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BEFORE PAUL HOFFMAN ARBITRATOR

PACIFICA FOUNDATION/NEW DAY PACIFICA ARBITRATION

NDP 4/26/21 SUPPLEMENT TO 3/22/21APPLICATION

Introduction/Summary---New Day Pacifica's election bylaw proposition would effect a complete reformation of Pacifica Foundation national governance, as set out, is heavily opposed by controlling key National employees and a station general manager, and has been opposed and roadblocked at every stage since the first efforts, nearly one year ago in May 2020 when NDP- PF members and officers sought the PF mailing list to conduct a petition garnering the necessary membership percent to qualify. Notwithstanding member right to the list guaranteed by both PF bylaws and California Corporation Code, it took many months and the threat of litigation to get the lists and begin the petition drive and when successful and presented, other roadblocks were raised and after 8 months after efforts began, the December 4, 2020 settlement agreement was reached that sets the pathway for the election. Earlier in 2020 PF was in litigation, lost in February 2020, regarding an unrelated member proposed- bylaws election issue. The case focused on procedures and fairness and holdings in that case, relevant here were the basis of NDP threatened filing in the same Oakland court as the matters; instead, the December 4, 2020 agreement providing for arbitration was reached. Key Judge Roesch court orders October 21 2019 and February 6 and 18,2020 in that case, Crosier v. Pacifica Foundation, on PF's fair election shortcomings loudly resonate here as set out below.

Addressed here are 3 matters that have come up during the course of the arbitration that need to be decided urgently because ballots go out June 7, yet Pacifica refuses to add

second household members to the voter list as per Pacifica policy and history; because the current Pacifica membership list is so defective that it may omit up to 20% of active members and so needs to be rebuilt from the ground up which will take time; because those that control Pacifica and oppose NDP bylaws wants Ms. Penaloza to speak for the Pro and Con sides by writing on-air Pro and Con announcements rather than letting the Pro and Con speak for themselves and Ms. Penaloza to write assorted other although seemingly neutral “get-out-the-vote” announcements, just as when at least in union-buster elections the employer pushes get out the vote knowing that less motivated voters tend to vote No in favor of the status quo. PF GC recently mentioned an amendment to PF’s Articles of Incorporation that will allow Pacifica to make on-air announcement trashing “non-democratic governance” as typified by New Day’s proposals, concurrent with the bylaws referendum campaign. Pacifica recently set deadlines for some of these, and the matters are addressed for arbitrator resolution.

3 matters are address here:

A-- Electorate list Family Member issue(pages 2-4);

B-- Access to the Electorate List (4-10), an issue related to the issue that started the controversary nearly a year ago in May 2020, when access needed to conduct petition for enough signers to trigger the NDP bylaws election, and now needed to assure a fair election as explained below;

C-- Pacifica’s National and Local Broadcasts and Written Election Announcements and Informationals, the 30 day introductory bylaws announcement much discussed, plus current and future broadcasts and announcements and informationals (10-16);

A--Second Household Member Issue

Pacifica’s National Election Supervisors have always recognized that second household members (defined as a household donating more than \$50 annually) have the right to vote in Pacifica elections. The 2020 Ballot Request Form that RP used last year specifically recognizes the legitimacy of second household member voting rights, asking “is there any other information you would like to send to the election staff? For example, this is a second



household ballot.” NES’s reports always detail how many second household ballots were issued (2020, 150; 2018, less than 193 ballots). This is a settled issue in Pacifica.

What may make the issue seem less than the clear-cut issue it is that the second household member bylaws language says households must ‘jointly donate’ to be eligible for a second household ballot.

But as Penaloza explained to the PNB on April 15, the NES can’t retroactively tell when members jointly donated because at “the data collection level, when the membership was collected. That even if it was a joint membership, it was not recorded,” because each station’s membership system only has room for 1 donor name, 1 first name and 1 last name. She continued “I’ve been involved in this for years, and this is one of the problems that has persisted.” (Note that KPFK several months ago added two spaces for a second donor’s first and last name, but that does not correct the hundreds of second household members who donated before then.).

Penaloza then explained that the way she handles the enfranchisement of second household members: when households donating \$50 request their second household ballot, she then checks with the station to confirm that they had donated \$50 and then routinely sends them a ballot. Period. The second household member does not have to prove to the NES that they “jointly donated” --because it is impossible for them to prove --because no records are kept by the stations.

So when New Day’s Kean asked Penaloza in November 2020 if signed statements she had from 550 members that they had donated \$50 with the name of the second household member they wanted added to the voter list were sufficient, and if so, what data Penaloza needed from them to add them to the voter list, RP immediately responded with what fields and formats she needed the data in. Once Kean sent her the data formatted as requested, RP responded that the information Kean had provided “will help me integrate (the second household members) into the full data set.” Clearly Penaloza planned to add the qualifying members of the 550 households to the voter list. When some Vote No PNB members heard this and objected, she responded that “while it is additional work for me, the validity of

these records stands. So given the circumstances, unless I am told otherwise, I will do my best to include household members for which I find matches.” (EM Dec 29, 2:52am)

So when General Counsel Schwartz ‘told her otherwise’, he was consciously upending years of Pacifica practice meant to enfranchise second household members, and in this case for partisan purposes because he believed that all the 550 households submitted by New Day were Yes votes.

At the April 15 PNB Mr. Schwartz describe his reversal of Pacifica practice as “the rule”, that if there were two names on the membership application they qualify for a second household ballot, and if there weren’t two names they don’t, knowing full well that what he is asking is impossible, and that he will be able to successfully disenfranchise 550 second household members Yes votes.

