

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of  
Noncommercial Educational Station  
Fundraising for Third-Party Non-Profit  
Organizations

TO: THE COMMISSION

**Comments of National Religious Broadcasters in Support of  
A Rule Change Permitting On-Air Fundraising by Noncommercial  
Educational Stations for Third-Party Non-Profit Organizations**

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## TABLE OF CONTENTS

	<u>Page</u>
<b>INTRODUCTION AND SUMMARY .....</b>	<b>3</b>
<b>I. DISCUSSION</b>	
<b>A. It is in the Public Interest to Revise FCC Rules to Lift Restrictions on the Ability of NCE Stations to Conduct Fundraising For Third-Party Non-Profit 501(c) (3) Organizations .....</b>	<b>8</b>
<b>B. Limitations on the Types of NCE Stations That Could Qualify For the New Rule .....</b>	<b>9</b>
<b>C. Limitations on the Types of Non-Profit Groups That Can Benefit From the New Rule, and “Affiliations” .....</b>	<b>12</b>
<b>D. Limiting Fundraising to 1% of Annual Airtime Gives Adequate and Reasonable Flexibility .....</b>	<b>18</b>
<b>E. The Role of the NCE Station in Fundraising .....</b>	<b>19</b>
<b>F. The 9<sup>th</sup> Circuit Decision and “Remuneration” .....</b>	<b>20</b>
<b>G. Disclosures .....</b>	<b>25</b>
<b>H. Reporting Duties .....</b>	<b>25</b>
<b>I. Opt-In Considerations .....</b>	<b>26</b>
<b>II. CONCLUSION .....</b>	<b>28</b>

## INTRODUCTION AND SUMMARY OF THE DISCUSSION

The National Religious Broadcasters (NRB) is a non-partisan, international association of Christian communicators and broadcasters, including television stations and networks, whose member organizations represent millions of listeners, viewers, and readers. Our mission is to advance biblical truth; to promote media excellence; and to defend free speech. In addition to promoting standards of excellence, integrity, and accountability, NRB provides networking, educational, ministry, and fellowship opportunities for its members. Our membership includes television and radio stations and networks and web-casters, along with television and radio programmers, but it also includes numerous community service, charitable, and humanitarian organizations, as well as churches with media outreach programs.

NRB strongly supports the basic concept at the heart of this Notice of Proposed Rulemaking (“NPRM”). We believe that the educational content provided by on-air fundraising by non-commercial NCE stations on behalf of non-profit groups will serve a vital public interest: it will energize citizens to desire an increased spirit of volunteerism, and will assist the NCE stations and the charities that they promoted so they can meet critical social and humanitarian needs during a challenging economic time. We have heard virtually no objections to this proposal during the lengthy public discussion that pre-dated the issuance of this NPRM, and we have heard uniformly supportive comments from NCE stations and charities that are in favor of it.

We recommend in accord with the recommendation of the *INC Report* issued by the FCC working group that any NCE station that does not receive Corporation for Public Broadcasting (“CPB”) grants may qualify to participate in a new rule permitting on-air

fundraising for third-party 501 (c) (3) organizations up to 1% of the station's annual on-air time. Further, the fact that many *religious* NCE stations will therefore be participating because they do not partner with the CPB does not create any First Amendment problem, as evidenced by a long line of Supreme Court case law, including one decision that ruled that even where the *majority* of the members of the benefited class are religious in nature, that fact alone will not violate the Establishment Clause. NRB also believes that it is only logical that there should be no prohibition against an NCE station conducting on-air fundraising for a non-profit group that may have some "affiliation" with the station, particularly as NCE stations now have unlimited ability to raise funds for themselves. The logistical and definitional problems in creating a fair, workable distinction based on a purported "affiliation" rule are numerous, and the benefits, if any, for the public interest would be scant. The 501 (c) (3) status of the non-profit group should suffice to insure that a genuine charitable purpose will be advanced on the air and that the recipient of donations will be a publicly accountable organization.

NRB believes that the current practice of the Commission issuing waivers for mass catastrophes or exceptional incidents should be retained as an additional adjunct to the proposed new rule, as those situations arise only infrequently, and that would still reserve maximum flexibility for the Commission to meet unusual and unpredictable disaster scenarios through a separate waiver process. NCE stations participating in obtaining such waivers should not have that fundraising time count against their 1% cap.

We suggest *only one limitation* be placed on the types of non-profit groups that would benefit from this rule change: namely, that such groups be recognized by the Internal Revenue Service as 501 (c) (3) organizations. This factor would increase the

likelihood that the fundraising efforts on-air would serve the public interest. Further, this approach would alleviate intractable problems that would otherwise occur in the Commission having to decide which charity groups are worthy, or whether there is an impermissibly close “affiliation” between an NCE station and the subject charity. Also, it would resolve the need to analyze whether a given charity is sufficiently “local.” NRB believes that requirements that only “local” charities be the subject of this rule change ignores the reality of how non-profit organizations often work simultaneously not only in local communities, but also in national, and sometimes even international venues, and have affiliations and offices with national and global umbrella groups. Attempting to limit groups to those that are “local” would be a self-defeating exercise in semantics, and would serve no discernable public interest, and would actually ignore the information needs and desires of audiences.

