

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

In re Applications of )  
 )  
**WQED PITTSBURGH** )  
 (Assignor) )  
 )  
 and ) File No. BALET-970602IA  
 ) Facility ID Number 41314  
**CORNERSTONE TELEVISION, INC.** )  
 (Assignee) )  
 )  
 For Consent to the Assignment of License )  
 of Noncommercial Educational Station )  
 WQEX(TV), Channel \*16, Pittsburgh, )  
 Pennsylvania )  
 )  
**CORNERSTONE TELEVISION, INC.** )  
 (Assignor) )  
 )  
 and ) File No. BALCT-970530IA  
 ) Facility ID Number 13924  
**PAXSON PITTSBURGH** )  
**LICENSE, INC.** )  
 (Assignee) )  
 )  
 For Consent to the Assignment of License )  
 of Station WPCB-TV, Channel 40, )  
 Greensburg, Pennsylvania )

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 15, 1999**

**Released: December 29, 1999**

By the Commission: Chairman Kennard and Commissioner Tristani affirming in part, dissenting in part, and issuing a joint statement; Commissioners Furchtgott-Roth and Powell affirming in part, dissenting in part, and issuing a joint statement; Commissioner Ness issuing a separate statement.

1. The Commission has before it for consideration: (1) the above-captioned application for consent to assign the license of noncommercial educational television (NCETV) station WQEX(TV), Channel \*16, Pittsburgh, Pennsylvania, from WQED Pittsburgh (WQED) to Cornerstone TeleVision, Inc. (Cornerstone), licensee of station WPCB-TV, Channel 40 (IND), Greensburg, Pennsylvania, and the contingent application for consent to assign the license of station WPCB-TV from Cornerstone to Paxson Pittsburgh License, Inc. (Paxson); (2) a petition

to deny both assignment applications filed by The Alliance for Progressive Action and the QED Accountability Project (Alliance);<sup>1</sup> (3) an informal objection from Robert W. McChesney, an associate professor at the University of Wisconsin-Madison; (4) an "Emergency Petition to Direct Immediate Filing of Renewal Applications" filed by Alliance, requesting that the Commission institute an early renewal proceeding against WQED to investigate its qualifications to remain a Commission licensee;<sup>2</sup> (5) over three hundred letters from WQEX(TV) viewers and others, the majority of whom oppose the assignment of WQEX(TV) to Cornerstone, but a minority of which support the grant of the application for consent to that assignment; (6) thousands of form letters from individuals who state that they are supporters of commercial-free public television and oppose "the loss of one of Pittsburgh's two public television stations" and the acquisition of a station in the Pittsburgh market by "Paxson Communications, a leading broadcaster of infomercials;"<sup>3</sup> (7) a letter issued by the Video Services Division on March 27, 1998, informing Cornerstone that, based upon the showing made in the assignment application and in Cornerstone's response to Alliance's petition to deny, the staff required further information regarding Cornerstone's qualifications to operate on a reserved channel, as well as its proposed noncommercial educational service; (8) the parties' responses to the staff letter; and (9) an amended showing regarding Cornerstone's planned programming for Channel \*16, filed March 31, 1999 (and supplemented on April 1 and May 12, 1999), Alliance's comments on the supplemental showing, and responses filed by Cornerstone and WQED. For the reasons discussed below, we conclude that Alliance and the objectors have failed to raise a substantial and material question of fact regarding the qualifications of WQED, Cornerstone and Paxson.

## BACKGROUND

2. WQED is the licensee of two noncommercial educational television stations in Pittsburgh, WQEX(TV), Channel \*16 and WQED(TV), Channel \*13. In June, 1996, WQED requested that the Commission dereserve the Channel \*16 allotment and permit WQED to assign WQEX(TV) to a commercial entity and use the net proceeds to pay down debt and fund the future operations of WQED(TV).<sup>4</sup> The Commission denied the dereservation request on July 24, 1996, concluding that WQED had not made a compelling showing that would support its

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<sup>1</sup> Alliance states that it is a coalition of approximately 40 public interest organizations in the Greater Pittsburgh area, and that it has sponsored the QED Accountability Project since 1993 as a "watch dog" organization for public television. Alliance also forwarded a number of letters from viewers and signed petitions opposing the proposed transactions.

<sup>2</sup> WQED filed a Motion to Strike the Emergency Petition, requesting that the Commission initiate a sanction proceeding against Alliance and its counsel.

<sup>3</sup> These "CitizenLetters" were sent to the Commission by Working Assets, a long distance telephone provider, at the request of its telephone service subscribers/customers. In addition, the Video Services Division received over 1,500 telephone calls from Working Assets subscribers, stating their opposition to the proposed transactions.

<sup>4</sup> WQED's petition was filed pursuant to the Department of Justice and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), which provided, in pertinent part, that the Commission "shall, not later than 30 days after receipt of a petition by WQED, Pittsburgh, determine, without conducting a rulemaking or other proceeding, whether to amend Section 73.606 of Title 47, Code of Federal Regulations, by deleting the asterisk for [Channel 16] in Pittsburgh, Pennsylvania . . . ."

proposed departure from the Commission's strongly held policy disfavoring dereservation. *See Deletion of Noncommercial Reservation of Channel \*16, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700 (1996). The Commission's conclusion was based, in part, on the fact that a possible alternative solution to WQED's financial problems existed. In this regard, WQED disclosed in connection with its dereservation petition that it had entered into an agreement with Cornerstone, whereby Cornerstone agreed to exchange Channel 40 for Channel \*16, and operate on Channel \*16 as a noncommercial educational station in the event WQED's dereservation petition was denied, thereby allowing the sale of Channel 40 to a commercial buyer, with the proceeds of the sale shared by WQED and Cornerstone. The Commission made clear, however, that it did not intend to "prejudge or signal approval of any future application seeking our consent to a 'channel swap' between WQED and Cornerstone." *Id.* at 11711.

3. Almost a year after the Commission denied the dereservation petition, WQED, Cornerstone and Paxson filed the above-captioned assignment applications to implement the channel exchange between WQED and Cornerstone, and the sale of WPCB-TV to Paxson. Alliance filed a petition to deny, in which it challenges the qualifications of WQED, Cornerstone and Paxson. In addition, because Cornerstone proposed to make only minimal changes in its operations upon moving to Channel \*16, Alliance submitted videotaped programming aired on WPCB-TV, which Alliance alleged would be inappropriate, for a variety of reasons, if transmitted over a noncommercial reserved channel. As discussed more fully below, by letter dated March 27, 1998, the Video Services Division requested that Cornerstone amend its portion of the WQEX(TV) assignment application to provide supplementary information regarding its qualifications to operate a station on a noncommercial reserved channel such as Channel \*16, and its proposed noncommercial educational service. On April 27, 1998, Cornerstone filed a response to the Division's request for additional information, to which Alliance filed a reply on May 12, 1998. Cornerstone again supplemented its programming showing on March 31, 1999, and Alliance responded with comments on April 30, 1999. Cornerstone and WQED filed replies to Alliance's comments on the supplemental showing on May 12, 1999.

## DISCUSSION

### WQED'S QUALIFICATIONS TO ASSIGN THE LICENSE OF WQEX(TV)

4. In assessing the merits of a petition to deny, a two-step process is required under Section 309(d)(1) and (2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), (2). *See also, Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petition demonstrates by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If such a *prima facie* case is alleged, the second test is whether -- on the basis of the application, the pleadings, and other matters of which the Commission may take official notice -- a substantial and material question of fact is presented to warrant further inquiry in a hearing.

5. Citing the Commission's *Jefferson Radio* policy,<sup>5</sup> Alliance contends that an inquiry into

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<sup>5</sup> *See Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964)("It is the recognized policy of the Commission that assignment of broadcast authorization will not be considered until the Commission has

WQED's conduct and character is required because WQED misled and deceived the Commission, the Pittsburgh City Council and the WQED Board of Directors in connection with its dereservation petition. Alliance also asserts that WQED has made repeated misrepresentations in connection with requests to the Corporation for Public Broadcasting (CPB) for public funding. Finally, Alliance argues that WQED's decision to simulcast WQED(TV) and WQEX(TV) during the pendency of this proceeding, as well as alleged violations of Commission rules, raise further questions regarding WQED's continued qualifications to operate the two stations, which should be addressed through an early renewal proceeding.

6. WQED's Conduct in Connection with the Dereservation Petition. Alliance claims first, that WQED solicited letters supporting the dereservation petition "under false pretenses," thereby misleading the Commission as to the level of community support.<sup>6</sup> WQED denies this allegation, and submits letters from individuals Alliance suggests were duped into writing letters, reiterating their support for WQED's actions. We simply cannot conclude, based upon Alliance's unsupported assertion, that WQED manipulated the Commission record in connection with its dereservation petition. We also disagree that WQED lacked candor because it failed to disclose in connection with its dereservation petition that it had earlier rejected an offer by two Congressmen to facilitate the enactment of legislation which, according to Alliance, would have immediately resolved WQED's debt crisis.<sup>7</sup> Discussions with Pennsylvania representatives regarding alternative methods of resolving WQED's financial crisis were not relevant to the Commission's consideration of the statutory criteria it was required to apply in determining whether to dereserve Channel \*16.<sup>8</sup> Finally, with respect to Alliance's assertion that WQED management "averted a City Council resolution condemning the sale of the station by lying to the Council," and also lied to its own Board regarding the May 1996 agreement with Cornerstone, allegations of non-adjudicated, non-FCC related misconduct have no bearing on a licensee's qualifications. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified*, 7 FCC Rcd 6564 (1992)(Relevant non-FCC misconduct typically includes only adjudicated instances of fraudulent

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determined that the assignor has not forfeited the authorization.")

<sup>6</sup> In connection with the dereservation petition, WQED disclosed that it had agreed to pay Cornerstone \$7.5 million in the event the petition was granted and WQED was permitted to sell WQEX(TV) to a commercial operator, thereby obviating the contemplated channel exchange between WQED and Cornerstone. According to Alliance, because the letters failed to mention the contingent payment to Cornerstone, WQED clearly withheld this information from the persons from whom it solicited support, recognizing that fewer supporting letters would have been written if WQED had fully disclosed its agreement with Cornerstone.

<sup>7</sup> Alliance states that in March 1996, certain members of Congress offered to propose legislation which would have dereserved Channel \*16, but required that any proceeds from the sale of WQEX(TV) in excess of WQED's outstanding debt be given to the Corporation for Public Broadcasting.

<sup>8</sup> The specified statutory criteria were: (1) the public interest; (2) the existing common ownership of two noncommercial stations in Pittsburgh; (3) the financial distress of WQED; and (4) the threat to the public of loss or impairment of local public broadcasting service in the area. In connection with the third criteria, WQED submitted audited financial statements prepared by KMPG Peat Marwick LLP, which fully documented WQED's financial condition. Accordingly, we find no merit to Alliance's accusation that WQED misled the Commission about its financial condition.

misrepresentations to governmental units, or adjudicated criminal misconduct involving false statements or dishonesty.) Accordingly, we conclude that Alliance has failed to raise a substantial and material question as to WQED's qualifications, based on WQED's conduct in connection with its dereservation petition.

7. WQED's Compliance with Section 396 of the Communications Act. Alliance also alleges that WQED has received over \$9 million in grants from the Corporation for Public Broadcasting over the past five years, and falsely certified its compliance with Section 396 of the Communications Act during each grant cycle.<sup>9</sup> WQED vigorously contests these allegations, producing extensive documentation of its compliance with Section 396.<sup>10</sup> Based upon the foregoing, we see no need for further inquiry. It is well settled that the CPB has exclusive congressional responsibility for the distribution of funds pursuant to Section 396 of the Act, and that the Commission does not consider a licensee's compliance with that section in its licensing proceedings. *See KQED, Inc.*, 88 FCC 2d 1159, 1164-65 (1982), *aff'd*, *California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985). Moreover, as WQED points out, the CPB is aware of Alliance's allegations regarding WQED's compliance with Section 396, and continues to support WQED's proposed divestiture of WQEX(TV).<sup>11</sup>

8. Public File Access. Section 73.3527 requires licensees to maintain a public inspection file containing specified station records, and to make the file available to the public during regular business hours. *See* 47 C.F.R. § 73.3527(d), (f). According to Alliance, an individual visited WQED's offices twice on October 8, 1996, and was told to call to make an appointment to inspect the public file, a practice contrary to Commission policy. *See Availability of Locally Maintained Records for Inspection by Members of the Public*, 28 FCC 2d 71 (1971). WQED states that written station policy prohibits station personnel from requiring members of the public to schedule an appointment to inspect the station file. WQED also denies that it required Alliance's representative to make an appointment, and submits affidavits of three of its employees disputing her claim that she was told to schedule an appointment.<sup>12</sup> Even if Alliance's representative was told to call for an appointment, we do not believe that one isolated violation,

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<sup>9</sup> The Public Broadcasting Act of 1967, which created the CPB, provides for the funding of programs and public stations, and specifies certain conditions attached to that funding. Alliance alleges that WQED failed to comply with Section 396(k)(4), which prohibits federal funding of a licensee unless its governing and advisory bodies hold open meetings preceded by reasonable notice to the public, and Section 396(k)(8), which requires that public broadcasters establish a community advisory board (CAB), assure that the CAB meet at regular intervals, and permit the CAB to advise the governing board on programming policies and other matters.

<sup>10</sup> For example, WQED submits letters from current CAB members attesting to the overall responsiveness of WQED management, and minutes from CAB meetings. WQED also notes that Alliance dwells primarily on CAB events that occurred in 1993 and 1994, before WQED's new management revamped the CAB procedures.

<sup>11</sup> *See* Letter from the CPB, PBS and America's Public Television Stations to Chairman Kennard, dated February 12, 1998.

<sup>12</sup> While the record indicates that Alliance's representative made an appointment to inspect the public file, it is unclear whether she was required to schedule an appointment as a prerequisite to gaining access to the file, or whether she scheduled the appointment as a matter of personal convenience.

which directly contravenes written station policy, is so serious as to be license threatening. *See Mark R. Nalbene, Receiver*, 6 FCC Rcd 7529, 7531-32 (MMB 1991); *WPOM Radio Partners, Ltd.*, 6 FCC Rcd 1413, 1414 (MMB 1991). We emphasize, however, the importance of maintaining a public inspection file and allowing free access to members of the public, consistent with our rules and policies. *See Public Notice: Availability of Locally Maintained Records for Inspection by Members of the Public*, 13 FCC Rcd 17959 (1998).