The General Counsel even changed Penaloza’s job description to explicitly take away her ability in 2021 to add New Day’s second household members, when he stated in her job description that “Contractor will verify names submitted as additional household members by requesting that station membership departments verify these joint memberships. She will send a message including the following language. “We have received a list of individuals which the New Day Pacifica group asserts are household members at your station. Please advise us if your station has any information, like a donation form, where any of these individuals was listed, before now, as a household member.” The General Counsel knew this is impossible for the stations to verify, and that the New Day second household members would be disenfranchised as a result.

Remedy for Second Household Members voting requests: Long-standing Pacific practice enfranchising second household members will be immediately reinstated, with written requests from members submitted by Kean and others be immediately processed, and that a revised list produced for inspection no later than May 15.



## **B—Access and Integrity of the Voter List**

Elections are won or lost based on who controls the voter list. The power of state officials to purge the voter rolls has disenfranchised millions of American voters. List packing, the mythical election fraud claimed by Trump, has been less common in governmental elections, but more common in union elections and other less regulated elections, especially in the stereotypical banana republic. Access to the voter list to make sure that it hasn't been purged or packed is a central premise of election integrity.

Blocking initial access to the membership list is another way that those in power prevent upstarts from challenging their power. If you don't have access to the membership list you cannot communicate your message of the need for change quickly and effectively. In union elections, the union is given access to the list only 25 days before the election, and so must tediously assemble a bargaining unit list based on talking to the workers long before that.

The New Day Pacifica campaign also has centered around the voter or membership list. In May 2020, the Pacifica Executive Director with the backing of the PNB and PFGC blocked the beginnings of the New Day campaign all access to the membership list, knowing blocking access to communicating with the members would crush the emerging, infant upstart. It was only after New Day threatened to take Pacifica to court that PF relented and allowed New Day to email the membership in August 2020. At the time Pacifica said the only available membership they had was 9 months old, so New Day could either use that old list or wait until the next time PF updated the list (typically only updated twice every three years at election time, so the next scheduled updating of the list would not be until summer 2021). So right off the bat New Day was handicapped with an old list, when annual membership turnover was thought to be between 20 and 40%. PNB also changed the signature threshold from 1% to 5%, making it five times more difficult to qualify a bylaws amendment for consideration.

Even given those odds, New Day was able to connect with thousands of Pacifica members who realized the beloved Foundation was going out of existence if governance changes were not made. New Day filed a bylaws petition with the required thousands of member

signatures in October 2020, only to be told by the PNB that the petition wasn't timely. Again, only with New Day threatening to go to court did PF offer to accept the New Day petition, but only if New Day agreed to binding arbitration by an outside neutral that Pacifica would pay for rather than taking Pacifica to court. A prior unrelated bylaws reform effort in late 2019 took Pacifica to court three times for their refusal to set an election calendar and follow fair election rules; each time Judge Roesch swiftly ruled against Pacifica's heavy-handed attempts to crush the bylaws reform effort. In November 2020 New Day negotiated an election agreement with Pacifica, signed December 4, centered around a firm election calendar (to prevent PF's delaying tactics), list inspection (to ensure election integrity) and binding arbitration where the hearing must be held within 7 days of request and a decision rendered the same day as the hearing (fair decision by a neutral without delay).

The December 4 agreement contains critical list integrity and list inspection protocols. First, the membership list provided will note "volunteer staff and listeners granted hardship waivers or 3-hour volunteer waivers", the three ways that people could qualify for a ballot without either being on paid staff (easily verifiable) or a dues-paying member (verifiable with the requisite financial records) (para 2). Having access to the specific list of these three categories is critical to election integrity at Pacifica, because at least two of the three categories have been the subject of actual list packing in prior or current elections, volunteer staff and 3-hour volunteer hours dues waiver. Second, the newly updated list would be "available for inspection and suggested correction" (para 2). Third, a second updated list (to be used to send out the ballots) would be developed after the Record Date (voter eligibility deadline), "noting listeners granted hardship waivers or 3-hour volunteer waivers" (para 8), and Fourth, "fourteen days before balloting, the eligible voter list shall be available to any member for inspection and suggested correction".

From the beginning, Pacifica flaunted these agreements on the membership list, concerning the list development, inspection and correction. Here are five problems with the development and finalization of the voter/membership list that need to be immediately remedied.



**1.Faux list “certification” deadline.** The fabricated bombshell General Counsel Schwartz dropped several days ago (4/21/2021 6:09 PT email from Schwartz), that “the final list of voters will be (hopefully) certified next week, which will be the end of the ‘household member’ issue,” which General Counsel Schwartz also repeated at the April 15 National Board meeting claiming an April 27 deadline violates both the December 4, 2020 agreement and contradicts AS’s own referendum schedule. The referendum schedule agreed to by PF and NDP was that “the voter list would be available for inspection and correction” starting May 24, which was based on the December 4 agreement (paragraphs 8 and 9). Schwartz and Penaloza’s work plan laid out in her March 4 contractor job description states that the final lists “will be submitted to vendors by May 24, 2021”, and “these lists will be made available for inspection.”