We believe that allowing NCE stations to use up to 1% of their annual airtime for programming that raises funds for 501 (c) (3) organizations provides adequate flexibility for the station and would safeguard against abuse. It is unlikely that this would create excessive on-air appeals, and is consistent with the reality that non-commercial stations have a natural incentive to avoid offending their audiences, particularly when they must depend on their donations for their operational survival. Likewise, NCE stations should be given great latitude in deciding the format of their fundraising appeals, and no obligation to create original programming should be imposed; such stations should have the option as an example of using of pre-packaged fundraising segments if they wish. This broad discretion is consistent with the wide latitude that the Commission has given

to public broadcasters in past proceedings involving promotional activities and non-profit groups.

The decision of the 9<sup>th</sup> Circuit Court of Appeals in the *Minority Television* case should have no direct bearing on this proceeding, dealing as it does with the striking down of restrictions against non-commercial stations receiving remuneration for airing political or issue-advocacy ads. On the other hand, NCE stations should not be restricted from discussing current issues of public concern during fundraising appeals as relevant to a particular non-profit organization or to the various causes that such a group addresses, and we would oppose any other content prohibitions placed on programming for on-air fundraising appeals. As to the Commission's question about defining "remuneration" in the context of this NPRM however, we suggest that the restrictions of § 73.503 (c) should not apply to this rule change; financial and other consideration value received by NCE stations should not be thusly limited by that rule because the fundraising activities envisioned by this proposal would apply by definition only to *special* fundraising programming, and not to *regular* broadcast programming. In light of the current economic climate, the special financial challenges of NCE stations, and the additional costs incurred in airing and perhaps producing fundraising programming, we believe this is reasonable and necessary.

We have no objections to the Commission's suggested requirement of regular, on-air disclosures during a fundraising program that clearly identify the non-profit group that is being promoted.

We do not oppose the suggestion that NCE stations, on a form proscribed by the FCC, report how they have utilized their on-air fundraising time, and specifically

disclosing: the date and times of each such program, the identity of the non-profit group promoted, whether a specific cause or project was the focus and if so a short description, and – if the NCE participated in tallying, receiving and disbursing any funds for the non-profit group – an indication as to the general financial ranges in which the total funds that were raised would fall. We would caution against a mandate that the station must account for precise amounts raised by the non-profit, as some stations may not wish to participate in receiving, counting, and then distributing funds but may wish to simply ask listeners to make payments to the non-profit group directly.

Finally, we do not support a requirement that NCE stations must “opt-in” to this fundraising rule change prospectively. No similar mandate was placed on public broadcasters in prior Commission proceedings where rules were relaxed regarding on-air announcements for third-party non-profit groups and the mentioning of their products and services, and we see no benefit to the public interest here by such a requirement. It would also be unreasonable to expect stations to make advance predictions about future fundraising programming. Such an opt-in mandate would force NCE stations out of an abundance of caution to simply file rote opt-in statements, a futile exercise that would yield no valuable information for the Commission, for the public, or for prospective non-profit groups. NCE stations desire the flexibility, rather, to make decisions on fundraising programming during the year based on factors that defy precise prediction, like suddenly developing areas of real-life social and humanitarian need, new projects of worthy charity groups that arise, and the availability of special fundraising time that might unexpectedly open up within their programming schedules.

## I. DISCUSSION

### **A. It is in the Public Interest to Revise FCC Rules to Lift Restrictions on the Ability of NCE Stations to Conduct Fundraising for Third-Party Non-Profit 501(c)(3) Organizations**

The NPRM invites comment on whether the public interest will be advanced by this contemplated rule change. NPRM, ¶ 8. NRB firmly believes that the public interest will be substantially served by this proposed rule change. Because NCE stations would be permitted to fundraise on the air during regular programming hours for 501 (c) (3) non-profit organizations, there is a presumed public interest being served in the public being educated concerning social needs and charitable causes. By creating an on-air, three-party connection between non-commercial stations, non-profit charities, and the public, a likely outcome could be an increased spirit of volunteerism, and a citizenry better educated about the causes and remedies for social maladies such as homelessness, drug addiction, illiteracy, poverty, juvenile delinquency, unemployment, and the break-up of families. After all, an audience that must decide whether to write a check or charge their credit card for a specific charitable need is likely to invest a closer ear to that kind of on-air discussion and exercise a more critical assessment of the information shared than almost any other.

NRB has had the opportunity to play a part in the lead-up to this NPRM. Craig Parshall, NRB Senior Vice-President and General Counsel, participated in a Washington panel presentation of the FCC “Future of Media” working group, at which time NRB’s proposal for relaxation of the current rules was publicly proposed.<sup>1</sup> When the working group later issued the *INC Report*, this rule change was recommended. Later, in an FCC

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<sup>1</sup> See: NPRM, ¶ 7, n. 24.



field hearing at Arizona State University, FCC Chairman Julius Genachowski publicly called for relaxation of current restrictions on third-party fundraising by NCE stations. During the considerable time that this proposal has been publicly discussed, we know of no substantive criticisms being voiced against it.

