

Declaratory Ruling Educational Noncommercial TV Station  
Reconsideration, Petition for, Denial of

Request for declaratory ruling of *Second Report and Order*, 86 FCC 2d 141, granted to resolve the uncertainty that exists as to the impact of Public B/cing Amendments Act of 1981 upon the *Second Report*. Petition for clarification granted Reconsideration petitions denied.  
—*Educational B/c Stations*  
BC Docket No. 21136

FCC 82-327

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Commission Policy Concerning the  
Noncommercial Nature of Educational  
Broadcast Stations.

BC Docket No.  
21136

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 1982; Released: July 30, 1982

BY THE COMMISSION: COMMISSIONER WASHBURN ISSUING AN  
ADDITIONAL STATEMENT.

1. The *Second Report and Order* in Docket No. 21136 evaluated the financial needs of public broadcasters as well as their obligation to provide a noncommercial service.<sup>1</sup> The Commission relaxed certain restrictions on public broadcasters' fundraising activities. Petitions for reconsideration and clarification, and various comments in response thereto, were filed with the commission concerning the *Second Report*. Additionally, a petition for declaratory ruling was filed regarding the impact of the Public Broadcasting Amendments act of 1981 (with particular reference to Sec-

<sup>1</sup> *Second Report and Order*, 86 F.C.C. 2d 141 (1981). Hereinafter referred to as "*Second Report*."

tions 399A and 399B of the Communications Act) upon the *Second Report*.<sup>2</sup> The *Second Report* and Sections 399A and 399B serve a similar underlying purpose and achieve similar ends, by providing public broadcasters the opportunity to attract additional financial support while focusing upon the noncommercial nature of public broadcasting in general. In light of the basic thrust of both the *Second Report*, and Sections 399A and 399B, and in the interest of expediting consideration of the issues raised by the various pleadings, we will address the request for declaratory ruling together with the petitions for reconsideration and clarification.<sup>3</sup>

### Background

2. Essentially, the *Second Report* liberalized prior restrictions upon noncommercial broadcasters by amending 47 C.F.R. §73.503 and 47 C.F.R. §73.621 to: (1) allow public broadcasters to air promotional announcements when deemed in the public interest and no consideration for such announcements is received;<sup>4</sup> (2) eliminate the name only requirement for donor acknowledgements and permit the broadcast of informational, but not promotional, messages (*i.e.*, the messages may include such information as the donor's logo, location and product lines or services); and (3) delete any limitations on the timing and frequency of donor acknowledgements. The amendments were designed to further the important governmental interest in preserving the essentially noncommercial nature of public broadcasting *within a minimal regulatory framework* by insulating public broadcasters from commercial marketplace pressures and decisions.<sup>5</sup> The Commission believes that the rules satisfy constitutional objections since they are narrowly fashioned to achieve an important governmental interest (*i.e.*, the rules prohibit the broadcast of promotional announcements *for consideration*—no more, no less),<sup>6</sup> and that the rules satisfy the statutory mandate of 47 U.S.C. §317 (47 C.F.R. §73.1212) since the donor acknowledgements, as allowed, better inform the public as to the identity of the sponsoring entities.<sup>7</sup> Moreover, it was

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<sup>2</sup> Section 1231 of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 97th Cong., 1st Session (1981), amended the Communications Act by adding Sections 399A and 399B.

<sup>3</sup> By *Order* of April 23, 1981, the Commission consolidated the petitions for reconsideration and clarification.

<sup>4</sup> Consideration is broadly defined "to denote anything of value given in exchange for something else of value." *Second Report, supra* at 142.

<sup>5</sup> *Second Report, supra*, at 142-143.

<sup>6</sup> A regulation which infringes upon First Amendment rights is valid if it furthers a substantial government interest and is narrowly tailored to serve that interest. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Community Service Broadcasting of MidAmerica, Inc. v. FCC*, 593 F. 2d 1102, 1111, 1114 (D.C. Cir., 1978).