**2. Grossly Incomplete Membership List.** Pacifica’s January 3 membership list is wildly incomplete leaving up to 20% of active members off the list, and over 10,000 members with no listed email (even though when New Day sent a postcard out to these 10,000 members, we got hundreds of responses with emails back.) The analysis of who is left off the list is based on New Day’s comparison of our petition-signers with the actual list, and then asking those members taken off the list whether they were sustainers, other active members or needed to renew (and therefore justifiably taken off the list). Please note that the revised list being worked out now based on the April 7 Record Date does NOT correct these omissions, because both lists are based on the same flawed station membership lists.

- 556 second household members were intentionally left off the list, based on Mr. Schwartz’s instructions to Penaloza. This was verified by our analysis of the January 3 list.
- At least 62 long-term monthly sustainers were left off the January 3 list. That means people that have been giving the same monthly donation month-after-month for years. There is no conceivable reason why any of them would be left off a station’s membership list, given that they each donate money each and every month and should be easy to recognize in a membership record.

- Of the 188 members we were able to reach who were not on the January 3 list for reasons other than the second household issue, 136 (72%) are either long-term monthly sustainers or otherwise active members. The remaining 28% said they needed to renew their membership. We have no idea how or why so many active members do not appear on Pacifica's list; we do NOT assume bad intent, only bad lists.
- Based on the data from members they in fact reached, NDP's estimate is that overall Pacifica has incorrectly left off 1044 active members of the 5000 records that were analyzed, with 556 of the 1044 being second household members intentionally left off based on Schwartz's upending of PF's second household member policy, and 488 being active members left off due to the incomplete membership lists at each of the stations.
- The Pacifica membership list is so incomplete (missing 10% of the undisputed active members and missing another 10% of the members who are second household members) that the revised list CANNOT be used as the voter list. Suggesting that a reasonable remedy is that members who aren't on the list have to wait until they don't get a ballot after June 7 then request one (as Penaloza has recommended on occasion), when they may be 20% of the actual total membership is a recipe for massive disenfranchisement of legitimate Pacifica members.
- Concerning missing emails, it is our strong belief that most of the 10,000 members have email addresses that could be used by Pacifica if PF just asked for them. There are only several hundred members who request paper ballots (per NES 2020 Final Report) and therefore probably don't have an email address.

**3. List of volunteer staff, dues waiver not included.** The January 3 list does not include a notation of those members who were "volunteer staff and listeners granted hardship waivers or a 3-hour volunteer waivers" as was agreed in the December 4, 2020 settlement (paragraph 2).

- There are at least 1800 volunteer staff at Pacifica (vs. paid staff), yet NONE were noted as such.



- NDP information is that at least WBAI has granted many 3-hour volunteer waivers that New Day plans on contesting as invalid, yet there were none noted on the list.
- We do not know how many hardship waivers have been granted, but that category and the 3-hour volunteer waiver category should be easy to spot if the list includes donation history because neither group of members paid \$25 to Pacifica in the last 12 months.

4. List inspection allowed by Pacifica grossly insufficient. The list inspection granted New Day did not meet the minimum requirements of the December 4 agreement or the Pacifica bylaws.

General Counsel Schwartz offered only two alternatives on February 2 for list inspection (after weeks of negotiating on the issue with New Day): “1. Pacifica prints out the whole list on paper. Your folks come in and review the lists. They can bring computers, so as to check names, addresses, etc. but not copy. Pacifica will pay someone to sit in a large space with your clients so he/she/they can observe... 2. A third party runs your client’s data base vs. the Pacifica data base looking for whatever your clients want, even if it is to check whether petition signers are members.” (Email 2/2/21, 10:12pm).

Alternative #1 was ludicrous on its face, that you could go through 40,000 hard copies records manually. Alternative #2 allowed our third-party vendor to run matching algorithms on our existing databases, but not analyze the list for evidence of list packing or other problems. It was extremely difficult and time consuming to figure out these matching algorithms, then to analyze the results without being able to see the list. It was also cost New Day over \$1500 to do the limited matching that we did.

Schwartz’s very limited inspection protocol options violated our December 4 agreement which clearly states that “the updated list (January 3) will be available for inspection and correction”, and that “fourteen days before balloting, the eligible voter list shall be available to any member for inspection and suggested correction.”

Pacifica’s bylaws clearly state that “Every director or his or her designated agent, shall have the absolute right at any reasonable time to inspect and copy all the Foundation’s

books, records and documents of every kind and to inspect the physical properties of the Foundation (Article 12 section 3), and “any inspection under the provisions of this Article may be made in person or by agent or attorney and the right to inspection includes the right to copy and made extracts.” (Article 12 section 5).

#### **5. Remedies for List integrity section:**

##### **Remedy for sections 1 and 2:**

- Each station must compile a new list manually that includes each of each their monthly sustainers. For whatever reason, pulling a sustainer list off their computerized database leaves out many long-term monthly sustainers, which is totally unacceptable.
- Pacifica must do an immediate postcard to all 10,000 members for whom they do not have email addresses to collect their email addresses, so that they can get their ballot timely, but also so that they can start receiving the national Pro and Con mailings to inform their decision.
- Pacifica must make available as part of list inspection the individual donation records of the members over the prior 12 months (individuals at least \$25, \$50 for family memberships) so we can verify the accuracy or inaccuracy of PF's wildly inaccurate records so they can be corrected.
- NOTE: the staff list is equally incomplete, with long-term volunteer staff left off the list. The entire staff lists should immediately be provided in a downloadable format to New Day.

**Remedy for section 3:** include 12-month donation data with the revised list. From that we will have the list of members who are received either 3-hour volunteer waivers or hardship waivers that Pacifica must provide documentation for.

