Attorney General
The State of Oregon

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Application of the State of Oregon, Acting by through the State Board of Higher Education for the Benefit of Southern Oregon University, for a Permit to Construct a New NCE FM Station at Redding, CA	)	**NCE MX Group: 880611** **File No. BPED-19900129MH** **Petition for Reconsideration**
and	)	
KFPR(FM) Redding, CA **Facility ID NO. 66567** **BPED-19880610ML** **MX Group No. 880611**	)	**DA 07-4136** **1800B3-1B** **Petition to Deny**

Petition for Reconsideration

State of Oregon, Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon University
By Its Attorneys:

Ernest T. Sanchez
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Special Assistant Attorneys General

Counsel for the State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University

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Wendy Robinson
Assistant Attorney General

Filed: November 8, 2007

Summary

The State of Oregon, Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon University, by its attorneys, files this Petition for Reconsideration of both the Commission's decision in its March 27, 2007 Order, *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations,*[1] and the Audio Division *Letter Decision* of November 3, 2007 in which the State of Oregon's The *Omnibus Order* decision is impermissibly premised upon the retroactive application of administrative rules in Subpart K of Part 73 of the Commission's rules in this proceeding with respect to Group 880611, without specific statutory authorization for such retroactive application, in violation of section 706 of the Administrative Procedure Act. For this reason, new determination must be made on the basis of the appropriate comparative standards. Application of the new rules to Group 880611 is impermissibly retroactive because this matter is subject to a 1996 remand order of the D.C. Circuit to evaluate the applications in this Group in accordance with the comparative standards applicable at the time of their original applications.

In the alternative, and without waiving its rights to assert the above argument with respect to retroactive application, the State of Oregon also urges reconsideration of its application on the basis of the Commission's failure in the above-captioned Order to credit it with three points as an established local applicant under Rule 73.7003(b). Under the Commission's ruling, no government entity can meet the standards for credit as an established local applicant under the Commission's point system when it applies for frequencies in communities outside its area of

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[1] 22 FCC Rcd 6101 (2007) (hereafter, *Omnibus Order"*).

jurisdiction, even though nothing in the plain language of the rule, or its extensive regulatory and appellate history, permits the Commission to adopt this narrow *post hoc*, rationale for denying Oregon this credit. It is arbitrary and capricious, and an abuse of discretion, for the Commission to discriminate against governments that apply for NCE stations outside the government's area of jurisdiction, if the state government can otherwise meet the test for local applicant status.

Finally, the State of Oregon seeks reconsideration of the denial of its Petition to Deny, in which it raised substantial and material questions of fact regarding the prohibited substitution of parties that occurred when the University Foundation sought to "assign" its application for a construction permit for Channel 205 in Redding, CA, in the guise of an assignment of license for what appeared to be a full-service station, KFPR(FM). The State of Oregon argues that the Audio Division ignored the strong evidentiary support for its allegations with respect to this and other deceptions and misrepresentations on the part of University Foundation and Research Foundation, both in the 1997 Assignment Application and the 2001 Point Supplement. The State of Oregon seeks reconsideration of the denial of this Petition to Deny which should have been granted pursuant to the terms of section 309(d) and (e) of the Communications Act, 47 U.S.C. §309(d),(e).

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Application of the State of Oregon, Acting by through the State Board of Higher Education for the Benefit of Southern Oregon University, for a Permit to Construct a New NCE FM) Station at Redding, CA	)	**Petition for Reconsideration**
and	)	
KFPR(FM) Redding, CA	)	**DA 07-4136**
Facility ID NO. 66567	)	**1800B3-1B**
BPED-19880610ML	)	
MX Group No. 880611	)	**Petition to Deny**

Petition for Reconsideration

The State of Oregon, Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University ("State of Oregon"), by its attorneys, respectfully submits this Petition for Reconsideration with respect to the Commission's rejection of the State of Oregon's application for a construction permit for Channel 205 (File No. BPED-19900129MH), as set forth in paragraphs 71-72, 209 of the Commission's *Omnibus Order.*[1] The State of Oregon also seeks reconsideration of the denial by the Audio Division of the State of Oregon's Petition to Deny the tentative decision to grant a permit to construct a new NCE FM station to the Research Foundation, California State University, Chico ("Research Foundation")(File No.

[1] *Comparative Consideration of 76 Groups of Mutually-Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations,* Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (hereafter, *"Omnibus Order").*

BPED-19880610ML) [2] and dismissal of its April 26, 2007 Petition for Reconsideration of the *Omnibus Order,* which the Letter Decision dismissed on the basis that *Omnibus Order* was an interlocutory order, which would make a petition for reconsideration premature and inappropriate. *Letter Decision* at 1, n.3. Inasmuch as the *Letter Decision* dismissed the previously-filed Petition for Reconsideration (which it termed the *"April Submission,"*) without consideration, it cannot be disputed that the document termed the *April Submission* has not yet received any consideration on its merits, and any commentary in the *Letter Decision* on the arguments raised therein are *dicta.* In the *Letter Decision*, the Audio Division granted Research Foundation's application to construct a new NCE station in Redding, CA.[3]

In this present Petition for Reconsideration, the State of Oregon consolidates its arguments from the so-called *April Submission* (a copy of which is attached hereto as Exhibit 1) with a request for reconsideration of the issues raised in its Petition to Deny. Specifically, with respect to the arguments originally raised in the *April Submission,* the State of Oregon seeks reconsideration of the Commission's retroactive application of sections 73.7000 through 73.7005 of the Commission's Rules[4] to its application. The State of Oregon also seeks reconsideration of the Commission's rejection of the State of Oregon's claim for three points as an established local applicant under FCC Rules 73.7000 and 73.7003(b)(1). Finally, the State of Oregon seeks reconsideration of the staff's denial of its Petition to Deny on the grounds that the staff has

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[2]See *Letter* from Peter Doyle, FCC Audio Division, to The State of Oregon, FCC 07-4136, ___ FCC Rcd _____ (Released October 3, 2007) (*Letter Decision).* This Petition for Reconsideration is timely, since the Public Notice of the Commission's action was issued on October, 9, 2007

[3]*Letter Decision* at 3 - 6.

[4] 47 C.F.R. §§ 73.7000 - 73.7005.

misconstrued and misapplied the Commission's rules and longstanding policies prohibiting the substitution of parties in a pending application for new construction permit.

I. Subpart K of Part 73 of the Commission's Rules Was Impermissibly Applied Retroactively to the State of Oregon's Application for a Construction Permit in the Commission's Determination with Respect to the Redding I Group

In the *Omnibus Order,* the Commission rejected the State of Oregon's application (File No.19900129MH) for a Construction Permit for Channel 213 in Redding, CA, and granted Research Foundation's application for that Channel (File No. BPED-19880610ML). This determination was made by an analysis of the two applications under the provisions of Subpart K of Part 73 of the Commission's rules, specifically sections 73.7000 through 73.7003.[5] The staff did not rule on the merits of the State of Oregon's argument regarding the retroactive application of the rules,[6] however but, rather, dismissed the State of Oregon's original Petition for Reconsideration as premature and inappropriate with respect to an interlocutory order.

The State of Oregon therefore adopts in its entirety Section I. A through E of its so-called *April Submission* with respect to the improper retroactive application of Subpart K of Part 73 of the Commission's rules, and incorporates those sections by this reference as Part I of this Petition for Reconsideration. The State of Oregon seeks reconsideration of the Commission's erroneous

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[5] *Id.*, ¶¶ 32-36, 71 - 72, 209. Pursuant to the Commission's instructions, the Media Bureau staff issued public notice of Research Foundation as the tentative selectee in Group 880611 on March 28, 2007.

[6] In a footnote, the Audio Division opined that the D.C. Circuit's *Remand Order* did not support the State of Oregon's claims of impermissible retroactive application of the point system rules to this case because "the court did not specify a traditional evidentiary hearing before an administrative law judge" or preclude the Commission from adopting a new method of choosing among applicants. This argument ignores the context of this case. In 1996, in a case that had been already pending for over 6 years, it would have been unnecessary and redundant for the D.C. Circuit to have enhanced the language of its *Remand Order* with specific inclusion of all the

retroactive application of these new rules to its remanded application.

II. The State of Oregon Is Entitled to Credit as an Established Local Applicant, Outside Its Area of Jurisdiction, on the Same Basis as Non-governmental NCE Applicants

Alternatively, for the reasons stated above, the State of Oregon likewise adopts in its entirety Section II. A through C of its so-called *April Submission* with respect to the arbitrary and capricious application to the State of Oregon's application of Subpart K of Part 73 of the Commission's rules, and incorporates those sections by this reference as Part II of this Petition for Reconsideration. The State of Oregon seeks reconsideration of the Commission's erroneous, arbitrary, and capricious application of the established local applicant rules (sections 73.7000 and 73.7003(b)(1) to its remanded application.