<sup>7</sup> Section 317 basically requires a station to make an announcement that the programming material was broadcast for consideration, unless the consideration consists of goods or services provided at little or

hoped that Sections 73.503 and 73.621, as amended, would enable non-commercial broadcasters to attract additional revenue and broaden their economic base. Stated another way, it was our hope that the liberalization of restrictions on donor acknowledgements would encourage more contributors.

3. The *Second Report* reflected the Commission's desire 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. The recent amendments to the Communications Act relating to public broadcasting reflect Congress' desire to ensure that the public telecommunications media remains financially viable in view of substantial Federal funding reductions, by encouraging and facilitating the ability of public broadcasters to generate additional private financial support which is necessary for their continued survival.<sup>8</sup> In this vein, Congress (1) created the Temporary Commission on alternative Financing for Public Telecommunications (Temporary Commission) to undertake a study and aggressively explore alternative sources of funding, and (2) authorized public broadcasters to provide services, facilities and products in exchange for remuneration, so long as such services, facilities or products would not interfere with the delivery of public broadcasting service.<sup>9</sup> Moreover, like the *Second Report*, Section 399A permits the inclusion of non-promotional identifying information (*i.e.*, the donor's aural visual logograms, slogans and location)

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no cost for noncommercial, nonpromotional purposes. The basic premise of the sponsorship identification requirement is that the public is entitled to know by whom they are being persuaded. *Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 141 (1963).

<sup>8</sup> According to the *House Report*, one of the primary purposes of the legislation was "to facilitate and encourage the efforts of public broadcasting licenses to seek and develop new sources of non-Federal revenue, which will be necessary for the long term support of the system as Federal funding is reduced." Public Broadcasting Amendments Act of 1981, H. R. Rep. No. 97-82, 97th Cong., 1st Sess., p. 7 (1981) (*House Report 97-82*).

<sup>9</sup> The *House Report 97-82* stated that Section 399B prohibits public broadcast stations from using their "facilities for the broadcast of any advertisement" but "explicitly authorize[s] [them] . . . to engage in the offering of services, facilities, or products in exchange for remuneration." For instance, such offerings may include the provision of "instructional, educational and cultural material, for remuneration, to public school systems and other nonprofit institutions . . ." *Id.* at 25. It should be noted that 26 U.S.C. § 513 requires public broadcast stations to report and pay taxes on unrelated business income. Thus for tax purposes, Section 399B provides that public broadcast stations establish a separate accounting system for the above noted activities. Public broadcast stations should be cautioned that their tax-exempt status may be jeopardized if the Internal Revenue Service determines that profit making has become their *primary activity*. See *e.g.*, *Carle Foundation v. United States*, 611 F. 2d 1192 (7th Cir. 1979); *Iowa State University of Science and Technology*, 500 F. 2d 508 (Ct. Cl. 1974). See also, *American College of Physicians v. United States*, 530 F. 2d 930 (Ct. Cl. 1976) (profits received by a tax exempt organization generated through advertising in its trade journal did not constitute taxable income of an unrelated trade or business).

in donor acknowledgements,<sup>10</sup> and Section 399B prohibits the broadcast of promotional announcements for consideration.<sup>11</sup>

4. Although Sections 399A and 399B parallel the *Second Report* in most important respects, there are three notable differences. First, Section 399A imposed a restriction upon the scheduling of donor acknowledgements, whereas the *Second Report* eliminated all timing and frequency restrictions. Second, although Section 399A retains the *Second Report's* "promotion vs. identification" distinction regarding donor acknowledgements, the statute appears to be more restrictive as to the information which may be included in such acknowledgements. Third, while both the *Second Report* and Section 399B disallow the broadcast of promotional announcements for consideration, the proscription in the *Second Report* is unquestionably broader than that found in Section 399B. These differences will be dealt with, in greater detail, in connection with the petition for declaratory ruling.

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<sup>10</sup> Section 399A provides:

- (a) For purposes of this section, the term 'business or institutional logogram' means any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization.
- (b) Each public television station and each public radio station shall be authorized to broadcast announcements which include the use of any business or institutional logogram and which includes a reference to the location of the corporation, company, or other organization involved, except that such announcements may not interrupt regular programming.
- (c) The provisions of this section shall not be construed to limit the authority of the Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies or other organizations.