On the other hand, we can say that our members – both NCE stations and 501 (c) (3) non-profit organizations – are uniformly supportive of this proposal. This rule change would represent a “win-win-win” scenario. NCE stations would be able to promote worthy causes and receive some reasonable compensation; non-profit groups could be supported so they can better provide community, humanitarian, and social services – all without government funding; and the public could be better educated and energized to participate in helping to solve significant human problems and relieve human suffering. While we realize that the “public interest” that the FCC seeks to advance through its regulations is linked specifically to broadcast media, and that the focus of public interest is on programming that meets the needs of audiences, we believe the kind of on-air fundraising that will result from this rule change will constitute the essence of *public interest*.

#### **B. Limitations on the Types of NCE Stations that could Qualify for the New Rule**

The question is raised as to whether and how the Commission should limit those NCE stations that may participate in expanded fundraising for third-party non-profit organizations. NPRM, ¶ 9.

We note in this question the Commission’s reference to the concern, expressed by the *INC Report*, that public broadcasting officials may not want the option of using this

proposed rule change, as it would place them in the “awkward” position of choosing between multiple worthy causes. There is another obvious consideration: stations that are Corporation for Public Broadcasting (CPB) recipients are therefore grantees of public funding, which distinguishes them from all other NCE stations that are purely supported by private donations. We agree with the *INC Report* recommendation that only NCE stations that are *not* CPB grantees qualify to participate in this proposed rule change.

The Commission notes the obvious fact that NCE stations, “which are not CPB grantees,” would include “most religious broadcasters ...” NPRM, ¶ 9. However, this fact should pose no constitutional problem, and certainly no First Amendment impediment under the Establishment Clause.

In *Walz v. Tax Commission of City of New York*, 397 U.S. 644 (1970), the Supreme Court faced a claim that tax exemptions for religious bodies constituted “sponsorship” of religion, and thus infringed the “neutrality” requirements of the Religion Clauses. In soundly rejecting that notion, the Court reviewed numerous incidental benefits that have accrued to religious groups by reason of government actions, but which nevertheless are permissible under the First Amendment, including the provision of public bus transportation for parochial school students, and the supplying of textbooks and teaching materials to religious schools. *Walz, supra* at 397 U.S. 671-72.

In a similar vein, the actions of the Commission here, should it adopt the proposed rule change, would not constitute unconstitutional “sponsorship” of those NCE religious stations that come within a new fundraising rule; rather, the FCC is simply providing a logical, common sense revision of its rules based on neutral, objective criteria. The fact

that an incidental benefit may accrue to religious NCE stations, or to third-party religious non-profits, does not make it constitutionally suspect.

The cases in this respect are numerous: *Walz, supra* (tax exemptions); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (exemptions from otherwise applicable requirements for unemployment compensation benefits); *Zobest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (public-funded special education translator utilized in a private religious school); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (use of public university facilities by religious groups); *Zelman v. Simon-Harris*, 536 U.S. 639 (2002) (public funds used to provide tuition aid to students of private schools, most of whom attend religious institutions).

*Zelman v. Simon-Harris, supra*, is particularly pertinent because some 82% of the private schools eligible for tuition aid were religious; however, the Supreme Court rejected any *per se* rule that the Establishment Clause is violated merely by the sheer overwhelming percentage of religious recipients who benefited from the application of a facially religion-neutral rule. *Zelman* at 657-58.

Lastly, any delineation by the Commission, where only certain kinds of non-CPB NCE stations are permitted to participate, or certain kinds of social needs may be addressed, will invariably run afoul of the fact that fundraising for charities is a form of protected speech under the First Amendment, and such restrictions would represent content-based discrimination.<sup>2</sup> It would be hard to justify the reasonableness of such regulations, as they would constitute an unprecedented intrusion into NCE broadcast operations where the Commission would be making arbitrary value-judgments on

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<sup>2</sup> *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988).

programming content and on the value of certain social needs or certain charities and not others.

**C. Limitations on the Types of Non-Profit Groups that can Benefit From the New Rule, and “Affiliations”**

The Commission seeks comment on whether it should “further limit” any rule change regarding the types of non-profit organizations that can benefit by on-air fundraising by NCE stations which substantially alters or suspends regular programming. NPRM, ¶ 10. NRB advocates limiting this rule to fundraising for, or on behalf of, any 501 (c) (3) organization of the station’s choosing. This represents a modest modification to the current rules, and is an improvement over other restrictions that apply based on determinations merely by the “non-profit” status of the entity involved.

