

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Noncommercial Educational Station Fundraising)
for Third-Party Non-Profit Organizations) MB Docket No. 12-106
)
Notice of Proposed Rulemaking)

COMMENTS

These comments are submitted by Common Sense Alliance, a non-profit corporation whose purpose is to study, analyze and provide commentary and proposals on legal, regulatory and government policy issues in the furtherance of the public interest. These comments respond to the captioned *Notice of Proposed Rulemaking* (“NPRM” or “Notice”) concerning the issue of whether and under what circumstances to allow noncommercial educational (“NCE”) broadcast stations to conduct on-air fundraising activities that interrupt regular programming for the benefit of third-party non-profit organizations.¹ Specifically, these comments focus on the constitutionality under the First amendment of the provisions of 47 U.S.C. § 399B, that prohibits NCEs from broadcasting 1) advertisements for goods and services on behalf of for-profit entities, 2) advertisements regarding issues of public importance or interest (“public issues”), and 3) political advertisements. As such, these Comments are directly responsive to the Commission’s request for comments on the First Amendment implications of any limitation on the types of entities that may benefit from fundraising activities aired on NCE stations.² Particular focus is given to the April 12, 2012 decision of the United States Court of Appeals for the Ninth Circuit in *Minority Television Project, Inc. v. FCC*, No. 09-17311, 2012 WL 1216284 (9th Cir. Apr. 12, 2012) (“*Minority Television*”) which the Commission recognizes makes

¹ NPRM at 1.

² NPRM at 10.

unenforceable §399B's provisions banning NCE's airing of public interest and political advertisements in the Ninth Circuit.³

OFFICIAL NOTICE

At the outset, Common Sense urges the Commission to take official notice of the holdings in *Minority Television*⁴ as dispositive of the issues that §399B's provisions impose content-based restrictions on NCE's speech since it restricts such speech based on the content of the speech and that it discriminates within the class of speech it defines as advertisements. The Commission should accept these holdings and expand its decision not to enforce §399B (2) and (3)'s provisions nationwide based on the finding that those provisions are unconstitutional restrictions on NCEs' rights of free speech.

SECTION 399B(1)

The Ninth Circuit refused to apply its analysis and reasoning for holding §399B (2) and (3)'s unconstitutional to §399B (1). Common Sense submits that there are cogent arguments that makes the Ninth Circuit's decision to sustain the validity of §399B (1) questionable.

The Court's analysis in *Minority Television* begins with it holding that the government has a substantial interest in ensuring high-quality educational programming on public broadcasting stations.⁵ It dismisses the notion that the alternatives to over-the-air broadcasting of such programming by holding that the radio spectrum remains a finite national resource.⁶ It accepts the fact that Congress sought to ensure niche programming such as public affairs shows and educational programs for children and cites to the Commission's holding that public broadcast stations offer "programming of an entirely different character from that available on

³ NPRM at 13.

⁴ *Minority Television* at 3929 of Slip Opinion, April 12, 2012.

⁵ *Id* at 3942.

⁶ *Id* at 3943.

most commercial stations.”⁷ Reliance is then placed on evidence that public broadcast stations do broadcast different programs than commercial stations, with 16% of all program hours devoted to educational children programming while only 2% of such programming is provided by commercial stations.⁸ But is this really “relevant evidence”? Given the programming restrictions on NCEs, this is to be expected. If it is the program restrictions that result in NCEs providing more of this type of programming than commercial stations and in commercial stations deferring to the NCEs, it may prove that the policy goal is being achieved. But it is not proof that absent these restrictions, the same results would be obtained.

This proceeding presents an opportunity to obtain evidence in today’s diverse media environment if retaining the restrictions on such programming is really needed. The assumptions that the restrictions are needed because of limited spectrum and the government’s right to curtail speech to protect that spectrum need to be challenged because they are not likely to be borne out in today’s environment. Indeed, less than 10% of the viewing public receives their programming via over-the air broadcasting. And the disproportionate share of the finite amount of radio spectrum allocated to broadcasting is under siege by new technologies that need more spectrum in order to meet the ever growing demand of the public for the seemingly endless amounts of programming now available over the Internet, cable, satellite, wireless and optical fiber systems. Obtaining the actual facts of today’s media environment is essential because of the First Amendment issues involved.

