

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| Modernization of Media Regulation Initiative |) | MB Docket No. 17-105 |
| |) | |

COMMENTS OF MINNESOTA PUBLIC RADIO

Minnesota Public Radio (“MPR”) is pleased to submit these Comments in response to the *Public Notice* (“PN”) adopted by the Federal Communications Commission (“FCC” or “Commission”) on May 18, 2017 initiating a review of FCC rules applicable to radio and television broadcasters (among others).¹ MPR is one of the nation’s premier public radio stations producing programming for radio, digital and live audiences. MPR is the licensee of 45 radio stations that comprise a network serving nearly all of Minnesota and parts of surrounding states. MPR and its three regional services—MPR News, Classical MPR and The Current—reach 900,000 listeners each week. MPR’s mission is to enrich the mind and nourish the spirit, thereby enhancing the lives and expanding the perspectives of its audiences, and assisting them in strengthening their communities.

MPR applauds the Commission for its interest in “eliminat[ing] or modify[ing] regulations that are outdated, unnecessary or unduly burdensome.” One such regulation, which is of particular interest to non-commercial educational (NCE) broadcasters, is 47 C.F.R. section 73.503(c), which has been interpreted by the Media Bureau to restrict the types of expenses that

¹ *In re Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, FCC 17-58 (rel. May 18, 2017).

can be reimbursed pursuant to a Public Service Operating Agreement (“PSOA”).² This rule, as interpreted by the Media Bureau, has a chilling effect on PSOAs that ultimately disadvantages NCE broadcasters and the communities they serve. For example, NCE broadcasters unable or unwilling to utilize PSOAs often opt to sell their stations, which harms the public interest by reducing local ownership and programming. In order to lessen these harms, the scope and meaning of section 73.503(c) should be clarified.

I. BACKGROUND

PSOAs are similar to local marketing agreements used by commercial broadcasters in that they are agreements whereby a third party agrees to program a station and, as consideration for use of the station’s facilities, pay a negotiated sum to the station licensee. Unlike commercial agreements, however, PSOAs are limited in scope and are viewed skeptically by broadcasters who might otherwise utilize them. This skepticism derives from a June 7, 2012 Consent Decree in which the Media Bureau interpreted section 73.503(c) to limited the types of payments NCE broadcasters can receive from PSOAs.³ Specifically, the Media Bureau determined that payments to NCE broadcasters by programmers must be limited to reimbursement of operating expenses.⁴

² MPR is a party to a PSOA with the licensee of a station located in Sioux Falls, SD.

³ *In re University of San Francisco (Assignor) and Classical Public Radio Network LLC (Assignee) for Consent to Assignment of License Station KUSF(FM), San Francisco, CA*, Consent Decree, DA 12-725 (rel. June 7, 2012) (the “USF/CPRN Consent Decree”).

⁴ The Consent Decree arose out of an assignment application filed by the University of San Francisco (“USF”) seeking FCC consent to assign KUSF(FM) to Classical Public Radio Network LLC (“CPRN”) for \$3.75M. Among the various terms and conditions was a PSOA that allowed CPRN to program KUSF during the pendency of the assignment application. In return, CPRN agreed to pay USF a flat monthly fee (initially \$5,000, rising to \$7,000 per month after a few months) in addition to reimbursement of all operating expenses, specifically: the cost of broadband or other circuits used for delivery and reception of the programming, electrical power to the transmitter site, regulatory fees, insurance rider, and telephone expenses incurred at the transmitter site. Upon reviewing the assignment application, the Media Bureau took issue with the

How the Media Bureau arrived at this interpretation is unclear; other than citing section 73.503(c), the Bureau does not analyze or discuss the rule in any detail or point to any prior precedent that would have put NCE broadcasters on notice that such an interpretation was possible. Nor is the Bureau's interpretation necessarily supported by a plain text reading of the rule itself. Section 73.503(c) provides that:

A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

The first sentence is vague in its scope, but certainly "costs incidental to its production and broadcast" could be read broadly to encompass a wide range of costs, as just about any legitimate business cost incurred by a broadcaster is "incidental" to the "broadcast" of programming.⁵ The second sentence seems to confirm this broad reading – payment of "line charges" and "general contributions to the operating costs of a station" are explicitly *permitted*. In the USF/CPRN Consent Decree, however, the Bureau, without explanation, appears to focus solely on the portion of the rule that permits reimbursements for operating costs. Such a myopic interpretation is not supported by section 73.503(c).