9. WQED's Decision to Simulcast WQED(TV) and WQEX(TV). Several months after the assignment applications were filed with the Commission, Alliance filed a separate petition requesting that the Commission institute an early renewal proceeding against WQED, based upon WQED's announcement that it intended to commence simulcasting its two television stations.<sup>13</sup> Alliance contends that simulcasting two stations with overlapping service areas is inconsistent with WQED's obligation to serve the public, wastes valuable spectrum, and has the same net effect on the Pittsburgh public as would a complete "darkening" of WQEX(TV). WQED opposed the petition and filed a motion requesting that the Commission censure Alliance and its counsel for filing a strike petition.

10. We conclude that given the circumstances present here, WQED's decision to simulcast its two television stations during the pendency of this proceeding raises no issue regarding its qualifications to transfer WQEX(TV). First, the Communications Act and Commission rules do not require that commonly-owned noncommercial educational television stations be separately programmed, nor are they required to operate on a regular schedule with a specified minimum number of hours. 47 C.F.R. § 73.1740(b). While at least a portion of WQED's public funding is conditioned on separately programming each station, the CPB has granted a temporary waiver of this requirement, based on WQED's financial condition.<sup>14</sup> Alliance also complains that WQED's decision to simulcast is "an effort to increase the probability of the proposed sale." WQED, however, has not advanced the programming change as grounds

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<sup>13</sup> The Commission requires that "persons seeking the extraordinary, discretionary action of calling for the early filing of a renewal application because of alleged 'compelling reasons' should, at a minimum, support their requests with factual allegations meeting the requirements of Section 309(d) [of the Communications Act]." *Greater Portland Broadcasting Corporation*, 3 FCC Rcd 1953, 1954 (1988), quoting *Sioux Empire Broadcasting Co.*, 9 FCC 2d 683, 684 (1967).

<sup>14</sup> *See* Letter from CPB Associate General Counsel to counsel for Alliance, dated October 10, 1997. In connection with Alliance's assertion that the Commission has "sought early renewal of a license when a broadcaster sought to modify its programming for financial reasons, without informing the Commission," the case on which it relies, *Leflore Broadcasting Co., Inc.*, 36 FCC 2d 101 (1972), is not applicable to the circumstances here. Renewal applications used to require a pledge that specific amounts of various categories of non-entertainment programming would be broadcast, and a specified format maintained. Eight months after the Commission granted Leflore's renewal application, which proposed to meet the unmet entertainment and non-entertainment needs of the large minority community in Greenwood, Mississippi, Leflore notified the Commission that it had changed its format due to economic difficulties, and the Commission instituted an early renewal proceeding to determine whether Leflore had carried out its programming representations in good faith, or misrepresented its programming plans in the renewal application. Here, WQED was not required to pledge a specific program proposal in its renewal application (*see* File No. BRET-940401LU), nor does the assignor's portion of FCC Form 314, on which the pending WQEX(TV) assignment application was filed, make any inquiry regarding the nature and extent of the assignor's program service.

favoring grant of the pending assignment applications, and under the circumstances, we fail to see the relevance of WQED's programming decision to our consideration of the contested applications.<sup>15</sup>

11. With respect to WQED's request that we censure Alliance and its counsel for abuse of process, in order to establish the filing of a strike petition, "the charging party must make a strong showing that delay is the primary and substantial purpose behind a petition to deny." *Radio Carrollton*, 69 FCC 2d 1139, 1151 (1978)(subsequent history omitted.) In determining whether delay is the petitioner's primary purpose, the Commission will consider, *inter alia*, statements admitting an obstructive purpose, withholding information relevant to the disposition of the requested issues, and the absence of any reasonable basis for the adverse allegations in the petition. *Id.* at 1151-52. Upon consideration of these criteria, we find that WQED has not made the requisite "strong showing" that delay was the "primary and substantial" purpose behind Alliance's emergency petition. As proof of an obstructive purpose, WQED cites to a press release dated October 8, 1997, in which Alliance predicts that if the emergency petition "is successful, it would delay the swap or sale . . . ." In the preceding paragraph, however, the press release states that the emergency petition was filed "because WQED has announced that beginning November 2, it will stop airing WQEX's unique, locally-oriented programming, and instead will take the extraordinary step of simulcasting WQED's programming on WQEX." While the press release then discusses Alliance's opposition to the pending assignment applications, and observes that Commission action instituting an early renewal proceeding against WQED would delay the proposed assignments, we do not find it establishes that delay was Alliance's "primary and substantial purpose" in filing the emergency petition. In addition, WQED has not suggested that Alliance withheld relevant information, and we cannot find that Alliance's emergency petition was so frivolous as to constitute a strike pleading, absent a clear showing that delay was the substantial and primary purpose. *See Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999, 2000 (1989); *American Mobilephone, Inc.*, 10 FCC Rcd 12297 (WTB 1995). Thus, we find WQED's allegation of strike pleadings and abuse of process are insufficiently supported.<sup>16</sup>

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<sup>15</sup> Because WQED was not required to disclose its programming decisions in connection with the assignment application, we disagree with Alliance that WQED somehow violated Section 1.65 of the rules, which requires an applicant to promptly inform the Commission of any significant changes that may be of decisional significance in the consideration of its application. 47 C.F.R. § 1.65. Moreover, the simulcasting issue was fully briefed by both parties before simulcasting commenced, and WQED informed the Commission in connection with the 1996 dereservation proceeding that it was considering curtailing operations or simulcasting its two stations.

<sup>16</sup> In its May 12, 1999 reply to Alliance's comments on its March 31, 1999 supplement, Cornerstone contends that Alliance should be sanctioned because its webpage solicits and encourages website visitors to contact the Commission to oppose the sale of WQEX(TV), in violation of Section 1.1210 of the rules, which provides that "no person shall solicit or encourage others to make any presentation which he or she is prohibited from making under the provisions of this subpart." 47 C.F.R. § 1.1210 (1998). It appears, however, based upon the materials submitted by WQED, that Alliance's webpage is meant to inform interested persons of the proposed assignment of WQEX(TV) and the Commission's processes, and urge Pittsburgh area residents to make their views known to the Commission, a presentation which is exempt from the prohibitions of restricted proceedings pursuant to Section 1.1204(8) of the Commission's rules. *See* 47 C.F.R. § 1.1204(8). Accordingly, we see no reason for further inquiry.

12. WQED's Admitted Violation of Section 399B of the Act. By letters dated October 16 and 31, 1997, WQED notified the Commission that it had recently broadcast announcements supporting a ballot proposition in exchange for remuneration from a for-profit organization, in apparent violation of Section 399B of the Communications Act, 47 U.S.C. § 399B.<sup>17</sup> WQED also informed the Commission that it had taken a number of remedial measures, including returning the remuneration, broadcasting an announcement opposing the ballot initiative at comparable times, and producing a live, town-hall type meeting on the proposed tax referendum. After this voluntary disclosure, Alliance supplemented its emergency petition, asserting that the underwriting violation further demonstrates WQED's unfitness to remain a licensee, and suggesting that WQED has been biased in its presentation of the issues because of its Chief Executive Officer's own views on the ballot proposition. Again, we conclude that Alliance has failed to raise an issue as to WQED's continued qualifications, based upon an isolated violation of Section 399B of the Communications Act. While we do not condone violations of our enhanced underwriting requirements by noncommercial stations, an adjudicated violation of Section 399B typically results in the imposition of a fine or admonishment. *See, e.g., Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997). Because WQED promptly informed the Commission of its violation, and took immediate remedial steps to ensure that contrasting viewpoints were aired, we will admonish WQED for its violation of Section 399B of the Communications Act, but decline to take other enforcement action against it. We also remind WQED that the Commission expects all noncommercial television licensees to comply with our underwriting requirements.

13. Public Interest Considerations. Under Section 310(d) of the Communications Act, the Commission may only approve a transfer of control of a license if it determines that the transfer would serve the "public interest, convenience and necessity." 47 U.S.C. § 310(d). Alliance contends that grant of the WQEX(TV) assignment application would be contrary to the public interest, primarily because of the loss of programming aired on WQEX(TV) prior to WQED's decision to simulcast. In support, Alliance submits letters from numerous viewers praising the programming which previously had been aired on WQEX(TV) and the station's responsiveness to the needs of children, minorities, the elderly and the poor. However, it is "well-settled Commission policy that potential changes in programming formats are not considered in reviewing assignment applications." *WDCU(FM)*, 12 FCC Rcd 15242 (MMB 1997); *see also, Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC 2d 858, 865-66 (1976), *recon. denied*, 66 FCC 2d 78 (1977), *rev'd sub nom., WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir 1970, *rev'd*, 450 U.S. 582 (1981)). And while the Commission "reserve[s] the right

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<sup>17</sup> Section 399B prohibits noncommercial educational stations from broadcasting advertisements, and defines an advertisement as "any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended --

- (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
- (2) to express the views of any person with respect to any matter of public importance or interest; or
- (3) to support or oppose any candidate for public office.



to intervene in such matters if necessary to serve the public interest more fully," *WNYC Communications Corp.*, 11 FCC Rcd 13841, 13844 (VSD 1996), we see no reason to do so at this time. In this regard, we disagree with Alliance's contention that an assignment would significantly reduce the amount of noncommercial, educational programming available in Pittsburgh, instead replacing it with infomercials.<sup>18</sup> As discussed below, as the licensee of a television station on reserved channel \*16, Cornerstone will be required to operate on a noncommercial basis and to air primarily educational programming. While the content of Cornerstone's programming would undoubtedly differ from the programming which was carried on WQEX(TV), the overall educational nature of the programming must still remain. Moreover, with respect to Alliance's fear that allowing the proposed assignment would "set a precedent for selling noncommercial educational licenses to religious groups," especially in markets with commonly-owned public television stations, we will continue, as we have in the past, to closely scrutinize all applications for assignment of noncommercial educational licenses, to ensure that the facility will continue to operate in accordance with our noncommercial educational rules and policies upon assignment, and to take appropriate actions when viewers or other interested parties notify the Commission that a noncommercial educational station is operating contrary to our rules and policies.

14. Accordingly, we find that WQED is fully qualified to assign its license for WQEX(TV), Channel \*16.

#### **CORNERSTONE'S QUALIFICATIONS TO OPERATE ON CHANNEL \*16**

15. Cornerstone is a nonprofit, Section 501(c)(3) organization,<sup>19</sup> and is presently airing a largely religious programming format on Channel 40, which is licensed to Greensburg, a small community located 30 miles east of Pittsburgh. Cornerstone has stated that upon grant of the pending assignment applications, it intends to shift the majority of its present programming to reserved Channel \*16. It is undisputed that licensees operating on unreserved commercial television channels -- such as Cornerstone -- are afforded a great deal of discretion in the scheduling, selection and presentation of programs aired on their stations. *See Commercial TV Stations*, 98 FCC 2d 1075, 1091-92 (1984).<sup>20</sup> As discussed below, because the noncommercial

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<sup>18</sup> According to Alliance, "the proposed assignments would replace two educational, noncommercial stations (WQED and WQEX) and one religious station (Cornerstone), with one educational noncommercial station (WQED), one religious station (Cornerstone), and a new commercial station (Paxson) that will air mostly infomercials." Professor McChesney also discusses the importance of "second stations" such as WQEX(TV) in serving their communities, and opposes the proposed transactions as "an attempt to close down a second station to pay off back debt accrued by the established station."

<sup>19</sup> Section 501(c)(3) of the Internal Revenue Code provides, in part, for the exemption from federal income tax of organizations that are organized and operated exclusively for religious, charitable, scientific or educational purposes, provided no part of the net earnings inure to the benefit of any private shareholder or individual.

<sup>20</sup> Moreover, the Commission has acknowledged that specialty programming, of the type presently offered by Cornerstone on WPCB-TV, appeals to segments of the population with particularized programming interests, which are typically not met by other types of programming. *See, e.g., First Report and Order* in Docket 20553, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

educational broadcast service differs from the commercial service, applicants for reserved channels are required to demonstrate certain qualifications and meet other requirements not applicable to the commercial service.

16. The NCETV Regulatory Framework – Section 73.621(a). The Commission first established a separate allocation for noncommercial educational broadcasting in 1945, when it set aside twenty percent of the FM radio band for use by noncommercial educational radio stations. Approximately five years later, the Commission conducted hearings on the need for educational television, with a total of 76 witnesses testifying on the issue. In 1952, the Commission reserved 242 channels for noncommercial educational television service, including Channel \*16 in Pittsburgh. *Sixth Report and Order* in Docket Nos. 8736 and 8975, 41 FCC 148 (1953); *see also* 47 C.F.R. § 73.606.<sup>21</sup> The proponents of the allocation presented evidence on, among other things, the potential of educational television for both in-school and adult education, and the type of program material that could be presented over noncommercial television stations. In reserving the channels, the Commission recognized “the important contributions which noncommercial educational television can make in educating the people both in school – at all levels – and also the adult public.” *Id.* at 165, quoting *Third Notice of Further Proposed Rulemaking*, 16 Fed. Reg. 3072 (1951). The Commission also expected that the separate allocation for these stations “was justified” by the “high quality type of programming which would be available in such stations – programming of an entirely different character from that available on most commercial stations.” *Id.* at 165-66.

17. For more than 50 years through the maintenance of the reserved allocations for noncommercial educational broadcast stations, this Commission has sought to promote the development of a “high quality type of programming” that would be different from the programming generated by the commercial pressures and demands placed on commercial stations. *Id.* As originally envisioned, these reserved channels have been used “to serve the educational and cultural broadcast needs of the *entire* community to which they are assigned.”<sup>22</sup> As Congress recognized when it adopted legislation to fund the operation of certain public broadcasting stations, it is in the public interest “to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational and cultural purposes.”<sup>23</sup> Congress recognized that “expansion and development of public telecommunications

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<sup>21</sup> The Commission’s statutory authority to prescribe allocations for noncommercial educational television stations emanates from Section 303 of the Communications Act of 1934, as amended, 47 U.S.C. § 303, which gives the Commission authority to prescribe “the nature of the services to be rendered by each class of station.” *See Memorandum Opinion and Order, Amendment of Section 3.606 of the Commissions Rules and Regulations*, 7 R.R.2d 371, 373-75 (1951).

