

**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
)	
)	

**COMMENTS OF THE PUBLIC BROADCASTING SERVICE AND THE
ASSOCIATION OF PUBLIC TELEVISION STATIONS**

The Public Broadcasting Service (“PBS”)¹ and the Association of Public Television Stations (“APTS”)² welcome this opportunity to submit comments on the Federal Communications Commission’s (“Commission”) *Notice of Proposed Rulemaking* regarding 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.³

PBS and APTS urge the Commission to limit its proposed rule change permitting on-air fundraising for third-party non-profit organizations to licensees that do not receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting (“CPB”). The distinction between CPB-qualified stations and other NCE stations in the context

¹ PBS, with its nearly 360 member stations, offers all Americans the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches 123 million people through television and 21 million people online, inviting them to experience the worlds of science, history, nature, and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances.

² APTS is a non-profit organization whose membership comprises the licensees of nearly all the nation’s CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

³ Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations, *Notice of Proposed Rulemaking*, MB Docket No. 12-106 (rel. Apr. 26, 2012) [hereinafter “NPRM”].

of third-party fundraising was originally recommended by the Commission’s Working Group on Information Needs of Communities.⁴ CPB-qualified stations have a unique statutory mission of public service that could be undermined by a rule change allowing on-air interruptions to fundraise for third parties outside of the waiver process. This unique role should be preserved through the Commission’s authority to distinguish between CPB-qualified stations and other NCE stations. Should the Commission conclude that it cannot draw this distinction in its third-party fundraising rules, then the Commission ought to maintain the current rules. The existing waiver process has worked satisfactorily for decades. NCE licensees can continue to achieve any third-party fundraising objectives they might have through the established waiver process, with possible modifications to broaden that process.

I. A RULE ALLOWING INTERRUPTION OF REGULARLY-SCHEDULED NCE STATION PROGRAMMING FOR THIRD-PARTY FUNDRAISING SHOULD NOT INCLUDE CPB-QUALIFIED STATIONS.

PBS and APTS submit that CPB-qualified stations should not be included in a rule that permits the interruption of regularly-scheduled NCE station programming for fundraising on behalf of third-party non-profit organizations. CPB-qualified stations serve a unique role in providing objective and educational programming to the public, as demonstrated by the programming restrictions that a CPB community service grant entails. By limiting the expansion of third-party fundraising to those NCE stations that are not CPB-qualified, the Commission would be helping to safeguard the public service mission of CPB grantees. To this end, the

⁴ See Working Group on Information Needs of Communities, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, at 356 (June 2011), available at www.fcc.gov/infoneedsreport [hereinafter “INOC Report”]. See also NPRM at ¶¶ 7, 9.

Commission has the authority to draw this distinction between CPB-qualified and other NCE stations, consistent with the First Amendment.

PBS and APTS recommend that the Commission base its third-party fundraising rule distinguishing CPB-qualified stations on the definition of a “qualified noncommercial educational television station” found in the Satellite Television Extension and Localism Act of 2010. This definition provides:

The term ‘qualified noncommercial educational television station’ means any full-power television broadcast station that –

(A) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational broadcast station and is owned and operated by a public agency, nonprofit foundation, nonprofit corporation, or nonprofit association; and

(B) has as its licensee an entity that is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(B) of this title.”⁵

A. CPB-QUALIFIED STATIONS SERVE A UNIQUE PUBLIC ROLE THAT WOULD BE UNDERMINED BY INCLUSION IN THE PROPOSED THIRD-PARTY FUNDRAISING RULES.

Noncommercial educational broadcast stations that are CPB-qualified exist to serve the public interest and as “a source of alternative telecommunications services for all citizens of the Nation.”⁶ Congress established CPB to “facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and

⁵ Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, § 207(b)(6) (May 27, 2010) (amending 47 U.S.C. § 338) [hereinafter “STELA”].

⁶ Public Broadcasting Act of 1967, 47 U.S.C. § 396(a)(5) (2004) (declaring congressional policy that public telecommunications services will be responsive to “all citizens of the Nation”) [hereinafter “Public Broadcasting Act”].

innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance”⁷

The requirement that CPB-qualified stations be objective and balanced is indicative of the need for these stations to be insulated from both governmental control and from excessive pressure by other third parties. For instance, to provide the fullest possible insulation from external interference and influence, Congress chose to act through a private corporation in facilitating the development of public broadcasting.⁸ Similarly, the appropriation for CPB is determined two years in advance in order to guard against interference with programming.⁹

Protection from extraneous influence is further emphasized by the manner in which CPB-qualified stations receive funding. To receive a community service grant from CPB, stations must meet a variety of eligibility criteria, which include obligations and restrictions on broadcasting, fundraising, and other operations.¹⁰ In particular, CPB grant recipients must devote the substantial majority of their total daily programming hours to CPB-qualified programs. CPB-qualified programs must be directed towards a general audience and serve “demonstrated community needs of an educational, informational and cultural nature.”¹¹

⁷ *Id.* at § 396(g)(1)(A).

