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

In the Matter of	)	
	)	
Maricopa Community College District	)	
	)	
Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements on KJZZ(FM) and KBAQ(FM), Phoenix, Arizona	))))	FID Nos. 40095 and 40096

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 2014 **Released: November 24, 2014**

By the Commission: Commissioner Pai concurring and issuing a statement.

1. The Commission has before it an Application for Review filed on June 16, 2014 by Maricopa Community College District ("Maricopa"), licensee of noncommercial educational ("NCE") FM radio stations in Phoenix, Arizona.[1] Maricopa seeks review of a May 15, 2014 decision by the Media Bureau ("Bureau") denying its request to conduct a three-year "controlled and limited experiment" on the effects of including prohibited material in NCE underwriting acknowledgements or, alternatively, for a waiver of the Commission's underwriting rules and policies.[2] We affirm the Bureau's denial, as discussed below.

2. Pursuant to Section 399B of the Communications Act of 1934, as amended (the "Act") and Section 73.503(d) of the Commission's rules (the "Rules"), NCE radio stations may not air advertisements, *i.e.,* promotional announcements on behalf of for-profit entities in exchange for any remuneration.[3] They must, however, identify program sponsors,[4] and pursuant to guidelines adopted in the early 1980's, can enhance that identification with a contributor's slogan, location, value-neutral description of products, and trade names, provided that this material serves to identify rather than to promote.[5] Other information continues to be banned, including comparative or qualitative descriptions, price information, calls to action, and inducements to buy, sell, rent or lease, because such material is

[1] Maricopa is licensee of KJZZ(FM) and co-licensee with Arizona State University of KBAQ(FM) (the "Stations"), public broadcasting stations receiving federal funding through the Corporation for Public Broadcasting ("CPB").

[2] *See Ernest T. Sanchez, Esq.*, Letter, 29 FCC Rcd 5180 (MB 2014) ("*Decision*"); Request for Experimental Authority to Relax Standards for Public Broadcaster Underwriter Announcements at 15 (Mar. 18, 2013) ("*Request*").

[3] 47 U.S.C. § 399B; 47 C.F.R. § 73.503(d). *See also* 47 C.F.R. § 73.621(e) (comparable provision for television).

[4] *See* 47 U.S.C. § 317; 47 C.F.R. § 73.1212. The sponsorship identification rules require announcements only where the monetary or other consideration is provided as an inducement for the broadcast of specific programming, whereas announcements acknowledging general contributions are discretionary. In either situation, where acknowledgments of contributions are aired, the underwriting rules apply.

[5] *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations,* Third Report and Order, 97 FCC 2d 255, 265 (1984) ("*1984 Order*"), Public Notice (1986) *republished*, 7 FCC Rcd 827, 827-28 (1992) ("*Nature PN*") (see *Decision,* 29 FCC Rcd at 5180, n.13 for proceeding's complete prior history).

promotional.[6] These limits are intended to remove NCE stations from the market pressures under which commercial broadcasters operate, and to retain their essential character, free from extraneous influence and control.[7] Additional provisions of the Act and Rules allow for the temporary use of spectrum for technical experimentation,[8] and the Commission has, on rare occasions authorized on a waiver basis non-technical experiments including one to permit advertising on spectrum reserved for NCE use, at Congress's specific direction.

3. Maricopa requested experimental authority to study the effects of enhancing its underwriting acknowledgments to include: (1) interest rates; (2) sales, discounts, and special events; and (3) qualitative adjectives based in fact.[9] It maintains that its proposed three-year demonstration project would gather data to ascertain whether such enhancements could increase revenue without harming program quality or listener satisfaction. Maricopa stated that it developed this experimental proposal out of concern about the erosion of federal and state financial support, and to facilitate future policy choices by providing Congress, the Commission, and other NCE broadcasters with empirical data to test presumptions that underlie the current guidelines.[10]

4. In denying Maricopa's request for experimental authority, the Bureau stated that such authorizations are meant to facilitate "technical experimentation" and that Maricopa had not justified a waiver of that limitation for its non-technical study.[11] The Bureau also denied Maricopa's alternative request for a waiver of underwriting Rules and policies, stating that the proposal could undermine the Stations' NCE purpose, and that Maricopa's potential economic challenges were not so unique as to warrant a waiver.