<sup>22</sup> *Fostering Expanded Use of the UHF Television Channels*, 2 FCC 2d 527, 542 (1965) (emphasis added).

<sup>23</sup> Public Broadcasting Act of 1967, 47 U.S.C. § 396(a)(1). As a prelude to the passage of the Public Broadcasting Act, in 1964, the Carnegie Commission on Educational Television was charged by the National Association of Educational Broadcasters and the United States Office of Education with studying the needs of educational television. According to the study prepared by the Carnegie Commission, the reserved television channels were designed primarily to educate and increase viewers’ knowledge and understanding on a wide diversity of topics, such as community, national and world affairs; literature, art and the performing arts; nature and the physical world; health, nutrition and home economics; social interaction and behavior; and morality and spirituality. *See*

and of diversity of its programming depend on freedom, imagination, and initiative” and that noncommercial educational public broadcast services “will constitute an expression of diversity and excellence.”<sup>24</sup> Over the years, Congress thus has reaffirmed the importance of noncommercial educational service in educating the public, “and examining and solving the social and economic problems of American life today.”<sup>25</sup>

18. In setting forth eligibility criteria for NCETV applicants for the reserved noncommercial educational television channels, the Commission adopted Section 73.621 of its rules, 47 C.F.R. § 73.621, which mandates that the allocations are to be “used primarily to serve the educational needs of the community” and for “the advancement of educational programs.” Nowhere, however, does the rule define the term “educational.”

19. An issue as to the interpretation of this “educational” requirement arose in the context of an application filed by a religious institution in 1977. In *Moody Bible Institute of Chicago*, in a two sentence opinion, the Commission granted an application for a new noncommercial educational FM (“NCEFM”) station, finding that religious institution qualified as an “educational organization” under Section 73.503 of the Commission’s rules.<sup>26</sup> In a Concurring Statement, Chairman Wiley wrote separately, indicating that “the reason for the concurrence is simply to express [the] concern with the lack of a clear Commission standard for determining when an organization qualifies for a grant of license under” the rule governing eligibility for NCEFM stations.<sup>27</sup> The Chairman was “particularly concerned that [the] present standard [was] unclear with respect to the eligibility of religious vis-à-vis non-religious organizations.”<sup>28</sup> Similarly, Commissioner White wrote separately in *Moody Bible Institute*, rejecting the notion that the Commission could constitutionally separate religious broadcasters or programming from educational broadcasters or programs given the broad and vague standards that had been adopted by the Commission prior to that time.<sup>29</sup> Commissioner White expressed the belief that over the years, the Commission had “articulated the principle that organizations which are primarily

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*Public Television, a Program for Action*, Report of the U.S. Senate Committee on Commerce to Accompany S. 1160, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. S. Rep. 222 (1967).

<sup>24</sup> *Id.* § 396(a)(4-5).

<sup>25</sup> Sen. Rep. No. 91-167, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. at 7 (1969).

<sup>26</sup> *Moody Bible Institute of Chicago*, 66 FCC 2d 162 (1977) (“*Moody Bible Institute*”). Section 73.503, the rule governing eligibility for NCEFM stations, parallels section 73.621 governing NCETV stations in many respects, with several differences. As is discussed in more detail below, one significant difference is the absence from Section 73.503 of the requirement that the noncommercial educational station “be used primarily to serve the educational needs of the community. Compare 47 C.F.R. § 73.621(a) with 47 C.F.R. § 73.503(a).

<sup>27</sup> *Moody Bible Institute*, 66 FCC 2d at 162-63 (Concurring Statement of Chairman Richard E. Wiley, joined by Commissioner Benjamin L. Hooks).

<sup>28</sup> *Id.* at 163. The Chairman, joined by Commissioner Hooks, stated that “religious organizations must be judged on the same basis as non-religious organizations.”

<sup>29</sup> *Id.* at 163-68 (Concurring Statement of Margita E. White).

religious in nature, even though they may have some educational aspects, will not be allowed to operate on channels reserved for educational use.”<sup>30</sup> Commissioner White also noted that previous Commission precedent “rejected the contention that education was the quintessence of religion;” instead, the Commission had taken the position that if “the educational thrust” of an organization “is but incidental to and supportive of the religious function, the organization is not an educational one.”<sup>31</sup> For more than four pages, Commissioner White criticized the Commission’s practices prior to 1971, asserting that these actions violated the First Amendment, especially given the “total absence of even the most rudimentary definition or guideline as to what is or is not religious.” *Id.* at 165, 164-68.

20. Shortly thereafter, in response to *Moody Bible Institute*, the Commission provided some clarification of the rule, issuing a set of processing standards. *Notice of Inquiry*, Docket No. 78-164, 43 Fed. Reg. 30847, 30844-45 (1978) (the “*Guidelines*”). According to the *Guidelines*, in evaluating whether a proposed use of a NCETV station meets the requirements of Section 73.621, the Commission gives “primary weight to those programs which may properly be categorized as ‘instructional’ or ‘general educational.’” *Id.* at 30844. “Instructional” programs are “all programs designed to be utilized by any level of educational institution in the regular instructional program of the institution;” a “General Educational” program is “an educational program for which no formal credit is given.” *Id.* at 30844-45. No further guidance was prescribed regarding the kind of “educational programs” to which the Commission would give “primary weight.”

21. Nevertheless, the Commission did specifically acknowledge that religious programs could qualify under the *Guidelines*. In specifically addressing religiously oriented programming, the Commission stated:

We will not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature. While not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters relating to religion would qualify. In this regard, some programs will properly be considered to be both instructional and religious or both general educational and religious.

*Id.* at 30845. The Commission expressly provided that, “as in all matters relating to programming, we will defer to the judgment of the broadcaster unless his categorization appears to be arbitrary or unreasonable.” *Id.*

22. Thus, in the *Guidelines*, the Commission took steps to clarify that religious “institutions” would qualify where they provided instructional programming, an issue at the heart of *Moody Bible Institute*. Cornerstone, however, is not an institution, much less an organization,

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<sup>30</sup> *Id.* at 163, citing *Keswick Foundation Incorporated*, 26 FCC 2d 1025 (1970); *Christ Church Foundation, Inc.*, 13 FCC 2d 987 (1968); *National Education Foundation, Inc.*, 15 FCC 2d 1032 (1968).

<sup>31</sup> *Id.* at 164, citing *Bible Moravian Church, Inc.*, 28 FCC 2d 1 (1971). In *Bible Moravian Church*, the Commission had indicated that “recognizing that some overlap in purposes is, or can be involved, we look to the application as a whole to determine which is the essential purpose and which is incidental.” *Id.* at 2.

that provides instruction in a formal setting. Instead, Cornerstone is a religious organization seeking to meet the requirements for a reserved NCETV channel based predominantly on its proposal to broadcast “general educational” programs, most of which are religious in orientation. Notwithstanding the changes made in the *Guidelines* following *Moody Bible Institute*, we are left only with the *Guideline’s* direction that a “general educational” program is “an educational program for which no formal credit is given.” We therefore must look to Commission precedent for any further instruction in evaluating the reasonableness of Cornerstone’s judgment concerning its proposed programming.

23. Commission Precedent - Interpreting The Requirements of Section 73.621. In 1985, in *Way of the Cross of Utah, Inc.*, the Commission considered, and rejected, an application of a religiously oriented entity seeking a license to operate on a reserved NCETV channel.<sup>32</sup> In that case, the Commission stated that “noncommercial, educational organizations, even though religiously oriented, can qualify upon an appropriate showing for licenses on reserved channels. The programming provided by such licensees provides diversity preferred by many of our citizens.” *Id.* at 1374. Nevertheless, the Commission denied the application, finding that the applicant’s Board of Directors was not sufficiently representative of the community of license and that the applicant had not provided a program schedule with a description of its programming.<sup>33</sup> Given the applicant’s failure to provide a program schedule on which the Commission could assess the applicant’s judgment, the Commission did not make any effort to define “general educational programming.”

24. Subsequent to *Way of the Cross*, the Commission has designated several cases for hearing concerning an applicant’s eligibility for noncommercial educational reserved channels based on the standards in the *Guidelines*.<sup>34</sup> These cases, however, involved applications for NCEFM stations similar to the application presented in *Way of the Cross*, where the applicants provided no program schedule or only the barest of descriptions concerning the nature of their proposed programs. For example, in *Music Ministries*, the Commission designated an application for hearing on an eligibility issue because the applicant’s program statement contained only several general lines regarding its intention to broadcast instructional and general educational

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<sup>32</sup> 101 FCC 2d 1368 (1985).

<sup>33</sup> *Id.* at 1375-77. Despite the absence of any program schedule, the Commission stated that “religiously oriented applicants for reserved television channels can meet the requisite eligibility standards.” *Id.* at 1374 n.8. In so doing, the Commission expressly rejected the conclusion of the Mass Media Bureau that “the Commission has articulated the principle that organizations which are primarily religious in nature, even though they have some educational aspects, will not be allowed to operate on channels reserved for educational use.” *Id.* Despite some evidence to the contrary in the Commission’s decision in *Bible Moravian Church*, see *supra* at n.31, the Commission held that this “statement was clearly in error.” *Id.* In any event, “in *Way of the Cross*, the Commission overruled *Moravian Church, Inc.*, 28 FCC 2d 1 (1971), and made clear that noncommercial educational organizations, even though religiously-oriented, can qualify upon an appropriate showing for licences on reserved channels.” *Columbia Bible College Broadcasting Co.*, 6 FCC Rcd 516, 517 (ASD 1991).

<sup>34</sup> *Music Ministries, Inc.*, 9 FCC Rcd 3628 (1994); *Toccoa Falls College*, 8 FCC Rcd 3085 (1994); *Holy Spirit Harvest Church*, 7 FCC Rcd 3043 (1992); *Dry Prong Educational Broadcasting Foundation*, 7 FCC Rcd 496 (1992); *Christian Family Cinema*, 6 FCC Rcd 7364 (1991).

programming, without any description of programs.<sup>35</sup> In *Dry Prong* and *Holy Spirit*, the applications were designated for hearing on an eligibility issue because they similarly provided a general program statement without delineating programs that the applicants judged to be educational.<sup>36</sup> Finally, in *Christian Family Cinema*, the Commission designated an application for hearing because it found the program schedule supplied by the applicant to be “devoid” of any descriptions of educational programming. 6 FCC Rcd at 3628.

25. In other cases involving applicants for NCEFM stations, where illustrative examples of programming were provided, the Commission has tended to grant the applications, even where the program schedule provided by the applicant was less than comprehensive.<sup>37</sup> For example, in *Palm Bay*, the Commission held that an applicant was eligible under Section 73.503(a) where the applicant had provided a description of 10.75 hours of its programs, finding the “illustrative program list” sufficient to meet the applicant’s burden.<sup>38</sup> Similarly, in *Columbia Bible College*, the Commission’s Audio Services Division found an applicant eligible under Section 73.503(a) based upon its review of the applicant’s proposed program schedule.<sup>39</sup> Acknowledging that the applicant’s programs were “geared to religious instruction,” the Division stated that the Commission “will not disqualify any program simply because the subject matter of the teaching [is] religious in nature.” *Id.* at 517. In granting these applications and rejecting claims that the applicants were not proposing programming that was sufficiently educational in nature, the Commission did not give any further guidance regarding the definition of a “general educational” program or any distinction between religious and educational programming.<sup>40</sup>

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<sup>35</sup> 9 FCC Rcd at 3628 (mere commitment to air “educational” and “some instructional” programming is not sufficient). The applicant also failed to indicate whether it was eligible as an “institution” or an “organization.”

<sup>36</sup> *Dry Prong*, 7 FCC Rcd at 496; *Holy Spirit*, 7 FCC Rcd at 3044 (merely stating that corporation is a religious, charitable and educational entity, but providing no documentation of programs, is insufficient). The applicant in *Toccoa Falls* also failed to file sufficiently detailed program descriptions to support the finding that it qualified as an educational organization proposing to broadcast the requisite educational programming. 8 FCC Rcd at 3085.

<sup>37</sup> See, e.g., *Palm Bay Public Radio, Inc.*, 6 FCC Rcd 1772 (1991); *Lower Cape Communications, Inc.*, 47 R.R.2d 1577 (1980); *Columbia Bible College Broadcasting Co.*, 6 FCC Rcd 516 (ASD 1991); *Community Educational Association*, 10 FCC Rcd 3179 (ALJ 1995).

<sup>38</sup> 6 FCC Rcd at 1773-74. In granting the application, the Commission rejected the contention in a petition to deny that the applicant had not provided descriptions of a sufficient amount of its programs, applying the standards set forth in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

<sup>39</sup> 6 FCC Rcd at 517. In *Columbia Bible*, the Division rejected a petition to deny the subject application, determining under the *Astroline* test that the applicant’s program schedule evidenced a sufficient intent to advance educational purposes. *Id.* at 516-17.

<sup>40</sup> It is worthy to note that one Administrative Law Judge, in finding an NCEFM applicant qualified under Section 73.503, drew guidance from a Commission statement regarding its “basic role” in the “history and development of public broadcasting.” See *Community Educational Association*, 10 FCC Rcd 3179, 3180 (Chachkin, 1995) citing *Notice of Proposed Rule Making, Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 87 FCC 2d 716, 732 (1981) (“*Public Radio and TV*”). In *Public Radio and TV*, the Commission had recognized that its role had been “to broadly classify its program service, . . . the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming.” 87 FCC 2d at 732. According to the Commission, “public broadcasting is

26. The Commission's grant of these NCEFM applications, and its concomitant rejection of petitions to deny, however, does not reflect the outer limits of the showing the Commission can, and does, require from applicants for licenses for NCETV stations. The Commission applies a higher standard to applicants for NCETV reserved channels than is applied to NCEFM applicants based upon the more stringent requirement for eligibility in the relevant rule. While applicants for NCEFM and NCETV stations both must demonstrate that their programming will be "used for the advancement of" an educational program, only applicants for NCETV stations must show that "the proposed stations will be used primarily to serve the educational needs of the community."<sup>41</sup>

27. We do not agree with Cornerstone that the foregoing framework is inconsistent with the Supreme Court decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650-51 (1994). In *Turner*, numerous cable programmers and operators challenged the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992,<sup>42</sup> and the district court granted summary judgment for the government, holding that the challenged provisions were consistent with the First Amendment. While the Supreme Court vacated summary judgment and remanded to the district court, it agreed with the lower court's conclusion that the must-carry requirements did not warrant strict scrutiny as a content-based regulation, in that "Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power . . . and thereby to ensure that all Americans . . . have access to free television programming -- whatever its content." *Id.* at 649. The Court also rejected the argument that the preference conferred on broadcast stations by the must-carry rules automatically entails content requirements, recognizing that the Commission is forbidden by statute to engage in censorship, and that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming which must be offered by broadcast stations." *Id.* at 650. The Court also noted that "[s]tations licensed to broadcast over the special frequencies reserved for 'noncommercial educational' stations are subject to no more intrusive content regulation than their commercial counterparts," in that noncommercial licensees "are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational' programs." *Id.* at 651.