**Remedy for section 4:** PF will provide a downloadable list including 12-month donation history, with first 5 characters of the email and street addressed blocked out to address PF's membership list distribution concerns.



**C— Pacifica's Nat.& Local Broadcast&Written-Election Announcements& Informationals**

New Day persists in its claim regarding on-air announcements. Here's why:

1. **Big Lie**---All three versions of the announcement that aired during what was to be the 30 day neutral election Notice Period (March 8-April 7) objectively determinable false anti-Yes inaccurate and misleading description of the New Day bylaws, meant to undergird the Big Lie, that New Day's real but hidden goal is to close down WBAI---- and the way New Day is going to do it is during a fictional governance gap between the out-going and incoming New Day board when the 4 officers supposedly have dictatorial powers and can do whatever they want, including shut down WBAI.

Every version of the announcement aired/posted during the Notice Period included the Big Lie. The versions of the aired/published announcement written by RP also included the Big Lie.

**Chronology of PF On-Air Announcements**

<b>Date Announcement Aired*</b>	<b>Description in Announcement of the Governance Gap</b>	<b>Big Lie: 4 officers would close down WBAI</b>
<b>March 8 – 11 (Version 1)</b>	<b>The proposed bylaws would..."terminate the current PNB, install four Transition Officers in its place for a year..."</b>	<b>yes</b>
<b>March 11 – 23 (Version 3)</b>	<b>"The current board would be terminated and four preselected directors will become the Transition Officers for three years."</b>	<b>yes</b>
<b>March 23-April 7 (Version 4)</b>	<b>"If the proposed bylaws are adopted, the national board will be terminated and a transition board composed of 4 preselected directors will be installed..." (on-line voter guide)</b>	<b>yes</b>

\*Pacifica has not yet produced the daily logs the five General Managers are required to keep. ("Station Managers will send confirmations to the National Election Supervisor that three daily on-air announcements required by the Pacifica Bylaws are made." Paragraph 5 of December 4 agreement.)

The Big Lie was expressed by Pacific's chief national lawyer Schwartz himself in his nationally broadcast at the National Board April 15 meeting just after the 30 day notice where he said "what bothers me most about these bylaws is that, for—whether it's 1-1/2 months or 3 months I'm not sure—there would be four people running Pacifica, no Board. They could do whatever they want, whatever they want. And it somehow gets me in the gut, that WBAI would be back off the air if these four people got to run it...There is a period of total dictatorship by a 4-person committee that could total change Pacifica." This quote was first referenced in my April 20 12:10pm email, along with the actual facts: as written in the New Day bylaws, the first meeting of the Transition Board of Directors to take place within 15 days, not Arthur's 1.5-3 months, includes 10 directors/officers: 5 station representatives directors chosen by each Local Station Board, 1 Affiliates stations director chosen by the Affiliates and the 4 national officers, so the 4 national officers are NEVER a majority of the New Day board.

**2a. Equal Time and Level Playing Field.** Judge Roesch stressed the absolute importance of Pacifica playing by the equal time and level playing field rules, in response to last year's complaints during the prior, different, unrelated bylaws reform effort. NDP seeks no more than what Judge Roesch said at the February 14, 2020 Crosier hearing is essential: equal time and a level playing field.

**Judge Roesch:** "I am also going to make requirement that there's two sides here, they get equal time. If somebody publishes at 5:15 in the afternoon, the other side gets a publication at 5:15 in the afternoon for the same amount of time." (Transcript Page 42)

**Judge Roesch responding to General Counsel Schwartz:** "Well, if you are providing equal time, then you're going to have to provide---the local station announcements that they're opposed to this, you're going to have to provide equal time for the proponents...If the station is going to make advertisements saying that the station board dislike proposition A, then the proponents of proposition A get the same amount of time...As long as it's equal, I don't have a problem with it...But it's going to be equal. You can't say that the station board gets extra ones because they're not going to get extra ones. It's going to all be equal." (Page 45-46)

**Judge Roesch:** "The whole object from the Court's point of view is that there is a level playing field here." (Page 48)



Mr. Swartz did not disagree, and in fact stated that “I don’t think there will be any more shows like that unless the shows themselves have both sides represented on the show.” (page 46)

**2b. NY Station Manager Reimers No Campaign**---The WBAI General Manager Reimers unleashed a tsunami of 24/7 anti-NDP commentary/screeds on-air during the Notice Period March 8-April 7. Pacifica’s official 50-second bylaws announcement typically was sandwiched between screeds developed by WBAI immediately before and after, exhorting listeners to remember October 2019(long before NDP-the station was closed down for a period because of fiscal deficiencies) and renew their WBAI membership so they can vote No on the bylaws and save WBAI. And because these screeds were being read by beloved and respected WBAI radio hosts, the screeds were given immeasurable additional credibility for WBAI listeners (no level playing field).

Please take one minute and listen to one of these professionally produced anti-New Day recorded advertisements, with music and sound effects by the WBAI Program Manager and various staff with the Big Lie themes.

1. Grateful Dead cart, with WBAI Program Director Linda Perry, Grateful Dead music in the background (subliminal message is that New Day is the West Coast trying to rule the East Coast and close down WBAI) <https://wbai.org/archive/program/episode/?id=21337>, listen starting at minute 57:28. Referendum “being put forward by many of the same people who took part in shutting down WBAI in Oct of 2019.”
2. Atilla the Hun cart, with Max Schmidt staffer, and foreboding march music in the background, listing disasters that have happened on April 7; subliminal message is that New Day is coming to pillage Pacifica; it is “very important election to determine the continued survival of WBAI.” <https://wbai.org/archive/program/episode/?id=21316>, listen starting at minute 59:17.