The existing dichotomy between public and commercial broadcasting results in the same restrictions that the Court found undid §399B (2) and (3). That is, §399B (1) restricts speech based on the content of the speech and results in discrimination within the class of speech it defines as advertisements. The discrimination factor would appear to arise from the

⁷ Id.

⁸ Id.

assumption that commercial broadcast stations and networks are free to purchase the rights to programming that initially airs on public stations, but under the statute, NCE's and PBS cannot purchase programming that may initially air on commercial broadcast stations and networks.⁹

The Court noted that Minority Television did not dispute that the government had a substantial interest in maintaining public broadcast stations' niche programming.¹⁰ The Court then addressed Minority Television's argument that §399B was not narrowly tailored to the asserted government's interest. Before addressing the Court's analysis on this point, issue can be taken with the Court's rejection of Minority Television's reliance on *Citizens United v. FEC*, 130 S. Ct. 876 (2010).¹¹

The issue there concerned whether §399B should be considered under the standard of strict scrutiny and entitled to the most exacting decree of First Amendment protection. Under this standard it would have to be shown that the restrictions of §399B further a compelling interest and were narrowly tailored to achieve that interest.¹² The Court rejected the application of *Citizens United* because it was not a broadcast regulation case, did not involve broadcast spectrum regulation.¹³ But this arguably misses the larger and more important point that *Citizens United* established the broadest application of the First Amendment in history and that to do so, it found that the government's interest in preventing corruption in political campaigns and discouraging the public's trust in the electoral processes was not "compelling."

⁹ One example, the program now aired on a commercial network, "Who Do You Think You Are" originated on public television.

¹⁰ *Id.*

¹¹ *Id.* at 3933. Minority Television made this argument only as to §399B (2) and (3). But the issue being raised here it is submitted will be shown to apply to §399B (1).

¹² *Id.* at 3930.

¹³ *Id.* at 3933. "*Citizens United* in no way dealt with the 'unique considerations' inherent in congress's regulation of the broadcast spectrum... the Supreme Court specifically rejected the contention that content-based laws which burden political speech and are enacted pursuant to the broadcast spectrum require the application of strict scrutiny." *Id.* at 394.

It is difficult to rationalize the Supreme Court's rejection of a compelling government interest in preventing corruption in political campaigns and discouraging the public's trust in the electoral processes, with the Court's holdings in *Minority Television* that because it involved radio spectrum, strict scrutiny and the most exacting degree of First Amendment protection was not required, at least as to §399B (2) and (3). As to §399B (1), the question can be raised if the government has no compelling interest to restrict speech to prevent corruption in political campaigns and discouraging the public's trust in the electoral processes, what legitimate interests does the government have in restricting NCEs from engaging in commercial speech besides the concerns over spectrum. But if those concerns are not well founded, then what legitimate interest does the government retain that justifies continuing its restrictions on commercial speech by NCEs and public networks?

The Court in *Minority Television* applied the standard that requires the restriction on speech be narrowly tailored to further a substantial governmental interest.¹⁴ As suggested, if there is not a "compelling interest" in preventing corruption in political campaigns and discouraging the public's trust in the electoral processes, how can restricting commercial speech by NCEs and public networks be found to be "substantial" if there is no longer a spectrum management issue, and the speech of NCEs and public networks is discriminated against in favor of commercial stations and networks?

Whether or not there is still a substantial government interest must be established at this time by substantial evidence. The assumptions and broad policy justifications that are said to have existed when Congress enacted §399B 31 years ago cannot simply be accepted as justifying the continued restrictions on commercial speech. The Commission is required to

¹⁴ Id at 3935.

obtain a fresh record to determine whether today's media environment continues to justify the ban on NCEs' and public networks' First Amendment rights.

A reasonable starting point seems to be an analysis of the factors relied on by the Court in *Minority Television* by which it determined that §399B (1) was narrowly tailored to achieve the government's "substantial interest."

SPECTRUM SCARCITY?

A solid record based on the evidence taken as a whole needs to be established as to whether the concerns over the finite availability of the radio spectrum justifies the continued restrictions on speech embodied in §399B (1). If the evidence is that spectrum scarcity no longer is a concern about ensuring the public access to the type of programming that §399B (1) was ostensibly intended to protect, does the government continue to have a substantial interest in maintaining §399B (1)'s restrictions on free speech?