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characterized largely by a negative distinction, *i.e.*, public stations are not operated by profit seeking organizations nor supported by on-the-air advertising. The positive dimensions of public broadcasting are determined by social, political, and economic forces outside the Commission." *Id.* Such a limited role allowed "the system to develop in response to the diverse and proximate needs of the communities within which it operates and not according to a standard Commission mold." *Id.* The role allowed "those who operate, support, and consume public broadcasting to directly determine the nature of its service, especially its programming." *Id.*

<sup>41</sup> Compare 47 C.F.R. § 73.503(a) (for NCEFM applicants) with 47 C.F.R. § 73.621(a) (*emphasis added*). The Commission apparently adopted a higher standard for NCETV applicants than for NCEFM applicants because of the greater spectrum use by television stations, the more extensive coverage of television stations, and the lesser number of television stations that serve geographic markets. See *Way of the Cross*, 101 FCC 2d at 1371 n.3.

<sup>42</sup> Sections 4 and 5 of the Act require cable television systems to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations.

28. Noncommercial educational television stations are not required to operate on a regular schedule with a specified minimum number of hours. *See* 47 C.F.R. § 73.1740(b). However, while the Commission's rules do not require a specific minimum number of hours of educational programming which must be broadcast by a television station operating on a reserved channel, both before and since *Turner* was decided, Section 73.621 has required that a station operating on a reserved channel be "used **primarily** to serve the educational needs of the community." Such a requirement is essential to giving meaning to the reservation of frequencies for "noncommercial educational" purposes, and is not presumptively unconstitutional under *Turner*. To the contrary, the Court upheld the provision requiring cable operators to carry noncommercial educational stations, using the percentage of programming that is educational to evaluate whether a noncommercial educational station complied with the must-carry requirements. While emphasizing the discretion accorded noncommercial educational stations, the Court did not suggest that the "primarily educational" requirement was unconstitutional.

29. Given the importance of these objectives, and the authority of the Commission to prescribe "the nature of the services to be rendered by each class of station," the First Amendment does not prevent the Commission from establishing incidental restrictions on speech that are required for a broadcaster to maintain eligibility for a reserved allocation.<sup>43</sup> The Commission therefore can require broadcasters to operate on a noncommercial basis, and to present programming that is directed "primarily to serve the educational needs" of the communities they serve.<sup>44</sup> If the Commission's separate allocation for noncommercial *educational* stations is to achieve the educational goals underlying the allocation, our guidelines for programming such stations must encompass more than simply operating on a noncommercial basis. Any restrictions arising from the *educational* requirements are not directed narrowly at religious programmers, but act only as an incidental restriction on such expression. Just as not all cultural, artistic, and social programs will qualify as "general educational" programming, not all religious broadcasting must be deemed to be "general educational" programming. Nevertheless, in examining whether programming is "educational" or whether a program is of a "general educational" nature, we cannot help but consider First Amendment concerns. It is for this reason that we defer to the broadcaster's judgment unless that judgment is arbitrary or unreasonable.<sup>45</sup>

30. Cornerstone's Showing And Alliance's Contentions – Programming. We turn then to the record in this proceeding regarding Cornerstone's proposed programming. This case has proceeded over the last three years through three basic rounds of pleadings. First, Cornerstone filed its application in June 1997, prompting the filing of a Petition to Deny by Alliance, which Cornerstone opposed. Second, in response to a Bureau request in March 1998 that Cornerstone provide a further demonstration of the overall general, educational, cultural and instructional

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<sup>43</sup> *See National Broadcasting Company v. United States*, 319 U.S. 190 (1943); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9<sup>th</sup> Cir. 1983); *Kings Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974).

<sup>44</sup> *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 43 R.R.2d 731, 737-41 (1978) ("*Policy on NCE Stations*") (explaining Commission authority to determine the kinds and types of communications that can be broadcast on particular frequencies).

<sup>45</sup> *See supra* at Paras.18-21.



nature of its programming, Cornerstone filed an amendment and a responsive pleading, to which Alliance responded.<sup>46</sup> Third, in March and April of 1999, Cornerstone once more supplemented its descriptions of its proposed programming and Alliance once more responded with its contention that the programming was not primarily educational.<sup>47</sup>

31. While Cornerstone's descriptions and proposals have become more specific and detailed with each round of pleadings, it is clear that Cornerstone primarily will continue to broadcast religiously oriented programs that have aired on Channel 40, albeit with some additions and modifications. In its June 1997 application, Cornerstone represented that it "expects to continue to broadcast the majority of its programming, which has a very significant general educational component."<sup>48</sup> Nevertheless, Cornerstone has indicated that it "plans to expand its program offerings to include for-credit Bible study courses and to expand its instructional program offerings in the future as funding and studio space/time permit."<sup>49</sup> It also has promised to add "a weekly literacy program designed to reach functionally illiterate adults and children with basic reading problems."<sup>50</sup> As originally cast, its general educational programming would include this literacy program, "biblical programs, and popular 'how to' programs for learners of all ages, including adult learners, on topics such as gardening, fishing, hunting, home repairs, crafts, cooking, exercise and more."<sup>51</sup>

32. Cornerstone's primary approach in demonstrating that it qualifies under Section 73.621 has been to provide descriptions of its existing programs to support its claim that they are

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<sup>46</sup> In its April 1998 amendment, Cornerstone submitted a programming schedule setting forth a total of 168 hours of programming per week. See Cornerstone Amendment, April 27, 1998, Exhibit 7 ("1998 Amendment"). Descriptive information and illustrative tapes were provided for programs that accounted for slightly more than 100 hours of that weekly schedule. *Id.* at Exhibits 5-6. Cornerstone stated that 52 hours of its existing programming qualified as "general educational," and that it proposed to add 5 hours per week of for-credit instructional programming from Oral Roberts University, and a literacy program initially referenced in its June 1997 application. *Id.* at 3. Cornerstone also stated that its list of programs was "not exhaustive of Cornerstone's programming." *Id.* at 6.

<sup>47</sup> In a March 31, 1999 amendment to its programming proposal ("1999 Amendment"), Cornerstone provided further descriptive and illustrative material for 94.5 hours of regularly scheduled programming that it contends qualifies as general educational or instructional programming. See 1999 Amendment, Supplemental Showing. Cornerstone reiterated its intention to add 5 hours of instructional programming from Oral Roberts University, and supplied additional information regarding the proposed broadcast of that programming. *Id.*

<sup>48</sup> Application, Exhibit F, at 24. Cornerstone states that it "will air programming designed to further lifelong education, with emphasis on religious teaching and education as well as the teaching of moral and ethical values and practical Christian living." *Id.* Exhibit C, at 18.

<sup>49</sup> *Id.* Exhibit C, at 17.

<sup>50</sup> *Id.* Exhibit C, at 18. Cornerstone stated that it "will also air children's programming, including religious educational programming and programming that teaches children morals and values for living in a community."

<sup>51</sup> *Id.* Exhibit F, at 24. Cornerstone set forth brief descriptions of these programs in Exhibits F-2 and F-3 of its initial application.

“general educational.”<sup>52</sup> Cornerstone, however, also has delineated certain additional programs that it will broadcast, including Bible study instruction in conjunction with Oral Roberts University and programs designed to address illiteracy. Additionally, Cornerstone has recognized that it will need to make adjustments to its programs to comply with the requirements of Section 73.621, and has committed to making such changes.<sup>53</sup> This commitment appears to relate most directly to its need to eliminate the current commercial nature of its programs. Cornerstone has also provided some indication that it is willing to add additional programs to its schedule if that is in the public interest and necessary to comply with Section 73.621(a).<sup>54</sup>

33. In opposing the grant of Cornerstone’s application based on the claim that its station will not be used primarily to meet the educational needs of the community, Alliance has intertwined two threads of argument. First, Alliance contends that Cornerstone’s programming must be categorized as primarily religious, rather than educational, instructional and cultural.<sup>55</sup> Second, Alliance contends that Cornerstone’s programming is narrow, extremist, ideological, biased, distorted, erroneous, and propagandistic.<sup>56</sup> In support of its contentions with regard to Cornerstone’s programming, Alliance has supplied various declarations from individuals who have viewed the programs that have been broadcast on Channel 40 and apparently will be broadcast on Channel \*16 if Cornerstone’s application is granted.<sup>57</sup> In addition, Alliance provided videotapes

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<sup>52</sup> For this reason, in its May 12, 1999 response (“May 1999 Response”) to Alliance’s comments on its 1999 Amendment, Cornerstone reiterated that “Cornerstone’s stance has always been (and remains) that Cornerstone’s existing programming, modified to meet applicable Commission standards for noncommercial operations, qualifies as educational.” May 1999 Response at 4.

<sup>53</sup> Cornerstone has indicated that it “has always understood that adjustments to its broadcast schedule would be necessary in order to operate a noncommercial educational broadcast station.” Cornerstone Supplementary Pleading, April 27, 1998, at 12 (*emphasis in original*).

<sup>54</sup> For example, Cornerstone has stated that it “plans to air *much* of its current program schedule on Channel \*16,” but has simultaneously indicated that these programs will be “*supplemented by some new programs, including instructional programs in cooperation with Oral Roberts University.*” April 27, 1998 Supplemental Pleading, at 12 (*emphasis added*). There are additional examples of other potential programs in the record. Specifically, in calculating the total number of hours of qualifying programs described in its 1999 amendment, Cornerstone reports that “additional children’s programs and other general educational programs not summarized here will bring the total even higher.” 1999 Amendment, Supplemental Showing, at 3. Finally, Cornerstone has stated that its “promises of future performance as a noncommercial educational licensee are commitments to the agency. The Commission must take those commitments seriously – Cornerstone certainly does.” 1999 Amendment, Supplemental Showing, at 3.

<sup>55</sup> See, e.g., Petition to Deny, at 11, 27. Among other things, Alliance contends that “Cornerstone operates a religious station, not an educational station, and that Cornerstone’s “current programming does not meet the educational needs of the community.” Specifically, Alliance alleges that “scholars from the Pittsburgh area have viewed the programming that Cornerstone designates in its application as ‘General Educational’ or ‘Children’s programming’ and found that it does not meet established educational standards.” *Id.*

<sup>56</sup> Alliance uses declarations, discussed below, to support the general claim that Cornerstone “serves a small sectarian audience in a market that is religiously and ethnically diverse.” April 30, 1999 Reply, at 5.

<sup>57</sup> Linda Flower, a Professor of English at Carnegie Mellon University, has opined that the programming is “highly ideological, extremist tract,” contending instead, that educational programming should “offer an accurate

of programming aired on WPCB-TV, some of which, it alleges, has no clear educational content and substance, and dispute Cornerstone's characterization of specific programs as educational. In response, Cornerstone affirmed that it has "a co-extensive religious purpose" and uses "religious-oriented programming as a vehicle to pursue its educational goals." Cornerstone also submitted the declarations of its President and Vice President-Programming, stating that in their "best judgment," the majority of Cornerstone's programming "has educational value and would qualify as educational programming under the Commission's standard for reserved band TV operations."<sup>58</sup>

34. As discussed above, given the state of the record after the initial round of pleadings, the Bureau required Cornerstone to provide a "further demonstration of the overall general, educational, cultural, and instructional nature" of its proposed programming.<sup>59</sup> The Bureau noted that Cornerstone "identifies over 70 percent of its programming as having a religious component."<sup>60</sup> In response to the staff's request, Cornerstone submitted an updated programming schedule reflecting the WPCB-TV schedule as of May 1, 1998, totaling 168 hours of programming per week. Cornerstone also represented that the schedule, while "subject to change as Cornerstone's programming plans evolve . . . represent[s] Cornerstone's current plans for Channel \*16." Cornerstone then listed 77 programs by program title under several categories,<sup>61</sup> and more specifically described the educational component of a number of programs said to be representative of the other educational shows to be aired. In responding to the Commission and Alliance in the second and third round of pleadings in this case, Cornerstone has also stressed its First Amendment right to broadcast programming that is, in its judgment, of an educational nature, with deference due from the Commission to their judgment.<sup>62</sup> Cornerstone also points out the vague and general nature of the

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and balanced report that is supported by evidence, not primarily by personal testimony and emotional appeals." Professor Flower recognizes the "right of advocacy groups" from the "political right as well as left, to use incantation and appeals to fear and bias to rally support," but indicates that "we should not confuse this polemical activity with educating the public about weighty and complex issues with multiple sides, which call for open debate and balanced judgment." Michael Schneider, a senior science writer, takes issue with specific programming aired on WPCB-TV, indicating that it "proselytizes against knowledge that is well accepted and respected among scientists." Carole Stabile, a professor at the University of Pittsburgh, calls the programming "propagandistic," and indicates her belief that viewers "learn a narrow version of Christianity," but "learn nothing about science, contemporary politics, or the diverse culture in which they live." As a final example, Lincoln Wolfenstein, a professor of physics at Carnegie Mellon University, complains that specific programming on WPCB-TV regarding the planets and astronomy "ignores new and convincing evidence" of scientific fact, and "instead of objective reporting," presents "ideological beliefs."

<sup>58</sup> Cornerstone also submitted letters from officials from the National Religious Broadcasters stating that in their opinion, the programming currently aired on WPCB-TV is educational.

<sup>59</sup> See March 27, 1998 Letter from Barbara A. Kreisman to Oleen Eagle ("FCC Request"), at 3.