5. On review, Maricopa contends that the Bureau's action was arbitrary and capricious[12] because the conclusion that experimental authority pertains only to technical matters is inconsistent with broader language in the Act, and with the Commission's approval of nontechnical experiments in the early 1980's (the *Expo Experiment* and the *TCAF Advertising Demonstration Program*).[13] Maricopa also

---

[6] *Nature PN*, 7 FCC Rcd at 827.

[7] *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations,* Second Report and Order, 86 FCC2d 141, 142 (1981) (subsequent history omitted).

[8] *See* 47 U.S.C. § 303(g); 47 C.F.R. § 5.203. At the time of Maricopa's *Request*, experimental authorizations for broadcast stations were governed by 47 C.F.R. § 73.1510, but the Commission later moved the requirements to Part 5 of the Rules, which had governed all other experiments. *See Promoting Expanded Opportunities for Radio Experimentation,* Report and Order, 28 FCC Rcd 758, 846 (2013), Order on Reconsideration, 28 FCC Rcd 8501.

[9] For example, it would announce that a bank is "offering certificates of deposit with rates up to 2.5 annual percentage yield;" that a car dealership is having a "Sale on Memorial Day;" and that others are "certified," "accredited," "award-winning," "experienced," "long-established," or ranked. This, Maricopa argues, is merely a "gentle tweak" to the current underwriting guidelines. Application at 4.

[10] *Request* at 3-5. Maricopa acknowledged that there have been previous studies in 1983 and 2012, but argued that its own study would use superior methods to provide better, more empirical, and more timely information. *Id.* at 4, 10-13, 22.

[11] *See Decision*, 29 FCC Rcd at 5180, n.14, citing 47 C.F.R. §§ 5.203 and 73.1510.

[12] 5 U.S.C. § 706.

[13] *See* 47 U.S.C. § 303(g); *International Expo Information Broadcasters, Inc.,* 89 FCC 2d 1374 (1982) ("*Expo Experiment*")(*authorization* of emergency and event-oriented information for 11 million people attending 1982 World's Fair in Knoxville, Tennessee); Temporary Commission on Alternative Financing of Public Telecommunications ("TCAF"), Report to Congress (Oct. 1, 1983) ("*TCAF Report*"), Executive Summary available at http://www.current.org/1983/01/temporary-commission-on-alternative-financing-1983/ (accessed Sept. 23, 2014) (at Congress's direction, temporarily permitting ten NCE television stations to air advertising to facilitate recommendations to Congress on alternative financing); Pub. L. No. 97–35, Omnibus Budget Reconciliation Act of 1981 §§ 1232-33, 95 Stat 357 (1981). Maricopa also relies upon a proceeding in the

(continued….)

states that the Bureau's waiver denial was perfunctory and used circular reasoning. It argues that the Bureau did not give the waiver request a "hard look" and may have ignored or misunderstood material facts, such as the goals and benefits of the proposal.[14] Finally, it argues that the Commission should revise the underwriting policies applied by the Bureau, which allegedly rely upon old, untested presumptions from an era politically more liberal and technologically less advanced.[15]

6. Upon consideration of the Application for Review and the entire record, we affirm the Bureau's denial of the waivers for the reasons stated herein. First, although not explicitly discussed by the Bureau below, the Commission lacks authority to provide the relief which Maricopa seeks. The advertising ban in Section 73.503(d) of the Rules, which Maricopa wants waived, implements the prohibition in Section 399B of the Act. Section 73.503(d) and related Commission policies are carefully calibrated to avoid stations' running afoul of the statutory prohibition on promotional announcements[16] on behalf of for-profit entities.[17] The rule and policies thus help ensure that NCE licensees do not cross the line between acceptable underwriting announcements and statutorily prohibited advertisements. While Maricopa downplays the magnitude of the underwriting enhancements it proposes to air, saying that the material cannot "be deemed true commercial advertising" because it merely "pushes the envelope slightly"[18] we find nevertheless that Maricopa's proposal would cross the line established in the statute. Indeed, the agency has issued numerous decisions in the enforcement context holding that the types of underwriting announcements Maricopa proposes, *e.g.,* those including information about sales/discounts/special events and "qualitative adjectives" that are "factually-based," violate not only the rules but also Section 399B of the Act.[19]

7. Maricopa's original request to conduct its proposed experiment expressly recognized that the Commission lacks authority to waive the statute, and claimed only to be seeking "suspend[ed]

(Continued from previous page)
1960's allowing, on an experimental basis, a commercial station's one-year test of an all-advertising format. *See McLendon Pacific Corp.,* Letter, 4 FCC 2d 722 (1966).