In its 1982 Memorandum Opinion and Order (“*Policy Statement*”), the Commission addressed this “non-profit” category, noting that in its broad form it would “encompass a multitude of organizations with varied purposes and functions,” including “labor and agricultural associations or organizations; mutual insurance companies or associations; benevolent life insurance associations; mutual or cooperative telephone companies; and state chartered credit unions.”<sup>3</sup> By contrast, NRB suggests limiting those beneficiary non-profit groups to organizations recognized under § 501 (c) (3) of the Internal Revenue Code. This would limit the benefit of these fundraising efforts to groups that would have the highest likelihood of serving the public interest, solving social problems and needs, and possessing a logical relationship to regular programming of

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<sup>3</sup> Memorandum Opinion and Order, 90 FCC 2d 895, 900, n. 16 (1982) (“*Policy Statement*”) as noted at NPRM, ¶ 36.

NCE stations.<sup>4</sup> IRS regulations list the exempt purposes under 501 (c) (3) as “charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international sports competition, and preventing cruelty to children or animals.”<sup>5</sup>

This proposed rule change would, of course, include *religious* 501 (c) (3) groups as well. We believe that faith-based non-profits are a worthy component, and would be worthy beneficiaries of this rule change.

Indeed, if government were to exclude religious groups and faith-motivated people from participating in programs that facilitate the provision of non-profit public services and charitable good works, it would eviscerate the non-profit sector. According to a 2008 study of the Pew Forum on Religion and Public Life, 51.3% of Americans identified themselves as Protestant Christians, which included “Evangelical churches, Mainline churches, and Historically Black churches.”<sup>6</sup> Of those in that category, between 45% and 54% indicate that they perform “community volunteer work through [their] place of worship” at least “several times a year.”<sup>7</sup> This is roughly *twice* the commitment made by the average American. According to the National Center for Charitable Statistics at the Urban Institute, only 26% of all Americans donate volunteer time to non-profit organizations.<sup>8</sup>

Further, religious 501 (c) (3) organizations are a worthy component of this proposed rule change from a policy and public interest standpoint, not only because of

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<sup>4</sup> See: NPRM, ¶ 5, discussing the waiver granted to an NCE television station to raise funds on the air for Wolf Trapp Foundation, because that was determined, in part, to “be consistent with regular programming ...”

<sup>5</sup> See: <http://www.irs.gov/charities/charitable/article/O,,id=175418,00.html>.

<sup>6</sup> The Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey – Religious Affiliation: Diverse and Dynamic*, (February 2008), page 5.

<sup>7</sup> *Id.*, at page 158.

<sup>8</sup> The National Center for Charitable Statistics at the Urban Institute, *The Nonprofit Almanac*. 8<sup>th</sup> Ed. (2011), “The Non-Profit Sector in Brief,” page 1.

their modest revenues and limited assets, but also because they exhibit a very close match between revenues received and expenses incurred with almost no accumulated or excess surplus. Of the eight categories of publicly reporting non-profits analyzed by the National Center for Charitable Statistics, religion-based ones ranked toward the bottom of the list in total revenue; above them were groups classified as Human Services, Education, Health, Public and Social Benefit, and Arts, Culture and Humanities. The only categories with lower total revenue were those of Environment and Animals, and International and Foreign Affairs.<sup>9</sup>

At the same time, religion-based 501 (c) (3) groups, which are the lowest of all categories in net assets, also exhibit good stewardship of their finances, with a virtual 1:1 ratio between revenue and expenses, beating out all other non-profit categories where other classifications either show considerable deficits or substantial surpluses.<sup>10</sup>

The Commission inquires whether the proposed rule change should prohibit fundraising for non-profit groups that are “affiliated” with the NCE station. In addition to the difficulty in arriving at a satisfactory definition of the precise “affiliations” that would be prohibited, there is a larger problem with this approach: given the current rules that permit NCE stations great leeway to raise funds for themselves, we fail to see the logic in restricting fundraising for non-profit groups under the fear that some additional benefit may inure to the NCE station. There is a myriad of ways in which such an “affiliation” rule – well-intentioned though it may be – could be used to unfairly deny the benefit of this fundraising rule to NCE stations merely because they may share some common board members with the third party non-profit group, or have other organizational ties.

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<sup>9</sup> Id., page 4, Table 2.

<sup>10</sup> Id.

The administrative burdens of policing an “anti-affiliation” provision would be substantial, and the public interest purportedly served, if any, would be *de minimis*.

We also note the Commission’s use of the word “local” in describing potential qualifying non-profit groups where, for instance, it asks: “If we limit any new flexibility for NCE stations to fundraising for *local* non-profit entities ...” NPRM, ¶ 10, page 7 (emphasis added). We believe that the *only* qualifier for prospective non-profit groups that could benefit from this rule change should be that they qualify as a 501 (c) (3) organization.

Limiting such groups to only those that have “local” status in the community of license of the NCE station may superficially appeal to a notion of broadcast “localism,” but on closer inspection we believe that appeal would prove to be illusory. There are some non-profits that are solely local in the strict sense; but many if not most have ties to state, regional, or national umbrella organizations or affiliations. One example will suffice. Teen Challenge International, USA, is an NRB member, and is a non-profit drug-counseling and drug rehabilitation ministry with a storied history and commendations from government leaders and public institutions.<sup>11</sup> It has 240 residential centers across America, many of them in inner-city, urban areas.<sup>12</sup> Accordingly, would it be considered to be “local” to NCE stations in those urban areas? Because the organization has an international outreach, however, is it therefore international and not domestic?