<sup>60</sup> *Id.* at 3 n.5.

<sup>61</sup> Cornerstone grouped these programs under the following category headings: "General Educational (Includes Programs Involving Religious Teaching)," "Cultural and Arts Programming," "News and Public Affairs," "Informational," "Entertainment" and "Instructional (For College Credit)". Cornerstone also submitted a videotape with short excerpts of representative programs, in order to acquaint the staff with the nature of its programming.

<sup>62</sup> Cornerstone Opposition to Petition to Deny, at 17 (citing *Way of the Cross*). Cornerstone has stated, for example, that "the FCC staff is engaging in unconstitutionally rigorous scrutiny of, and applying an impossibly

definition for educational programming,<sup>63</sup> citing *Black's Law Dictionary* as a source of a definition.<sup>64</sup> Cornerstone also relies on the brevity of educational demonstrations by prior applicants for NCEFM stations, and the expansion of the descriptions has provided for all of its programming, including the hours of new programming Cornerstone proposes to broadcast on Channel \*16.<sup>65</sup>

35. In responding to the Commission and Cornerstone, Alliance has stressed that the First Amendment does not protect applicants from complying with any incidental restrictions on their speech that are necessary to ensure eligibility for the reserved noncommercial educational allocation.<sup>66</sup> Again, Alliance directs us to what it sees as the narrow and religious perspective of Cornerstone's programming, and its refusal to respond with changes to its schedule despite the Commission's alleged finding in the FCC Request that more than "seventy percent" of Cornerstone's "programming is primarily religious."<sup>67</sup> The Petitioners emphasize the fact that the Commission previously has designated cases for a hearing when an applicant has made an insufficient showing that its programming meets the eligibility requirements for reserved noncommercial educational channels.<sup>68</sup>

36. Ultimately, at this stage of the proceeding, we are left with Cornerstone's contention that it has set forth a schedule and described approximately 100 hours of its weekly programming that it believes, in its judgment, is composed of "instructional" or "general educational" programs. Specifically, we are left with descriptions of 99.5 hours of Cornerstone's programming that set forth the applicant's judgment concerning the educational orientation of the programs, and the contention of Alliance that the proposed programming is not sufficiently educational to make

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high standard to, the Cornerstone application, simply because of the applicant's religious orientation and programming viewpoint." April 27, 1998 Supplemental Pleading, at 1-2.

<sup>63</sup> Cornerstone points out that "what the Commission means by 'educational' in this context may not be well defined. The concepts of 'instructional' and 'general educational' programming originally set forth in the [Guidelines] have apparently evolved, as traditional public broadcasting stations air many programs that fall outside either concept." *Id.* at 9-10.

<sup>64</sup> According to *Black's Law Dictionary*, education comprehends "not merely the instruction received as school or college, but the whole course of training; moral, religious, vocational, intellectual, and physical. Education may be directed to either the mental, moral or physical powers and faculties, but in its broadest and best sense it relates to them all." *Black's Law Dictionary*, 5<sup>th</sup> Ed. (1979).

<sup>65</sup> See April 27, 1998 Supplemental Pleading, at 4-8, citing *Palm Bay, Columbia Bible College, Community Educational Association* (see *supra* at Paras. 24-25 for a discussion of these cases); *Id.* at 11; 1999 Amendment, Supplemental Showing, at 1, 4.

<sup>66</sup> Alliance's August 1, 1997 Reply to Opposition at 4-5.

<sup>67</sup> See, e.g., Alliance's May 12, 1998 Reply, at 5. In fact, the Commission staff did not find that more than 70 percent of Cornerstone's programming was "primarily religious," but instead recognized that Cornerstone itself acknowledged that over "70 percent" of its programming had a "religious orientation."

<sup>68</sup> See, e.g., *id.* at 15, citing *Christian Family Cinema, Music Ministries, Toccoa Falls, and Holy Spirit Harvest Church* (see *supra* at Para. 24 for a discussion of these cases).

Cornerstone eligible to acquire and operate a NCETV station on Channel \*16.

37. Evaluating Cornerstone's Judgment Regarding Its Programming. As an initial matter, we conclude that Cornerstone has provided a program schedule and description of programming that prevents us from denying its application based on its failure to come forward with sufficient evidence to evaluate its proposal. Cornerstone has provided us with descriptions and examples of approximately 100 hours of programming, and we thus cannot designate Cornerstone's application for hearing for failure to present us with a program schedule and information regarding the subject matter of its programs. Cornerstone has made a demonstration that its proposed programming for Channel \*16 will be "primarily to serve the educational needs of its community" that significantly exceeds the showing made in *Way of the Cross* and the other cases designated for hearing by this Commission on the basis of evidentiary insufficiency.<sup>69</sup> Specifically, after the third round of pleadings concluded in June 1999, Cornerstone had set forth descriptions of approximately 100 hours of weekly programming with the basis for its belief that these programs were educational in nature. That showing must be credited, absent our determination that Cornerstone's judgment is "arbitrary or unreasonable."

38. Alliance claims, however, that Cornerstone's programs are primarily religious in nature, and thus, do not qualify as "general educational" programs.<sup>70</sup> Under *Astroline Communications Company v. FCC*, the proponent of a petition to deny first "must set forth specific allegations of fact that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity."<sup>71</sup> If a *prima facie* case is made, then the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters of which the Commission may officially take notice, a substantial and material question of fact is presented." *Id.* at 1561.

39. In reviewing Alliance's allegations, which must be taken as true, it appears that Alliance has made a substantial effort to make a *prima facie* case that Cornerstone's judgment regarding the educational nature of its programming is "arbitrary or unreasonable." Alliance's efforts, however, to assert that the religious nature of the programming somehow prevents it from being educational must fail. If we have made anything clear in the past, it is that religious programming may be found to be primarily educational, regardless of its religious orientation.<sup>72</sup> Although Alliance supports its assertions that much of the religious programming is ideological and propagandistic, it still must demonstrate -- with specific allegations of fact -- that such an orientation prevents the programming from being "used primarily to serve the educational needs"

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<sup>69</sup> See 1999 Amendment, Supplemental Showing; *supra*, 6-8. This is true even given the more substantial showing that is required of NCETV applicants.

<sup>70</sup> See *supra* at Para. 33.

<sup>71</sup> 857 F.2d 1556 (D.C. Cir. 1988).

<sup>72</sup> See *supra* at Paras. 19-23; *Moody Bible Institute*, 66 FCC 2d at 162; *Guidelines*, 43 Fed. Reg. at 30845; *Way of the Cross*, 101 FCC 2d at 1374 n.8; *Columbia Bible College*, 6 FCC Rcd at 517.

of the community in the reasonable judgment of the broadcaster.<sup>73</sup> We cannot question a licensee's judgment regarding the appropriate classification of its programming, much less overturn it, simply because Alliance believes the programming to be extremist, narrow-minded, or even plain wrong.

40. Regardless of whether a *prima facie* case has been made by Alliance, however, we must conclude that under the second prong of the *Astroline* test, we cannot find "arbitrary or unreasonable" the applicant's judgment that its proposed programming will be "used primarily to serve the educational needs" of its community. The Commission and its staff have reviewed the evidence in the record, including Cornerstone's descriptions of its programs in the second and third rounds of this proceeding and the additional programming it intends to broadcast. Some of Cornerstone's programming can clearly be regarded as serving the educational and instructional needs of the community, even without significant deference to Cornerstone. These programs include proposed college course offerings, Bible study series, drama presentations of Bible stories, news and public affairs programming, and regularly-scheduled programs on topics such as music, gardening, quilting, cooking, health, travel, fitness and children's issues. A relatively small portion of the programming Cornerstone has presented appears to be entertainment programming that cannot, absent greater detail from the applicant, be identified as "general educational" programs, even giving deference to the applicant in light of our very general guidelines.<sup>74</sup>

41. Apart from these programs, a substantial number of the programs that Cornerstone has described in the Supplemental Showing in its 1999 Amendment are programs with religious orientation that Cornerstone claims teach viewers how to use biblical stories and principles, investigate and analyze scriptural texts, and generally study selected Bible passages. The Commission and its staff apparently would be able to classify some of these programs as educational based upon the level of scriptural analysis and discussion of issues even given our absence of clearer guidelines for such an analysis because of the deference due to the judgment of the broadcaster.<sup>75</sup> Assessment of other programs becomes much more problematic given the clearly devotional orientation of the programming and the absence of such guidelines.

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<sup>73</sup> The evaluation of such an issue places us, of course, squarely in the position of assessing the content of the programming of the broadcaster or applicant, a situation in which this Commission ought to be placed only in the rarest of instances. See *CBS v. Democratic National Committee*, 412 U.S. 94, 120-21, 126-27 (1973). It is perhaps for this reason that even Alliance acknowledges that they "do not seek to prevent Cornerstone from airing any of its current programming, with the exception [of programs that violate the Commission's substantive rules on commercial operation]. Instead, Petitioners maintain that to fulfill the requirements to operate as a noncommercial educational broadcaster, Cornerstone must also provide programming that meets the educational and cultural needs of the entire Pittsburgh community." Alliance's May 12, 1998 Reply, at 2 (*emphasis in original*).

<sup>74</sup> These programs include "Sportsweek" and "His Place," described as a "fictional drama setting of a diner where people meet to talk about their lives."

<sup>75</sup> Giving the requisite deference to Cornerstone's judgment, for example, and based upon the record before it, the Commission and its staff could find "Biblical Portrait of Marriage," "Effective Living with Myles Munroe," "Food for Life," "Jack Hayford (The Living Way)," "John Hagee Today," "Love Worth Finding," "Marriage and Family Magazine," "The Word for Today," "Exposing the Lie," "Father Michael Manning," "Just the Facts," "Singles Plus," and "Marriage Plus" reasonably classified as "general educational" programming.

42. Based on this review, we cannot say that the applicant's judgment that these other proposed programs will "primarily . . . serve the educational needs of" the Pittsburgh community is "arbitrary or unreasonable." Cornerstone has made a significant effort to explain its basis for its judgment.<sup>76</sup> Looking at the record as a whole, in light of our current precedent, we cannot say that the Commission can establish a basis for delineating a "substantial and material question of fact" concerning the applicant's judgment, much less find that judgment to be "arbitrary or unreasonable."<sup>77</sup>

### **COMPLIANCE WITH SECTION 73.621(A) – ADDITIONAL GUIDANCE**

43. We have now been faced squarely with the difficult balance between maintaining the educational nature of the reserved allocations and the First Amendment rights of broadcasters on this band. We believe that it would be advisable to give this licensee, other potential applicants and licensees, as well as the Commission and its staff, additional guidance regarding the review of programs or programming proposals for the reserved NCETV channels. In order to comply with the requirement that a NCETV station "be used primarily to serve the educational needs of the community," we now clarify that this requirement is two-fold. First, with respect to the overall weekly program schedule, more than half of the hours of programming aired on a reserved channel must primarily serve an educational, instructional or cultural purpose in the station's community of license. Second, in order to qualify as a program which is educational, instructional or cultural in character, and thus counted in determining compliance with the overall benchmark standard, a program must have as its primary purpose service to the educational, instructional or cultural needs of the community. We "will defer to the judgment of the broadcaster unless" the broadcaster's "categorization appears to be arbitrary or unreasonable."<sup>78</sup> Additionally, the overall context of the broadcast is important to evaluating the reasonableness of the judgment of the broadcaster.

44. In assessing whether a program has as its primary purpose service to the educational, instructional or cultural needs of the community, "we will not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature."<sup>79</sup> We do not believe that the discussion of religious matters during a program that has as its primary purpose

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<sup>76</sup> For example, Cornerstone asserts that in "Joyce Meyers, Life in the Word," Ms. Meyers "teaches viewers how to use biblical principles and stories to cope with life's challenges." Cornerstone also asserts that "Kenneth Copeland" is a program that "consists of analysis and discussion of scriptural text on a variety of subjects with an emphasis on those that are most relevant to contemporary social issues." As one final example, Cornerstone describes "Living by the Word" as a program that employs "a team teaching approach to engage the viewer in a thorough study of a selected Bible passage."

<sup>77</sup> A majority of three Commissioners has attempted in this decision to provide additional guidance to this licensee, other potential applicants and licensees, and the Commission staff, with respect to the review of future programs and programming proposals for the reserved NCETV channels. We believe that it would be inequitable to apply any clarified guidelines emanating from this decision to the record developed over the past three years.

<sup>78</sup> *Way of the Cross*, 102 FCC 2d at 1372 n.8, citing *Guidelines*, 43 Fed. Reg. at 30844-45.

<sup>79</sup> *Id.*

service to the educational, instructional or cultural needs of the broader community disqualifies the program from being a “general educational” program under Section 73.621.<sup>80</sup> Conversely, however, not all programming, including programming about religious matters, qualifies as “general educational” programming. For example, programming primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify as “general educational” programming.<sup>81</sup> We reiterate that the reserved television channels are intended “to serve the educational and cultural broadcast needs of the *entire* community to which they are assigned,”<sup>82</sup> and to be “responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests.”<sup>83</sup>

45. Other Programming Related Matters. Stations operating on reserved channels are also required to provide a noncommercial service. Alliance contends that Cornerstone intends to air commercial programming on Channel \*16 in contravention of Section 399B of the Communications Act, and also to engage in prohibited fundraising. In support, Alliance points to Cornerstone's proposal to retain most of its present programming and gives examples of programs aired on WPCB-TV in 1997 which would not meet the Commission's requirements for operation on a reserved noncommercial channel. In its March 27, 1998 letter, the staff requested that Cornerstone review the programming it presently proposes to air on Channel \*16, and, with respect to those programs which presently would not comply with the Commission's advertising and fund-raising restrictions on noncommercial, educational stations, to explain what steps it will take to monitor and adjust those programs to comply with the rules. In response, Cornerstone states that it has undertaken a comprehensive program to ensure compliance with noncommercial educational rules and policies upon commencing operations on Channel \*16, and detailed a number of steps it had taken to ensure its compliance with Section 399B in the event it is permitted to operate on Channel \*16.<sup>84</sup> Accordingly, based upon the information we have before

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<sup>80</sup> Examples would include programs analyzing the role of religion in connection with historical or current events, various cultures, or the development of the arts; exploring the connection between religious belief and physical and mental health; examining the apparent dichotomy between science, technology and established religious tenets, or studying religious texts from a historical or literary perspective. In this regard, we agree with Cornerstone that if we conclude that a program “parsing the language and meaning of the literature of Shakespeare is ‘educational,’ then a program parsing the language and meaning of the Bible” also similarly can be “educational.” See April 27, 1998 Reply Pleading, at 10. As the Commission stated in *Way of the Cross*, while “not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters related to religion would qualify.” *Id.*

<sup>81</sup> Thus, church services generally will not qualify as “general educational” programming under our rules. However, a church service which is part of an historic event, such as the funeral of a national leader, would qualify if its primary purpose is serving the educational, instructional or cultural needs of the entire community.