III. The Audio Division Decision Is in Error Because It Fails to Recognize That a Prohibited Substitution of Parties Has Occurred

The Research Foundation, to which the Audio Division in its *Letter Decision* granted a construction permit on Channel 205 in Redding, CA, is a separate and different legal entity from the University Foundation which was the original 1988 applicant for that channel. The *Letter Decision* is based upon the flawed premise that this complete change – from one corporate entity to another corporate entity – was merely an example of "routine and inevitable ownership changes over a substantial period of time during which the Commission was unable to act on NCE applications" *Letter Decision* at 4. That conclusion is wrong both on a factual as well as legal basis. If this were a case where the members of the Board of the University Foundation had gradually been replaced over the course of 19 years, the staff's characterization would be

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details of the "further proceedings" that were commonplace at the time.

accurate and the transaction would, indeed, have been of "no decisional significance." Had the University Foundation actually held the license for Channel 205 during the period from 1996 through the present day, the Commission would have been notified of any such gradual changes in its board composition over the course of time in bi-annual Ownership Reports on form 323-E.

What happened here, however, in 1997 was an assignment on Form 316 of the licenses for one full-service station, KCHO, and nine translators stations (BALED-19970827FA, BALED-19970827FC through BALED-19970827FK) from University Foundation, a corporate entity incorporated in 1940 (Petition to Deny, Exhibit 3), to the Research Foundation, a separate corporate entity incorporated in 1996 (Petition to Deny, Exhibit 5). That same Form 316 also included an attempt to assign a pending application for construction permit, disguised as a full-service license with the call sign "KFPR" (BALED-19979827FB).[7] Even though University Foundation did not hold a license for Channel 205, and was fully aware that the D.C. Circuit had, one year earlier, reversed and remanded the Commission's erroneous grant of a construction permit to it, *State of Oregon v. F.C.C.,* 102 F.2d 583 (DC. Cir. 1996), University Foundation nevertheless falsely identified Channel 205 in that Form 316 (BALED-19970827FB) as "KPRF," as if it were simply another one of its "currently authorized auxiliary stations, " rather than a pending application, and the Commission failed to notice that Channel 205 at Redding was not a

[7]The *Letter Decision* rejects the State of Oregon's argument that the University Foundation's use of the call sign "KFPR(FM)" to identify the Redding facility in the 1997 assignment application was deceptive. The basis for this rejection was the "Commission's designation of call sign KFPR(FM) to identify the Redding facility effective December 17, 1992." That designation, however, was four years before the D.C. Circuit's ruling overturning the grant of a construction permit to the University Foundation and remanding the case to the Commission. As of 1997, all University Foundation held with respect to Channel 205 in Redding was a pending, contested application for a construction permit, which it successfully disguised as a full-service radio license when it applied for consent to assignment in 1997.

licensed facility.

As the State of Oregon argued in its Petition to Deny, that attempted assignment not only violated Commission rule 73.3540, which by its terms only permits the assignment of licenses or construction permits on Forms 314 or 316, 47 C.F.R. § 73.3540 (c), but involved a major and serious misrepresentation of a material fact to the Commission in an application form. *See* Commission Rule 73.1015 (false certification). Channel 205 was listed among genuine licenses that University Foundation held and could legitimately assign to the new corporate entity as if it, too, were a licensed facility, without alerting Commission staff who processed the application form that all University held and was trying to assign was a pending and contested application for construction permit.[8] The Commission staff's approval of the assignment on November 25, 1997 (*see Petition to Deny,* Exhibit 9B) merely demonstrates that Commission staff was, in fact, misled, not that this was an appropriate filing. Rather, the lack of candor and attempt to deceive had been successful.

In the Audio Division's *Letter Decision,* Commission staff has again been misled regarding a prohibited substitution of parties that occurred in the years between the original 1988 University Foundation application and the recent grant of the of the Redding FM channel to the Research Foundation. In its *Petition to Deny*, the State of Oregon provided detailed factual documentation of the prohibited substitution of parties that occurred in connection with this application. No Commission rule permits the substitution of one corporate applicant for another,

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[8] Section 1.65 o f the Commission's rules, which requires applicants to "furnish substantial and significant changes in information" to the Commission, states that an application is deemed "pending before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court."

which is precisely what happened here, as the documentary exhibits demonstrate. One non-profit corporation was substituted for another. Research Foundation is a separate corporate entity, and is neither a subsidiary of University Foundation nor the old Foundation reorganized and renamed. The original University Foundation still exists, according to the State of California and the Internal Revenue Service, with a separate board of trustees and staff from the Research Foundation. The *Letter Decision*, however, treats this substitution of parties the same as one of the "gradual," "routine and inevitable ownership changes over a substantial period of time" to which the Commission granted a waiver of Rule 73.3573 in the *Omnibus Order*. *Letter Decision* at 4, *citing Omnibus Order* at 6125. In a later discussion of the State of Oregon's arguments, the *Letter Decision* demonstrates its failure to comprehend either Oregon's factual showing or its legal arguments by referring to the "1997 assignment of various radio interests to the Research Foundation," as "ministerial matters of no decisional consequence." Later in the same paragraph, the Audio Division refers to the assignment of the application for Channel 205 as a change in the name of the applicant. *Letter Decision* at 6.

The *Letter Decision* is wrong on both the facts and the legal significance of those facts. The "various radio interests" that were assigned from University Foundation to the new and separate entity, Research Foundation, included an inchoate "interest" that was not assignable under the Commission's rules since it was neither a license nor a construction permit. *See* section 73.3540, 47 C.F.R. §73.3540. Furthermore, it was hardly a mere "ministerial matter of no decisional consequence," since it involved supplying inaccurate information to the FCC. The "decisional significance" here is not whether Research Foundation or University Foundation might qualify for 3 points as an established local applicant under rule 73.7003(b)(1) but, rather,

whether University Foundation, Research Foundation, or both violated Commission rules 1.65, 73.3540, and 73.3573, among others, and whether these entities provided false and misleading information to the Commission in an application. The "decisional significance" here, as the Commission pointed out in granting waivers to those applicants whose changes in ownership were, in contrast, "gradual and inevitable," is that [u]nder the Rules, a 50 percent change in ownership of an NCE applicant would generally be considered a 'major change' and would not be permissible outside of a filing window," resulting in dismissal of the application. *Omnibus Order* at 6124-25. The State of Oregon is not talking here about any changes in board membership that may have occurred, either before or after the filing of the Point Supplements in 2001. Rather, we are talking about a 100 percent change in ownership that occurred when ownership was transferred or assigned from one non-profit corporate entity to an entirely different one. This was not a change in name of the corporation, as the *Letter Decision* would characterize it, because University Foundation is still in existence and still uses that same name (*Petition to Deny,* Exhibits 3, 4).

The Audio Division staff has misconstrued and misapplied the Commission's discussion of Major Changes of Ownership in the *Omnibus Order* (at 6123 to 6129). The Commission began consideration of the issue by noting several applicants who had "filed amendments or other documents which reflect substantial changes in their officers and/or governing boards since they filed their applications." Pointing out that such amendments "would, generally, be considered a 'major change' and would not be permissible outside of a filing window," the Commission went on to consider whether such changes that "occurred gradually pursuant to state law, "*Omnibus Order* at 6124, n. 145, or "occurred naturally as the organization evolved and

grew," should result in the dismissal of the applications. Considering it "unreasonable to penalize" such applicants under the circumstances, the Commission granted a waiver to parties that had applied for such a waiver and those other selectees who had also experienced similar gradual routine changes in the governing boards. *Omnibus Order* at 6124-25, n. 148.

The Audio Division's error is in treating the transfer of control that occurred between University Foundation and Research Foundation as if it were the same type of gradual, routine, and inevitable change in composition of the governing board of an applicant. The case at issue is completely different and should be governed by the Commission's contrasting evaluation and ruling concerning Fatima Response, Inc. ("FRI"). As the Commission explained in its denial of any waiver to FRI and dismissal of its application, "[a]ny contention that Fatima II was merely a revival and change in control of Fatima I is contradicted by the fact that new Articles were filed and a new registry number assigned." *Omnibus Order* at _____, n. 174. Any such substitution of parties would be considered a major change under Rule 73.3573(a)(1), 47 C.F.R. §73.3573(a)(1), and would require filing of a major change application. That Rule states: "A major change in ownership is a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed." Since a corporation, including a non-profit corporation is a separate entity from its officers and directors, what took place in 1997 was a true change in ownership of the application for Channel 205, a change that required University Foundation to file an amendment to its initial application. Any such major change in ownership is not permitted. Like that of FRI, this change in ownership was sudden, not gradual, resulting in a complete change of control from one corporation to another.