Also there is a Joni Mitchell one (You don’t know what you’ve got til it’s gone), recordings of community supporters during the October 2019 WBAI shutdown and more.

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These 50-second announcements were broadcast more than a dozen times daily during the last three weeks of the Notice Period, all without equal time for New Day.

Bertholdt Reimers has been WBAI Station Manager since 2010, and as such is in charge overall of the station (as is every Pacifica Station Manager), including all aspects of the station's staffing, programming and on-air content. The tsunami of anti-NDP advertisements could not occur without his explicit approval. Reimers reports directly to the Pacifica Executive Director.

2c. Besides the nationally streamed Vote No rally at the April 15 PNB meeting lasting several hours, Pacifica has also sent out at least two national emails titled "Good News", where they laud the brilliance and supposed accomplishments of Pacifica's current governance structure. Both newsletters had the appearance of a neutral update from Pacifica, when they were in actuality crass vote No campaign pieces. Not a level playing field.

2d. Reimers also sent out five official anti-NDP WBAI E-newsletters and emails in the last three weeks of the March 8-April 7 Notice Period exhorting WBAI listeners to renew their membership before April 7 because "the bylaws referendum is promoted by the same people who organized the coup against WBAI in October 2019. If the bylaws referendum succeeds you the listeners will lose your ability to democratically elect Local Station Board members who in turn elect Pacifica National Board members". Another of the Reimer emails encourages listeners to renew membership by April 7 so "you can vote on a referendum which chips away at the network's democratic governance," adding "It is called by many of the same people from the coast who plotted to shut down WBAI in October of 2019. That's when our staff, listeners and elected officials fought the attack and a month later, took back local control."

2e. Besides the PFGC and Executive Director openly attacking the New Day bylaws, WBAI GM Reimers officially endorsed the national anti-NDP campaign as WBAI General manager on March 31, 2021 the website of the newly coalesced Vote No Pacifica Radio Project of the formerly antagonistic groups and individuals opposed to NDP (Pacifica Fightback, Rescue Pacifica, Social Uplift Foundation, and Pacifica in Exile.) Reimers' Program Director Linda Perry also endorsed the Vote No campaign at the same time.



The fact that Pacifica's national staff and one of its station managers openly advocated No to the New Day bylaws means that there is no level playing field for New Day. Who decides what goes into national Pacifica emails? The Vote No executive director? Who decides whether second household members are able to vote or not? The Vote No national General Counsel. Who allows grossly incomplete membership lists to be used as voter lists? Pacifica's Vote No national staff.

2f. Reimer has been actively involved in fighting NDP from Day One of NDP's campaign petitioning for enough signers to trigger a vote-he began August 2020, through staff and membership emails and many 2-hour special programs. The same day the first New Day Pacifica national email was sent out (August 22), Reimers sent out an all-staff email criticizing NDP and any staff who might rat him out for sending this all-staff email attacking NDP (see END NOTE 1: text of Aug 24 all staff email), followed by his August 2020 email to WBAI members which included a long anti-NDP article by WBAI member and PF national chair Alex Steinberg. WBAI also aired a multitude of 2-hour anti-NDP specials since the New Day campaign started August 2020 (often simulcast on WPFW).

WBAI broadcast at least 10 hours of anti-New Day special programming between September 2020 and March 2021, with four hours during the March Notice Period alone. One show interviewed the WBAI General Manager, another interviewed the PFGC. None of the shows interviewed anyone who supported the New Day bylaws. Here are the five 2-hour specials:

1--September 30, 2020: WBAI 2-hour Local Station Board show. Some of the anti-New Day speeches quoted below:

- Hazel Pinder, WBAI LSB:" It's just so hard to believe that they're coming back again...And it's terrible. And they're coming back again. And then they'll come back again...We have to stop them. I'm just tired of the nonsense. I just can't believe it."

2--December 8, 2020: WBAI 2-hour special also aired on WPFW called "The Battle for Community Radio", includes a speech by PFGC Arthur Schwartz. Some of the anti-New Day commentary:

- **Arthur Schwartz, PFGC:** “The board will have the naysayers critical of how Pacifica functions. It hasn’t been apparent to me as General Counsel. The board has addressed problems. The board has dealt with issues with its audits, with any loans that are due. The board addresses the financial issues as they come up...There are those who think that the issue is structural; it’s not in structure.”

- **Tracy Rosenberg, KPFA listener and former KPFA LSB and PNB:** “These attempts are coming from the California stations. And what they sort of represent, as people have talked about is an attempt to centralize and attempt to whitewash and attempt to sort of smooth out the sounds and centralize the finances and control of the organization to wipe out what is perceived as an opposite faction or voices of dissent with the idea that the only way Pacifica will run smoothly is essentially our way...These are the same folks that were heavily involved in the WBAI takeover and shut down in the fall of 2019.”

**3--February 23, 2021: WBAI 2-hour Local Station Board show. Some of the anti-New Day commentary:**

- **Alex Steinberg, WBAI LSB and PNB National Chair:** “New Day is the group that wants to overturn our bylaws and saddle it with a new undemocratic set of bylaws where we will lose any kind of local input into programming and management...It’s a serious challenge to Pacifica and to WBAI, because we know that if this bylaws referendum passes, WBAI will be (shut down).”