<sup>82</sup> *Fostering Expanded Use of the UHF Television Channels*, 2 FCC 2d at 542 (emphasis supplied.)

<sup>83</sup> *Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 900 (1982). As Cornerstone recognizes, it is obligated to comply with Section 73.621. Cornerstone also will be obligated to comply with any clarifications to Section 73.621(a), including those provided in this decision. If Cornerstone's operation of a NCETV station is shown to violate Section 73.621 after programming is actually broadcast on Channel \*16 by Cornerstone, the Commission can take appropriate action at that time.

<sup>84</sup> For example, Cornerstone states that it has hired a station manager whose basic duty is to ensure that



us at present, we see no reason for further inquiry into Cornerstone's commitment to operate Channel \*16 in full compliance with the applicable rules and policies for noncommercial operations.

46. Alliance also raises a number of other issues relating to Cornerstone's present operation of WPCB-TV, and its compliance with the Commission's general programming policies. We have considered Alliance's arguments and conclude that it has failed to raise a substantial and material question of fact as to Cornerstone's qualifications to assign the license of WPCB-TV. *See Jefferson Radio v. FCC*, 340 F.2d at 783.

47. Alliance complains that Cornerstone's programming "promotes the adoption of a belief based on its own brand of evangelical Christianity," and that the alleged ideological nature of Cornerstone's programming raises an issue as to whether Cornerstone "is likely to give a fair break to others who do not share them." In support of its assertion that Cornerstone's programming is unbalanced, Alliance refers to a number of programs aired on WPCB-TV which express views with which Alliance apparently disagrees.<sup>85</sup> In response, Cornerstone asserts that its programming represents a wide variety of theological perspectives, including Sunday broadcasts of "traditional church services covering the spectrum of Christian denominations," and that it has adequately responded to community issues in the past.

48. To the extent that Alliance alleges that Cornerstone has failed to meet its public interest obligations to present programming which is responsive to the needs and interests of its community of license, *Commercial TV Stations*, 98 FCC 2d 1075, 1091-92 (1984), thereby calling into question whether it can be expected to meet its public interest obligations as the licensee of Channel \*16, we find that it has failed to make a *prima facie* case. The Commission has granted licensees broad discretion to choose, in good faith, which issues are of concern to the community and to choose the types of programming to address those issues. The Commission will defer to the broadcaster's judgment regarding its issue-responsive programming absent a showing that "the broadcaster was unreasonable or discriminatory in its selection of issues or that the licensee has offered such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community." *License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, 5 FCC Rcd 3847, 3848 (1990). While Alliance submitted affidavits from a few individuals who viewed several hours of programming on WPCB-TV and were critical of the content of the programs, we find these affidavits insufficient to support an allegation that

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Cornerstone complies with the noncommercial educational rules and policies, that staff members have attended briefing sessions on these rules and policies, and that it has undertaken a review of its program-related documents and agreements to ensure that all programs aired on Channel \*16 comply with Section 399B of the Communications Act and applicable rules and policies.

<sup>85</sup> Examples include programs in which the Unitarian Church is identified as a "cult," the Church of Latter Day Saints is described as the cause of serious social problems in Utah, and adherents of Hinduism are referred to as part of "the Kingdom of the enemy." Alliance also submits affidavits from several Pittsburgh scholars, alleging, *inter alia*, that Cornerstone's programming includes "attacks on other segments of the community, including homosexuals and non-Christian faiths," is offensive to Jews, and fails to address problems and concerns of the African-American community.

Cornerstone "has offered such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community." *Id.*

49. We also conclude that Alliance has failed to raise a *prima facie* case that Cornerstone has been "unreasonable or discriminatory in its selection of issues," *Philadelphia Renewal Applications*, 5 FCC Rcd at 3848, or used WPCB-TV to "exercise[] for [its] own private interests in a grossly partial, discriminatory or unfair manner." *WBNX Broadcasting Co.*, 12 FCC 837, 841 (1948). With respect to Alliance's complaint that some of Cornerstone's programming included disparaging comments regarding certain religious adherents and other groups, these expressions of views, although clearly offensive to some viewers, do not rise to the level of repeated irresponsible, defamatory or discriminatory conduct which would warrant an inquiry into whether Cornerstone can be relied upon to administer fairly its responsibilities as a licensee. We emphasize again, however, that noncommercial educational television licensees are expected to provide "a service that is responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests." *Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d at 900.

50. Similarly, in support of its contention that Cornerstone's proposed programming does not meet the educational needs of the Pittsburgh community, Alliance submitted affidavits from area educators who were critical of Cornerstone's programming. For example, two local professors viewed an hour-long documentary aired on WPCB-TV on April 26, 1997 regarding issues affecting American public schools, and opined that the program had little or no educational value, describing the program as "extremist," "radically unbalanced," and presenting "misinformation as if it were accepted knowledge."<sup>86</sup> A professor at the University of Pittsburgh with extensive involvement in AIDS research and prevention efforts, and the Associate Director of the Pittsburgh AIDS Task Force, viewed an hour-long program aired on April 27, 1997, and concluded that the program presented a "distorted view" of AIDS Service Organizations, presented statements and opinions that were "inflammatory and false," and sought to undermine HIV prevention efforts by discouraging viewers from taking advantage of HIV educational efforts. The Commission, however, "has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary," finding that "[a]ny other position would stifle discussion and destroy broadcasting as a medium of free speech." *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190, 191-92 (1966), *aff'd*, *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969). Instead, "[i]t is the role of the public, critics, and students of the mass media, either to comment or to be critical with regard to [a broadcaster's coverage of issues.]" *Democratic National Convention Television Coverage*, 16 FCC 2d 650, 658 (1969). Accordingly, we encourage viewers to make their views regarding programming matters known to Cornerstone's Board and management.

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<sup>86</sup> One of the educators stated that in his opinion, this program was "propaganda" and "would have been more appropriately presented as a 'paid political message.'" As a commercial licensee, Cornerstone is not prohibited from accepting and airing paid political programs. Noncommercial educational licensees, however, may not broadcast "any message or other programming material . . . in exchange for any remuneration, and which is intended . . . to express the views of any person with respect to any matter of public importance or interest; or to support or oppose any candidate for public office." 47 U.S.C. § 399B.

51. Cornerstone's Board of Directors. Noncommercial television applicants which are non-profit organizations, such as Cornerstone, must submit "evidence that officers, directors and members of the governing board are broadly representative of the educational, cultural and civic groups in the community." (FCC Form 340, Section II, Paragraph 11(a)). Prior to the filing of the assignment application, Cornerstone's Board of Directors was comprised of Reverend R. Russell Bixler and Oleen Eagle, who had served continuously as directors and chief officers since 1978, when Cornerstone acquired the WPCB-TV construction permit, Reverend Mitchel Nickols, who had served on the Board since 1989, Linford S. MacDonald, a director since 1992, and Reverend Gary Tustin. The remaining officers of Cornerstone were also long-time employees of the company: David Skeba, Vice President-Programming and Mrs. Eagle's nephew, had been employed full-time since 1979, and Blake A. Richert, Vice President-Engineering, had been employed since 1983.<sup>87</sup> While Cornerstone named three new directors to its Board the month preceding the filing of the assignment application,<sup>88</sup> based upon the information provided in the assignment application, the staff could not reach a determination as to whether Cornerstone's Board was sufficiently representative.<sup>89</sup> Accordingly, the staff gave Cornerstone the opportunity to provide additional information regarding the steps it had taken, and further steps it intended to take, to ensure that its Board and management were broadly representative of the educational, cultural and civic groups in the Pittsburgh community.

52. Cornerstone amended its application on April 27, 1998, to provide further information regarding its directors and the organizations with which they are affiliated. Cornerstone also stated that it had hired a Station Manager, whose responsibilities include "the creation and oversight of the station's participation in cultural and educational activities . . . and for the administration of a Community Advisory Board for Channel \*16" which "will be made up of individuals from the Channel \*16 coverage area from these categories: Civic, Cultural (Ethnic), Cultural (Arts), Business, Senior Citizens, Youth, Service Organizations, Local Education, Media and Labor." Cornerstone filed a second amendment to the assignment application on June 12, 1998, to report that two additional board members -- William F. Roemer and William W. Pendleton, Sr. -- have agreed to join Cornerstone's board should Cornerstone become the licensee of Channel \*16.

53. We have reviewed all of the materials and conclude that Cornerstone's Board of Directors and management are sufficiently representative of the Pittsburgh community. With the

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<sup>87</sup> The only information provided about Dolores Richert, the Secretary of the corporation, is that she is married to Blake Richert.

<sup>88</sup> Richard Simmons, William E. Kofmehl and Michelle D. Agatston replaced Mr. MacDonald, who was named a member of Cornerstone's Advisory Board.

<sup>89</sup> For example, few of the directors appeared to be affiliated with secular organizations in the Pittsburgh area, nor did it appear that the Board included representatives from local civic organizations, local government, cultural institutions or organizations, local universities or boards of education, professional groups, labor organizations, environmental or recreational groups, or organizations dedicated to the needs and interests of various segments of the Pittsburgh community, including senior citizens, the disabled, women, children, minorities and ethnic groups.

exception of the Reverends Tustin and Simmons,<sup>90</sup> the remaining ten officers and directors reside in the Pittsburgh area. Mr. Roemer is Chairman of the National City Bank of Pennsylvania, a Governing Board member of the United Way of Allegheny County, Pittsburgh 2000 and the Coalition for Christian Outreach, and the President of the Board of Trustees for the Episcopal Diocese of Pittsburgh. He is also a former director of the Pittsburgh Branch of the Federal Reserve Bank of Cleveland, the Pittsburgh Symphony and the Allegheny Trails Council of the Boy Scouts of America. Mr. Pendleton, a former member of the Pennsylvania House of Representatives representing Pittsburgh and Allegheny County, is on the Board of Directors of Grove City College, the Pittsburgh Advisory Economic Development Committee, Forbes Hospital HMO, Ronald McDonald Charities, and the Saltworks Theatre Company in Pittsburgh. He is also a member of the NAACP and Urban League, and serves on advisory boards to the Pittsburgh Board of Education and Catholic Diocese. Dr. Kofmehl, who received a Ph.D. in Education from the University of Pittsburgh, is the Chairman of the Board of Directors of the Lutheran Service Society of Western Pennsylvania, and the Executive Director of the Allegheny County Literacy Council/Christian Literacy Associates, an organization that trains volunteer tutors and provides literacy programs in the United States and overseas. He is also on the faculty of local community colleges, supervises student teachers at Pittsburgh inner-city schools, and was a member of a local school board for a number of years. Reverend Nickols, who also received a Ph.D. in Education from the University of Pittsburgh, is the Founder and Pastor of Bibleway Christian Fellowship, Inc., a church in a Pittsburgh suburb, and serves as a member of the Citizen's Advisory Committee and Human Relations Committee of the Highlands School District, and of the Council of Graduate Students in Education at the University of Pittsburgh. He also teaches courses in African-American History, Philosophy and Religions of the World at Allegheny Community College, is a regular speaker at area schools regarding "valuing diversity," and is a member of various professional educational organizations, the League of Voter Education, and the NAACP. While the remaining officers and directors are somewhat less involved with local organizations,<sup>91</sup> we believe, on balance, that Cornerstone has adequately demonstrated that its Board and management are representative of the community.

54. Alliance complains that various segments of the community are not presently represented on Cornerstone's Board. It also acknowledges, however, that "no one group is entitled to representation." Here, Cornerstone's Board includes representatives of the business community, local government (through membership on boards of education and various advisory committees), religious organizations (including two religious Dioceses in Pittsburgh), a health care organization, various charitable organizations, institutions of higher education, numerous professional organizations, and organizations committed to the interests of minorities (NAACP

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<sup>90</sup> Reverend Tustin resides within the service area of WKBS-TV, Channel 47, Altoona, Pennsylvania, which is licensed to Cornerstone, and has no involvement with Pittsburgh area organizations. Reverend Simmons resides in Washington, D.C. and his involvement with Pittsburgh organizations has been minimal.

<sup>91</sup> Ms. Agatston oversees a day care center for an area church, is a member of the Pittsburgh 2000 Women's Steering Committee and Hosanna House Advisory Committee, and is said to be active in the African-American community. Mrs. Eagle is a member of several area chambers of commerce and the Pittsburgh Steering Committee for the March for Jesus, and also is involved with international ministry projects. Reverend Bixler, Mr. Skeba, and Mr. and Mrs. Richert apparently have no present formal involvement with any local organizations.

and Urban League).<sup>92</sup> In this regard, it is also important to recognize that Cornerstone has operated on a nonreserved channel allocated to Greensburg for more than twenty years, during which time it was not required to have a board broadly representative of a major city. Moreover, Cornerstone has begun taking the necessary steps towards converting from a commercial to a noncommercial educational operation, including expanding its Board to add five new directors, hiring a station manager responsible for community and cultural outreach, and committing to form a broadly representative CAB to provide general input into the station regarding programming.<sup>93</sup> In the event that Cornerstone becomes the licensee of Channel \*16 at Pittsburgh, we fully expect that it will continue to broaden the representative nature of its Board of Directors and management over the course of its operation on Channel \*16, consistent with its obligations as a noncommercial educational licensee in a community as large and diverse as Pittsburgh.