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<sup>11</sup> According to information supplied on July 18, 2012, by Teen Challenge to NRB, numerous officials have endorsed its programs. For instance, President George W. Bush stated publicly: “One of the really successful programs in America is a program called Teen Challenge. It’s a faith-based program. The program’s focus is aimed in helping young folks in overcoming drugs, which can often lead to crime and other problems.” Similar endorsements have come from Presidents George H. W. Bush and Ronald Reagan, and Drug Czar Gil Kerlikowske, Director of National Drug Control Policy.

<sup>12</sup> Information provided by Rev. Snow Peabody, Teen Challenge International, USA, National Representative, Washington, DC, July 16, 2012.

This kind of distinction between “local” and “non-local” non-profit groups breaks down in the face of how non-profit groups actually function, and the way in which they serve communities. Such groups perform services over broad geographical areas, and in fact are often global in their outreach, even while they continue to serve small, local towns across America. NRB’s broadcast member stations that will most likely utilize this rule change, as well as the non-profit groups they will likely want to promote, all share a missions-minded approach that is both intensely local in the desire to identify and meet community needs, yet at the same time global in the desire to minister to similar needs around the world. Some staff members of our NCE radio stations, encouraged by NRB’s office of Strategic Partnerships, travel to remote parts of the world to counsel, mentor, and assist fledgling Christian stations in struggling nations. That does not mean, however, that in so doing, those stations have abandoned their commitment to their local communities of license. In fact, we would suggest that such a global outreach, and the information that those stations can share later with their listeners through programming that details those experiences, serves a vital public interest.

To qualify these non-profit groups according to an abstract standard of locale or localism would drain the vitality from this proposed rule change, and would do little to advance the public interest. It would also ignore audience preferences. This month, NRB member Northwestern College, an NCE radio licensee that oversees several stations, surveyed 1200 of the members of their various listener-response panels who regularly listen to and comment on Northwestern’s programming. Over 60% of them indicated that



they prefer to be informed about the needs of impoverished persons regardless of whether they are in their local community or in other parts of the world.<sup>13</sup>

The Commission questions here whether it should retain its past waiver process for singular catastrophic disasters. We believe that it should. It should remain as an additional adjunct to this new fundraising rule, and because that situation would arise only occasionally, the administrative burdens on FCC staff would be infrequent; yet it would preserve for the Commission the flexibility to marshal America's media resources in a concerted effort to assist in those mass disasters.

Lastly, while we are proposing that non-profit groups to be promoted on the air under this proposed rule change be qualified *only* by their status under § 501 (c) (3) of the IRS code, there is an additional, somewhat implicit condition as well. Notions of fair trade practice would dictate that NCE stations not promote or fundraise for a non-profit group on the air and where a specific service project or cause is the focus of the fundraising plea, if the station knows that the particular non-profit group is not equipped or not intending to actually address that particular service need or to provide services for that particular cause. While we have no reason to believe that these situations will arise, in the unlikely event that they do, the FCC reporting by NCE stations participating in this new rule ought to give the Commission the basic information sufficient to satisfactorily deal with any complaints by the public in this regard. The Commission has ample authority to take action against any NCE station that abuses this fundraising process.

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<sup>13</sup> Information furnished by Northwestern College, July 19, 2012. See also the Comment of Northwestern College in this proceeding.

**D. Limiting Fundraising to 1% of Annual Airtime  
Gives Adequate and Reasonable Flexibility**

The Commission questions whether a 1% cap on annual airtime devoted to fundraising for third party non-profits is adequate, flexible enough, and how it should be computed and how it should relate to the kinds of mass disasters for which the Commission has granted waivers in the past. NPRM, ¶ 11.

NRB believes that a rule that grants NCE stations use of up to 1% of their annual airtime for fundraising for non-profit organizations provides adequate flexibility to the station. There is a natural *checks-and-balances* implicit within that 1% rule, and it is keyed into the realities of serving broadcast audiences. NCE stations will be reluctant to frustrate their audiences with excessive or demanding appeals for third-party non-profits, particularly when their own stations rely on donations from their listeners in order to operate. In fact, similar reasoning underpinned the decision of the Commission in the *Second Report*; where the FCC determined that timing and frequency restrictions for underwriting and donor acknowledgments could be lifted “since audience resistance was viewed as a sufficient deterrent to the excessive scheduling of acknowledgments.”<sup>14</sup>

As to the issue of calculating maximum available airtime, the most reasonable approach would for the NCE station to use the prior year’s total on-air time as the 100% figure, and then figure the 1% cap based on that.