The *Letter Decision* rejected the State of Oregon's analogy of this case to that of FRI, but

in so doing missed the distinguishing factors that the Commission relied upon in the *Omnibus Order*. Waiver of rule 73.3573 is not only unwarranted when one entity attempts to "hijack" the application of an unrelated entity, but also, as the Commission pointed out in its statement of the alternative basis for its dismissal of FRI, because "Fatima, as currently constituted, is not the entity that originally filed the application for an NCE FM broadcast station at McCloud, California." The Commission then recited the undisputed facts that Fatima I was one corporation, that a new corporation had been formed "by filing new Articles of Incorporation and receiving a new registry number . . . from the Oregon Secretary of State," in order to "replace the original McCloud applicant." Under these circumstances, "the proper applicant," the Commission determined, would be Fatima I, which had "failed to file the required Section 1.65 amendments[.]" The Commission went on to explain that "under this fact pattern, even had ownership of Fatima I not changed by over 50 percent, Fatima I . . . has failed to prosecute its McCloud application. This too is grounds for dismissal. "*Omnibus Order* at 6128.

The relevant facts brought forward by the State of Oregon regarding the University Foundation's failure to file the required Section 1.65 amendments and failure to prosecute its original application are likewise grounds for dismissal of the application. In this case, as in FRI, a second entity was incorporated and put forward to replace the original "proper applicant." Nothing in Rule 1.65 or Rule 73.3573 limits the application of either rule to parties such as FRI who are involved in a power struggle.

Even the *Constellation Communications* decision[9] cited by the Commission (*Omnibus Order* at 6124, n.147) does not grant applicants the right to ignore these rules. That case, which

[9] 11 FCC Rcd 18502 (1996).

involved the Commission's cut-off rule for satellite applications, is distinguishable on several grounds. In the first place, Constellation Communications had applied for a waiver of the rule in question; secondly, the change in ownership was occasioned because some of the original corporations who held stock in the corporate applicant were acquired in the ordinary course of business by other corporations. These acquisitions, the Commission found, "involved Constellation shareholders with substantial lines of business apart from Constellation's proposed [satellite] business;" and, finally, Constellation's "technical violation" of Rule 1.65, had occurred for only "a very short period of time." *Constellation Communications* at 18513 - 15.

Here, in contrast, University Foundation, like Fatima, did not apply for a waiver of either rule 73.3573 or rule 1.65; the change in ownership evidenced in the 1997 assignment application involved only change in the ownership of what the *Letter Decision* terms "radio interests;" and, finally, University Foundation's violation of Rule 1.65 was hardly "technical," but rather involved an essential element of its application, a violation that has continued for nearly ten years, rather than a very short time. The most significant point of difference, of course, is the failure to request a waiver, as Constellation and most of the applicants with "gradual" and "routine" board changes have done, even though its change in ownership was sudden and involved a 100 percent change. Furthermore, like Fatima, the University Foundation failed to even notify the Commission of the change, as required of all applicants by Rule 1.65. The intentionally inaccurate assignment application filed in 1997 obviously did not serve as appropriate notice to the Commission since the facility was falsely identified in that Form 316 as a licensed station rather than as a Channel with a pending application, and because it did not, in fact, provide the needed notice, as evidenced by the failure of the Commission to note the change

in the identity of the applicant in its CDBS database. The latter fact – that the original applicant's name remained in the database – is not a "ministerial matter of no decisional consequence," as the *Letter Decision* claims but, rather, evidence of the success of University Foundation's deception. In addition, the Audio Division fails to cite a single previous case where the Commission has allowed such a 100 percent substitution of parties without disqualification of the applicant for a prohibited major change or to explain why University Foundation should not have been required to seek a waiver of rule 73.3573 and comply with rule 1.65.

As the D.C. Circuit held in *Alegria I, Inc. v. F.C.C.,*905 F. 2d 471, 474 (1990), "a simple invocation of 'the public interest,' without more, is an insufficient explanation for the FCC's failure to apply section 73.3471(j) [the AM equivalent of section 73.3573 at that time]. The agency is obliged to provide a more reasoned, less inscrutable basis for its actions [citations omitted]." As explained by the Chief of the Audio Services Division in *Sacred Heart University, et al.,* 6 FCC Rcd 4606 (1991), major change amendments to applications for new FM stations are considered "suicide" amendments, "since its acceptance would constitute a major change requiring the assignment of a new file number to the application and would result in the dismissal of the . . . application from the instant proceeding."

The *Letter Decision* disposes of the State of Oregon's arguments that the University Foundation and Research Foundation both engaged in false, deceptive, and misleading filings without any reasoned consideration. The only discussion with respect to allegations of misrepresentation is the offhand, but mistaken, discussion of use of the call sign in the Assignment application. Yet, as the *Alegria I* and *Sacred Heart University* cases both indicate, University Foundation had a powerful motive to deceive the Commission with respect to its

attempted assignment of an application for construction permit and its violation of Rules 73.3573 and 1.65. Let us suppose that, instead of including Channel 205, under the guise of KFPR(FM), University Foundation limited its August 1997 assignment application to its already-licensed facilities, and filed an amendment to its pending application changing the applicant from the University Foundation to the Research Foundation. Under Rule 73.3573, that would have been deemed a major change "suicide" amendment, resulting in either dismissal of the amendment, or the assignment of a new file number to the pending application, disqualifying University Foundation from the proceeding, which would have resulted in award of the construction permit to the State of Oregon, the only other applicant. Alternatively, of course, University Foundation could have sought a waiver of rule 73.3573, leaving one to wonder why it did not choose this route. Was it concerned that such a waiver would not be granted or did it already consider itself the licensee for Channel 205, regardless of D.C. Circuit decisions to the contrary?

The *Letter Decision* gives no consideration whatsoever to motives the University Foundation might have had for deceiving the Commission. Rather than discussing the longstanding rules 73.3573 and 1.65, and the Commission's consistent application of those rules in the past, the Audio Division has bent the rules by mischaracterizing the substitution of one party for another as an applicant as if it were simply a "routine" change in board members of the original University Foundation, with "no decisional significance." Yet, the decisional significance speaks for itself – not in whether or not the substituted Research Foundation could "pass" as the prior applicant and qualify for 3 points but, rather, because the substitution itself might have disqualified its application, permitting the State of Oregon to prevail.

The Commission's decision to grant waivers to applicants for "routine and inevitable

ownership changes over a substantial period of time during which the Commission was unable to act on NCE applications," is not at issue here. The issue, rather, is whether an intentional change of the party applicant while, at the same time, successfully disguising an application as a licensed facility, with no request for waiver and with a complete failure to notify the Commission about the change in violation of longstanding rules, is entitled to the same generous indulgence.

In connection with the recently-closed NCE application window, the full Commission sought to reassure potential NCE applicants that it would work diligently to protect the integrity of the NCE application process to prevent efforts to "game" the NCE application system through the use of undisclosed relationships between applicants and third parties. As the full Commission stated:

> We also acknowledge the concern expressed by some commenters about the potential for attempts to circumvent the [NCE] application limit. [footnote omitted]) We note that the Bureau retains the discretion to conduct investigations and, where there is a substantial and material question of fact regarding real parties in interest, the Commission will designate applications for hearing to determine whether the applications comply with the Commission's rules and policies.

See Public Notice, *FCC Adopts Limit For NCE FM New Station Applications in October 12 - October 19, 2007 Window*, MM Docket No. 95-31, (FCC-7-179) (Released October 10, 2007), Action by the full Commission (pages 4-5). The Commission and the Bureau staff would do well to apply that same vigilance to applications and applicants in cases that are being processed in the wake of the *Omnibus Order*. The obvious readiness of the Audio Division to brush aside or find an excuse for every substantial and material allegation regarding rule violations on the part of University Foundation and Research Foundation do not represent the kind of careful vigilance the Commission promises for the new applications. The State of Oregon requests a thorough reconsideration of the substantial and material questions of fact and law it has raised in

its Petition to Deny and in this Petition for Reconsideration regarding serious and disqualifying rule violations on the part of University Foundation and Research Foundation, as well as a pattern of misinformation, deception, and lack of candor on the part of both the former and new applicants. Among these allegations are:

1. Inconsistencies between the Foundation's representations to the Commission and the documented material from the California Secretary of State's files (*Petition to Deny* at 9 - 10).

2. Misrepresentations and lack of candor in the University Point Supplement and the explicit false certification that the Research Foundation is the same entity as the University Foundation (*Petition to Deny* at 11 - 17).

3. Misrepresentations and lack of candor in the 1997 Foundation Assignment Application (*Petition to Deny* at 17 - 20).

The Audio Division has excused the Foundation's false certifications as "inadvertent" and "of no decisional consequence" because the staff did not award local applicant points to either applicant. This characterization misses the point. The false certification goes beyond qualifications for three points as an established local applicant.[10] The real significance lies in pretending that there had been no change, that Research Foundation was the same entity as University Foundation and, thus, avoiding dismissal of the entire application for violation of sections 73.3573 and 1.65 of the Commission's rules. The staff fails to explain why no legal penalty is associated with efforts by both Foundations to mislead the Commission into believing they were the same entity and no major change had taken place. Staff has put forward a novel and legally unjustified conclusion that, simply because these misrepresentations were so numerous and so obvious, that any intent to deceive is obviated. Over and over, one or the other Foundation claims inadvertence or

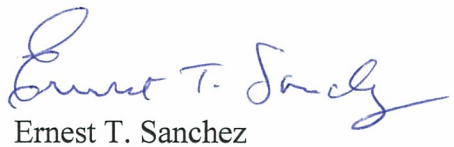
[10] The staff fails to explain, however, why the lack of success of any particular misrepresentation should render the deception itself forgivable.

insignificance in defense of a misrepresentation and the staff accepts it, which seems overly indulgent in a paper proceeding without the benefit of discovery, testimony under oath, cross examination, follow up questions, or any opportunity for a fact finder to evaluate credibility of witnesses. The Audio Division's willingness to assume that Foundation's numerous factual misstatements, errors and mischaracterizations were all honest mistakes is the essence of arbitrary and capricious decision making in this matter.