<sup>11</sup> Section 399B provides, in pertinent part:

- (a) For purposes of this section, the term 'advertisement' means 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 public office.
- (b)(1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities or products in exchange for remuneration.
- (b)(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

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## Discussion

5. Having generally discussed the *Second Report* and Sections 399A and 399B, we will proceed to consider the: (1) petition for declaratory ruling; (2) petition for clarification; and (3) petition for reconsideration.

*(1) Petition for Declaratory Ruling*

6. The petition urged the Commission to issue a ruling, declaring that Section 399B is mandatory and self-executing and, in effect, that it supersedes the *Second Report's* more restrictive consideration received rule.<sup>12</sup> Specifically, the petitioner declared that Section 399B is broader in that it:

- (a) Permits public broadcasters to broadcast nonpromotional material even when consideration is received; and
- (b) Even permits the broadcast of promotional announcements as long as the person offering the services, facilities or products is not engaged in the offering of those products, services or facilities for a profit.

According to the parties, a declaratory ruling is necessary to dispel the uncertainty public broadcasters face regarding their potential for fundraising and encourage them to take full "advantage of their new flexibility to seek out the additional, non-Federal sources of revenue they vitally need."

7. In its discretion, the Commission may issue a declaratory ruling to terminate a controversy or remove an uncertainty. 5 U.S.C. § 554(e); 47 C.F.R. § 1.2. In recognition of the importance to public broadcasters in developing non-Federal revenue sources which will ensure continued high quality programming, we believe a declaratory ruling is warranted to resolve the uncertainty that exists as to the impact of Section 399B, as well as Section 399A, upon the *Second Report*.

8. As we previously stated, the *Second Report's* prohibition against the broadcast of promotional announcements is broader than that found in Section 399B. The *Second Report* prohibits all promotional announcements for consideration (*i.e.*, the "consideration received rule") irrespective of the nature of the sponsoring entity—be it a profit or a non-profit organization. Section 399B's preclusion, however, is unambiguously and clearly limited to the broadcast of promotional announcements ("advertisements")<sup>13</sup> sponsored by *profit entities*.<sup>14</sup> We recognize that Section

<sup>12</sup> The petition for declaratory ruling was jointly filed by the National Association of Public Television Stations (NAPTS) and the Public Broadcasting Service (PBS). The law firm of Dow, Lohnes and Albertson filed comments in support of the petition.

<sup>13</sup> Section 399B also prohibits sponsored announcements which "express the views of any person with respect to any matter of public importance or interest" or which "support or oppose any candidate for political office," by defining all such announcements as "advertisements."

<sup>14</sup> The plain language of the statute restricts the definition of advertisements to promotional announcements sponsored by profit entities and excludes from that definition, by way of omission, similar

399B is part of the legislative scheme to increase non-Federal support for the public telecommunications media, and as such the allowance of promotional announcements sponsored by non-profit organizations may prove to be an additional revenue source. We are also cognizant of Congress' intent to preserve the essentially noncommercial nature of the public broadcasting service—a service that is responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests. In this regard, we note that the Temporary Commission (*supra* at para. 3), assigned to the task of exploring alternative means of financing for the public telecommunications media, was directed to consider and satisfy the following criteria:

- (a) Continued growth in audience coverage and programming excellence; and
- (b) Insulation of program control and content from the influence of special interests—be they commercial, political or religious.<sup>15</sup>

9. We believe that the *Second Report's* blanket prohibition against all *sponsored* promotional announcements served to retain a substantial distinction between commercial and noncommercial stations, by ensuring that public broadcasters' judgments are made in the public interests, and insulated from the commercial pressures of an open marketplace—whether those pressures are exerted by profit or non-profit entities.<sup>16</sup> The consideration received rule thus preserved a reasonable distinction between commercial and noncommercial services without casting undue financial constraints upon public broadcasters. However, our rule undeniably restricts public broadcasters in their fundraising activities to a greater degree than Section 399B, and thus is inconsistent with the statute. A regulation that is inconsistent, or more restrictive, or not in harmony with the governing statute is invalid, *U.S. v. Larionoff*, 431 U.S. 864 (1977); *Miller v. U.S.*, 294 U.S. 435, 440, *rehearing denied*, 294 U.S. 734, (1935); *Ellis v. United States*, 610 F. 2d 760, 764–765 (Ct. Cl. 1979); *Scofield v. Lewis*, 251 F. 2d 128, 132 (5th Cir. 1958).