⁸ *Id.* at § 396(a)(10). Congress was sufficiently concerned with public broadcasting’s impartiality that it mandated that CPB (a private corporation) have a Board of Directors appointed by the President with the advice and consent of the Senate, and with no more than five of its nine members from the same political party. *Id.* at § 396(c)(1).

⁹ Corporation for Public Broadcasting, *Purpose & history of CPB’s advance appropriations*, available at <http://cpb.org/appropriation/purpose.html>.

¹⁰ See generally Corporation for Public Broadcasting, *FY2012 Television Community Service Grant General Provisions and Eligibility Criteria*, available at http://www.cpb.org/stations/grants/tv/generalprovisions/cpb_12TV_CSG_GeneralProvisions.pdf.

¹¹ *Id.* at 5.

Programs that promote the perspectives of particular political or religious beliefs are listed in the eligibility criteria as not being CPB-qualified.¹²

The insulation of CPB and the obligations and restrictions placed on grantees serve to ensure that CPB-qualified stations produce high-quality educational programming that is objective and balanced. These protections further Congress' intent in the foundation of public broadcasting. At the time of that founding, Congress declared that "it is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities."¹³ Public television stations thus have a mission to serve *all* segments of a community, specifically those that are less influential, rather than select third-party organizations.

The Commission has long recognized that third-party fundraising, even for worthy purposes, may be "inconsistent with the noncommercial nature of educational broadcasting" because NCE stations are not licensed to "serve as a fund-raising operation for other entities."¹⁴ As the Commission's Working Group on Information Needs of Communities stated, dedicating airtime to fundraising for selected third parties places public television stations "in the awkward position of deciding which worthy cause to support and which to reject."¹⁵ Furthermore, the proposed expansion of third-party fundraising increases the possibility that external organizations might influence programming that is intended to be impartial and to serve the public as a whole.

¹² *Id.* at 6.

¹³ Public Broadcasting Act at § 396(a)(6).

¹⁴ *In Re Request by Ohio State University, Columbus, Ohio For Waiver of Sections 73.503 and 73.621 of Commission's Rules*, 62 F.C.C.2d 449, 450 (1976) (denying request by Ohio State University's NCE station to broadcast fundraising programming in support of the Columbus Symphony Orchestra).

¹⁵ INOC Report at 317.

B. THE COMMISSION HAS THE AUTHORITY TO LIMIT THE PROPOSED EXPANSION OF THIRD-PARTY FUNDRAISING RULES TO NCE STATIONS THAT ARE NOT CPB-QUALIFIED.

The Commission has long understood that it is Congress' intent to maintain the essentially noncommercial nature of public broadcasting in service of the "overall public," and to insulate public broadcasting from "the sway of particular political, economic, social or religious interests."¹⁶ Given this understanding, while the Commission has no direct authority over CPB, its oversight of noncommercial licensees is part of the "carefully balanced framework of regulation" governing public television.¹⁷ The Commission should therefore consider the impact of its regulations on the objectives Congress established for CPB-qualified stations, and as a result the Commission ought to exclude CPB-qualified stations from a rule modification allowing on-air fundraising for third-party non-profit organizations.

In fact, Congress recently made such a distinction between CPB-qualified stations and other NCE stations in the Satellite Television Extension and Localism Act of 2010 ("STELA"), where Congress required that certain satellite television providers accelerate their timetable for carrying CPB-qualified stations in high-definition format.¹⁸ Specifically, Congress limited the mandate using the definition of a "qualified noncommercial educational television station" that is provided above in Section I.¹⁹

The distinction based on this definition in STELA survived First Amendment scrutiny in a recent case decided by the United States Court of Appeals for the Ninth Circuit. In *DISH*

¹⁶ *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 F.C.C.2d 895, 900 (1982).

¹⁷ *Accuracy in Media, Inc. v. F.C.C.*, 521 F.2d 288, 295 (D.C. Cir. 1975) (demonstrating Congress' intent to have FCC practices be part of a system of accountability for local noncommercial licensees).

¹⁸ STELA at § 207.

¹⁹ *Id.* at § 207(b)(6).