The Commission expresses concern here that NCE stations might “use too much of their airtime for unrelated non-profit fundraising” which “could undermine the noncommercial character” of the station and divert precious resources away from the primary function of providing programming to their communities of license. However,

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<sup>14</sup> Memorandum Opinion and Order, 97 FCC 2d 255, 263-264 (1984) (“*Reconsideration Order*”).

the type of fundraising programming that we are confident will occur will undoubtedly focus on specific social and spiritual needs and how those will be met by the particular non-profit group. NCE station managers and program directors understand what their audiences care about. Successful fundraising appeals by their nature must communicate information about important public needs, and the ways in which those needs can best be served. From our perspective, this is essentially what the Commission defines as the “primary function” of these stations – “providing service to their communities of license through programming.” Or in the words of the *INC Report*, having non-profit 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.”<sup>15</sup>

#### **E. The Role of the NCE Station in Fundraising**

The NPRM asks how active a role an NCE station may play in any newly authorized fundraising activity. NPRM, ¶ 12.

NRB believes that NCE stations should be given the discretion to determine whether they will actively participate in receiving, accounting for, and distributing donations to the subject non-profit group, or whether those donations will be directed to the non-profit group itself. We also maintain that NCE stations should be able to use their discretion in determining whether they will create original programming as part of the fundraising effort, or whether they will air pre-packaged fundraising programming created by the non-profit group. Imposing a duty of original programming would well impose financial burdens on the station, including but not limited to additional board operation staff and on-air personnel.

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<sup>15</sup> Cited at NPRM, ¶ 7, page 5.

It should be noted that previously, the Commission’s rule “accord[ed] public broadcasters great latitude” in airing promotions of other non-profit organizations as long as no financial consideration was received, and that rule “was not limited by the nature or content of the particular broadcast;” then later, when the rule was liberalized in the Commission’s *Second Report*, the Commission determined that the receipt of value from a non-profit would not affect this rule, reasoning that “given the non-profit status of [the subject non-profit groups], the receipt of consideration would no longer prevent the broadcast” of promotional mentions by an NCE station for a not-for-profit organization.<sup>16</sup> The Commission further stated that “[p]ublic broadcasters may in the exercise of their good faith judgment do so if they determine that such announcements ultimately serve the public interest.”<sup>17</sup> There is no evidence that this kind of broadcast discretion has led to any substantial abuse, or has failed to serve the public interest. We see no reason why a similar discretion should not be delegated to NCE stations under the purview of this contemplated rule change, which would take the prior rulings of the Commission to the next logical step, namely, limited fundraising on the air during programming hours.

#### **F. The 9<sup>th</sup> Circuit Decision and “Remuneration”**

The Commission inquires about the affect, if any, of the recent decision of the 9<sup>th</sup> Circuit Court of Appeals in the *Minority Television* case.<sup>18</sup> It further asks how “remuneration” should be defined “regarding Section 399B’s ban on public interest and political advertising, in light of that section’s treatment in the *Minority Television* case.” NPRM, ¶ 13.

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<sup>16</sup> *Policy Statement*, at 90 FCC 2d 906.

<sup>17</sup> *Id.* page 907.

<sup>18</sup> *Minority Television Project, Inc., v. FCC*, No. 09-17311, 2012 WL 1216284, at \* 17 (9<sup>th</sup> Cir. April 12, 2012).

We do not believe that the *Minority Television* decision has any direct impact on this proceeding, as it left intact 47 U.S.C. § 399B’s prohibition on advertisements by for-profit companies, having determined that the offending subsections, (a) (2) and (a) (3), were severable from subsection (a) (1), which prohibits the airing of spots for for-profit companies for remuneration, but inversely allows advertisements for non-profit groups where consideration is exchanged.

NRB’s proposal is that only 501 (c) (3) non-profit organizations be permitted to benefit from the subject rule change. This will effectively eliminate the need to determine questions about “remuneration” regarding political advertisements, because any activities by 501 (c) (3) non-profits which endorse candidates for political office are expressly prohibited by the Internal Revenue Code, which is applicable of course not only to the NCE station licensees themselves but also to the non-profits they are promoting.<sup>19</sup>

On the other hand, public interest issue-advocacy advertisements are distinct from endorsements of political candidates, and have separate protection under the First Amendment.<sup>20</sup> Some aspects of issue advocacy by 501 (c) (3) groups during an on-air fundraising program could surface; one could envision, for instance, the Salvation Army during a fundraising hour possibly being asked about public issues surrounding the organization’s moral and religious positions.<sup>21</sup> Or World Vision, an international Christian humanitarian relief organization, might receive a question about a lengthy,

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<sup>19</sup> See generally: Compliance Guide for 501 (c) (3) Public Charities, at <http://www.ires.gov/pub/irs-pdf/p4221pc.pdf>.

<sup>20</sup> *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464-65 (2007).