**4--March 6, 2021 (near the beginning of the Notice Period) WBAI aired a 2-hour program called “the Pacifica Radio Democracy Project, also broadcast on WPFW. The shows all include speeches by various members of the national and local boards as well as WBAI General Manager Reimers. Some of the anti-New Day speeches:**

- **Ralph Poynter, WBAI LSB and PNB:** “I’m old enough to remember the slogan ‘we did it before, and we can do it again’. That was used to defeat the fascist movements in Europe. Well, we did defeat the (prior bylaws effort) before. But this time, they are back, so we must do it again...These folks in their real heart of hearts are unhappy with the terms ‘socialism’, ‘communism’, ‘national health care’, ‘social security’, this is what they are opposing.”

- **Berthold Reimers, WBAI General Manager:** “Okay, so basically vote against the damn thing. WBAI is doing okay, we have a 52 week schedule we are trying to run and see how it works. Are we are evaluating things every time. Vote against this.”

**5--March 31 2021: WBAI Local Station Board 2-hour program. Some of the anti-New Day speeches:**

- **Mitchel Cohen, WBAI:** “In my view, send them all to hell. We want our station. Yes, we want to continue to improve it. And we need to stop the attempt to homogenize



everything on the air. Diversity is not only racial and gender, it's also diversity of ideas. So we need to support WBAI as an independent and uncontrolled by officials of capitalism."

· James Sagurton, WBAI LSB and PNB: "The transition board members will be the only board members for the next three years...There's no opposition to them...These unelected people will remain in authority for three years."

During an unrelated bylaws referendum campaign defeated last year, Reimers as well as PFCG openly participated in anti-reform efforts. WBAI management was not even mildly chastised by Pacifica's Election Supervisor at the end of the campaign when the 3-person committee of Election Inspectors investigated and found improper an all-staff email sent by WBAI management to WBAI staff insisting that staff not only vote No in the bylaws referendum but show them their voter receipt showing they had voted no, that station loyalty would be measured by their actions. (see END NOTE 2: NES complaint re WBAI all-staff email March 18 2020)

What's the relationship of Reimers to the Pacifica national leadership and staff? Very close. Two of the three national officers of the Pacifica Foundation are New York WBAI listeners: Alex Steinberg, National Chair and James Sagurton, National Treasurer (the Vice-Chair is from KPFT-Houston).

PF General Counsel Schwarty lives in Manhattan, is a WBAI member and has had a radio show on WBAI called "Advocating for Justice" since July 2017 under Reimers' supervision. (The PFCG temporarily suspended his radio show in June 2020 as required by the FCC before the June 2021 local election where he is running for New York City Council seat.) PFCG's first represented WBAI in a pro bono capacity in a legal fight over the WBAI shutdown with Pacifica's then Executive Director in October 2019 before the last bylaws referendum, then was hired by the National Board as PF's General Counsel after they fired the Executive Director and hired current ED Lydia Brazon.

3.Pro and Con arguments should come from the Pro and Con parties, not the election staffperson. Penaloza claims the power, even though beyond her Pacific contract listing her duties, to write pros and cons arguments for on-air broadcast. This is NOT a level playing field. It is the advocates and opponents of the New Day proposals who have the right to

craft their own messages about why to vote Pro or Con rather than a Pacifica employee reporting to the ED and GC. These Pro and Con messages should be communicated to the Pacifica membership through continued emails to the membership (as the Pro and Con groups have done regularly since last August) as well as through several on-air debates broadcast on each station, following the debate protocol developed by Ms. Penaloza last year before the bias of herself and her supervisors became an issue. That would be equal time for both sides.

4. Vote No members have recently concocted an Article of Incorporations amendment scheme that will allow them to broadcast anti-New Day announcements on each station twice a day for 60 days in the middle of the New Day bylaws referendum. Vote No member Eric Jacobson labeled this faux amendment an attempt to “make it crystal clear that Pacifica is to be ‘democratically self-governed by its members’ and further economically advertizing to what that means relative to Pacifica’s directors such that any repetition of this latest New Day stunt is foreclosed...” The amendment would add that the Foundation “that is democratically self-governed by its members”, which later in the amendment describes a situation identical to that of New Day’s transition officers as governance inconsistent with PF being democratically self-governed. The on-air announcements would by-definition bias members against the New Day bylaws proposals, because the core of the Articles of Incorporation amendment is that the New Day bylaws proposals on their face are not democratic self-governance.

5. The 3-person committee to investigate election complaints cannot include Ms. Penaloza, because she is not a neutral. If RP is allowed on this committee, no level playing field is possible for New Day in resolving election complaints.

Remedies requested for this section:

a. Pacifica to air a newly corrected version of the bylaws announcement agreed to by PF GC and New Day counsel, read by a person chosen by New Day on all stations 3 times daily for 30 days starting May 9.



b. Pacifica to Cancel all on-air or written announcements by PF/Penaloza, and instead let the Pro and Con parties speak for themselves through on-air debates and on-going emails to the membership.