PSOA. The Bureau determined that USF and CPRN had violated section 73.503(c) of the Commission's rules by agreeing to fees in excess of reimbursement of operating expenses. When CPRN and USF pointed out a number of instances in which parties submitted agreements with terms similar to the payment terms in the PSOA, the Bureau replied that "USF and CPRN did not point out any instance in which the Bureau or the Commission issued a decision in which it considered and found such payment terms to be compliant with Section 73.503(c) of the Rules, because no such decision exists." *Id.*

⁵ The first sentence seems designed to prevent payment of bribes or other monies intended to line a broadcaster's pocket rather than reimburse a broadcaster for legitimate business expenses.

II. THE SALE OF NCE STATIONS UNABLE OR UNWILLING TO UTILIZE PSOAS HARMS THE PUBLIC INTEREST

The majority of NCEs are public radio, public television, and religious broadcasters. Of the public media stations, the majority are owned by colleges, universities and government entities. Over the last decade, colleges and universities looking to reduce costs associated with a licensed station have opted to sell their broadcast licenses outright.⁶ Part of this “sale” mentality is due to the fact that PSOAs are either not well-understood by the license holder/qualified programmer, or are not an option due to (i) debt obligations of the license holder or (ii) real or perceived risk associated with PSOAs by potential non-commercial programmers.

When colleges and universities⁷ faced with financial pressure decide to sell off their broadcast assets, the public interest suffers.⁸ Such sales often result in format changes and the loss of local ownership and programming. For example, Northern Kentucky University recently

⁶ In recent years, the number of institutional (university and college) station sales has increased dramatically. Many universities and colleges have experienced drastic cuts in federal and state appropriations, and due to budgetary constraints, many institutions have resorted to the sale of their public radio and TV stations to help balance their budgets. *See Trends in Noncommercial Radio Sales: 2012*, Public Radio Capital, <http://www.publicmedia.co/wp-content/uploads/2014/04/2012-Noncommercial-Station-Sales-Summary6.pdf>.

⁷ Community stations also face pressure to sell. In 2015, for example, Classical South Florida (“CSF”) sold three stations to Christian broadcaster Educational Media Foundation (“EMF”). EMF paid cash for the stations, beating-out public media organizations that were also interested in the stations but that had limited financial means or financing options to purchase them. PSOAs were also unworkable because, under current FCC regulations, they would not have allowed CSF to cover its debt service.

⁸ *Closures to Triple*, Inside Higher Ed, <https://www.insidehighered.com/news/2015/09/28/moodys-predicts-college-closures-triple-2017> (“The inability of small colleges to increase their revenue will result in triple the number of closures in the coming years, a new Moody's report projects.”). In addition, Northern Kentucky University recently sought Commission consent to sell WNKU and other stations to relieve millions of dollars in debt attributed to acquisition and buildout of the stations. *See, e.g.*, FCC File No. BALED-20170427AAN.

sought Commission consent to sell WNKU(FM), Highland Heights, Kentucky to relieve debt obligations attributed to acquisition and buildout of it and other stations.⁹ Once the deal goes through, WNKU's current locally-programmed, adult alternative format will be changed to religious programming and the station will operate as a satellite of Charlotte, North Carolina station WYFQ(AM). This situation illustrates the need for alternatives, such as PSOAs, to station sales. The need is all the more pressing now given federal funding threats to public media. If the Commission were to clarify the types of costs that can be reimbursed under a PSOAs as MPR proposes below, NCE stations may be sold less frequently, which promotes the public interest by supporting local ownership and programming.