<sup>21</sup> One blogger who notes some “controversy” regarding the Salvation Army’s moral and religious positions, is still quick to commend the group: “the Salvation Army does a lot of good. Their thrift stores are well known, as well as their help to the needy. Perhaps slightly less well known are their disaster relief, rehabilitation centers, and homeless shelters ...” *The Salvation Army – To Give – or Not to Give*, Jeff’s Lunchbreak, December 7, 2011. [Http://www.jefflewis.net/blog/2011/12/the\\_salvation\\_army\\_to\\_give\\_or.html](http://www.jefflewis.net/blog/2011/12/the_salvation_army_to_give_or.html).

highly publicized court case where its right to hire persons of the same faith was upheld by a federal trial court and the U.S. Court of Appeals, where the Supreme Court, in denying certiorari, allowed the ruling to stand.<sup>22</sup> In fact, it is hard to envision any successful non-profit organization, particularly faith-based ones, that have not been the subject of occasional, *public issue-related* controversy.

We would caution the Commission not to impose any content restrictions regarding the discussion of public issues in the context of fundraising appeals that disrupt or suspend regular programming within the purview of this NPRM for at least three reasons: (1) such discussions are forms of expression protected by the First Amendment. *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, note 6, *infra*; (2) the discussion of such matters would serve the public interest, not only in educating citizens on matters of public concern, but also revealing the core beliefs, and practices (even controversial ones) of the non-profit groups being promoted on the air, thereby permitting potential donors to better understand whether the group is a worthy recipient of their financial contributions; and (3) such discussions “would be consistent with regular programming” for stations that air current events programming or news, a test mentioned by the Commission as a reason for the granting of a waiver for the special Wolf Trap Foundation on-air fundraiser.<sup>23</sup>

Stations should be granted the discretion to determine the programming content during fundraising appeals that conform to the other applicable, non-content related guidelines for this rule change.

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<sup>22</sup> Hal Benton, *High court refuses World Vision hiring case*, The Seattle Times.com, October 2, 2011.

<sup>23</sup> NPRM, ¶ 5.

As to the question regarding “remuneration,” we are mindful of the Commission’s inquiry into this issue, which arose in the context of a proposed sale of a non-commercial station in San Francisco; where the agreed payment, which presupposed the continuation of broadcast programming pending the final closing, not only included reimbursement of operating expenses but also included additional financial consideration as well.<sup>24</sup> The Media Bureau questioned whether such consideration comported with the NCE restrictions of § 73.503 (c).<sup>25</sup> Those rules permit an NCE station to broadcast programming furnished by other entities only “if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast is received ...”

We would suggest that a distinction be made between *regular* “programming” supplied by a third-party entity that is within the purview of § 73.503 (c), which would continue to be covered by that rule, and those *special* fundraising activities by NCE stations for a third-party non-profit group as proposed in this NPRM – the latter necessarily involving “activities [that] would substantially alter or suspend regular programming.” NPRM ¶ 1. Thus, the *non-regular* programming activities falling in the latter situation and which are the subject of this proceeding should not come within the restrictions of § 73.503 (c).

NCE stations are currently permitted unlimited opportunities to raise funds on the air for their own operations. It is only a very short, logical step therefore to this resulting corollary: that NCE stations should be permitted to participate in joint fundraising efforts with third party 501 (c) (3) organizations, where the station would receive compensation,

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<sup>24</sup> Letter of inquiry from Peter Doyle, Chief, Audio Division, Media Bureau, to the University of San Francisco, re: KUSF (FM), 26 FCC Rcd 9251, 9255 (June 28, 2011).

<sup>25</sup> Id. at 9255, inquiry 11 (b).

for instance, computed on a flat rate, or would receive underwriting grants or sponsorship revenue from the third-party non-profit, in addition to recouping its administrative costs associated with the fundraiser. In this time of extreme economic challenge for non-profit groups and NCE stations, such creative non-profit partnerships should be encouraged not discouraged, particularly where the Commission has previously noted its obligation in this context to lift “unnecessary restrictions which will hinder [NCE station’s] ability to remain financially viable.”<sup>26</sup> NCE stations will necessarily incur expenses in producing and airing fundraising appeals, and donors who regularly give to the station may redirect some of their giving away from the station and over to the third-party non-profit group. Permitting NCE stations to receive financial consideration will help them to absorb, and adjust to, these financial circumstances.

There are also additional considerations regarding the financial realities facing both religious NCE stations, and faith-based non-profits in general. Religion-based non-profit organizations are toward the bottom of all non-profit categories in revenue according to recent studies, and have the lowest assets among all such categories.<sup>27</sup> NRB’s own 2005 national survey data indicates further, that approximately 64% of all Christian radio stations are non-commercial in nature, and about half of those stations serve markets with populations in excess of 300,000; yet at the same time, more than half of Christian stations on the whole must operate with full-time staff consisting of five or fewer employees.<sup>28</sup> Our own anecdotal experience since 2005 is that this trend is

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<sup>26</sup> *Policy Statement*, at page 910.

<sup>27</sup> See: data cited in section C. above, and footnotes 4 - 6.