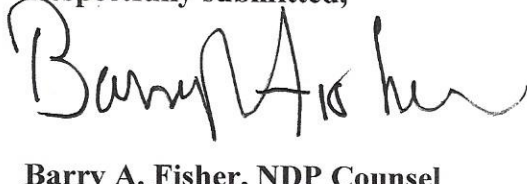
c. New Day to get national equal time by airing a 50-minute New Day-produced special on all five stations on May 24 during prime time.

d. Postpone the Articles of Incorporation announcements until after July 7, and if not possible have their amendment announcements shown to New Day and to the arbitrator to show their lack of bias against New Day.

e. Stop all announcements, references by radio hosts on WBAI to the bylaws, to “locally-controlled”, “independent” WBAI, “saving WBAI” etc. No WBAI membership emails until after July 8.

f. 3-person committee to resolve election complaints should include a representative from the Pro and Con sides along with a true neutral, a respected retired Pacifica leader mutually agreed to by PFGC and New Day counsel. Ms. Penaloza has plenty of work to do on the election lists to keep her busy.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barry A. Fisher". To the right of the signature is the date "4/16/21" written vertically.

Barry A. Fisher, NDP Counsel

End Notes Attached

END NOTE 1: August 24 2020 WBAI management's all staff email

END NOTE 2: Resolved NES complaint from last year's failed bylaws referendum re WBAI management's all-staff email March 18 2020

----- Forwarded message -----

From: **Berthold Reimers** <berthold@wbai.org>

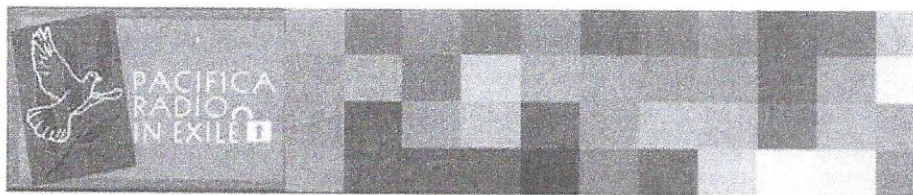
Date: Sat, Aug 22, 2020 at 12:05 PM

Subject:

To: WBAI Staff Announce <staffannounce@wbai.org>

Dear WBAI producers and Staff,

WBAI's Management has always taken the position to stay neutral in conflicts and let the producers and staff make their own decisions. I am sure one WBAI staff member is going to alert these people and have them have a post here in rebuke to my email. But: Enough is enough. The John Vernile kabale is at it again and they want to have another by-laws amendment that will cost the network another \$100K plus. They want to disenfranchise WBAI, WPFW (DC) and KPFT (Houston). They definitely want to disenfranchise the producers and the unpaid staff. The response to them below says it all.



### There They Go Again

*Aren't You Dying To Vote on **Another** Set of Bad Replacement Bylaws?*

**Berkeley** - With so much of importance going on in the world right now, about the last thing in the world we want to do is trouble you with Pacifica's internal shenanigans. And we understand that you really don't want to focus on this right now. And you shouldn't have to. Pacifica and its board members should be laser-focused on providing you the alternative information you want to help make sense of the world. Sadly, some of them aren't. They are focused on themselves and their power dynamics.

But here's the good news. You don't have to focus on it. **This is literally an email requesting you to do absolutely nothing.** All you have to do is **not sign a new bylaws petition** asking you to force yet another bylaws election. Corrections made after the last disaster that was rejected overwhelmingly have raised the threshold for a bylaws petition from 1% to 5% of the members. You can literally save Pacifica \$100,000 dollars and save yourself from poring over **58 pages** of new bylaws. **Yes, hard as it may be to believe, these new proposed bylaws are even longer than the existing ones.**

We understand that some of you will want to do your homework. So as we did last time, we will send you a point by point analysis of the changes that are proposed when we've had a chance to fully review it. (The new bylaws proposal doesn't tell you what was crossed out or added, so it is a ponderous process of comparing the text paragraph by paragraph for dozens of pages). But we didn't want to wait to tell you about it. Honestly, it's fine with us if you never bother to read it all. Because even if these were the best bylaws in the world - **and they are not** - you still should not sign this petition.

Before briefly discussing the merits, there is a question of process. Why on earth shouldn't **any** bylaws proposal wait until the next election in the



summer of 2021 when it can be sent out at no additional cost in a regularly scheduled election? Who has an extra \$100,000 (for the 2nd time in a year) to pay election staff, election contractors, lawyers, not to mention all those requests for donations you will get from proponents and opponents? Who wants to get for and oppose emails daily - again - especially right in the middle of one of the most consequential political elections of our lifetimes? Who wants the energy of Pacifica's staff going to touting bylaws proposals when earthshatteringly important things are happening every day, much of it misreported by the mainstream media?

You were told the last time we engaged in this merry-go-round that Pacifica would **collapse** if you didn't immediately install a bunch of handpicked people. You didn't fall for it. Yes, there are financial stresses. Always have been at Pacifica. Back in 1994 when the whole foundation had less than 8 million dollars in income and lost \$339,000 and in 2018 when the whole foundation had 11.6 million dollars in income and lost \$7,800. Bylaws don't make money. And in this case, they cost money.

So what's on the table this time? More handpicked directors. This time, they are:

- \* Sharon Kyle, the owner of the LA Progressive, an online news site in LA which has had its own financial struggles,
- \* Jan Goodman, a current director, also from LA, who has already served six consecutive years on the Pacifica National Board and would have to step down at the end of the year, but is proposing via these new bylaws to serve for another 3 years for a total of 9 consecutive years.
- \* Lyden Foley, a current director, from Texas.
- \* Akio Tanaka, a KPFA LSB rep.

All 4 would serve from January 2021 to December 2023 as the preselected officers of the Pacifica National Board.

They would be joined by one representative from each station (none of whom can be officers) and 2 staff reps (one paid and one unpaid) who would be elected in nationwide staff elections, with paid staff voting for paid and unpaid staff voting for unpaid. This cuts staff representation on the national board by 60%, and gives 10x more representation to 100 paid staffers than to the 1,000+ unpaid staffers who produce the majority of the on-air programs. To this group can be added three random at-large directors with no criteria required other than a majority vote by the ad-hoc board.