III. SECTION 73.503(C) SHOULD BE CLARIFIED TO ENNUMERATE THE TYPES OF COSTS THAT CAN BE REIMBURSED UNDER PSOAS

As explained above, section 73.503(c) of the Commission's rules is not clear. It permits programmers to reimburse licensees for costs "incidental" to the "production and broadcast" of programming as well as pay "line charges" and make "general contributions to the operating costs of a station." The Media Bureau's interpretation of section 73.503(c) in the USF/CPRN Consent Decree is equally unclear and not supported by the text of the rule or any prior precedent. That interpretation – limiting payments NCE broadcasters may obtain pursuant to a PSOAs to reimbursements for operations costs – combined with the vague language of the rule itself has had a chilling effect on PSOAs that often results in station sales and threatens NCE broadcasters' ability to survive, which in turn harms the public interest.

The Commission, therefore, should clarify the scope and meaning of the rule and specifically enumerate the costs that can be reimbursed via a PSOAs in accordance with section

⁹ See, e.g., FCC File No. BALED-20170427AAN.

73.503(c). In particular, MPR urges the Commission to clarify that all verifiable operating expenses for a station are permissible, including without limitation the following: (i) utilities; (ii) reasonable salary and benefit costs of the two employees designated under the main studio rule and other employees of licensee, as agreed to by the programmer; (iii) insurance, maintenance, and facility repair costs; (iv) an allocation of space costs related to employees; (v) the allocable cost of fiscal services related to the creation of invoices and the processing of payments related to licensee costs; (vi) administrative costs associated with providing access to public files at the main studio location; (vii) operating costs, maintenance, insurance, taxes, and other costs related to the main studio facility or other related facilities, including maintenance, repair, and replacement of any equipment; (viii) costs related to the replacement, maintenance or repair of telephone cabling; (ix) electrical service, HVAC, or plumbing that supports the main studio facility; (x) maintenance, repair and replacement of the transmission system; (xi) electricity costs for the transmitter; (xii) rental cost of transmitter site; (xiii) any fees for FCC licenses and other local, state and federal registrations (including legal fees); (xiv) insurance for the transmitter and other equipment outside of the main facility; (xv) parking costs for guests and employees; (xvi) internet and other connectivity; (xvii) telephones; and (xviii) licensee contract costs holder related to station operations. The following additional expenses should also be allowed: (i) interest and principal costs of licensee's debt and other financial obligations, as attributable to the license and as agreed to by the programmer; (ii) banking fees; (iii) securities-related costs; and (iv) costs associated with contract renewals (including legal fees).

Of course, the fact that these costs would be permissible under the rule does not mean that every PSOA will provide that programmers pay all of these costs. PSOAs will continue to

be carefully negotiated by NCE broadcasters and third party programmers. For example, broadcasters with debt obligations may negotiate an agreement whereby a programmer's payments are related to servicing that debt, and do not include any allocations for utilities or facility repairs. Nor would clarifying the costs that can be reimbursed under PSOs threaten licensees' control over their stations. Licensees would continue to exercise ultimate control over programming, personnel, and finances. The fact that programmers could reimburse licensees for various costs does not in any way mean that licensees would lose control over financial decisions for their stations. Licensees would continue to determine what money is spent where. The only thing that would change is the source from which the licensee pays its expenses.

Clarifying the rule as suggested above serves the public interest by encouraging NCE broadcasters to utilize PSOs which, by helping alleviate funding shortfalls and reducing the likelihood of a station sale, contribute to the continued vitality of NCE broadcasting and ensure that communities across America can continue to enjoy the NCE stations upon which they rely.

IV. CONCLUSION

MPR appreciates the opportunity to submit these comments and urges the Commission to act expeditiously to reduce the burdens of unnecessary and counterproductive regulations on broadcasters.

Respectfully submitted,

MINNESOTA PUBLIC RADIO

/s/

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