Conclusion.

For the reasons set forth in the *Petition to Deny*, the original *Petition for Reconsideration* attached as Exhibit 1 (*April Submission)*, and this *Petition for Reconsideration*, and in the supporting documentation that provide clear support for allegations of deception, lack of candor, and abuse of FCC process brought forward, the State of Oregon urges the Commission, pursuant to the standards of section 309(d) of the Communications Act, 47 U.S.C. Section 309(d), to dismiss the application for Channel 205 at Redding, CA filed by the University Foundation in 1988. The State of Oregon urges the Commission to reconsider the stated basis and rationale for its tentative selection of Research Foundation's application and the Audio Division's *Letter Decision* which erroneously granted that application. The State of Oregon also urges the Commission to reconsider its impermissible retroactive application of the new Point System rules in the context of a specific remand of this case by the D.C. Circuit.

Respectfully submitted,



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Dated: November 8, 2007

Certificate of Service

I, the undersigned Susan M. Jenkins, certify that on this 8th day of November, 2007, I caused a copy of the foregoing Petition for Reconsideration, filed by the State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University, to be served upon the following persons, by mailing a copy, via the United States Postal Service, first-class mail, to the following person or persons at the indicated last known address for said person.

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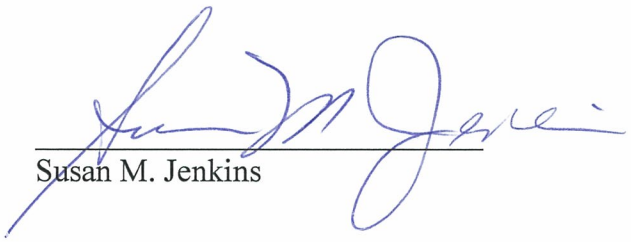

Susan M. Jenkins

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations	)	
and	)	
Application of the State of Oregon, Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University, for Permit to Construct a New NCE Station at Redding, CA	)	NCE MX Group 880611 File No. BPED-1990129MH

Petition for Reconsideration

State of Oregon, Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon University

By Its Attorneys:

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Filed: April 26, 2007

Summary

The State of Oregon, Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon University, by its attorneys, has filed a Petition for Reconsideration of the Commission's decision, in its recent Order, *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations.*[1] That decision is impermissibly premised upon the retroactive application of administrative rules in Subpart K of Part 73 of the Commission's rules in this proceeding with respect to Group 880611, without specific statutory authorization for such retroactive application, in violation of section 706 of the Administrative Procedure Act and, for this reason, must be vacated and a new determination made on the basis of the appropriate comparative standards. Application of these rules to Group 880611 is impermissibly retroactive because the Commission is subject to a 1996 remand order of the U.S. Court of Appeals for the D.C. Circuit to evaluate the applications in this Group in accordance with the comparative standards applicable at the time of their original applications.

In the alternative, and without waiving its rights to assert the above argument with respect to retroactive application, the State of Oregon also urges reconsideration of its application on the basis of the Commission's failure in the above-captioned Order to credit it with three points as an established local applicant under Rule 73.7003(b). Under the Commission's ruling, the State of Oregon cannot meet the standards for credit as an established local applicant under the Commission's point system for NCE applicants when it applies for frequencies in communities outside its area of jurisdiction. The State of Oregon argues that nothing in the plain language of

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[1] FCC 07 - 40, ____ FCC Rcd ____ (March 27, 2007 (hereafter, *Omnibus MX/NCE Order"*).

the rule, or its extensive regulatory and appellate history, permits the Commission to adopt this latter-day, *post hoc*, rationale for denying Oregon this credit, which is premised solely on its status as a state government NCE applicant. It is arbitrary and capricious, and an abuse of discretion, for the Commission to discriminate against governments who apply for NCE stations outside the government's area of jurisdiction, where, as here, the state government entity otherwise meets the test for local applicant status.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations	)	
and		
Application of the State of Oregon, Acting by through the State Board of Higher Education for the Benefit of Southern Oregon University, for a Permit to Construct a New NCE FM Station at Redding, CA	)	NCE MX Group: 880611 File No. BPED-19900129MH

Petition for Reconsideration

The State of Oregon, Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University (hereafter, "State of Oregon"), by its attorneys, respectfully submits this Petition for Reconsideration with respect to the Commission's rejection, in MX Group 880611, of the application of the State of Oregon for a construction permit for Channel 205 (File No. BPED-19900129MH). Within that Group, the application of an entity called "Research Foundation, California State University, Chico" (File No. BPED-19880610ML) ("Foundation") was chosen as tentative selectee, as set forth in the Commission's Memorandum Opinion and Order in *Comparative Consideration of 76 Groups of Mutually-Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM*

Stations.[1] The State of Oregon specifically seeks reconsideration of the following numbered paragraphs of that *Order:* ¶¶ 6 - 7 and 21 [discussion of applicability of 307(b) fair distribution of service criteria], 35 through 36, 71 - 72, and 209.[2] Specifically, the State of Oregon seeks reconsideration of the Commission's retroactive application of sections 73.7000 through 73.70005 of the Rules[3] to its application. On alternative grounds, the State of Oregon seeks reconsideration of the Commission's rejection of the State of Oregon's claim for three points as an established local applicant under FCC Rules 73.7000 and 73.7003(b)(1).[4]

I. Subpart K of Part 73 of the Commission's Rules Was Impermissibly Applied Retroactively to the State of Oregon's Application for a Construction Permit in the Commission's Determination with Respect to the Redding I Group

In the *Omnibus MX/NCE Order,* the Commission rejected the State of Oregon's application (File No.19900129MH) for a Construction Permit for Channel 213 in Redding, CA, and granted Foundation's application for that Channel (File No. BPED-19880610ML). This determination was made by an analysis of the two applications under the provisions of Subpart K

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[1]Memorandum Opinion and Order, FCC 07-40, _____ FCC 2nd _____ (Released March 27, 2007) (hereafter, *"Omnibus MX/NCE Order").*

[2] *Omnibus MX/NCE Order, _____ FCC Rcd* at _____, ¶¶ 6 - 7, 21, 35 - 36, 71 - 72, and 209. For convenience and ease of identification, the State of Oregon will refer hereinafter to the Commission's decision with respect to Group 880611 as "Redding I."

[3] 47 C.F.R. §§ 73.7000 - 73.7005.

[4] The State of Oregon is also filing a separate Petition to Deny against "Foundation" as the tentative selectee on the grounds that the Research Foundation that filed a Form 340 Supplement on July 19, 2001 appears to be an entirely different entity from the University Foundation that filed the original application for a construction permit in this proceeding. The State of Oregon also alleges in that Petition to Deny that the "Foundation" entity failed to disclose numerous radio authorizations and applications that are attributable to it for purposes of the tie-breakers under the definition of *attributable interest* in Rule 73.7000, Rule 73.7003(c), and Rule 73.3555, 47 C.F.R. §§ 73.3555, 73.7000, and 73.7003(c).

of Part 73 of the Commission's rules, specifically sections 73.7000 through 73.7003.[5]

This Petition seeks reconsideration of this determination on the grounds that the Commission impermissibly applied the rules in Subpart K, which were enacted in 2001, to the still- pending Redding I applications. In doing so, the Commission failed to conduct the traditional fair distribution analysis required under section 307(b) of the Communications Act of1934 to those competing applications.[6] Rather, basing its determination on the the test for NCE applicants set forth in Rule 73.7002 (applied to groups of mutually-exclusive NCE applicants who propose to serve different communities),[7] the Commission failed to perform any § 307(b) analysis of these applications. Instead, the Commission proceeded to the other "point system" criteria, set forth in Rule 73.7003, for its evaluation of the applications in this Group.

Both the Commission's use of Rule 73.7002 to avoid applying the statutory fair distribution test to these applications, as well as its application of the new point system in section 73.7003 instead of the comparative standards in use when these were originally filed, constitute an impermissibly retroactive application of the new rules to these applications. Group 880611 is unique among all the mutually-exclusive groups that have been consolidated in this proceeding in that, with respect to this one group, the Commission was under a 1996 remand order of the U.S. Court of Appeals for the D.C. Circuit to evaluate the two applications under the

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[5] *Id.*, ¶¶ 32-36, 71 - 72, 209. Pursuant to the Commission's instructions, the Media Bureau staff issues public notice of Foundation as the tentative selectee in Group 880611 on March 28, 2007.