It gets worse. After this ad-hoc board does its thing for three years with no input from the listener-sponsors, you will get to vote. You will get to vote in **NINE different elections, selecting a person to be the national board chair, a person to be the national board vice chair, a person to be the national board secretary, a person to be the national board treasurer, a person to be the local board chair, a person to be the local board vice-chair, a person to be the local board secretary, a person to be the local board Outreach Coordinator, and a person to be the local board Membership and Fundraising Coordinator.** You don't need to pay any attention to the rest of the local station board since it will be selected for you. Meanwhile in parallel elections, the paid staff will pick a person to be the national paid staff representative and a local paid staff representative, and the unpaid staff will pick a person to be the national unpaid staff representative and the local unpaid staff representative. **In short: 13 elections and all by strict majority rule since there is only one seat in**

play for each.

We'll stop here, although there are still dozens of changes. Next email for that. **But we will note that many things that are objectively problematic in the existing bylaws are left intact and what mostly changes is the allowance for diverse points of view.** There isn't **any** allowance for diverse points of view. If you can't command majority support, there will be no space for you in Pacifica governance. It's a travesty for a network that literally defines itself as a home for minority points of view.

**So put this bylaws petition where it belongs .... in the trash folder.**

For more details, see the latest Save KPFA/UIR newly invented name at [newdaypacific.org](http://newdaypacific.org).

If you value being kept up to speed on Pacifica Radio news via this newsletter, you can [make a little contribution to keep Pacifica in Exile publishing](#). Donations are secure, but not tax-deductible.

To subscribe to this newsletter, please visit our website at [www.pacificainexile.org](http://www.pacificainexile.org)

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*Started in 1946 by conscientious objector Lew Hill, Pacifica's storied history includes impounded program tapes for a 1954 on-air discussion of marijuana, broadcasting the Seymour Hersh revelations of the My Lai massacre, bombings by the Ku Klux Klan, going to jail rather than turning over the Patty Hearst tapes to the FBI, and Supreme Court cases including the 1984 decision that noncommercial broadcasters have the constitutional right to editorialize, and the Seven Dirty Words ruling following George Carlin's incendiary performances on WBAI. Pacifica Foundation operates noncommercial radio stations in New York, Washington, Houston, Los Angeles, and the San Francisco Bay Area, and syndicates content to over 180 affiliates. It invented listener-sponsored radio.*

Thank You,

Berthold Reimers  
WBAI Radio 99.5 FM  
General Manager  
(212) 209-2820



## COMPLAINT PBRC043

3/19/2020 10:33:57

[email address redacted]

Sherry Gendelman

[email address redacted]

Anonymous: No

The below communication is outrageous! It is management intimidation and harassment. This must stop immediately. All staff must be informed that their voting in this election is their private right, and that management has no right to ask them to prove they voted or to do anything at all .

> ----- Forwarded message -----

> From: [name redacted] <[redacted]@wbai.org>

> Date: Wed, Mar 18, 2020 at 2:33 PM

> Subject: BYLAWS VOTE: ACTION NEEDED TODAY!!

> To: WBAI Staff Announce <[redacted]@wbai.org>

> Cc: [name redacted] <[redacted]@wbai.org>

>

>

> Dear Staff,

> [name redacted] and I want you to send us the receipt that shows you voted. This helps WBAI Management see that the station vote count is accurate. In addition, it helps us evaluate your involvement with WBAI Radio and it's future.

>

> As of today, less than 50% of WBAI programmers have voted. Staff have contacted me with concerns about this. We should be at 99.5% at least! Please do your part and participate in the bylaws vote.

>

> Today is the last day to have your vote counted. If you have not voted do it today and send us the receipt which shows you voted.

>

> The receipt looks like this. You get it by clicking on the site where you voted:  
<https://pacificasimplyvoting.com>

> Voting receipt - Pacifica By-laws Amendment Vote - Staff

> Receipt code: NXXC

> Time of vote: 2020-02-25 11:30:08 America/New\_York

> IP address: xxxx

> Are you in favor of ("yes" vote) or opposed to ("no" vote) to the proposed bylaws?

> Thank you,

> [name redacted]

>

> [name redacted]

> [title redacted]

> WBAI Radio, New York

> --

> To unsubscribe from this group and stop receiving emails from it, send an email to  
[staffannounce+unsubscribe@wbai.org](mailto:staffannounce+unsubscribe@wbai.org).

Remedy: This must stop immediately. All staff must be informed that their voting in this election is their private right, and that management has no right to ask them to prove they voted or to do anything at all . Direction to WBAI management to immediately send an e-mail to staff saying their action was inappropriate and in violation of fair campaign rules, and that staff should NOT send receipts that showed that they voted or how they voted

\* Follow-up notification by the NES to all staff with the same information, plus telling them they may change their vote (and the procedure for doing so) and that they should not provide any information about their doing this to WBAI management

\* Extension of voting deadline adequate to do the above and give staff time to get and read this info, to request a ballot reset, and to re-vote.

- **Election Inspectors Response:** The NES has sent the following message out in an email to WBAI Staff: "The Pacifica Election Inspectors advise all who have voted to keep their receipts private. It is our opinion that in a free and fair Pacifica election, station management cannot require and should not encourage the submission of voter receipts from staff."