Network Corporation v. Federal Communications Commission, DISH Network argued that the STELA mandate as limited to CPB-qualified stations was a “content-based regulation of free speech in violation of the First Amendment.”²⁰ The Ninth Circuit Court of Appeals disagreed in its decision upholding the lower court’s denial of DISH Network’s motion for preliminary injunction.²¹ While DISH argued that the court should apply strict scrutiny because the distinction was content-based, the Court instead found that the mandate was content-neutral and thus applied intermediate scrutiny. The Court reasoned that the federal funding criteria that must be met by CPB-qualified stations are “designed not to promote Congress’s preference, but to guard against the influence of special interests. Furthermore, the CPB offers financial incentives for stations to differentiate their programming and the government is forbidden by law from exercising any direction, supervision, or control over the CPB.”²²

The Ninth Circuit’s application of an intermediate scrutiny analysis based on the distinction being content-neutral should similarly apply to a rule limiting the expansion of on-air third-party fundraising to stations that are not CPB-qualified. The Court recognized that Congress’ intent in limiting the STELA mandate to CPB-qualified stations was to protect public broadcasting’s unique role and public service mission, just as a distinction between CPB-qualified and other NCE stations would do in the third-party fundraising context.

Distinguishing between CPB-qualified and other NCE licensees should survive intermediate scrutiny. A content-neutral regulation is sustained if “it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free

²⁰ *DISH Network Corporation v. Federal Communications Commission*, 653 F.3d 771, 773 (9th Cir. 2011), cert. denied 132 S. Ct. 1162 (2012).

²¹ *Id.* at 776.

²² *Id.* at 779 (internal citations omitted).

expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.”²³ The ultimate determination is not based on whether a particular regulation is necessary, but on whether the decision to adopt that regulation is reasonable and based on substantial evidence.²⁴

Drawing a distinction between CPB-qualified and other NCE licensees for the purposes of on-air third-party fundraising would serve the long-established and substantial government interest of helping CPB foster a public television system in which the sway of third-party organizations – however well-intentioned – is minimized. The distinction is reasonable and minimally restrictive on First Amendment rights because it affects only those stations that have affirmatively sought to satisfy CPB’s grant eligibility requirements.²⁵ As DISH Network noted in *DISH*, the HD acceleration mandate is “reserved only for a subset of government-funded beneficiaries.”²⁶ Stations that wish to engage in more exhaustive third-party fundraising have a clear alternative for doing so by foregoing CPB-eligibility, as many NCE stations choose to do.

II. IF THE COMMISSION CONCLUDES IT CANNOT DISTINGUISH AMONG NCE LICENSEES IN ITS THIRD-PARTY FUNDRAISING RULES, THEN THE COMMISSION SHOULD NOT ADOPT THE PROPOSED RULE MODIFICATION.

The Commission’s current rule prohibits NCE stations from conducting fundraising activities to benefit any entity besides the station itself if the activities would substantially alter

²³ *Id.* at 780 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

²⁴ *See id.* (citing *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994)).

²⁵ Furthermore, the restrictiveness of the distinction is minimized by the fact that excluding CPB-qualified stations from the proposed rule change would not lead to an outright prohibition on third-party fundraising, given that such stations could continue to avail themselves of the established waiver process where the circumstances warrant.

²⁶ *DISH Network*, 653 F.3d at 779.

or suspend regular programming.²⁷ PBS and APTS urge the Commission to maintain this existing prohibition if it concludes that it cannot distinguish among NCE licensees in its proposed third-party fundraising rule modification.

As discussed above, CPB-qualified stations serve the unique role of providing high-quality educational programming that is objective and balanced. Congress saw to the creation of a public television system that serves the overall public, particularly less influential segments, rather than select third-party organizations.²⁸ Allowing CPB-qualified stations to fundraise on-air for third-party organizations could adversely affect this statutory mission, as it puts stations in the position of choosing which organizations receive airtime and increases the potential for third-party organizations to influence on-air programming.

A. NCE LICENSEES CAN ACHIEVE THEIR THIRD-PARTY FUNDRAISING OBJECTIVES THROUGH THE WAIVER PROCESS AND A POSSIBLE EXPANSION TO THIS PROCESS.

CPB-qualified stations have found the waiver process to work well where exigent circumstances present themselves. Rather than change the rules in a way that might adversely affect the mission of the public television system, the Commission could help NCE licensees continue to conduct limited third-party fundraising through the established waiver process.

The Commission generally denies the waiver requests of NCE licensees when a proposed fundraising broadcast “is not designed to raise funds for station operations” *and* the content “is

²⁷ See 47 C.F.R. §§ 73.503(d) and Note, 73.621(e) and Note; *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Second Report and Order, 86 F.C.C. 2d 141, 157-58, ¶¶ 42-43 (1981), Memorandum Opinion and Order, 90 F.C.C. 2d 895, 907, ¶ 20 (1982), *recon. granted*, Memorandum Opinion and Order, 97 F.C.C. 2d 255, 264-65, ¶ 19 (1984). See also *Ohio State University*, 62 F.C.C. 2d at 450.

²⁸ See Public Broadcasting Act at § 396(a)(6) (declaring Congressional policy that public television develop programming that is responsive to the needs of “unserved and underserved audiences, particularly children and minorities”).

inconsistent with the noncommercial nature of educational broadcasting.”²⁹ However, the Commission has granted waivers of Sections 73.503(d) and 73.621(e) to licensees of NCE television stations to “support relief efforts following disasters of particular uniqueness or magnitude.”³⁰

For example, after the Filene Center at Wolf Trap Farm Park burned down, the Commission granted a waiver to an NCE licensee to fundraise for the Wolf Trap Foundation.³¹ Similarly, NCE stations were granted waivers to fundraise following Hurricane Andrew’s devastation in Florida, Hurricane Katrina, the September 11, 2001 terrorist attacks, the 2005 tsunami affecting Southeast Asia, and the January 2010 earthquake in Haiti.³²

The record of over thirty-five years demonstrates that the Commission has broad authority to grant a waiver where it finds good cause to be shown. For instance, the waiver request was granted for the Wolf Trap fundraiser in part based on the fact that the fundraising programming would be consistent with regular programming, given that more than half of the broadcast consisted of excerpts of programs previously broadcast by the NCE station making the request.³³

²⁹ *Ohio State University*, 62 F.C.C. 2d at 450.

³⁰ Press Release, Federal Communications Commission, Media Bureau Announces Procedures for Obtaining Commission Approval for NCE Station Fundraising to Aid Japan Relief Efforts (Mar. 16, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305220A1.pdf [hereinafter “NCE Station Fundraising to Aid Japan Relief Efforts”].

³¹ *See Cohn and Marks*, 51 R.R. 2d 659, 660 (1982).

³² *See, e.g.*, NCE Station Fundraising to Aid Japan Relief Efforts, *supra* note 30; NPRM at ¶ 6.

³³ *Compare Cohn and Marks*, 51 R.R. 2d at 660, with *Ohio State University*, 62 F.C.C. 2d at 449 (denying Ohio State’s NCE licensee’s request to fundraise on-air for the Columbus Symphony Orchestra because the broadcast of such programming is “inconsistent with the noncommercial nature of educational broadcasting”). *See also* NPRM at ¶ 5.

Given that some noncommercial broadcasters have advocated for increased flexibility to fundraise on-air for third-party non-profit organizations,³⁴ PBS and APTS propose that, in lieu of replacing the waiver process, the criteria the Commission uses for evaluating waiver requests could be updated and expanded as circumstances present themselves. In the future, the Commission could grant waivers to NCE stations to fundraise for third-party organizations that are not connected to specific disasters or regularly for third-party organizations where the Commission is presented with evidence that there is a substantial overlap between viewership of the station and supporters of the third-party organization. This mechanism would grant noncommercial broadcasters additional flexibility, while also allowing the Commission to ensure that there are local benefits to each opportunity for third-party fundraising and protecting the unique public service role of CPB grantees.

Retention of the waiver process for limited third-party fundraising, with a possible expansion for increased flexibility, would provide additional benefits. The waiver review process occurs prior to broadcast and thereby increases the likelihood that a third-party fundraiser supports the applicant NCE station's public service mission, in contrast to the proposed after-the-fact public file disclosure of on-air third-party fundraising activity. The requirements of the waiver review process encourage stations to closely scrutinize potential third-party fundraisers prior to air. In addition, under a broadened waiver process, the Commission could implement a standardized and streamlined approach to ensuring that there is a substantial relationship between the third-party non-profit's supporters and the community that the applicant NCE licensee serves.

³⁴ See INOC Report at 317, 356.

CONCLUSION

CPB-qualified stations serve a unique public service role as noncommercial educational broadcasters. A rule modification allowing NCE licensees to conduct on-air fundraising on behalf of third-party non-profit organizations could adversely affect that mission. Therefore, PBS and APTS encourage the Commission to limit any rule that expands the scope of third-party fundraising outside the waiver process so that it would apply only to NCE stations that are not CPB-qualified. This distinction would help preserve the public television system's role as a provider of high-quality, objective, educational programming. Should the Commission conclude that it cannot distinguish between CPB-qualified and other NCE licensees, PBS and APTS urge the Commission to maintain the existing prohibition. As explained in these comments, we submit that the current rules could be modified to institute an expanded waiver process to allow interested NCE stations to appropriately fundraise on behalf of third-party organizations.

Respectfully submitted,

PUBLIC BROADCASTING SERVICE

Craig A. Sperling
Vice President and
Deputy General Counsel
Thomas Rosen
Senior Counsel
2100 Crystal Drive
Arlington, VA 22202
Telephone: (703) 739-5000
Facsimile: (703) 837-3300

ASSOCIATION OF PUBLIC TELEVISION STATIONS

Lonna Thompson
Executive Vice President, Chief Operating
Officer, and General Counsel
2100 Crystal Drive, Suite 700
Arlington, VA 22202
Telephone: (202) 654-4200
Facsimile: (202) 654-4236

July 23, 2012