<sup>28</sup> This survey data was disclosed to the Government Accounting Office in August, 2009, as part of NRB’s responses to questions from the GAO regarding the detrimental impact of congressional “performance rights” proposals: Craig Parshall, Bob Powers, [The Detrimental Impact of “Performance Rights” Proposals on Christian Radio](#), Responses of the National Religious Broadcasters (NRB) to Questions from the Government Accountability Office (GAO), August, 2009, page 2 par. 1, and page 5 par. 9.



continuing and that some stations have had to cut back even further on full or part-time staff. Christian NCE broadcasters accomplish a staggering amount of work and public interest service with relatively skeletal staff and minimal revenue. When a down economy is added to this scenario, it is clear that this rule change should permit NCE stations to participate in joint fundraising efforts with 501 (c) (3) organizations and be permitted to receive compensation as outlined.

### **G. Disclosures**

The Commission inquires regarding the necessity of disclosures that NCE stations should make in order to avoid confusion in the minds of the audience. NPRM, ¶ 14. We agree with the FCC's suggestion that stations clearly identify the non-profit charity group for whom they are raising funds on the air. We also agree that its suggestion is reasonable for the requirement that such on-air disclosures be made at the beginning and at the end of the program and at least once during each hour of the fundraising program. Any further detailed disclosures – for example, the background of the group, any special projects for which funds are being raised, etc. – could be made on the website of the NCE station, and the audience invited to access that information.

### **H. Reporting Duties**

The Commission asks for comment on the reporting duties of NCE stations participating in on-air third-party fundraising. NPRM, ¶ 15. We would not oppose the requirement that such stations, on a form proscribed by the FCC, report how they utilized their on-air fundraising time, and specifically disclosing: the date and times of each such program, the identity of the non-profit group promoted, whether a specific cause or project was the focus and if so a short description, and, if the NCE participated in tallying

or receiving any funds for the non-profit group, an indication as to the financial range in which the total funds raised would fall (e.g. 0 – \$50,000, \$50,000 – \$100,000, \$100,000 – \$500,000, etc.).<sup>29</sup>

Lastly, we would not oppose the FCC’s suggestion for inclusion of this report in the station’s public file, nor would we oppose the suggested certification provision during license renewal where the NCE station must certify compliance with the provisions of the third-party fundraising rules.

### **I. Opt-In Considerations**

The NPRM asks for comment on whether NCE stations should be required to affirmatively “opt-in” to the third-party fundraising process. NPRM, ¶ 16. We do not believe that such a requirement would be either necessary or advisable. The FCC would already be adequately informed through the annual reporting form of those stations that had participated. Forcing a station, in advance, to declare that it intends to utilize this rule change would force it to speculate. Forecasting of this kind could create unfair hardships for the station or confusion in the minds of the public where a change of circumstances later prevents the station from carrying-through with its intentions. Its major impact would be to limit and restrict stations that miss the “opt-in” deadline, or that fail to accurately predict in advance their fundraising activity for the entire year. New charitable causes, community needs, social emergencies, changes in programming schedules – these are the kinds of factors that will determine an NCE station’s decision to utilize the

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<sup>29</sup> The reason for ranges rather than specific amounts is necessary because (1) further funds may accrue to the non-profit later, without the station’s knowledge; (2) NCE stations that chose not to actively participate in receiving and accounting for funds would nevertheless be burdened with excessive administrative duties in order to comply with those kinds of reporting duties, and (3) detailed reporting of amounts raised through fundraising is already required by IRS regulations governing 501 (c) (3) organizations, including NCE stations that are a non-profits themselves.

fundraising rule change, yet they are exactly the kind of factors that cannot be gauged in advance in order to satisfy an administrative opt-in requirement.

The Commission notes that such an “opt-in” requirement “would serve to inform both the Commission and interested non-profit groups which NCE stations intend to engage in third-party fundraising activities. We do not see any regulatory advantage for the Commission to receive a list of NCE stations that *might* possibly utilize this rule change, as opposed to filed reports that definitely describe which stations *did in fact* utilize the rule. If such an opt-in is mandated, stations, lest they miss the later opportunity to use this fundraising opportunity for worthy charities, would invariably err on the side of caution by opting-in; and in the end such a list would prove to be relatively meaningless. Further, such an opt-in is a rather curious feature, considering the fact that nowhere in the *Second Report*, the *Policy Statement*, or the *Reconsideration Order*, did the Commission suggest that public broadcasters would need to affirmatively “opt-in” as a condition of utilizing the consistently liberalized rules regarding station activities promoting third-party non-profit groups.

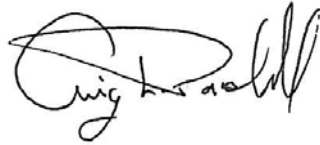
As for any potential benefit accruing to non-profit groups by their ability to peruse a list of “opt-in” stations, our judgment is that partnerships between NCE stations and non-profit groups would be best forged by trusted relationships and common goals, rather than non-profit groups trolling a public “opt-in” file looking for available NCE stations.

## II. CONCLUSION

For the foregoing reasons, we request that the FCC issue an order that any NCE station that does not receive Corporation for Public Broadcasting (“CPB”) grants be permitted to conduct on-air fundraising for third-party 501 (c) (3) organizations that substantially alters or suspends regular programming, in accord with the further recommendations contained in this Comment.

Dated this 23rd Day of July, 2012.

Respectfully submitted,



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