[6] 47 U.S.C. § 307(b).

[7] 47 C.F.R. § 73.7002(a).

comparative criteria that existed before the NCE application freeze in April 2000.[8] As a direct result of the Commission's complete disregard of the remand order of the D.C. Circuit in *State of Oregon v. FCC,*[9] this nearly twenty-year old Group finds itself one of 76 mutually-exclusive groups consolidated in the *Omnibus MX/NCE Order.* That remand order, however, makes this Group's status unique among all the other NCE applicants and Groups consolidated and considered in that *Omnibus MX/NCE Order.*

Had the Commission acted in a timely fashion in response to the D.C. Circuit Court's remand order, application of the either or both the statutory fair distribution standard and/or the then-existing comparative standards would have resulted in the award of the Channel 205 to the State of Oregon long before the NCE freeze went into effect. The State of Oregon urges the Commission to reconsider its erroneous application of Subpart K to this MX Group and, in so doing, select the Oregon application as the superior applicant under the Commission's previously-applicable rules and comparative criteria.

A. The Commission Ignored the D.C. Circuit's Remand Order With Respect to the Application of the State of Oregon in the Redding I Proceeding.

The history of the two applications in MX Group 880611 spans almost twenty years. As is evident from the application numbers, Foundation filed its application in June 1988. The Oregon competing application, filed in January 1999, was initially dismissed by the Commission as untimely. In 1996, after many years of litigation within the Commission and in the U.S. Court

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[8] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* Report and Order, 15 FCC Rcd 7386, 7437 (2000), *vacated in part on other grounds sub nom., National Public Radio, et al., v. FCC,* 254 F 3d 226 (D.C. Cir. 2001) (hereafter, "*NCE Order*").

[9] 102 F. 3d 583 (D.C. Cir. 1996).

of Appeals for the District of Columbia Circuit,[10] the D.C. Circuit reinstated Oregon's application, stating:

> The FCC acted arbitrarily and capriciously by rejecting Oregon's application as untimely without having provided clear notice of the filing deadline. Therefore, we vacate the Commission's order dismissing Oregon's application and remand this case to the agency for further proceedings consistent with the foregoing opinion.[11]

Unfortunately, the Commission delayed taking action in response to this remand, and failed to resolve the two mutually exclusive applications. This should have been done within a reasonable time period under the comparative criteria which were in effect at the time of the applications for choosing between competing NCE applicants.[12] However, the Commission never designated the applications for hearing, and months and then years passed. In April 2000, in the first *NCE Order,* the Commission announced a freeze on new NCE applications while it considered how it would choose between competing NCE applicants .[13] That *Order* also set forth the Commission's new proposed point-based system for new NCE applications.

The next year, when the first set of mutually-exclusive NCE Groups to which the new point-based system would be applied was announced, the State of Oregon was surprised and frustrated to find itself listed in MX Group 880611 with Foundation. Then, in 2004, the U.S. Court of Appeals substantially upheld the new point-based criteria against a variety of legal

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[10] *See State of Oregon v. FCC,* 102 F.3d at 584 - 585 for a summary of the procedural history of this application.

[11] *Id.,* at 587..

[12] *See Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992).

[13] *NCE Order*, 15 FCC Rcd at 7437.

challenges, including those raised by the State of Oregon, to the proposed rules as written.[14] Even to the present day, the FCC's efforts to fashion those standards continue, with the full Commission scheduled to rule on reconsideration motions related to the new NCE standards on April 25, 2007, which has now been postponed indefinitely.[15]

For nearly eleven years, the Commission ignored that remand order, after having awarded the construction permit to Foundation while the State of Oregon's appeal to the D.C. Circuit was pending. It then subjected the State of Oregon's application to the NCE freeze and, abandoning the former comparative standards, embarked on the new points-based system, ultimately grouping this proceeding with other pending mutually-exclusive NCE proceedings. None of those other pending proceedings, however, was subject to a pending appellate court remand order.

Each of these actions by the Commission violated the Court's remand order, which required the Commission to conduct further proceedings consistent with the Court's opinion.[16] That is, the Court ordered the Commission to reinstate Oregon's application to the same status as that of Foundation, and to proceed thereafter to conduct the comparative analysis to which Oregon was entitled under the then-existing rules and standards.

The Commission failed to do as the Court ordered. The two mutually-exclusive applications were never designated for hearing, Oregon never received an opportunity to

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[14] *American Family Association v. FCC,* 365 F. 3rd 1156 (2004).

[15] *See* FCC Meeting Notice (April 19, 2007); *see also* FCC Meeting Notice (April 25, 2007).

[16] *State of Oregon v. FCC,* 102 F.3d at 586.

demonstrate the superiority of its application under the then-existing test for fair distribution of service, and Foundation – which had been allowed to construct and operate the station while the State of Oregon sought remand on appeal to the D.C. Circuit – was permitted to continue to operate the Redding facility, as if it had legitimately been awarded the construction permit and license.

The Commission's decision on March 26, 2007 with respect to the Redding I applications in the *Omnibus MX/NCE Order* continues this agency's disregard of the remand order in the guise now of applying the new "point-based system" rules. It does so in a manner that, in effect, "ratifies" the Commission's previous, improper, dismissal of Oregon's application. Having unreasonably delayed and, in fact, unlawfully withheld the action required by the remand order, the Commission has now retroactively relied upon the more limited applicability of the "new" NCE fair distribution test to disqualify the State of Oregon's application from consideration under the statutory fair distribution standard. Furthermore, the Commission has now also applied the new points system retroactively to Oregon's and Foundation's applications, including both the "established local applicant" test of Rule 73.7003((b)(1), and the so-called "tie-breaker mechanism"of 73.7003(c). Each of these new rules differs significantly from the comparative standards that would have been applied had the Commission obeyed the Court's remand order. The application of these rules retroactively to the Redding I applicants is impermissible under leading Supreme Court precedent, as will be discussed below.

During the many years post-remand while the State of Oregon's application was held in limbo, the Commission gave no notice, until 2001, that the it would retroactively impose new selection criteria – criteria that had not yet even been developed – on these applications, or that

it would continue to hold the applications, which have now been pending for almost two decades, until new criteria could be developed.. In 2001, when the Commission asked all pending NCE applicants to file a 340 supplement form to provide information relevant to the new comparative point system,[17] Oregon provided the requested information under formal protest, while specifically reserving its original rights with respect to this long-pending proceeding, and the information was accepted for filing without objection.

Until that time, the State of Oregon had no notice that the competing Redding I applications would be judged by the Commission on any basis other than the comparative criteria which were in effect at the time the applications were filed, nor did Oregon at any time consent to accepting the new point system as a proper method for choosing between the competing applications subject to that remand. It filed its 340 Supplement, as it had no choice but to do, while its petition for review of those rules was still pending before the D.C. Circuit in the *AFA v. FCC* proceeding.

B. The Commission May Not Retroactively Impose New NCE Selection Criteria on MX Group 880611

The U.S. Supreme Court has stated clearly that administrative agencies face a high legal burden when they try to apply rules retroactively. In *Bowen v. Georgetown University Hospital*,[18] a unanimous Supreme Court ruled decisively:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E. g., Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge*

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[17] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* Memorandum Opinion and Order, 16 FCC Rcd 5074 (*"MO&O"*).

[18] 499 U.S. 204, 209 (1988).

Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 -163 (1928). By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *See Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

In his concurring opinion, Justice Scalia clarified the Constitutional and administrative law issues involved when an agency applies a rule retroactively:

> The issue here is not constitutionality, but rather whether there is any good reason to doubt that the APA means what it says. For purposes of resolving that question, it does not at all follow that, since Congress itself possesses the power retroactively to change its laws, it must have meant agencies to possess the power retroactively to change their regulations. Retroactive legislation has always been looked upon with disfavor, *see* Smead, "The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence," 20 Minn. L. Rev. 775 (1936); 2 J. Story, Commentaries on the Constitution of the United States 1398, p. 272 (5th ed. 1891), and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation, *see Pension Benefit Guaranty Corp., supra*, at 730; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 -17 (1976). It is entirely unsurprising, therefore, that even though Congress wields such a power itself, it has been unwilling to confer it upon the agencies. Given the traditional attitude towards retroactive legislation, the regime established by the APA is an entirely reasonable one: Where quasi-legislative action is required, an agency cannot act with retroactive effect without some special congressional authorization. That is what the APA says, and there is no reason to think Congress did not mean it.[19]

More recently, in *Landgraf v. USI Film Products*, the Supreme Court again strongly reaffirmed the general impermissibility of retroactive application of administrative rules: "As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted

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[19] *Bowen v. Georgetown University Hospital,* 488 U.S. at 223-224.

in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[20] The Court went on to explain that

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted [footnote omitted]. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' *Kaiser,* 494 U.S., at 855 (Scalia, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.[21]

The Commission has pointed to no statutory provision which would permit it to apply these new point-system standards retroactively to a mutually-exclusive NCE group that was subject to a pending federal appellate court remand order premised upon the former rules. In the Balanced Budget Act of 1997, Congress amended the Communications Act of 1934 to expand the FCC's authority to use auctions as a means of allocating non-reserved channels of the

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[20] 511 U.S. 244 (1994), citing, *Kaiser Aluminum & Chemical Corp. v. Bonjourno*, 494 U.S. 827, 842 -844, 855-856 (1990) (Scalia, J., concurring). *See also, e.g., Dash v. Van Kleeck*, 7 Johns. *477, *503 (N. Y. 1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C.J.); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 *Minn.L.Rev.* 775 (1936).