[14] For example, Maricopa stresses that it is motivated by the potential de-funding of public broadcasting, not by a desire to increase its own revenue. Application at 11.

[15] *Id.* at 6.

[16] The rules proscribe "promotional announcements." 47 C.F.R. §§ 73.503(d), 73.621(e). The statutory definition of "advertisement" is any message or programming aired for remuneration that is intended "*to promote* any service, facility, or product offered by any person who is engaged in such offering for profit," 47 U.S.C. § 399B(a)(1) (emphasis added).

[17] *See 1984 Order,* 97 FCC 2d at 256-57 (the statutory provisions closely paralleled the Commission's underwriting rules and the Commission subsequently "modified and clarified its rules and policies to conform to the Congressional mandate") (citing *Commission Policy Regarding the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 FCC 2d 895 (1982)), and 265 (modifying Commission rules "in accordance with" statute to relax restrictions not required by the statute).

[18] Application at 4.

[19] *See, e.g., Educational Community Radio, Inc.,* Memorandum Opinion and Order and Notice of Apparent Liability, 28 FCC Rcd 5283, 5287 (MB 2013) (announcement referencing appearance of "Canada's #1 Bluegrass Band" violated rule and statute and that statement's factuality or truth was irrelevant to determining if it was promotional); *Independence Public Media of Philadelphia, Inc.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 857, 861 (EB 2009) (reference to design award); *Ministerio Radial Cristo Viene Pronto, Inc.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 241, 243-44 & Attachment (EB 2009) (announcements including "finance it for 12, 14, or up to 18 months without interest," "without interest," and "10% discounts"); *Penfold Communications, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 13 FCC Rcd 23731, 23732-34 (MMB 1998) (references to "clearance sale" and "grand opening"). *Nat'l Farm Workers Service Center, Inc.,* Letter, 9 FCC Rcd 6855 (MMB 1994) (availability of "special financing" and "different plans for financing" impermissible because "financial information [is] violative of Section 399B, even where the price is not specifically identified").

enforcement" of Section 399B.[20] However, Maricopa cited no legal basis upon which the Commission could so abstain, and Maricopa's Application for Review states only that Maricopa is not seeking a waiver of the statute but rather a waiver of the Commission's rules.[21] The Commission's power to waive its own Rules cannot confer upon it any authority to ignore a statute.[22] While some portions of the Act contain specific language authorizing the Commission to waive provisions thereof, the Act grants no such authority with respect to Section 399B.[23] Nor has Congress specifically called for the proposed study, in contrast to the *TCAF Advertising Demonstration Program* upon which Maricopa relies.[24] *Expo Experiment*, unlike the case at hand, did not implicate section 399B or the underwriting rules.[25] Accordingly, we conclude that we cannot grant Maricopa's request because the underwriting enhancements Maricopa seeks authority to broadcast would violate the statutory prohibition against airing advertisements on NCE broadcast stations. In view of the foregoing, Maricopa's request for an experimental license is moot and it is therefore unnecessary to address Maricopa's arguments that the Bureau failed to give a hard look to Maricopa's request for waiver of the experimental authorization rule to permit a non-technical experiment.

---

[20] *Request* at 3, 20. Maricopa thus sought to distinguish its request from one in which the Bureau denied a waiver of the statutory ban on advertising. *Id.* at 20, citing *Network of Glory,* Letter, 26 FCC Rcd 14259 (MB 2011).

[21] Application at 13.

[22] *See Metromedia, Inc.,* Memorandum Opinion and Order, 56 FCC 2d 909, 909-10 (1975) (Commission could not accept reconsideration petition filed one day late because despite Commission's discretion under its Rules to accept late filings, it was bound by a statutory 30-day reconsideration deadline in the Act, 47 U.S.C. § 405(a)).