INTERMEDIATE SCRUTINY STANDARD

Rejecting the need for application of the standard of strict scrutiny in adjudicating the First Amendment rights at issue, the Court in *Minority Television* set forth the premises for the application of intermediate scrutiny standard noting that the guiding principle of narrow tailoring under intermediate scrutiny requires the government to "demonstrate that the recited harms" to the substantial governmental interest "are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Turner I*, 512 U.S. at 664-65. And, also noted that although a statute is "not invalid simply because there is some *imaginable* alternative that might be less burdensome on speech," *Turner II*, 520 U.S. at 217, the government must prove that the statute does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 665 (internal quotations omitted). Importantly, the government must prove both the reality of the recited

harms and that the statute does not burden more speech than necessary “by substantial evidence.” *Turner II*, 520 U.S. at 211. “Substantial evidence” must include “substantial evidence in the record before Congress” at the time of the statute’s enactment.

SUBSTANTIAL EVIDENCE REQUIREMENT

The Court next synthesized First Amendment cases, finding that they produced two key principles – that to sustain any content-based restriction, the government must prove both the reality of the recited harms and that the statute does not burden more speech than necessary “by substantial evidence.” *Turner II*, 520 U.S. at 211, and that, that evidence must be found “in the record before Congress” at the time of the statute’s enactment. *Id.* In addition, it was noted that when Congress enacts a “selective and categorical” ban on speech, the government must also prove the speech banned poses a greater threat to the government’s purported interest than the speech that is or would be permitted.¹⁵ Having reviewed and stated the standards for First Amendment review, the Court concluded:

We hold that 399b(a)(1), which prohibits advertising by for-profit entities for their goods and services, meet this standard. (at 3941).

The Court then moved on to examine the government’s interest in banning advertising by for-profit entities. The following comments and analysis challenge the Court’s findings and reasoning that find that the government has a sufficient interest to maintain the ban on public broadcast stations’ advertising for for-profit entities.

¹⁵ The Court cited to *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), holding that it reaffirmed that § 399b would be subjected to rigorous analysis even if viewed through the lens of commercial speech. Pointing out that this case involved paradigmatic *commercial* speech, it noted that the Supreme Court held that “the First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’ ” *Id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); and that “[c]ommercial speech is no exception” to this principle in part because a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Id.* (quotation marks omitted). The Court then concluded that “... after *Sorrell*, it is clear that commercial speech is subject to a demanding form of intermediate scrutiny analysis.

OUTDATED ASSUMPTIONS ARE NOT EVIDENCE

The chief difficulties with the Court's decision to sustain the continuing ban on public broadcast stations' advertising for for-profit entities lies in its reliance on outdated assumptions and its disregard for the lack of record evidence based on today's media environment. Beginning with the purpose of ensuring high quality educational and noncommercial programming, the Court assumes that, if permitted, public stations would attempt to attract advertising dollars by replacing niche educational programming with programming of great mass market appeal. (at 3942). It then rejects the development of multiple sources of diverse programming in today's media landscape based on the unanalyzed assumption that because the broadcast spectrum remains a "finite national resource," these multiple outlets are of no consequence.

Compounding this oversight is the fact that there is no comparative evidence in the record of the (1) hundreds of programming options made available by these diverse sources, (2) the substantial amount of programming that is broadcast by both commercial and NCEs (e.g., mysteries, police shows, comedies/sitcoms, political, entertainment and general interest interview shows), (3) the fact that certain shows formerly broadcast by NCEs have migrated to dedicated channels on cable and/or satellite, such as The Cooking Channel, Fox Soccer Channel, and others, (4) ability of commercial stations to pluck popular NCE programming (such as the "Who Do You Think You Are" program mentioned above) that NCEs cannot hope to match.