55. Cornerstone's Qualifications as an Educational Organization With an Educational Purpose. Noncommercial educational broadcast stations will be licensed only to "nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." 47 C.F.R. § 73.621(a). Until immediately prior to the filing of the above-referenced assignment application, Cornerstone's Articles of Incorporation stated that it was organized as a "religious corporation for the purpose of bringing glory to Almighty God . . . [and] the promulgation of the Gospel of Jesus Christ and the truths of the Holy Bible by whatever means possible," and required that the corporation's authorized business "shall be exclusively for religious purposes, in furtherance thereof, and for no other purpose." While Cornerstone amended its Articles in May 1997, to change its designation from a "religious corporation" to a corporation "organized exclusively for religious, charitable, educational and distinct ecclesiastical purposes," and to expand the permitted purposes of the corporation to include education, based on the totality of the record before it, the staff was unable to determine to what extent Cornerstone intended to pursue its largely unidentified educational purposes on reserved Channel \*16.<sup>94</sup> Accordingly, the staff requested further information regarding Cornerstone's specific educational goals and its commitment to the advancement of an educational program, in accordance with Section 73.621 of the rules.

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<sup>92</sup> With respect to other areas, such as the arts, organized labor, and the specialized needs of children and the elderly, Cornerstone has promised that representatives of these interests, as well as other interests in the community, will be invited to participate in the station's community advisory committee.

<sup>93</sup> While the make-up of an advisory board is not considered in determining if the board of directors and management of a noncommercial educational applicant is broadly representative, the Commission recognizes that the existence of an advisory board is indicative that the station is responsive to local needs and interests.

<sup>94</sup> The staff noted that the fact that an applicant's Articles of Incorporation may "permit 'charitable, educational, religious and scientific' activities tells us nothing as to which of these activities will, in fact, be pursued, and to what degree," and thus, standing alone, does not establish an applicant's qualifications as an educational organization. *See Way of the Cross*, 101 FCC 2d at 1375. Moreover, while Cornerstone stated in the application that it would fulfill an educational purpose "by operating Channel \*16 as a noncommercial educational station that values education of children, teens, and adults on moral, ethical and community issues through lifelong learning and through the teaching of matters related to religion and practical Christian living," the staff did not consider this general statement sufficient to document a specific educational purpose or program.

56. In its April 1998 amendment, Cornerstone more fully described its educational objectives and program to include, *inter alia*: (1) advancing an overall educational program schedule to teach basic moral and ethical principles derived from Judeo-Christian ethics, as set forth in the Bible; (2) providing programming that instructs in everyday activities of life, such as exercise, gardening, home remodeling, cooking, computers, personal finance, health and nutrition; (3) providing programming to meet the educational and informational needs of children and teenagers; (4) offering college course credit programming and related correspondence courses; (5) providing an educational program series on basic adult literacy for the community at large; (6) providing entertaining educational programming with a moral and ethical emphasis which utilizes and fosters an appreciation for the arts, music and history; and (7) providing public affairs programming, including local programming, to meet the needs and interests of the community. Based upon the foregoing, we believe that Cornerstone has now adequately articulated specific educational programs and goals.

### **PAXSON'S QUALIFICATIONS TO BECOME THE LICENSEE OF WPCB-TV**

57. Alliance also contends that the assignment of WPCB-TV to Paxson would be contrary to the public interest. According to Alliance, the proposed programming statement submitted by Paxson in support of the assignment application does not accurately describe Paxson's actual programming plans and practices. Instead, Alliance states that Paxson's Internet website, as well as comments made by corporate officers in the trade and financial press, demonstrate that the programming on Paxson's Pittsburgh television station would consist almost entirely of sales presentations, with little or no noncommercial, local content. Alliance acknowledges that "Commission policy does not recognize that stations with programming substantially devoted to sales presentations are contrary to the public interest." It asks, however, that the Commission refrain from approving the transfer of additional stations to Paxson until such time as the Commission rules on a pending petition for reconsideration on the 1992 Cable Act provision requiring the Commission to determine whether home shopping broadcast stations are serving the public interest, convenience and necessity,<sup>95</sup> and completes a pending rulemaking proceeding regarding limitations on the commercial time on television stations.<sup>96</sup> In response, Paxson argues, *inter alia*, that the courts and Commission have repeatedly rejected arguments that would require intrusion into the format choices of broadcast licensees, and that the Commission has already concluded that specialty programming, including the shop-at-home formats, offer a valuable diversity of programming and satisfy the public interest, convenience and necessity. According to Paxson, deferring action on the pending assignment application would also violate fundamental administrative law principles regarding the distinction between rulemaking proceedings and application proceedings. Moreover, Paxson argues that in the event the Commission reconsiders the *Home Shopping Order* or imposes commercial time limitations on broadcast licensees, existing licensees utilizing a home shopping format would be allowed to adjust their programming to comply with the revised rules.

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<sup>95</sup> *Implementation of Section 4(g) of the Cable Television Consumer and Protection Act of 1992*, 8 FCC Rcd 5321 (1993) (*Home Shopping Order*), recon. pending.

<sup>96</sup> *Limitation on Commercial Time on Television Broadcasting Stations*, 8 FCC Rcd 7277 (1993).

58. We conclude that Alliance has failed to demonstrate by specific allegations of fact that grant of the application for assignment of license of WPCB-TV to Paxson would be *prima facie* inconsistent with the public interest, convenience and necessity. As discussed above, it is well-settled Commission policy that potential changes in programming formats are not considered in reviewing assignment applications. Moreover, the Commission has previously concluded that specialty stations, such as religious, foreign language and home shopping stations, are not inconsistent with the public interest,<sup>97</sup> and broadcasters such as Paxson are entitled to rely on these determinations unless and until we change our policy regarding home shopping formats. We also note that Paxson proposes to offer programming responsive to the issues of concern to Greensburg and the surrounding area, and to devote a portion of program time to news, public affairs and non-entertainment programming. FCC Form 314, Exhibit E.<sup>98</sup> In addition, Paxson and WQED contemplate entering into an agreement whereby WQED would provide up to five hours per week of public affairs programming and children's core programming for broadcast on WPCB-TV. Assignment and Acceptance Agreement, Art. 13.5(b). Accordingly, we find that Paxson's program service statement fully satisfies the Commission's requirements.

### CONCLUSION

59. Based upon our review of the record before us, we conclude that the petitions and objections against the proposed transactions fail to raise a substantial and material question of fact as to the qualifications of WQED and Cornerstone to assign their respective licenses, and have further failed to raise a substantial and material question of fact as to the qualifications of Cornerstone and Paxson as the proposed assignee's of WQEX(TV) and WPCB-TV.

60. Accordingly, IT IS ORDERED, That the Emergency Petition to Direct Immediate Filing of Renewal Applications filed by The Alliance for Progressive Action and QED Accountability Project on October 7, 1997 IS DENIED, and that WQED Pittsburgh's Motion to Strike the Emergency Petition IS ALSO DENIED.

61. IT IS FURTHER ORDERED, That the petition to deny filed by the Alliance for Progressive Action and QED Accountability Project, the informal objection filed by Robert W. McChesney, and the letters in opposition to the instant assignment applications ARE DENIED.

62. Having determined that the applicants are qualified in all respects, we find that grant

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<sup>97</sup> See *First Report and Order* in Docket No. 20553, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976); see also *D P Media of Martinsburg, Inc.*, 13 FCC Rcd 2123, 2130-31 (1998) ("Home shopping stations typically attract a limited audience but can provide a diverse and valuable service to subscribers.").

<sup>98</sup> Alliance complains that "[t]he entire description of Paxson's proposed programming consists of three boilerplate sentences." Applicants for assignment of an existing authorization, however, are required to provide only a brief narrative description of their proposed community issue-responsive service, sufficient to evince an understanding on the part of the applicant of its obligation to provide programming responsive to the needs of the community. See *Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments*, 3 FCC Rcd 5467 (1988), *aff'd*, *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990).

of the applications to assign the licenses of noncommercial educational television station WQEX(TV), Pittsburgh, Pennsylvania from WQED Pittsburgh to Cornerstone Television, Inc., and of television station WPCB-TV, Greensburg, Pennsylvania from Cornerstone to Paxson Pittsburgh Licensee, Inc. will serve the public interest, convenience and necessity.

63. Accordingly, IT IS ORDERED, That the applications for consent to the assignment of licenses of noncommercial educational television station WQEX(TV), Pittsburgh, Pennsylvania from WQED Pittsburgh to Cornerstone Television, Inc. (File No. BALET-970602IA), and of television station WPCB-TV, Greensburg, Pennsylvania from Cornerstone to Paxson Pittsburgh Licensee, Inc. (File No. BALCT-970530IA) ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary



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**STATEMENT OF CHAIRMAN WILLIAM KENNARD AND COMMISSIONER  
GLORIA TRISTANI, DISSENTING IN PART**

We disagree with the majority's decision not to designate Cornerstone's application for hearing. Under Section 73.621 of our rules, an applicant for a reserved channel must demonstrate that the station "will be used primarily to serve the educational needs of the community." If there is any substantial and material question of fact on that issue, the Commission must designate the application for hearing on the issue of whether the applicant's proposed programming is primarily educational. Here, even according all due deference under our precedent, the applicant has failed to carry its burden of proof. There are simply too many unresolved questions of fact regarding whether the proposed programming is primarily educational, or primarily something else.

Nor do we believe that the Commission's current standard is too vague to be applied to this applicant. The Commission established the general rule that reserved channels must be used primarily to serve the educational needs of the community and left the assessment of whether the standard has been met to case-by-case review. There is nothing unusual or improper about this. To the contrary, it is well-settled that "the decision whether to proceed by rulemaking or adjudication lies within the broad discretion of the agency."<sup>1</sup> In any event, even assuming that our standards needed to be clarified, the right solution would have been to give the administrative law judge further guidance, not to give this applicant a free pass. The people of Pittsburgh -- who are counting on the Commission to preserve the integrity of channels reserved for educational use -- deserve no less.

Instead, the majority has decided to grant the application. Standing alone, the majority's decision to grant this application would eliminate all eligibility standards for the reserved band.

To avoid this result, we join in that part of the order which sets forth clarified programming standards for broadcasters using reserved noncommercial channels. All broadcasters, including Cornerstone, are subject to this standard, which provides, among other things, that programming primarily devoted to religious exhortation (e.g., preaching), proselytizing, or statements of personally-held religious views and beliefs generally will not qualify as educational programming. While we regret the Commission's decision not to apply this standard to the facts before us, we believe that today's decision will permit the Commission to more effectively and expeditiously enforce its rules in future cases involving any broadcasters, including Cornerstone, alleged to be in violation of those rules.

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<sup>1</sup> *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

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## Separate Statement of Commissioner Susan Ness

**Re: *Applications of WQED Pittsburgh and Cornerstone Television, Inc.  
For Consent to the Assignment of License of Noncommercial Educational  
Station WQEX(TV), Channel \*16, Pittsburgh, Pennsylvania***

In considering the application of Cornerstone Television, Inc. (“Cornerstone”), to acquire the license to operate a Noncommercial Educational Television (“NCETV”) Station on Channel \*16 in Pittsburgh, Pennsylvania, we face the difficult task of balancing two cardinal principles at the heart of our regulation of public broadcasting: First, we seek to safeguard the reserved allocations for NCETV stations – an oasis for “the important contributions which noncommercial educational television can make in educating people both in school – at all levels – and also the adult public.”<sup>1</sup> Second, we seek to respect the First Amendment rights of broadcasters, including broadcasters of programming with a religious orientation, to exercise their editorial discretion.<sup>2</sup>

Ultimately, I concur in granting Cornerstone’s application. After applying our existing rules and precedent to the record in this proceeding, I cannot conclude that there is a substantial and material question of fact concerning the reasonableness of the applicant’s judgment that its proposed programming will be “used primarily” to serve the “educational” needs of the station’s community. My decision is based upon the application of our current overly general guidelines to Cornerstone’s program showing and Cornerstone’s apparent willingness to modify its programming to comply with the requirements of Section 73.621, which should include any clarification we provide.

Given the consequence of this decision, I write separately to explain why I cannot hold the applicant’s judgment to be “arbitrary or unreasonable.” As the recitation of our precedent in the decision we release today makes clear, “as in all matters relating to programming, we will defer to the judgment of the broadcaster unless [that] categorization appears to be arbitrary or unreasonable.” *Notice of Inquiry*, Docket No. 78-164, 43 Fed. Reg. 30847, 30845 (1978) (“Guidelines”). We also have clearly stated that “some programs will properly be considered to be both instructional and religious or both general educational and religious.” *Id.* But as to what constitutes a “general educational” program, our processing guidelines only state that a “general educational”

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<sup>1</sup> Sixth Report and Order, *Amendment of Section 3.606 of the Commission’s Rules and Regulations*, 41 F.C.C. 148, 165-66 (1952) (“*Sixth Report*”), quoting *Third Notice of Further Proposed Rulemaking*, 16 Fed. Reg. 3072 (1951).

<sup>2</sup> *Columbia Broadcasting System, Inc. v. National Democratic Committee*, 412 U.S. 94, 120-21, 126-27 (1973). As the Commission stated, the First Amendment does not prevent us from establishing incidental restrictions on speech that are required for a broadcaster to maintain eligibility for a reserved allocation. See *Decision*, ¶ 29.

program is “an educational program for which no formal credit is given.” *Id.* at 30844-45.<sup>3</sup>

**Cornerstone’s Programming Showing Under Current Guidelines And Precedent**

In the absence of clearer definitions and guidance, I am concerned that finding this broadcaster’s judgment to be arbitrary or unreasonable would constitute an improvident review of the applicant’s judgment, especially prior to any actual broadcast by Cornerstone of programs on the reserved channel. In its final amended showing, filed in April of this year, Cornerstone made a significant effort to demonstrate that approximately 100 hours of its current and proposed programs can be reasonably categorized, in *its* judgment, as “general educational” programs.<sup>4</sup> Some of these programs are clearly educational, even given the very general definitions and guidelines that we have provided, while the assessment of other programs becomes more problematic. *See Decision*, ¶ 41 & n.46. Looking at the record as a whole, in light of our current precedent, I cannot say that the Commission can establish a basis for delineating a “substantial and material question of fact” concerning the applicant’s judgment, much less find that judgment to be “arbitrary or unreasonable.”