[23] For example, a longstanding provision in Section 10 of the Act allows the Commission to forbear from enforcing provisions relating to telecommunications, but not to broadcasting. *See* 47 U.S.C. § 160. More recently enacted laws give the Commission waiver authority over limited issues not applicable here. *See generally Implementation of Commercial Advertising Loudness Mitigation Act,* Second Report and Order, 29 FCC Rcd 6244, 6295(2014); *Considering Deployment of Text-to-911*, Policy Statement and Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 1547, ¶56 (2014).

[24] That Commission-facilitated study, undertaken at the direction of Congress, ultimately recommended that Congress not allow NCE advertising but permit the non-promotional enhancements now in effect. Maricopa's proposal, while well-intentioned, is unilateral and seeks to provide Congress with information it has not requested. Maricopa shows only that Congress apparently has remained generally interested in the issue, having in 2012 asked CPB to report on alternative financing options. Request at 4, citing CPB, *Alternative Sources of Funding for Public Broadcast Stations* (June 20, 2012) ("*CPB Report"*) available at http://www.cpb.org/aboutcpb/Alternative_Sources_of_Funding_for_Public_Broadcasting_Stations.pdf (accessed Sept. 24, 2014). However, in contrast with the *TCAF Demonstration Program*, Congress has not directed Maricopa to undertake this study.

[25] The non-profit applicant therein referenced noncommercial broadcasting only to illustrate its belief that its acceptance of donations to cover operating expenses would not run afoul of a rule prohibiting the holder of an experimental authorization from charging others for transmission of information. *See Expo Experiment,* 89 FCC 2d at 1383; 47 C.F.R. § 74.182. *See also* 47 C.F.R. § 5.215. As to Maricopa's references to the possibility that Section 399B may be invalidated, Application at 10-12, the U.S. Court of Appeals for the Ninth Circuit recently upheld the statute against a constitutional challenge, and the U.S. Supreme Court declined to grant certiorari. *See Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir 2012), *aff'd en banc,* 736 F.3d 1192 (9th Cir. 2013) (upholding section 399B as constitutional), *cert. denied,* 134 S.Ct. 2874 (2014).

8. ACCORDINGLY, IT IS ORDERED that the Application for Review of Maricopa Community College District IS DENIED, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

CONCURRING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Maricopa Community College District, Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements for KJZZ(FM) and KBAQ(FM), Phoenix, Arizona*, MO&O, FCC No. 14-187

I agree with my colleagues that the Application for Review should be denied. While I do not doubt that Maricopa Community College District's (Maricopa's) proposed experiment involving the Commission's underwriting rules and policies was requested with the best of intentions, it does not meet the standard necessary to obtain a waiver. Among other things, as the Media Bureau has pointed out, Maricopa has not presented any special circumstances that distinguish it from all other noncommercial educational FM licensees.[1] Moreover, any reform of our underwriting rules and policies should be handled through industry-wide proceedings, rather than granting individual licensees special dispensation to air underwriting announcements that all other licensees would not be able to broadcast.

However, the Commission does not rest its decision on these narrow grounds. It instead goes much further, denying the Application for Review because it finds that the types of underwriting announcements that Maricopa would like to broadcast would violate the Communications Act.[2] Specifically, it concludes that these announcements would constitute advertisements, which noncommercial educational stations are prohibited by statute from airing.[3]

In my view, the Commission would have been better off avoiding this question of statutory interpretation. For one thing, as explained above, the Application for Review could have (and should have) been denied for other reasons. For another thing, today's decision could have a broader impact on public broadcasting. In particular, I have a hard time understanding how some of the "underwriting advertisements" that air before many of PBS's most popular programs, such as *Downton Abbey*, are lawful if all of the "underwriting announcements" that Maricopa would like to air are statutorily prohibited. For example, if it violates the statute for underwriting announcements to use qualitative adjectives based in fact,[4] how can Viking River Cruises tout its "modern river cruise vessel[s]" in a thirty-second "underwriting announcement" that obviously appears designed to entice viewers into taking a river cruise so that they can be "transported . . . to a another world, a world of dramatic landscapes, majestic castles and remarkable characters"?[5]

[1] *See Ernest T. Sanchez, Esq.*, Letter, 29 FCC Rcd 5180, 5182 (MB 2014).

[2] *See* 47 U.S.C. § 399B.

[3] *See* Memorandum Opinion and Order at para. 6.

[4] *See id.*

[5] *See* http://www.youtube.com/watch?v=f9BQj49zfXg