[21] *Id.,* at 265, *citing General Motors Corp. v. Romein*, (slip op., at 9) (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, A Theory of Retroactive Legislation, 61 *Texas L.Rev.* 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, *The Morality of Law* 51-62 (1964) (hereinafter Fuller).

broadcast spectrum.[22] Section 3002(a) of that Act, entitled "Extension and Expansion of Auction Authority," amended 47 U.S.C. §309(j) to permit the Commission to allocate the non-reserved band through auctions among commercial applicants.[23] This amendment of section 309, however, did not authorize the FCC to take any particular action with respect to NCE applicants, which were specifically exempted from the authority granted by subsection (j).[24] Congress took no action that would authorize the Commission to develop new NCE standards that could be applied retroactively, particularly to a group that had already begun the process under the old rules and had been remanded by the Court of Appeals to continue along that path under the former rules and procedures.

It is abundantly clear from a reading of the Court's opinion in *State of Oregon v. FCC* that the D.C. Circuit assumed, as did the State of Oregon, that, upon remand, the Commission would conduct the type of "comparative hearing" required "whenever there are before it mutually-exclusive applications," as required under *Ashbacker Radio Corp. v. FCC.*[25]

The Court also expected the Commission to act with relative promptness in response to its order, as can be seen in its approving quote from *McElroy Electronics Corp. v. FCC,*[26] that "the purpose of these rules [the cutoff A and B rules formerly governing applications] is to attract

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[22] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (August 5, 1997).

[23] *See NPR v. FCC*, 254 F3d 226 (D.C. Cir. 2001).

[24] *Id., at* _____.

[25] *State of Oregon v. FCC,* 102 F.3d at 583, *citing Ashbacker Radio Corp. V. FCC,* 326 U.S. 327 (1945).

[26] 86 F3d 248, 2253 (DC Cir 1996).

all competitive applications . . . within a fixed and reasonably short time frame, allowing the Commission to satisfy its *Ashbacker* obligations with a single, fairly prompt hearing." That "single, fairly prompt hearing," that "comparative hearing," is what the remand ordered the Commission to provide for the State of Oregon and Foundation, but that is not what the Commission did in response to the order. Instead, it put these applications on a bureaucratic back shelf for five years, while allowing Foundation to operate the station.

These applications next saw the light of day when, in violation of the remand order, they were denied a comparative hearing under the *Ashbacker* rules when this Group was added to the list of mutually-exclusive MX groups and required to file Form 340 Supplements in 2001. That requirement, and the subsequent application of the point-based system to this Group, not only violates the 1996 remand order but does so by impermissibly applying the new point system rules retroactively.

C. The *Omnibus MX/NCE Order* Fails to Address the Mandatory 307(b) Analysis Which the Commission Was Required to Undertake in Connection with the Mutually Exclusive Applications of Foundation and Oregon.

Section 307(b) of the Communications Act directs the Commission to do the following with respect to applications for licenses: "[i]n considering applications for licenses . . . , when and insofar as there is demand for the same, the Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same."[27] When the Commission adopted Rule 73.7002, it fashioned a variation of 307(b) analysis that, in accordance with the new rule, it is applies as a threshold issue only when the mutually-exclusive applications will serve different

[27] 47 U.S.C. § 307(b).

communities.[28] In such situations, a decisive preference on this threshold issue obviates the need to move on to a points comparison of the applicants.

However, as the Commission pointed out in paragraph 21 of the *Omnibus MX/NCE Order*, this threshold determination will not be and was not applied to any groups where "all applicants within a group either proposed to serve the same community, certified that they are not eligible for Section 307(b) consideration, or would serve similarly-sized populations."[29] Group MX 880611 was not among the groups considered under this threshold standard, even though the State of Oregon had indeed certified that it was eligible for such consideration and would have been entitled to win on this threshold determination had it been applied.[30] Application of the more narrow standard created by Rule 73.7002, rather than the standard in effect at the time of the State of Oregon's original application, constitutes an inpermissible retroactive application of the new rule to Oregon's disadvantage.

D. The Commission's Application of the Point-System Criteria, Including the Tie-Breaker Mechanism, to the Applicants in Group 880611 Is Also an Impermissible Retroactive Application of these New Rules Without Statutory Authority

As the Supreme Court explained in the *Landgraf* decision discussed above, the reason administrative agencies are not permitted to apply rules retroactively without express Congressional authorization involves the fundamental unfairness of unsettling the reasonable expectations of the parties appearing before the agency. The State of Oregon, when it filed its application in the Redding I proceeding, had certain expectations of what was required to prevail

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[28] 47 U.S.C. §73.7002; *Omnibus MX/NCE Order* at ¶¶ 6 - 7, 21.

[29] *Id.*, at ¶ 21.

[30] Oregon's 340 Supplement certified that its application would provide first service.

in a comparative hearing. It had no way of knowing what rules the Commission might develop, more than 12 year later, for future NCE applicants. If, as the Court reasoned in *Landgraf,* "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" and "settled expectations should not be lightly disrupted," it is indisputable that the retroactive application of these rules unfairly and unreasonably disadvantaged the State of Oregon, which expected that "the legal effect of conduct" would be "assessed under the law that existed when the conduct took place."[31] No "established local applicant" standard existed in 1989 (or, indeed, at the time of the remand in 1996). No "tie-breaker mechanisms" existed; if the merits of two applicants were essentially "tied" under the comparative standards in 1989 (or 1996), they either settled with each other or were required to "share" the frequency on some basis.[32]

The impermissible retroactive application of the new point-system retroactively to the State of Oregon's application has deprived it of the opportunity it previously enjoyed to either prevail in the comparative hearing in which it and the D.C. Circuit originally expected to participate or, at least, reach a tie that would have made it eligible to share the Redding I frequency with Foundation. For the Commission to apply these rules retroactively in this case was arbitrary and capricious, and in excess of the Commission's authority, since no Congressional authority existed for the retroactive application of these rules. For these reasons,

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[31] *Landgraf*, 511 U.S. at 265.

[32] *See, e.g., Applications of Maricopa County Community College District and Arizona Board of Regents for Arizona State University.*, 5 FCC Rcd.7614 (Review Board 1990); *see also* the further decision in that same proceeding at 6 FCC Rcd.953 (Rev. Board, 1991).

the Commission should reconsider its retroactive application of the new point-system rules to the applicants in this Group in the *Omnibus MX/NCE Order*, and comply with the D.C. Circuit's still-pending remand order in this proceeding.

II. Alternatively, the State of Oregon Argues that It Is Entitled to Credit as an Established Local Applicant, Outside Its Area of Jurisdiction, on the Same Basis as Non-governmental NCE Applicants

Although the State of Oregon maintains that the new point-system rules should not have been applied retroactively to the applicants in Group 880611 that were subject to the Court's remand order (Redding I) and does not waive that argument regarding retroactive application, the State of Oregon seeks, in the alternative, reconsideration of the Commissions ruling with respect to the manner in which the Commission applied the "established local applicant" criterion of Rule 73.7003(b) to Oregon's applications in this proceeding. In what Oregon maintains is a misapplication of the rule in a way that unduly and arbitrarily discriminates against the State of Oregon and government NCE applicants, the Commission failed to award the State of Oregon the three points credit to which it was entitled as an established local applicant. As stated above, this argument with respect to the established local applicant criterion is made in the alternative, without waiving the State of Oregon's primary position that all new rules in Subpart K were impermissibly applied retroactively in this proceeding.

A. The Application of the State of Oregon in Group 880611 Would Be Entitled to Three Points as an Established Local Applicant

In the Form 340 Supplements to its applications for Channel 205 in Redding I, the State of Oregon claimed entitlement to three points as an Established Local Applicant. The State of Oregon's claim to these points, in both applications, was not based on its status "as a state

government within its area of jurisdiction, " which is one of the two alternative routes provided by Rules 73.7000 and 73.(7003(b)(1) to qualify under this criterion. Rather, Oregon stated its qualifications as an established local applicant on the same basis as any other applicant might, in that Redding, California, since 1994, has been the local headquarters of Jefferson Public Radio ("JPR"), the NCE radio network that operates the stations licensed for the benefit of Southern Oregon University.