My conclusion is based in significant part on the absence of clarity in our definition of “general educational” programming and our guidelines for determining what is “religious” but not “educational” pursuant to Section 73.621.<sup>5</sup> We have not previously given applicants sufficient guidance as to how we will assess the reasonableness of their judgment, so that absent the most abusive exercises of broadcaster discretion, our own judgment must be circumspect. As the Supreme Court has recognized for almost 50 years, the “lack of standards in the license-issuing ‘practice’ renders that ‘practice’ a prior restraint in contravention of” the First Amendment.<sup>6</sup> What Justice Frankfurter wrote in

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<sup>3</sup> The Commission has not provided significant additional guidance in its decisions on applications for licenses for NCETV stations. As the discussion in the Decision we release today reveals, in the relevant past we have only designated applications for hearing where applicants provided inadequate descriptions of their programs. *See Decision*, ¶¶ 23-27. *See, e.g., Way of the Cross*, 101 F.C.C.2d 1368 (1985); *Music Ministries, Inc.*, 9 FCC Rcd. 3628 (1994); *Toccoa Falls College*, 8 FCC Rcd. 3085 (1994); *Holy Spirit Harvest Church*, 7 FCC Rcd. 3043 (1992); *Dry Prong Educational Broadcasting Foundation*, 7 FCC Rcd. 496 (1992); *Christian Family Cinema*, 6 FCC Rcd. 7364 (1991). We have not had to determine whether the judgment of a broadcaster was “arbitrary or unreasonable.”

<sup>4</sup> Cornerstone’s initial showing made in its June 1997 application and the supplemental showing first made in its April 1998 amendment to its application may well have been insufficient for a NCETV proposal as discussed in *Way of the Cross*, given the cursory nature of Cornerstone’s descriptions of its programs.

<sup>5</sup> In this respect, I find myself expressing sentiments similar to those of Chairman Wiley and Commissioners Hooks and White in *Moody Bible Institute*. *See Decision*, ¶ 19.

<sup>6</sup> *Neimotko v. Maryland*, 340 U.S. 268, 269 (1951) (exercise of discretion in denying permit based on vague ordinance governing issuance of authorization for speaking events in community park violates First Amendment as applied to states by Fourteenth Amendment); *see Saia v. New York*, 334 U.S. 558, 560 (denial of permit unconstitutional where “there are no standards prescribed for the exercise of ...

his concurring opinion in *Neimotko* nearly 50 years ago concerning the issuance of permits governing the right to hold meetings in public parks cannot be ignored by this Commission -- “the basis which guides licensing officials in granting or denying a permit must not give them a free hand, or a hand effectively free . . . .” *Neimotko*, 340 U.S. at 284-85 (Frankfurter, J., concurring). In this case, given the most general guidance provided for our review of the applicant’s programming judgment, I cannot find “arbitrary or unreasonable” the applicant’s judgment that its proposed programming will be “used primarily to serve the educational needs” of the Pittsburgh community.<sup>7</sup>

### Additional Guidance

Nevertheless, having concluded that our guidelines currently are sufficiently vague to make me reluctant to disregard the broadcaster’s judgment concerning its programming, I have joined two of my fellow Commissioners to clarify the guidelines for our review of NCETV proposals and programming. We have an obligation to provide additional guidance to FCC staff, as well as to applicants and existing licensees, if we are to be able to assess whether a broadcaster’s judgment is reasonable.

I recognize that it is a difficult task to establish meaningful and valid guidelines, and that the guidance proffered in our decision will not clarify the categorization of every program, given the variety of programs that can be broadcast. It is axiomatic, however, that the reservation of allocations for noncommercial *educational* stations is more than simply a reservation for *noncommercial* stations.<sup>8</sup> Without adequate guidance, we effectively would eliminate the eligibility standards that preserve the “educational” mission of the reserved allocations.

We now clarify our guidelines to state that for an NCETV station to be “used primarily to serve the educational needs of the community,” more than half of the hours of programming aired on that station must primarily serve an educational, instructional or cultural purpose. *Decision*, ¶ 43. Moreover, in order to qualify as a “general educational” program, a program must have as its primary purpose service to the educational, instructional or cultural needs of the community. *Id.* While some programs will properly be considered to be both general educational and religious, a program

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<sup>7</sup> Distinguishing primarily religious programs from general educational programs, unlike the case with identifying “commercial speech,” does not appear to be an instance where “the ordinary person exercising ordinary common sense can sufficiently understand and comply . . . without sacrificing the public interest.” *CSC v. Letter Carriers*, 413 U.S. 548, 579 (1974). See also *Policy on NCE Stations*, 43 R.R.2d 731, 740-41 (1978). For example, would the performance of Handel’s *Messiah* be primarily educational if it were performed at the Kennedy Center, but not be primarily educational if it were performed in a church? Similarly, would not some sermons be educational, depending upon their context?

<sup>8</sup> See *Decision*, ¶¶ 16-17 (discussing establishment of reserved noncommercial educational allocations for educational purposes and Congressional support for funding development of educational, instructional and cultural programming).

primarily devoted to religious exhortation, proselytizing or testimonials regarding personal religious faith generally will not qualify as a “general educational” program.<sup>9</sup>

Given this additional guidance, we will continue to defer to the judgment of an applicant or licensee concerning the educational nature of its programming, unless that judgment is arbitrary or unreasonable.<sup>10</sup> We also understand that the overall context of the broadcast is important to evaluating the reasonableness of the judgment of the broadcaster. While there may be additional guidance concerning the types of programming that would or would not qualify under Section 73.621(a), I do not believe that it would be appropriate to go beyond our elaboration today, absent public discussion and comment.

While we have the legal authority to do so,<sup>11</sup> I also believe that it would be inequitable to apply our newly enumerated processing guidelines to judge the instant record, which was developed over more than two years without the benefit of such clarification. First, the fact that this Commission has never issued more than very general guidelines suggests that our new guidance, which may be viewed as significant, should be carefully applied. Applying the revised processing guidelines to a record developed without its benefit would not constitute a wise exercise of discretion.<sup>12</sup>

Second, the potential harm to Cornerstone and others from our application of new definitions and guidelines is significant. Cornerstone and other parties would face, at a

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<sup>9</sup> Programs primarily devoted to exhortation and proselytizing, and other types of incitement and recruitment, should not qualify as general educational programming regardless of whether they are religiously oriented, or are oriented toward other social or cultural issues.

<sup>10</sup> We have continued to stress that “we will not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature. While not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters related to religion would qualify.” *See id.* ¶ 44 citing *Way of the Cross*, 102 F.C.C.2d at 1372 n.8; Guidelines, 43 Fed Reg. at 30844-45. Additionally, while stations operating on reserved educational channels are intended to serve the educational and cultural broadcast needs of their entire community, particular programs may meet the educational and cultural needs of different segments of the population.

<sup>11</sup> The Supreme Court has recognized that administrative agencies have the discretion to deal with problems on an ad hoc, case-by-case basis through adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). In proceeding by ad hoc adjudication, the Court acknowledged that “such action might have a retroactive effect” that was “not necessarily fatal” to the case-by-case procedure’s validity. *Id.* The Court indicated, however, that “such retroactive effect must be balanced against the mischief of producing a result which is contrary to statutory design or to legal and equitable principles.” *Id.*; see *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (“*Retail Union*”). In *Retail Union*, the D.C. Circuit indicated that agencies should resolve the balance by addressing five considerations, the essence of which involves balancing the extent of any clarification, the harm to a party from applying the clarification, and the interest served by applying the clarification. *Retail Union*, 466 F.2d at 390.

<sup>12</sup> I do not believe that the public interest would be served by taking yet another round of supplemental showings and pleadings to address Cornerstone’s proposed programming, or by designating the application for hearing to permit an administrative law judge to apply our clarified guidelines to the programming proposed by Cornerstone.

minimum, additional delay in any action on their pending applications.<sup>13</sup> Moreover, a Commission action that questions Cornerstone's judgment regarding its own programming showing based upon clarified processing guidelines delineated after the submission of Cornerstone's showing raises issues of fundamental fairness.

Finally, the grant of Cornerstone's application should not create deleterious mischief to our rules for reserved NCETV channels. As even Cornerstone recognizes, it is obligated to comply with Section 73.621, and it will be obligated to comply with any clarifications to Section 73.621(a), including those that are evident from this decision.<sup>14</sup> As noted in our *Decision*, if Cornerstone's operation of an NCETV station is shown to violate Section 73.621, as clarified by our decision, after programming is actually broadcast on Channel \*16 by Cornerstone, the Commission can take appropriate action at that time.<sup>15</sup>

### **Conclusion**

By our decision today, we tread carefully to further our two cherished objectives – preserving the distinct public benefits of the reserved educational allotments and respecting the First Amendment programming deference broadcasters enjoy when seeking to operate on such frequencies. I expect that Cornerstone will honor its commitment to meet the requirements -- as clarified today -- for broadcasters operating on reserved channels. In turn, the Pittsburgh community will soon again be served by two distinct educational television stations.

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<sup>13</sup> While I do not believe that the financial difficulty of WQED Pittsburgh ("WQED"), the current licensee of Channel\*16, necessitates a grant of the assignment application, we *are* obligated to act expeditiously, since we committed to do so at the time we declined to dereserve Channel\*16.

<sup>14</sup> The Commission has in the past granted applications that did not initially comply with the Commission's rules as clarified in the proceeding at issue, with the express recognition that the licensee would be obligated to comply with the rules as clarified. *See, e.g., NextWave Personal Communications, Inc.*, 12 FCC Rcd. 2030, 2071 (1997) (application granted with licensee permitted to restructure ownership to comply with foreign ownership restrictions).

<sup>15</sup> While I have not maintained that we are required to exercise our discretion in this manner, there is some precedent suggesting that this approach should be adopted. "Courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficient significant statutory interests." *See Retail Union*, 466 F.2d at 390. Regardless of the extent to which our application of clarified guidelines to Cornerstone's programming showing would be "retroactive," a review of the factors discussed in *Retail Union* still supports the exercise of discretion militating against an aggressive application of new guidelines to programming that has yet to be broadcast.

**SEPARATE STATEMENT OF  
COMMISSIONERS POWELL AND FURCHTGOTT-ROTH  
APPROVING IN PART AND DISSENTING IN PART**

**Re: In Re Applications of WQED Pittsburgh and Cornerstone Television, Inc.  
(file number BALET-970602IA), et al.**

Although we support most aspects of this order, we dissent from the portion of the decision that purports to give “additional guidance” to licensees using frequencies in reserved band to provide noncommercial television service. This guidance is, in fact, a significant departure from well-established Commission practice. As explained below, we object to its inclusion in this order on both procedural and policy grounds. This guidance may open a Pandora’s Box of problems that will create confusion and litigation that noncommercial licensees can ill afford.

The guidance announced in this order does three significant things. First, it quantifies the obligation of noncommercial licensees to “primarily serve the educational needs of the community” by requiring that “more than half of the hours of programming aired on a reserve channel must primarily serve an educational, instructional or cultural purpose in the station’s community of license.” *Order* ¶ 43. Second, it concludes that “a program must have as its primary purpose service to the educational, instructional or cultural needs of the community” in order to count toward this new benchmark. *Id.* Third, it singles out religious programming and purports to draw a line between programming that teaches about religion – which would count toward the new benchmark – and programming “devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs” – which would not generally qualify. *Order* ¶ 44.

Initially, as a procedural matter, we object to this guidance because it makes a substantial change in the Commission policy toward noncommercial licensees without the benefit of input from the broad class of affected licensees. While it may be legal for the Commission to make policy statements in an adjudicatory proceeding, we do not believe that it is wise to make a broad change like this without considering the views of a wider cross-section of those affected, particularly where constitutional questions are implicated.

On a substantive level, quantification of the “educational” obligation of noncommercial licensees suggests a greater federal intrusion into the programming judgment of noncommercial licensees that is, to our thinking, unwarranted and may well be unconstitutional.<sup>1</sup> Nothing in this record suggests a general problem among noncommercial licensees that requires either quantification or more stringent definition of what is “educational” programming for the reserved bands. Although it might, in a theoretical sense, be desirable to define qualifying programming, one must realistically

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<sup>1</sup> See, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 651 (1994).

evaluate the difficulty of that task and fully consider the potential restraint it may impose on noncommercial licensees.

It is true that judging what programming will serve the “educational, instructional and cultural needs” of a given community necessarily is a subjective determination. In the past, the Commission has wisely left this determination almost entirely to the noncommercial licensee who is closest to the community, subject to government reversal only if that judgement is arbitrary or unreasonable, a determination necessarily dependent upon the facts of a specific case. To the extent that the guidance in this order suggests that instead of trusting the judgment of licensees, the Commission now will take a more active role in evaluating licensee programming decisions, we think it turns in the wrong direction. Such guidance invites unnecessary battles over the content of noncommercial programming.

Quite simply, the more the Commission attempts to generically define which “educational, instructional and cultural” programming will count for regulatory purposes, the closer it will come to unacceptable content regulation. The example of church services used in this order illustrates the point. The order indicates that church services generally would not qualify as “general educational” programming. *Order* ¶ 44 n.91. We ask however, why such programming might not qualify as “cultural” programming just as a presentation of an opera might? It would be very hard to broad brush either type of programming as having no intrinsic cultural value. Moreover, depending upon the nature and content of the service, it might very well be properly educational. Certainly, millions of Americans attend church services, in part, for the educational value of the teachings embodied in a sermon. Additionally, we are concerned that any attempt to make a distinction based on religion alone raises grave constitutional concerns.<sup>2</sup> We therefore object to any distinction made on these grounds and we fail to see any other distinction that withstands scrutiny.

We further object to the suggestion in this order that qualifying programming must appeal to the broader community. The hallmark of noncommercial television has been service to the needs of smaller audiences. Indeed, the Commission regularly emphasizes the value of diverse niche programming to serve underserved and underrepresented populations. Thus, we see no basis for disqualifying a program simply because it appeals to only a segment of the population.

In sum, we cannot support the additional guidance portion of this order. While clarity in regulation may be a noble goal as a general matter, when treading this close to content regulation, we believe the traditional deference the Commission has given to broadcasters, murky though it may be, is the better course.

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<sup>2</sup> See, *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (denial of State funding for publications of student groups to those with religious editorial viewpoints is unconstitutional viewpoint discrimination; funding of such groups would not violate the Establishment Clause); see also *Lamb's Chapel v. Center Moriches Free Union School Dist.*, 508 U.S. 384 (1993) (permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination).