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

Adopted: April 25, 2012 **Released: April 26, 2012**

Comment Date: [30 days after date of Publication in the Federal Register]
Reply Comment Date: [60 days after date of Publication in the Federal Register]

By the Commission: Chairman Genachowski issuing a statement.

I. INTRODUCTION

1. In this *Notice of Proposed Rulemaking* ("*NPRM*" or "*Notice*"), we solicit comment on 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. Under the Commission's rules, in the absence of a waiver, an NCE station may not conduct fundraising activities to benefit any entity besides the station itself if the activities would substantially alter or suspend regular programming.[1] The recent report on "The Information Needs of Communities" ("*INC Report*") recommended that we consider affording noncommercial broadcasters more flexibility by allowing certain NCE stations to engage in fundraising for charities and other third-party non-profit organizations.[2] This *NPRM* promotes the goals of Executive Order 13579 by analyzing whether the Commission's longstanding policy against fundraising for third-party non-profits may be tailored to grant NCE stations limited flexibility without undermining the policy's important goals.[3]

II. BACKGROUND

2. Under longstanding Commission policy, an NCE station may not conduct fundraising

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[1] *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 FCC 2d 141, 157-58, ¶¶ 42-43 (1981) ("*Second Report*"), Memorandum Opinion and Order, 90 FCC 2d 895, 907, ¶ 20 (1982) ("*Policy Statement*"), *recon. granted*, Memorandum Opinion and Order, 97 FCC 2d 255, 264-65, ¶ 19 (1984) ("*Reconsideration Order*"). *See also Ohio State Univ.*, 62 FCC 2d 449, 450 (1976).

[2] *See* "The Information Needs of Communities: The Changing Media Landscape in a Broadband Age," by Steven Waldman and the Working Group on Information Needs of Communities at 356 (June 2011), available at www.fcc.gov/infoneedsreport.

[3] *See* Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 11, 2011); *Preliminary Plan for Retrospective Analysis of Existing Rules*, 2011 WL 5387696 (Nov. 7, 2011). Pursuant to Executive Order 13579, the Commission analyzes rules that may be outmoded, ineffective, insufficient, or excessively burdensome and determines whether any such regulations should be modified, streamlined, expanded, or repealed.

activities that substantially alter or suspend regular programming and are designed to benefit any entity other than the station itself.[4] "Regular programming" includes programming that "the public broadcaster ordinarily carries, but does not encompass those fundraising activities that suspend or alter their normal programming fare."[5] The Commission implemented this policy to reflect the concern that "educational stations are licensed to provide a noncommercial broadcast service, not to serve as a fund-raising operation for other entities by broadcasting material that is 'akin to regular advertising.'"[6]

3. The Commission has relaxed some of its other policies governing the broadcast of promotional announcements by NCE stations. Throughout this process, however, a concern that these changes not adversely affect the educational programming mission or noncommercial character of these stations has persisted. For example, in 1981, the Commission determined that stations could acknowledge contributions made by donors, but it continued to prohibit the broadcast of promotional announcements by NCE licensees in exchange for consideration, regardless of whether the sponsor of a given announcement was a for-profit or non-profit organization.[7] The Commission adopted these policies to '"strike a reasonable balance between the financial needs of [public broadcast] stations and their obligation to provide an essentially noncommercial broadcast service' and eliminate those proscriptive regulations deemed unnecessary to preserve the media's noncommercial nature."[8] Notably, the revised policy regarding contributions by donors was specifically intended to benefit the station itself and its need for funding to continue to serve its local audience through noncommercial and educational programming.[9]

4. Later in 1981, Congress adopted Section 399B of the Communications Act of 1934, which prohibits NCE stations from broadcasting "advertisements," defined as

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[4] *See Policy Statement*, 90 FCC 2d at 907, ¶ 20; *Reconsideration Order*, 97 FCC 2d at 264-65, ¶ 19. In the *Reconsideration Order*, the Commission addressed licensees' concern "that the substitution of the term 'licensee' for that of 'station' [in the *Policy Statement*] extends the permissible area of suspended programming beyond those activities designed to raise support for the station's operations to include activities designed to benefit the licensee's other non-station institutional business or state operations." The Commission acknowledged that the substitution of the term "licensee" for "station" had the unintended effect of expanding potential beneficiaries beyond that of the station itself and clarified that the fundraising must benefit the operations of the NCE station itself. *See Reconsideration Order*, 97 FCC 2d at 265, ¶¶ 19-20 ("In the absence of a waiver, noncommercial stations are prohibited from conducting any fundraising activity which substantially alters or suspends regular programming and [is] designed to raise support for any entity other than the station itself.").

[5] *Reconsideration Order,* 97 FCC 2d at 264, ¶ 18, *See also* Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Chicago Educational Television Association, 10 FCC Rcd 12018, 12019 (October 23, 1995) (finding that a scheduled broadcast of a fundraising holiday gift exchange did not constitute regular programming because it would not ordinarily be carried by the station, and thus concluding that the station violated the Commission's noncommercial fundraising policy).

[6] *Ohio State Univ.*, 62 FCC 2d at 450 (quoting *Noncommercial Educational Stations*, 26 FCC 2d 339, 343, ¶¶ 18-19 (1970)). *See also Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, First Report and Order, 69 FCC 2d 200, 226 ¶ 52 (1978) ("we adhere to our view that broadcast of such matter is inconsistent with the noncommercial nature of educational broadcasting. Furthermore, we believe that the devotion of programming time to raising money by on-the-air auctions for charitable or other organizations does not serve the purposes for which noncommercial educational broadcasting was established. The only plausible justification for permitting auctions for the benefit of others is that the station would retain a substantial portion of the revenue. However, even this justification is unpersuasive in view of the large amount of broadcast time licensees already devote to fund-raising. Simply put, noncommercial educational broadcasting is the wrong vehicle for general fund-raising by auctions and the only reason an exception is made on behalf of licensees is to aid in their efforts to provide the programming which they were licensed to broadcast.").

[7] *See Second Report*, 86 FCC 2d at 142-143 ¶¶ 4, 7-8.

[8] *Policy Statement*, 90 FCC 2d at 897, ¶ 3 (quoting *Second Report*, 86 FCC 2d at 141, ¶ 4).

[9] *See id.* at 900, ¶ 8.

> any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—
> (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
> (2) to express the views of any person with respect to any matter of public importance or interest; or
> (3) to support or oppose any candidate for political office.[10]

In light of this statute's enactment, the Commission reviewed its NCE policies in 1982. In the resulting *Policy Statement,* the Commission determined that non-profit organizations are excluded from the meaning of the phrase "any person who is engaged in such offering for profit" in Section 399B.[11] Thus, the Commission revised the *Second Report*'s determination regarding consideration received to allow the broadcast of promotional announcements sponsored by non-profit organizations in order to conform the rule to Section 399B of the Act.[12] Despite these changes and other liberalizations of the fundraising and donor acknowledgment rules, the Commission continued the ban on conducting fundraising activities which substantially alter or suspend regular programming and are designed to benefit any entity other than the station itself, codifying these requirements in Sections 73.503(d) and 73.621(e) of the Commission's rules.[13] Those rules provide, in pertinent part, that "[t]he scheduling of any announcements . . . may not interrupt regular programming."[14]

5. Commission staff has occasionally granted waivers of these rules in extraordinary circumstances. For example, the Commission granted a waiver to the licensee of an NCE television station to broadcast a three-hour fundraiser for Wolf Trap Foundation, with the money to be used to rebuild the Filene Center at Wolf Trap Farm Park which had burned down.[15] The Commission granted the waiver in part based on the fact that the fundraising programming would be consistent with regular programming, in that more than half of the program would consist of excerpts of past programs broadcast by the NCE station that had originated from Wolf Trap Farm, and the remainder of the program would consist of interviews with and performances from stars who had appeared at Wolf Trap.[16]

6. Similarly, the former Mass Media Bureau granted a waiver of Sections 73.621(e) and 73.503(d) of the Commission's rules to the licensee of an NCE radio station and an NCE television station in West Palm Beach, Florida, where the President had declared Dade County a disaster area following Hurricane Andrew.[17] The stations proposed to broadcast a two-hour simulcast along with four area commercial television stations to raise funds and donations and provide information for the hurricane

[10] 47 U.S.C. §§ 399b(a), 399b(b)(1).

[11] *See Policy Statement*, 90 FCC 2d at 899, ¶ 8.

[12] *See id*. at 901, ¶ 10.

[13] 47 C.F.R. §§ 73.503(d), 73.621(e). *See Policy Statement*, 90 FCC 2d at 907, ¶ 20.

[14] 47 C.F.R. §§ 73.503(d), 73.621(e).

[15] *See Cohn and Marks*, 51 RR 2d 659, 660 (1982) ("*Cohn and Marks*").

[16] *See id.* at 660. *See also* Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Richard J. Bodorff and Todd M. Stansbury, Esqs., 8 FCC Rcd 7909 (October 26, 1993) ("*Bodorff Letter*") (granting a request for a waiver of § 73.503(d) of the Commission's rules, where the one-time on-air fundraising would benefit the St. Paul Chamber Orchestra, which had a long history of providing programming to many stations and was facing "severe financial distress," and where the fundraising would maintain the existing programming format).

[17] *See* Letter from William H. Johnson, Acting Chief, Mass Media Bureau, FCC, to Malcolm G. Stevenson, Esq., 7 FCC Rcd 5634 (August 27, 1992) ("*Stevenson Letter*").

relief effort.[18] The staff granted the waiver in recognition of the catastrophic events that had occurred, the stations' unique ability to serve the area affected by the disaster, and the limited length of the program.[19] The Commission has also granted rule waivers for fundraising for other singular catastrophic events, such as Hurricane Katrina, the September 11, 2001 terrorist attacks, the January 2005 tsunami in Southeast Asia, and the January 2010 earthquake in Haiti.[20] More recently, the Commission established informal procedures through which NCE licensees could request Commission approval to conduct fundraising to aid the Japan earthquake and tsunami relief efforts, noting that it has granted waivers of Section 73.503(d) for "fundraising appeals to support relief efforts following disasters of particular uniqueness or magnitude" and that such waivers "have been issued for a specific fundraising program or programs, or for sustained station appeals for periods which generally do not exceed several days."[21] In contrast, in 1995, the staff denied a request for a waiver of Section 73.503(d) where the proposed fundraising for the Muscular Dystrophy Association occurred annually to address ongoing needs and was not limited to a specific one-time problem.[22]

7. In June 2011, a working group including Commission staff, scholars and consultants released the *INC Report*, a comprehensive report on the current state of the media landscape.[23] The *INC Report* discussed both the need to empower citizens to ensure that broadcasters serve their communities in exchange for the use of public spectrum and the need to remove unnecessary burdens on broadcasters who aim to serve their communities. Noting comments from the National Religious Broadcasters ("NRB"),[24] the *INC Report* recommended that we consider affording noncommercial broadcasters more flexibility by allowing NCE stations that are not grantees of the Corporation for Public Broadcasting ("CPB") to spend up to one percent of their annual airtime doing fundraising for charities and other third-party non-profit organizations.[25] In order to be eligible for CPB funding, an NCE station must devote the substantial majority of its daily total programming hours broadcast on all of its channels to CPB-qualified programming, which is defined as "general audience programming that serves demonstrated community needs of an educational, informational and cultural nature."[26] Programs that "further the principles of

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[18] *See Stevenson Letter*, 7 FCC Rcd at 5634.

[19] *See id.* Andrew was a Category 5 hurricane that caused historic amounts of damage in Dade County. *See* "After 10 Years, Hurricane Andrew Gains Strength," National Oceanic and Atmospheric Administration Press Release, NOAA 02-107 (rel. Aug. 21, 2002), available at http://www.nhc.noaa.gov/NOAA_pr_8-21-02.html.

[20] *See* Media Bureau Announces Procedures for Obtaining Commission Approval for NCE Station Fundraising to Aid Japan Relief Efforts (March 16, 2011).

[21] *Id*.

[22] *See* Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Karsten Amlie, 10 FCC Rcd 9763 (August 18, 1995).

[23] *See INC Report*. As noted in the *INC Report*, the report was drafted by an informal working group, and the views of the report "do not necessarily represent the views of the Federal Communications Commission, its Commissioners or any individual Bureaus or Offices." *Id.* at 362.

[24] In 2008, prior to proposing the relaxation of the prohibition on third-party fundraising by NCE stations in its comments in the *Future of Media* proceeding, NRB informally requested that the Commission modify its policy regarding fundraising by NCE stations to permit NCE stations to engage in limited fundraising for 501(c)(3) non-profit organizations without having to obtain a waiver from the Commission. *See* Memorandum from Craig Parshall, Senior Vice President and General Counsel for National Religious Broadcasters to the Federal Communications Commission at 2 (filed October 15, 2008) ("*NRB Memorandum*"). NRB argued that allowing NCEs to raise funds for non-profit organizations, unlike fundraising on behalf of for-profit organizations, would serve the public interest. *Id.* at 2. The *NRB Memorandum* will be made a part of the record of this proceeding.

[25] *See INC Report* at 356. *See also id.* at 317.

[26] *See* Corporation for Public Broadcasting, FY2012 Radio Community Service Grant General Provisions & Eligibility Criteria at 7 (2012) ("*Radio CSG General Provisions & Eligibility Criteria*"), available at

(continued....)

particular political or religious philosophies, or that are designed primarily for in-school or professional in-service audiences" are not considered CPB-qualified programming.[27] Campus stations managed and operated by and for students, stations licensed to political organizations, and stations that provide in-service training programming to licensee employees, clients, or representatives are also ineligible for CPB funding.[28] The *INC Report* noted that having local charities on the air can be a useful way of informing residents about problems in their communities and can help NCE stations achieve their public service or religious missions.[29] The *INC Report* also recommended that broadcasters that take advantage of this flexibility be required to disclose how the fundraising time is used, including how it is helping charities in the local community, so that the Commission can assess the effectiveness of providing this flexibility.[30]

III. DISCUSSION

8. We invite comment on whether it is in the public interest to revise our rules restricting the ability of NCE stations to conduct fundraising on behalf of third-party non-profit organizations. We believe that the original concerns animating the longstanding restriction remain valid.[31] Nevertheless, as shown by the past grant of waivers, the Commission has concluded that an NCE station can conduct certain fundraising activities on behalf of other non-profit organizations in some circumstances without sacrificing its noncommercial nature. It has generally sought to limit such waivers to short-term fundraising intended to assist communities that have suffered singular misfortunes of historic dimensions or, more rarely, to benefit non-profit organizations directly tied to the programming activities of the stations.[32] We seek comment on whether a blanket prohibition on the substantial interruption of programming for third-party fundraising remains necessary to preserve NCE stations' noncommercial nature and to retain those stations' focus on their designated function of serving their communities of license through educational programming, or whether it would serve the public interest to grant NCE stations some flexibility to substantially interrupt programming to conduct fundraising on behalf of other non-profits. If we determine that more flexibility is necessary and appropriate, we seek comment on how we should modify our existing rules, and on what grounds.

9. We propose to relax the prohibition on third-party fundraising for NCE stations and seek comment on that proposal. We further invite comment on whether we should limit the scope of our action and, if so, what the limitations should be and why. As noted above, the *INC Report* recommended that we revise our rules to allow only NCE stations that are not CPB grantees, such as most religious

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http://www.cpb.org/stations/grants/radio/generalprovisions/cpb_12RadioCSG_GeneralProvisions.pdf; Corporation for Public Broadcasting, FY2012 Television Community Service Grant General Provisions & Eligibility Criteria at 5 (2012) ("*Television CSG General Provisions & Eligibility Criteria*"), available at http://www.cpb.org/stations/grants/tv/generalprovisions/cpb_12TV_CSG_GeneralProvisions.pdf.

[27] *See Radio CSG General Provisions & Eligibility Criteria* at 7; *Television CSG General Provisions & Eligibility Criteria* at 6.

[28] *See Radio CSG General Provisions & Eligibility Criteria* at 7; *Television CSG General Provisions & Eligibility Criteria* at 6. Other eligibility criteria for CPB grants include requirements relating to minimum broadcast operating schedule; station employment; minimum non-federal financial support; station facilities (radio only); locally-originated program service (radio only); audience service (radio only); diversity of staff and board (television only); and transparency (television only). *See Radio CSG General Provisions & Eligibility Criteria* at 7-9; *Television CSG General Provisions & Eligibility Criteria* at 6-7.

[29] *See INC Report* at 356.

[30] *See id.*

[31] *See supra*, note 5 and accompanying text.

[32] *See supra*, ¶¶ 5-6.

broadcasters, to conduct fundraising for the benefit of third-party non-profit organizations.[33] The *INC Report* stated that some public broadcasting officials do not want the flexibility to engage in fundraising activities for third-party non-profit organizations because "it would put them in the awkward position of deciding which worthy causes to support and which to reject."[34] We invite comment on whether and how we should limit the NCE stations that may engage in limited third-party fundraising to address this concern. How would the Commission justify any such limitation? Is third-party fundraising less likely to trigger the concerns underlying the prohibition if conducted by certain NCE stations?[35] Alternatively, should we require NCE stations to opt in to the proposed relaxation, as discussed below in paragraph 16, so that NCE stations that do not want flexibility to engage in third-party fundraising can simply decline to opt in? We also invite comment on the First Amendment implications of any limitation on the classes of NCE stations that may conduct third-party fundraising.

10. As noted, Section 399B prohibits NCE stations from broadcasting, in exchange for remuneration, programming material intended to promote any service, facility or product offered by any person who is engaged in such offering for profit. Thus, if we decide to allow NCE stations additional flexibility to conduct fundraising for other entities, the statute requires that they be limited to non-profit entities. We seek comment on whether the Commission should further limit the kinds of non-profit organizations that may be the beneficiaries of fundraising conducted by NCE stations. In the *Policy Statement*, the Commission noted that "'non-profit' entities encompass a multitude of organizations with varied purposes and functions."[36] The Act defines the term "non-profit" (as applied to any foundation, corporation, or association) to mean "a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual."[37] NRB suggests that we limit the class of entities for which fundraising may be conducted to organizations which are non-profit under Section 501(c)(3) of the Internal Revenue Code[38] and that we allow fundraising when "the fundraising activities exempted shall be directed to an identified, bona fide charitable, educational, or religious need which the non-profit 501(c)(3) organization is equipped and committed to aid."[39] We seek comment on these suggestions. In order to eliminate uncertainty for NCE stations, would it be appropriate to allow fundraising for any entity that qualifies as a non-profit organization under Section 501(c)(3) of the Internal Revenue Code?[40] Should we establish any additional criteria to ensure that fundraising on behalf of non-profit entities is consistent with NCE stations' mission to serve their local communities through educational and noncommercial programming? As discussed above, the *INC Report* suggested that having local charities on the air can be a useful way of informing residents about

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[33] *See INC Report* at 356. This limitation also would include other non-religious NCE stations that are ineligible for CPB grants, including campus stations managed and operated by and for students, stations licensed to political organizations, and stations that provide in-service training programming to licensee employees, clients, or representatives. *See Radio CSG General Provisions & Eligibility Criteria* at 7; *Television CSG General Provisions & Eligibility Criteria* at 6.

[34] *See INC Report* at 317.

[35] *See supra*, note 5.

[36] *Policy Statement*, 90 FCC 2d at 900 n.16 (citing *The Exempt Organization Handbook,* Internal Revenue Service at 12-13 (1982)) (providing examples of athletic, labor and agricultural associations and organizations, mutual insurance companies or associations, benevolent life insurance associations, mutual or cooperative telephone companies, and state chartered credit unions).

[37] 47 U.S.C. § 397(8) (defining the term "non-profit" for purposes of Title III, Part IV, Subpart E of the Act).

[38] 26 U.S.C. § 501(c)(3).

[39] *See* NRB Memorandum at 2.

[40] Section 501(c)(3) provides that certain corporations, foundations, or other organizations that operate exclusively for religious, charitable, scientific, educational, or certain other non-profit purposes, are exempt from federal income taxation. *See* 26 U.S.C. § 501(c)(3).

problems in their communities and can help NCE stations achieve their public service or religious missions.[41] Would it further our interest in localism to limit NCE stations to soliciting donations for local non-profit organizations? Furthermore, given that third-party fundraising on behalf of affiliated entities may restrict an NCE station's ability to conduct fundraising for local non-profit organizations, should we limit fundraising on behalf of third parties to unaffiliated third parties? If so, how should we define "affiliated"? If we limit any new flexibility for NCE stations to fundraising for local non-profit entities, should we also retain our existing waiver process for fundraising activities for singular catastrophic events regardless of whether they are local in nature? We also seek comment on the First Amendment implications of any limitation on the types of entities that may benefit from fundraising activities aired on NCE stations.

11. In the event that we decide to modify the proscription on NCE broadcast stations interrupting regular programming to conduct fundraising activities on behalf of other non-profit organizations, we invite comment on how much flexibility to grant NCE stations to devote to this activity. NRB notes that because NCE licensees rely on fundraising to support their own operations, these stations will not want to broadcast "[e]xcessive appeals for other non-profit groups" because they "could negatively impact the licensee's own self-interests by diverting public support away from the broadcaster . . . ."[42] Approximately how much time do NCE stations spend each year broadcasting fundraisers on their own behalf? We are concerned that permitting NCE broadcasters to use too much of their airtime for unrelated non-profit fundraising could undermine the noncommercial character of the participating facilities and divert these stations from their primary function of providing service to their communities of license through programming. Thus, we believe a strict, if not a complete, limit on such activities would be advisable. The *INC Report* recommended that we consider allowing third-party fundraising so long as it does not exceed one percent of the broadcaster's total annual airtime.[43] We invite comment on this approach. With respect to NCE television stations, we seek comment on how the recommended one percent limit on third-party fundraising should be calculated and applied for stations that multicast programming on several different channels. We also seek comment on how we should enforce a relaxed limit on the amount of time that NCE stations may devote to third-party fundraising. Would an annual limit of one percent be sufficient to allow stations to use third-party fundraising flexibility both for the kinds of planned fundraising contemplated in the *INC Report* and for fundraising activities for disasters and other singular catastrophic events that in the past have required waivers? The Commission has traditionally granted waivers only for fundraising activities of "limited duration."[44] In addition to an annual limit, should fundraising activities continue to be circumscribed in this way, such as by adopting a durational limit on a specific program and/or on a discrete fundraising effort?

12. In the event we modify the current prohibition, we invite comment on whether we should require that an NCE station itself conduct all third-party fundraising activities, including collecting funds and distributing the funds to the non-profit entity, rather than airing fundraising programs produced by the non-profit organization or some other entity on behalf of the non-profit organization. Would requiring an NCE station to locally produce its third-party fundraising activities promote localism? What are the potential benefits and costs of requiring NCE stations to locally produce third-party fundraising activities? Are there any other limitations we should consider imposing in order to preserve the noncommercial and educational character of the NCE programming service?

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[41] *See INC Report* at 356.

[42] *See* NRB Memorandum at 2.

[43] *See Inc Report* at 356; NRB Memorandum at 2.

[44] *See Bodorff Letter*, 8 FCC Rcd at 7909 (granting a waiver request for a 35-hour phone-in pledge drive); *Stevenson Letter*, 7 FCC Rcd at 5634 (granting a waiver request for a two-hour fundraising event, due in part to its "limited length"); *Cohn and Marks*, 51 RR 2d at 660 (granting a waiver request for a three-hour fundraiser, noting that the request was "for a limited duration.").

13. Section 399B prohibits the airing, in exchange for remuneration, of programming material intended to express views on matters of public importance or interest, or to support or oppose political candidates.[45] We note that on April 12, 2012, the Ninth Circuit Court of Appeals struck down as unconstitutional Section 399B's ban on public interest and political advertisements by NCE stations.[46] Accordingly, we will not enforce Section 399B's ban on public interest and political advertisements in the Ninth Circuit once the court's mandate goes into effect. Nevertheless, to the extent any third-party fundraising that stations would like to conduct under a relaxed policy would fall into these categories, we invite comment on whether the statutory term "remuneration" includes repayment of a station's expenses associated with such fundraising activities. Additionally, we seek comment on whether Section 399B places any other limitations on the revision of our existing rules to permit substantial interruption of regular programming for fundraising activities on behalf of non-profit organizations.

14. We recognize that in certain situations third-party fundraising by an NCE station could potentially confuse the station's audience. For example, where an NCE station conducts fundraising activities on behalf of a non-profit organization or charity that is closely affiliated with the station, it may be unclear to the audience whether the station is fundraising for the station itself or for another entity. In the event that we decide to modify the third-party fundraising policy, in order to avoid audience confusion, should we require NCE stations to air a specified disclosure that clearly identifies the entity for which the station is conducting the fundraising? If so, what form should this disclosure take? Would it be sufficient for the station to clearly state that the fundraiser is not to benefit the station itself and to identify the entity for which it is fundraising and the specific cause, if any, supported by the fundraiser? How frequently during each fundraising effort or program should the NCE station air the disclosure? We invite comment on whether we should require the NCE station to air the disclosure at the beginning and the end of the fundraising program and at least once during each hour in which the program is on the air.

15. We also seek comment on whether, in the event that we decide to modify the third-party fundraising policy, we should require NCE stations that interrupt regular programming to conduct fundraising for third-party non-profit organizations to submit reports to the Commission on their fundraising activities. The *INC Report* recommended that the Commission consider requiring NCE broadcasters to disclose how they are utilizing fundraising time for third-party non-profit organizations so that the FCC can assess the effectiveness of the additional flexibility recommended therein.[47] If we require NCE stations to submit reports on third-party fundraising, what information should the stations be required to include in the reports? For example, the reports could include, for each fundraiser, the date and time of the fundraiser, the name of the non-profit entity benefitted by the fundraiser and whether this entity is a local organization, the specific cause, if any, supported by the fundraiser, the type of fundraising activity, the duration of the fundraiser, and the total funds raised. We seek comment on whether each of these reporting elements would be useful. What, if any, additional information should be included? Should NCE stations be required to file the reports on an annual basis? While we do not believe that filing such reports would be unduly burdensome, we invite suggestions for minimizing the reporting burden on NCE broadcasters. Furthermore, we invite comment on whether we should require NCE stations to include their reports on third-party fundraising in their public files. Such a requirement would help to ensure that the public has access to information about how NCE broadcasters are serving the public interest and their local communities.[48] Beyond the above-described reporting requirements, we

[45] 47 U.S.C. § 399b(a).

[46] *See Minority Television Project, Inc. v. FCC*, No. 09-17311, 2012 WL 1216284, at *17 (9th Cir. Apr. 12, 2012).

[47] *See INC Report* at 356.

[48] In the *Enhanced Disclosure* proceeding, we propose to make television broadcasters' public inspection files accessible online, in a new database to be hosted by the Commission on our website. *See In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations,* Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 00-168, 26 (continued....)

also invite comment on whether some form of assurance regarding compliance with the third-party fundraising limits should be required—such as certification of such compliance on licensees' renewal applications. This is a common method used to verify compliance in other areas,[49] and could assist in raising awareness of the limitations on this activity and ensuring compliance with the new rules.

16. Finally, we invite comment on whether we should require NCE stations that want to participate in fundraising for third-party non-profit organizations to affirmatively "opt in" by filing a letter or notification with the Commission. An opt in notification would serve to inform both the Commission and interested non-profit groups which NCE stations intend to engage in third-party fundraising activities.

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

17. As required by the Regulatory Flexibility Act,[50] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities of the proposals addressed in this *Notice*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

B. Initial Paperwork Reduction Act of 1995 Analysis

18. This *Notice* proposes new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.[51] In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[52] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."[53]

C. Ex Parte Rules

19. *Permit-But-Disclose.* The proceeding this *Notice* initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[54] Persons making *ex parte*

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FCC Rcd 15788, 15796–7, ¶ 16 (2011). We further propose to import and update any information that must be filed with the Commission electronically in the Consolidated Database System to each television station's Commission-hosted online public file. *See id.* at 15797, ¶ 16. To the extent that we adopt these proposals, we would likewise include each NCE station's reports on third-party fundraising in the station's Commission-hosted online public file under the proposal here.

[49] For example, the broadcast station license renewal application form requires renewal applicants to certify their compliance with the local public inspection file rules. *See* FCC Form 303-S, Application for Renewal of Broadcast Station License, Section III, Question 3 and Section IV, Question 3, available at http://transition.fcc.gov/Forms/Form303-S/303s.pdf.

[50] *See* 5 U.S.C. § 603.

[51] *See* Pub. L. No. 104-13.

[52] *See* Pub. L. No. 107-198.

[53] *See* 44 U.S.C. § 3506(c)(4).

[54] *See* 47 C.F.R. §§ 1.1200 *et seq.*

presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

20. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

21. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

22. For additional information on this proceeding, contact Kathy Berthot, Kathy.Berthot@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 303(r), and 399B of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) , 303(r), 399b, this Notice of Proposed Rulemaking IS HEREBY ADOPTED.

24. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

The Federal Communications Commission proposes to amend Part 73 of Title 47 of the Code of Federal Regulations (CFR) as follows:

PART 73 — RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Amend § 73.503 by revising the last sentence of paragraph (d), adding new paragraph (e), redesignating current paragraph (e) as paragraph (f), and revising the Note to § 73.503 as follows:

§ 73.503 Licensing requirements and service.

* * * * *

(d) * * * *The scheduling of any announcements and acknowledgements may not interrupt regular programming*, except as permitted under paragraph (e) of this section.

(e) A noncommercial educational FM broadcast station may interrupt regular programming to conduct fundraising activities on behalf of third-party non-profit organizations, provided that such fundraising activities do not exceed one percent of the station's total annual airtime. For purposes of this paragraph, a non-profit organization is an entity that qualifies as a non-profit organization under Section 501(c)(3) of the Internal Revenue Code.

(1) *Opt-In Notification*. A noncommercial educational FM broadcast station that intends to interrupt regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must file an opt-in notification with the FCC prior to engaging in such fundraising activities.

(2) *Audience Disclosure*. A noncommercial educational FM broadcast station that interrupts regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must air a disclosure during such activities clearly stating that the fundraiser is not for the benefit of the station itself and identifying the entity for which it is fundraising and the specific cause, if any, supported by the fundraiser. The station must air the audience disclosure at the beginning and the end of each fundraising program and at least once during each hour in which the program is on the air.

(3) *Reports.* A noncommercial educational FM broadcast station that interrupts regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must file a report with the FCC on an annual basis describing such activities. These reports must include, for each fundraiser, the date and time of the fundraiser, the name of the non-profit entity benefitted by the fundraiser and whether this entity is a local organization, the specific cause, if any, supported by the fundraiser, the type of fundraising activity, the duration of the fundraiser, and the total funds raised.

* * * * *

Note to § 73.503: Commission interpretation on this rule, including the acceptable form of acknowledgements, may be found in the *Second Report and Order* in Docket No. 21136 (Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations), 86 FCC 2d 141

(1981); the *Memorandum Opinion and Order* in Docket No. 21136, 90 FCC 2d 895 (1982); the *Memorandum Opinion and Order* in Docket 21136, 97 FCC 2d 255 (1984); and the *Report and Order* in Docket No. 12-106 (Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations), ____ FR ____, _____. *See also,* "Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations," Public Notice, 7 FCC Rcd 827 (1992), which can be retrieved through the Internet at *http://www.fcc.gov/mmb/asd/nature.html.*

3. Amend § 73.621 by revising the last sentence of paragraph (e) and the Note to paragraph (e), adding new paragraph (f), and redesignating current paragraphs (f) through (i) as paragraphs (g) through (j) as follows:

§ 73.621 Noncommercial educational TV stations.

* * * * *

(e) * * * *The scheduling of any announcements and acknowledgements may not interrupt regular programming*, except as permitted under paragraph (f) of this section.

Note: Commission interpretation of this rule, including the acceptable form of acknowledgements, may be found in the Second Report and Order in Docket No. 21136 (Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations), 86 F.C.C. 2d 141 (1981); the Memorandum Opinion and Order in Docket No. 21136, 90 FCC 2d 895 (1982); the Memorandum Opinion and Order in Docket 21136, 49 FR 13534, April 5, 1984; and the *Report and Order* in Docket No. 12-106 (Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations), ____ FR ____, _____.

(f) A noncommercial educational television station may interrupt regular programming to conduct fundraising activities on behalf of a third-party non-profit organization, provided that such fundraising activities do not exceed one percent of the station's total annual airtime. For purposes of this paragraph, a non-profit organization is an entity that qualifies as a non-profit organization under Section 501(c)(3) of the Internal Revenue Code.

(1) *Opt-In Notification*. A noncommercial educational television station that intends to interrupt regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must file an opt-in notification with the FCC prior to engaging in such fundraising activities.

(2) *Audience Disclosure*. A noncommercial educational television station that interrupts regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must air a disclosure during such activities clearly stating that the fundraiser is not for the benefit of the station itself and identifying the entity for which it is fundraising and the specific cause, if any, supported by the fundraiser. The station must air the audience disclosure at the beginning and the end of each fundraising program and at least once during each hour in which the program is on the air.

(3) *Reports.* A noncommercial educational television station that interrupts regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must file a report with the FCC on an annual basis describing such activities. These reports must include, for each fundraiser, the date and time of the fundraiser, the name of the non-profit entity benefitted by the fundraiser and whether this entity is a local organization, the specific cause, if any, supported by the fundraiser, the type of fundraising activity, the duration of the fundraiser, and the total funds raised.

* * * * *

4. Amend § 73.3527 by adding new paragraph (e)(14) to read as follows:

§ 73.3527 Local public inspection file of noncommercial educational stations.

* * * * *

(e) * * *

(14) *Reports on Fundraising for Third-Party Non-Profit Organizations.* For noncommercial educational FM broadcast stations a copy of each report required to be filed with the FCC by § 73.503(e)(3). For noncommercial educational TV broadcast stations a copy of each report required to be filed with the FCC by § 73.621(f)(3). These reports shall be retained in the public inspection file until final action has been taken on the station's next license renewal application.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act, as amended ("RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the attached Notice of Proposed Rulemaking ("*Notice*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* as indicated on the first page of the *Notice.* The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. Longstanding Commission policy provides that noncommercial educational ("NCE") stations may not conduct fundraising activities which substantially alter or suspend regular programming and are designed to benefit any entity other than the station itself.[4] "Regular programming" includes programming that the public broadcaster ordinarily carries, and not fundraising activities that suspend or alter the normal programming schedule.[5]

3. In June 2011, a working group including Commission staff, scholars and consultants released "The Information Needs of Communities" ("*INC Report"*), a comprehensive report on the current state of the media landscape.[6] Noting comments from the National Religious Broadcasters,[7] the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] *See, e.g., Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 FCC 2d 895, 907, ¶ 20 (1982) ("*Policy Statement*"), *recon. granted*, Memorandum Opinion and Order, 97 FCC 2d 255, 264-65, ¶ 19 (1984) ("*Reconsideration Order*"); *Ohio State Univ.*, 62 FCC 2d 449, 450 (1976). In the *Reconsideration Order*, the Commission addressed licensees' concern "that the substitution of the term 'licensee' for that of 'station' [in the Policy Statement] extends the permissible area of suspended programming beyond those activities designed to raise support for the station's operations to include activities designed to benefit the licensee's other non-station institutional business or state operations." The Commission acknowledged that the substitution of the term "licensee" for "station" had the unintended effect of expanding potential beneficiaries beyond that of the station itself and clarified that the fundraising must benefit the operations of the NCE station itself. *See Reconsideration Order*, 97 FCC 2d at 265, ¶ 19–20 ("In the absence of a waiver, noncommercial stations are prohibited from conducting any fundraising activity which substantially alters or suspends regular programming and are designed to raise support for any entity other than the station itself.").

[5] *See Reconsideration Order*, 97 FCC 2d at 264, ¶ 18.

[6] "The Information Needs of Communities: The Changing Media Landscape in a Broadband Age," by Steven Waldman and the Working Group on Information Needs of Communities (June 2011), available at www.fcc.gov/infoneedsreport. As noted in the *INC Report*, the report was drafted by an informal working group, and the views of the report "do not necessarily represent the views of the Federal Communications Commission, its Commissioners or any individual Bureaus or Offices." *Id.* at 362.

[7] NRB has requested that the Commission modify its policy regarding fundraising by NCE stations to permit NCE stations to engage in limited fundraising for 501(c)(3) non-profit organizations without having to obtain a waiver from the Commission. *See* Memorandum from Craig Parshall, Senior Vice President and General Counsel for National Religious Broadcasters, to the Federal Communications Commission at 2 (filed October 15, 2008). NRB

(continued....)

INC Report recommended that we afford noncommercial broadcasters more flexibility by allowing NCE stations that are not grantees of the Corporation for Public Broadcasting ("CPB"), such as most religious broadcasters, to spend up to one percent of their airtime doing fundraising for charities and other third-party non-profit organizations.[8] The *INC Report* also recommended that we require that broadcasters disclose how this time is used so that the FCC can assess the efficacy of allowing third-party fundraising.[9]

4. The *Notice* proposes to relax the rules to afford NCE stations more flexibility to conduct on-air fundraising activities on behalf of third-party non-profit organizations and seeks comment on a series of proposals to facilitate this additional flexibility. The *Notice* seeks comment on the following proposals:

- Revise the rules to allow NCE stations to substantially interrupt regular programming to conduct on-air fundraising activities for the benefit of third-party non-profit organizations;
- Define the class of non-profit organizations that may be the beneficiaries of third-party fundraising by NCE stations to include entities that qualify as non-profit organizations under Section 501(c)(3) of the Internal Revenue Code;
- Limit the amount of time that an NCE station may devote to third-party fundraising to one percent of the station's total annual airtime;
- Require NCE stations that substantially interrupt regular programming to conduct third-party fundraising to air a disclosure that clearly identifies the entity for which the station is conducting the fundraising;
- Require NCE stations that substantially interrupt regular programming to conduct third-party fundraising to submit annual reports to the Commission on their fundraising activities;
- Require NCE stations that substantially interrupt regular programming to conduct third-party fundraising to include their reports on third-party fundraising in their public files;
- Require NCE stations that substantially interrupt regular programming to conduct third-party fundraising to certify on their renewal applications that they have complied with the limits on fundraising; and
- Require NCE stations that want to substantially interrupt regular programming to participate in third-party fundraising to affirmatively "opt in" by filing a letter or notification with the Commission.

The *Notice* also has under consideration possible rule changes that would:

- Limit the classes of NCE stations that may engage in third-party fundraising;
- Limit the non-profit organizations that may benefit from fundraising by NCE stations, such as by limiting the eligible class of non-profit organizations to local entities and/or entities that are not affiliated with the NCE stations;
- Prescribe durational limits for each particular fundraising effort; and
- Require NCE stations to locally produce third-party fundraising activities.

(...continued from previous page)
argues that allowing NCEs to raise funds for non-profit organizations, unlike fundraising on behalf of for-profit organizations, would serve the public interest. *Id.* at 2.

[8] *See INC Report* at 356.

[9] *See id.*

The *Notice* invites commenters to suggest alternatives to these proposals and other rule changes that would help to ensure that fundraising on behalf of non-profit entities is consistent with NCE stations' mission to serve their local communities through educational and noncommercial programming.

B. Legal Basis

5. This *Notice* is adopted pursuant to Sections 1, 4(i), 303(r), and 399B of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 399b.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

7. **Television Broadcasting.** The SBA defines a television broadcasting station as a small business if such station has $14.0 million or less in annual receipts.[10] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[11] The Commission has estimated the number of licensed commercial television stations to be 1,387.[12] In addition, according to Commission staff review of the BIA Kelsey Inc. Master Access Television Analyzer Database (BIA) as of February 7, 2012, about 950 (73 percent) of an estimated 1,301 commercial television stations[13] had revenues of $14.0 million or less and thus qualify as small entities under the SBA definition. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.[14] Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed NCE television stations to be 396.[15] The

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[10] *See* 13 C.F.R. § 121.201, NAICS code 515120.

[11] U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting," available at http://www.census.gov/econ/industry/def/d515120.htm. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." *Id*. Separate census categories pertain to businesses primarily engaged in producing programming (*e.g.*, Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199). *See* 13 C.F.R. § 121.201.

[12] *See Broadcast Station Totals as of December 31, 2011*, Press Release (MB, rel. January 6, 2012) ("*January 6, 2012 Broadcast Station Totals Press Release*"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311837A1.doc.

[13] We recognize that this total differs slightly from that contained in the *January 6, 2012 Broadcast Station Totals Press Release*; however, we are using BIA's estimate for purposes of this revenue comparison.

[14] "[Business concerns] are affiliates of each other when one concern controls or has power to control the other, or a third party or parties controls or has power to control both." 13 C.F.R. § 121.103(a)(1).

[15] *See January 6, 2012 Broadcast Station Totals Press Release*.

Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

8. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent. Also, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

9. **Radio Stations.** The SBA defines a radio broadcasting station that has $7.0 million or less in annual receipts as a small business.[16] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[17] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[18] The Commission has estimated the number of licensed commercial radio stations to be 14,952.[19] In addition, according to Commission staff review of BIA Kelsey Inc. Master Access Radio Analyzer Database as of February 7, 2012, about 10,755 (approximately 97 percent) of an estimated 11,106 commercial radio stations[20] have revenue of $7.0 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[21] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed NCE radio stations to be 3,644.[22] The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

10. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

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[16] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[17] U.S. Census Bureau, 2007 NAICS Definitions, "515112 Radio Stations," available at http://www.census.gov/econ/industry/def/d515112.htm.

[18] *See id.* Radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number. *See id.*

[19] *See January 6, 2012 Broadcast Station Totals Press Release*.

[20] We recognize that this total differs slightly from that contained in the *January 6, 2012 Broadcast Station Totals Press Release*; however, we are using BIA's estimate for purposes of this revenue comparison.

[21] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[22] *See January 6, 2012 Broadcast Station Totals Press Release*.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

11. The *Notice* proposes a number of rule changes that would affect reporting, recordkeeping, and other compliance requirements. Each of these proposals is described below.

12. The *Notice* proposes to allow NCE stations to substantially interrupt regular programming to spend up to one percent of their total annual airtime conducting fundraising activities on behalf of third-party non-profit organizations. If this proposal is adopted, NCE stations may be required to keep records sufficient to demonstrate that their fundraising broadcasts are within the one percent limit. The *Notice* also proposes to require NCE stations to submit annual reports to the Commission on their fundraising for third-party non-profit organizations. Further, the *Notice* proposes to require NCE stations to include their reports on third-party fundraising in their public files and to certify on their renewal applications that they have complied with the limits on fundraising.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

13. The RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities. Such alternatives may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[23]

14. The *Notice* proposes to relax restrictions on third-party fundraising by NCE stations by allowing NCE stations to devote up to one percent of their total annual airtime to fundraising for the benefit of third-party non-profit organizations. This proposal would benefit small entities by reducing or eliminating the need for NCE stations to seek a waiver of the Commission's rules to conduct third-party fundraising activities and affording NCE stations more flexibility to decide which non-profit entities to support through on-air fundraising. The *Notice* also proposes to require NCE stations that conduct third-party fundraising to submit annual reports to the Commission on their fundraising activities, include such reports in their public files, and certify on their renewal applications that they have complied with the limits on fundraising. We believe that these reporting and recordkeeping requirements would impose only minimal burdens on any affected entities, and the costs of these reporting and recordkeeping requirements would be offset in our opinion by the additional flexibility afforded to NCE stations to conduct fundraising for third-party non-profit organizations of their choosing without the need to seek a waiver or prior FCC approval. For this reason, an analysis of alternatives to the proposed rules is unnecessary. We invite comment on whether there are any alternatives we should consider that would minimize any adverse impact on small entities, but which maintain the benefits of our proposals.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

[23] 5 U.S.C. § 603(c).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations* (MB Docket No. 12-106)

Today we take another step in our efforts to modernize the FCC by revisiting a policy that has been in effect for more than 40 years. We propose relaxing our longstanding ban on third-party fundraising by noncommercial broadcast stations and giving these stations more flexibility to raise money on-air for charities in their local communities and around the world.

Noncommercial broadcasters have long served the American public by providing high quality and innovative educational, cultural, and news programming to their local communities. As recommended in The Information Needs of Communities Report, we are now proposing to allow noncommercial stations to spend a modest amount of their total annual broadcast time—up to one percent—conducting fundraising activities on behalf of non-profit organizations.

Allowing noncommercial stations to partner with charities, churches and other religious organizations, schools, and other non-profits to raise money for worthy causes will enable these stations to help meet the needs of their local communities. On-air fundraising by noncommercial stations can also help raise awareness about important local and international topics, such as poverty, health care, and humanitarian issues.

We have historically granted waivers of the prohibition on third-party fundraising, particularly in response to disasters. For example, we have granted waivers to allow noncommercial broadcasters to raise funds in support of relief efforts for Hurricanes Andrew and Katrina, the September 11, 2001 terrorist attacks, the January 2010 earthquake in Haiti, and, most recently, the March 2011 earthquake and tsunami in Japan.

Given our experience in these and other cases, where the ability to raise funds for third-party non-profits has been invaluable, we question whether it remains appropriate to require noncommercial stations to seek a waiver just as emergencies are occurring. This proposal would eliminate the need for such requests.

This action reflects an effort to balance our continued interest in preserving the core educational mission of noncommercial stations with our goal of providing these stations additional flexibility to support non-profits of their choosing. We look forward to hearing from all interested parties on the issues raised in this proceeding.

I thank our Media Bureau and staff across the Commission for their hard work on this item, and the work yet to come in this proceeding.