As set forth in an Exhibit headed "Section IV, Question 1," the 340 Supplement application to File No. 19900129MH explains that JPR's headquarters, located at 1721 Market Street, Redding, CA., houses studios and a full-service broadcasting operation, and that the allied performing arts facility purchased by JPR in downtown Redding is being renovated to house offices as well as studios.[33] Exhibits, including the local telephone and address listings and a map with the reference coordinates for the office and arts center, were provided with the 340 Supplement to support this claim. The application also contained a certification that these headquarters would be maintained in Redding, CA for at least the four-year period after the license was granted, as required by the rules.

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[33]Specifically, the facilities and offices established for broadcast operations by JPR for Southern Oregon University in Redding, CA include two control rooms, one studio, three offices, a record library and a resident staff of paid and volunteer broadcasters, as well as an extensive network of microwave and leased circuit connections which have allowed daily live broadcasts from JPR's Redding location for well over a decade. Prior to 1999, the location was two blocks north at 1326 Market Street. The offices and areas associated with the Cascade Theatre, 1731 Market Street, in addition to the just-described radio headquarters facilities, includes the 1000-seat Cascade Theatre, a performing arts center which the State of Oregon owns and operates. The State of Oregon purchased the building, the 1935 art deco Cascade Theatre, in 1999, completely renovated it, and re-opened the facility in 2004 for general community use.

If this application belonged to any type of NCE entity other than a state government, these headquarters would more than meet the criteria set forth in Rules 73.7000 and 73.7003, and would have resulted in an award of three points to the applicant, which would consequently have been named the tentative selectee. But because the licensee for JPR stations, operated for the benefit of Southern Oregon University, is the State itself, the Commission has applied the rules unfairly in a way that disadvantages governmental entities outside their areas of jurisdiction. This application of the established local applicant rules ignores the plain language of the rules, is contrary to the Commission's prior explanation of how the rule would be applied, and unfairly discriminates against government entities as a class of NCE applicant. In this instance, the rule has been applied in an arbitrary and capricious manner.

B. The Plain Language of the Rule Provides for Application to Government Entities Qualifying as Local Applicants Outside Their Area of Jurisdiction.

Rule 73.7000 defines a "local applicant" as

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

Two categories of "local applicants" are created by this rule. The first category consists of applicants who can meet the first set of criteria – that is, being physically headquartered, having a campus, or having 25% of its board members resident within 25 miles of the reference coordinates. The second category consists of government entities who are applying for stations in communities within their respective areas of jurisdiction. These categories do not, on their face, or by their plain language used in the rule, disqualify a government entity that applies

outside its area of jurisdiction. Although government units are considered "local" throughout the area of jurisdiction, nothing in this rule compels that they may be considered "local" ***only*** within that same area. Nothing in the rule's plain language excludes applicants who are state governments from meeting the first set of criteria. The plain language uses the unadorned term "an applicant" with respect to the first set of criteria. There is no listed category limited to "non-government applicants" or " private NCE applicants."

Furthermore, nothing in the Commission's administration of these criteria before this ruling in the *Omnibus MX.NCE Order*, supports an interpretation that government units will not be accorded local applicant status if they apply outside their areas of jurisdiction. As the Commission is well aware, a large number of NCE licensees are city or state government entities.[34] Numerous application forms require an applicant to indicate which type of NCE entity it is. Section II, Question 2 of Form 340 offers three choices: "a. a non-profit educational institution," "b. a governmental entity other than a school," or "c. a nonprofit educational organization, other than described in a. or b." Each of these NCE entities is termed simply "an applicant."

Likewise, Worksheet #4 to the Form 340 Supplement, which assists applicants in responding to questions regarding their point status, offers applicants four choices: "local campus," "local headquarters," "local governing board," or "government entity within own

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[34] The history of public broadcasting demonstrates that educational institutions, including many prominent government universities and school boards, were pioneers in NCE broadcasting and among the first pioneers in the radio. WHA in Madison, WI, licensed to University of Wisconsin, is among the first AM stations licensed. The Chicago Board of Education was granted an FM license for WBEZ in 1939. It seems unfortunate for the Commission to now attempt to disadvantage government-owned educational entities who wish to continue this tradition.

jurisdiction." A government entity outside its own jurisdiction would necessarily have to pick one of the first three choices, and the instructions do not indicate that it may not do so.

The Worksheet, moreover, specifically defines the term "headquarters" as the applicant's "primary place of business." However, none of the principal ***governmental*** responsibilities of government entities, such as maintaining a state government in all its variety of tasks and responsibilities, administering a state university, or running a local public school board, could or should be termed "business." Thus, the entity's principal location for administration of these responsibilities and roles is not relevant to its primary place of business as a broadcaster. Rather, for government entities, the broadcast operation is separate from legislating, governing, administering a bureaucracy. The primary place of operations for Southern Oregon University is not Salem, but Ashland. But for its broadcast operations, Southern Oregon University has established a headquarters in Redding, California.

Remarkably, in the *Omnibus MX/NCE Order*, the Commission claims that "[t]he concept of 'headquarters' is not one that the Commission anticipated applying to state governments."[35] The Commission's failure to contemplate the possibility that governmental entities could operate radio stations outside their area of jurisdiction (even though many government licensees do just that) at the rulemaking stage should not now, when the rules are first being applied, be construed to justify disadvantaging an entire class of applicants. If the Commission has not previously considered the issue, any gloss it might put on the question now is merely *ad hoc*, without any principled basis, and thus not only arbitrary and capricious but an abuse of the Commission's

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[35] *Omnibus MX/NCE Order* at ¶¶ 36, 79. In ¶ 79, the Commission referenced its treatment of the established local applicant issue in its consideration of the State of Oregon's application in Group 880611 ("Redding I"), ¶¶ 35 - 37. The quoted language is at ¶ 36.

discretion. If the Commission never even considered the issue at the rulemaking stage, how can it reasonably say, "but, of course, it doesn't apply to state governments," the first time the credit is claimed by a state government outside its area of jurisdiction? This is a clear violation of Section 706 of the Administrative Procedure Act.[36]

Nothing in the language or history of this rule gives any hint that an NCE licensee or applicant that is also a government entity cannot establish a primary place of business for its radio or television broadcast operations that is outside of the state capital.[37] Nowhere in the considerable and extensive amount of written material generated by these rules over the past seven years has the Commission ever once indicated that government NCE applicants could not qualify under the "local headquarters" criterion when the application was outside of the area of jurisdiction.

In fact, the contrary is true – the Commission has consistently taken the position that all applicants may qualify under the one or more of the criteria listed in the first local applicant option, but only governmental entities within their own jurisdiction could qualify under the second option. In the first *NCE Order,* the Commission provided an example of how the local applicant criteria would be applied:

> Governments [it explained] would be local throughout the area within which their authority extends. For example, the New York State government would be considered local throughout New York State, including New York City, but the New York City Board of Education would be local only in New York City (or within 25 miles from the

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[36]5 U.S.C § 706.

[37]Should the Main Studio Rule, 73.3527, require state governments to establish their broadcast studios and offices in the state capital, or would a waiver of that rule be necessary if a station in southern Oregon wanted to establish its main studio in Salem?

reference coordinates of the proposed community of license).[38]

The message of this explanation is clear: if a government entity applies for a station in a community outside of its area of jurisdiction, it will not enjoy the automatic advantage of being local throughout its jurisdiction but will be have to qualify under the other set of criteria for localism. This understanding is reinforced by the discussion in the *NCE Order* that immediately preceded this example. The Commission first noted, in Comments filed by NPR, that NPR defined "local" with respect to state governments as being "located within the same state or a bordering state." Without reacting either affirmatively or negatively to NPR's proposal, the Commission then went on to indicate that it would utilize a definition derived from the standards formerly used for ITFS applicants, "as modified in response to commenter suggestions."

The New York State/New York City example immediately followed this discussion, which implies in that context that the Commission was taking NPR's suggestion into account.[39] The example provides a bridge that credits NPR's proposal without adopting it completely. The resulting apparent compromise is that a government entity, even if it is not automatically local outside its jurisdiction, as NPR proposed, it may still qualify as local if it meets one of the criteria that non-governmental entities must meet. That is, a state or city may enjoy an advantage within its own borders, but once it applies outside those borders, it is treated just like any other applicant.

Or so it seemed up until the *Omnibus MX/NCE Order* was released last month. Now, in

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[38] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7409-10 (2000)("*NCE Order*") at ¶ 54 .

[39] *Id.*.

that order, the first time the local applicant criteria are applied to a state outside its area of jurisdiction, the Commission reveals that, as applied, the rule heavily disadvantages government entities and may, in fact, eliminate them from qualifying as local outside their areas of jurisdiction.

Thus, although the local applicant criteria has been expressed and understood as permitting states to qualify as local outside their borders, the rule as now applied results in a situation where governmental entities that seek to qualify on the same basis as private entities are actually disadvantaged and burdened by the fact that it is a state or local government. In applying the local applicant criteria to Oregon, the Commission has turned the first part of the test into a *disqualifying* factor when the applicant is a state government. Your headquarters, the Commission says, without principled support for looking to the governmental function, rather than the broadcast function, is Salem. How could you possibly ever qualify as a local applicant anywhere beyond the state line?