The lack of current record evidence is further compounded by the Court's reliance on a totally stale record. For example, the Court cites to the testimony of a senior vice president of National Public Radio ("NPR") about an internal study it conducted presumably made 31 years earlier that showed that on-air advertising would hold little or no promise for public radio

because the public radio stations broadcast what commercial stations choose not to because of insubstantial income potential. (Id. At 3944-5). Not only is this statement outdated, it is speculative opinion lacking in empirical support and even if more true when made, cannot be said to be reliable today. Similar criticism applies to the Court's reliance on the Noll Report, cited at 3945 issued in 1981. Hereto is the claim that educational programs will "not attract sufficient viewership to attract substantial advertising revenue." But innovative educational programming like "Sesame Street" and "Mr. Roger's Neighborhood" have been running for decades. Their longevity also contradicts the predictions of financial doom that was forecast three decades ago.

These points are also contradictory and self-defeating. NPR and all NCEs engage in numerous fund-raising drives throughout the year, both over-the-air, by phone, through the mails and electronically. The point is that NCEs cannot exist without the "income potential" (albeit derived differently) inherent in their programming any more than commercial stations can survive without the income potential of their programming.

The Court's reliance on the testimony that commercial advertising on NCEs would appeal to the "lowest common denominator" rather the diverse audiences is equally outdated and of little probative value today, if ever. Today's media diversity is so great that it is difficult to believe that there is any evidence that there is still a "lowest common denominator" audience. In any event, no such evidence was in the record before this Court.

Next, the court relies on the decades old opinion of a trade association that commercialization would make public television indistinguishable from the "new commercial or pay culture cable services. And public television will fail." (Id.) A far more realistic problem for public television would appear to be the immense growth in media diversity over the last 30

years. Yet, public broadcast survives, a fact to which the Commission may give official notice, and in all likelihood thrives.

CONGRESSIONAL DISCRETION

Minority Television unsuccessfully argued the fact that Congress lacked any empirical data to support the 1981 enactment of 399b. The Court's rejection seems to beg the question. It is first stated that there is no authority that requires Congress to consider a "particular type of evidence in the record before Congress." *Id.* At 3946. While Congress may not be limited to a particular type of evidence, is it not required it at least to have something that has evidentiary value of substance? The Court's tolerance of "opinions, predictions and wishes" as a type of evidence that supports not just a statutory enactment, but one that curtails First Amendment guarantees is remarkable and raises a question whether a statute enacted on such grounds is itself inherently open to constitutional challenge under Article III.

The Court then cites to the Supreme Court's statement in *Turner I* that sound policy making "often requires legislators to forecast future events and to anticipate the likely impact of these events." *Id.* However true this statement may be in proper context, it is a surprising "justification" to use to sustain restrictions on commercial speech. The Court's acceptance of forecasts based on "opinions, predictions and wishes" is striking in its tolerance of the risk that legislation enacted on such a basis is likely to make bad law and in this case infringe on constitutional guarantees. Moreover, there is no logic in attempting to justify 399B based on forecasts made and anticipations had 31 years ago which today can be shown to be highly erroneous.

The Court concludes its analysis of these issues by quoting the Supreme Court's statement that –

'Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review. Turner I, 512 U.S. at 666.' Id.

This quote does not say Congress can enact a statute on whimsy or conjecture, opinions and predictions based on personal interests versus public interests, or simple wishes. A legislative record is needed to support legislation. That record must have some verifiable evidence to guide Congress in drafting the legislation so that what is enacted addresses the issues of concern in the public interest and in this case must be narrowly tailored to avoid constitutional impairments. To hold that a 31 year old record, originally based on opinion, wishes and predictions which, however acceptable 31 years ago, are no longer relevant and have been shown to be inoperative can justify continuing a ban on commercial speech is disconcerting.

CONCLUSION

The Commission is the expert body chartered by Congress to regulate communications in the public interest. It should therefore take the lead in addressing the constitutional issue presented in this NPRM based on its expertise in the regulation of broadcasting and the radio spectrum. It should conclude that based on today's media environment and the relevant developments over the past 3 decades that retention of §399B(1) is no longer justified. It is submitted that removing this section will not result in the fears expressed at the time of its enactment. On the contrary, it is submitted that public broadcasting will remain much as it is today. It has succeeded in building a loyal audience by the type of programming presented and it is most unlikely that this success will be jeopardized by rampant commercialization of public broadcast programming.

The benefits to repealing §399B(1) will be to bring consistency and logic to the application of First Amendment principles to the regulation of broadcasting and by placing in

the sound discretion of public broadcasters the programming decisions and how to support them as opposed to continuing the ban on the use of such discretion.

Respectfully submitted,
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