The possibility of a local headquarters having been established in Redding 13 years ago is similarly dismissed, by the offhand statement that "[a]n applicant is ***generally*** considered to have only one headquarters"(emphasis added).[40] The Commission's only reference for this statement is that "headquarters" in this context is the applicant's primary place of business. When, however, the government entity applies for a broadcast facility, its "place of business" is not the necessarily in the state's capital city (unless the station is there also) but, rather, the location where the business of broadcasting takes place.

Just as the primary place of business of General Electric is not the primary place of

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[40] *Omnibus MX/NCE Order*, at 36.

business of its subsidiary NBC,[41] the primary seat of government of the State of Oregon is not necessarily, or even generally, the place where it does business as a noncommercial educational broadcaster. The Commission has arbitrarily and capriciously eliminated government entities from qualifying as local applicants outside their area of jurisdiction, regardless of the specific circumstances in any one case, by an admittedly-generalized, unconsidered, and unsupported post-hoc rationale. The Commission should reconsider its flawed application of this rule to government entities in general and to the State of Oregon's application for this Redding frequency in particular. Nothing in these rules, or their extensive regulatory history, justifies applying the rules in this manner, and to do so is both arbitrary and capricious and an abuse of the Commission's discretion to interpret and apply its own rules.

C. The Regulatory History, the Opinion of the D.C. Circuit, and the Commission's Own Advocacy for These Rules Bars the Interpretation of Rule 73.7003(b) that the Commission Now Advances.

The language quoted above from the first *NCE Order* was hardly the Commission's last word on the meaning and application of the local applicant standard. In the Commission's Memorandum Opinion and Order in the NCE rulemaking proceeding[42], the Commission sought to "affirm, but clarify the standards for localism announced in the *NCE Order.* Applicants with a

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[41] The 10-K Report filed by General Electric Company on February 27, 2007, states: "General Electric's address is 1 River Road, Schenectady, New York 12345-6999; we also maintain executive offices at 3135 Easton Turnpike, Fairfield, Connecticut 06828-0001." *See* www.ge.com. NBC Universal's primary place of business, however, is 30 Rockefeller Plaza, New York, New York. *See* www.nbcuni.com.

[42] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* Memorandum Opinion and Order, 16 FCC Rcd 5074 ("*NCE MO& O*") (2001), *Erratum,* 16 FCC Rcd 10549, *recon. denied,* Memorandum Opinion and Order on Reconsideration, 17 FCC Rcd 13132 (2002)("*NCE Reconsideration Order*").

headquarters, campus, or 75% of board member residences within 25 miles of the reference coordinates of the community of license will be considered local. Governmental units will be considered local ***as well*** within their areas of jurisdiction (emphasis added)."[43]

Thus, the rule, as specifically clarified by the Commission in the *Reconsideration Order,* is that all applicants will be considered local if they meet one of the three initial criteria that involve offices, campuses, or board members within a 25-mile radius of the reference coordinates; governmental units will ***also*** be able to qualify as local, within their areas of jurisdiction, simply as a governmental entity or unit

When the new rules were first proposed, the State of Oregon disagreed with the Commission regarding whether the standard for local applicant was the best way to achieve whatever the benefits of localism might be, including local generation of programming. As the Commission is aware, the State of Oregon petitioned the D.C. Circuit for review of the established local applicant standard, as well as other aspects of the point system on which Oregon and the Commission disagreed. The D.C. Circuit, in *AFA v. FCC,*[44] declined to find the rules, as written, arbitrary or capricious, but invited the litigants to return to the court should it turn out that, as applied, the rules had an unreasonably and disparately negative effect. The Court explicitly cautioned the parties:

> 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. The Commission may well have a future obligation to reevaluate the point system if the empirical predictions and premises it used

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[43] *NCE MO&O,* at 5092, ¶ 50.

[44] *American Family Association, et al. v. FCC,* 365 F.3d 1156 (D.C. Cir. 2004) ("*AFA v. FCC*"), *cert. denied,* 125 S.Ct. 634 (2004).

to justify the point system turn out to be erroneous.[45]

In defending the local applicant standard and localism before the Court, the Commission, in the brief it filed in the *AFA v. FCC* case, quoted from section 396 of the Communications Act, to the effect that: "Public television and radio stations . . . constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs . . ."[46] What else was the State of Oregon doing, as a broadcast operation in Redding, but meeting this precise localism standard? In Redding, the State of Oregon, through its broadcast network JPR, built and established an office, extensive studios, and an allied performing arts center for the community? It has also, as attested in its Points Supplement, conducted extensive outreach activities to and with the community, including educational activities and arts performances at the Cascade Theatre. The kind of local presence and outreach conducted in Redding by the State of Oregon through JPR is far more extensive than can be demanded for any applicant claiming local applicant status under this rule. That standard was met, and surpassed, by the State of Oregon, through JPR, in the Redding community.

It is an abuse of discretion, as well as arbitrary and capricious and discriminatory, in violation of section 706 of the APA, for the Commission to apply this rule in a manner contrary to its plain language and regulatory history of the rule, in a manner which makes it impossible for a government entity to qualify outside its area of jurisdiction under criteria that are applicable

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[45] *AFA v. FCC,* 365 F3d at 1169-70.

[46] *AFA v. FCC,* No. 00-1310, *et al.*, Brief for Respondents Federal Communications Commission and the United States, p. 30.

to all other applicants except state governments.

Conclusion.

For the reasons set forth herein, the State of Oregon urges the Commission to reconsider the stated basis and rationale for its failure to select the State of Oregon as the tentative selectee from Group 880611 for a construction permit at Redding, California.

With respect to the State of Oregon's application in Group 880611, it is arbitrary and capricious, an abuse of discretion, and in excess of the Commission's statutory authority for the Commission to have applied the new point-system rules, including the fair distribution standard, the established local applicant criterion, and the tie-breaker mechanism, to the State of Oregon's application retroactively without express Congressional authorization to do so in a case that had been expressly remanded by the Court of Appeals for the D.C. Circuit for proceedings under the former comparative standards and hearing process. The Commission should grant reconsideration of its determination with respect to this Group so that the many complicated issues related to this nearly twenty-year old proceeding can be resolved without resort to impermissible retroactive application of the rules.

Furthermore, even if, *arguendo,* the retroactive application of the point system rules were not impermissible, the Commission should nevertheless grant reconsideration of its determination in Group 889611 because its application of the point system rules in a manner that disqualifies state government entities from receiving credit as a local applicant outside their areas of jurisdiction is likewise arbitrary and capricious and an abuse of discretion. The Commission's application of the point system rules in a manner that automatically disqualifies state government entities from receiving credit as a local applicant outside their areas of jurisdiction is most

certainly arbitrary and capricious, unduly discriminatory, and an abuse of discretion.

The Commission's decision in Group 880611[47] awarding tentative selectee status to the "Research Foundation," and the staff's subsequent public notice indicating that the tentative selectee in Group 880611 is the "University Foundation," should receive serious reconsideration on the part of the Commission. The determinations made in the *Omnibus MX/NCE Order* should be vacated for all the reasons stated herein and the appropriate standards applied to the applicants in this Group.

Respectfully submitted,

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[47] The State of Oregon has also filed a Petition to Deny Foundation's application on the grounds that the ***Research*** Foundation, the applicant's current incarnation, is a completely different and separate entity from the ***University*** Foundation, which was the original applicant for this frequency in 1988. Research Foundation is not a successor name designating the same entity but, rather, an entirely new entity. Thus, grant of waiver of the major change provision in Section 73.3573 is not only not warranted, it would not be appropriate, inasmuch as the new Foundation is an entirely new entity, with new articles of incorporation, a new tax ID number, and entirely new corporate officers, all of which changed in a single transaction, rather than gradually over time. Research Foundation is not qualified to be a Commission licensee because it failed to disclose this change, was evasive and not forthcoming on the change in ownership on its 340 Supplement filing, and has failed to appropriate account for the authorizations and applications which are attributable to it under the rules.

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Filed: April 26, 2007

Certificate of Service

I, the undersigned Susan M. Jenkins, certify that on this 26th day of April, 2007, I caused a copy of the foregoing Petition to Deny, filed by the State of Oregon Acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University, to be served upon the following persons, by mailing a copy, via the United States Postal Service, first-class mail, to the following person or persons at the indicated last known address for said person.

Jerold Jacobs, Esq.
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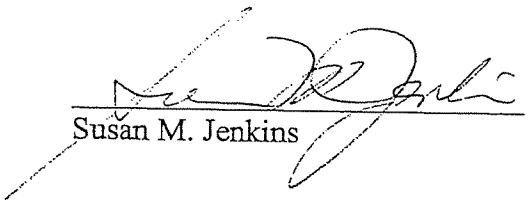

Susan M. Jenkins