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announcements sponsored by non-profit entities. Given the fact that the amendment was enacted subsequent to the issuance of the *Second Report* and that the *Second Report's* prohibition against sponsored promotional announcements extended to non-profit, as well as profit entities, we can only conclude that Congress was cognizant of our broader proscription and excluded from its definition of advertisements that which it intended to exclude. *See e.g.*, *Patrolmens Benevolent Association of the City of New York v. City of New York*, 41 N. Y. 2d 205, 391 N. Y. S. 2d 544, 359 N. E. 2d 1338, 1341 (1976).

<sup>15</sup> *House Report 97-82, supra* at 16.

<sup>16</sup> In this context, it should be noted that "non-profit" entities encompass a multitude of organizations with varied purpose and functions. For example, according to the Internal Revenue Service, the following organizations, among others, may be designated non-profit: athletic, labor and agricultural associations or organizations; mutual insurance companies or associations; benevolent life insurance association; mutual or cooperative telephone companies; and state chartered credit unions. *The Exempt Organization Handbook*, Internal Revenue Service, p. 12-13 (March 15, 1982).

10. To reconcile this apparent inconsistency and thus conform to the legislative mandate of Section 399B, we are revising the *Second Report's* consideration received rule to the extent that it prohibits the broadcast of promotional announcements sponsored by non-profit organizations. This action is taken pursuant to 47 U.S.C. § 303(a) and (b) which authorizes the Commission to classify and regulate classes of service, and 47 U.S.C. § 303(r) which authorizes the Commission to promulgate rules and regulations to implement applicable laws in a consistent fashion.<sup>17</sup> In so limiting the consideration received rule, we should emphasize that the *Second Report*, as well as Sections 399A and 399B, represent an interim step to afford public broadcasters more freedom in their programming determinations and in their ability to procure necessary financial support. Studies designed to assess the goals and purposes of public broadcasting and alternative means of financing are currently in progress by the Commission and the Congress. However, the pendency of these studies does not prevent the Commission from according public broadcasters the full freedom contemplated by the statute. Specifically, public broadcasters are authorized to air promotional announcements sponsored by non-profit organizations.

11. Additionally, we should point out that public broadcasters are, in fact, required under 47 U.S.C. § 317 (47 C.F.R. § 73.1212) to acknowledge donors. Contrary to petitioners' assertions, the *Second Report*, as well as Section 399A, provide that such acknowledgements may contain identifying, but nonpromotional, information.<sup>18</sup> As previously noted, however, Section 399A differs from the *Second Report's* treatment of donor ac-

<sup>17</sup> As petitioner pointed out, the Commission may amend its rules and regulations to conform to and comply with subsequent legislation without engaging in a rule making proceeding. See e.g., *Amendment of Part 73 (Radio Broadcast Services) and Part 76 (Cable Television Service) of the Rules (State Conducted Lotteries)*, 51 F.C.C. 2d 173 (1975).

<sup>18</sup> In a related context, the Broadcast Bureau received a request for a waiver of the Commission's sponsorship identification rules from Southern Educational Communications Association (SECA), the production agency for the television series, "Firing Line." SECA states that "Firing Line" is aired weekly on PBS, and is funded by PBS and through the contributions from corporations and individuals. SECA represented that there are currently 45 contributors ("41 have contributed \$5,000 or less; the other four are major underwriters with grants of \$20,000 to \$100,000"). According to SECA, PBS policy only allots twenty seconds to identify such contributors. It is thus difficult to identify all the contributors in the allotted time frame, which in turn inhibits their efforts to broaden their financial base of support, SECA proposes to give credit to the major underwriters and identify all minor contributors as "Friends of Firing Line." SECA stated that it would maintain an updated list of all underwriters at PBS or the Commission. We find that SECA's proposal is reasonable and does not violate the spirit of 47 C.F.R. § 73.1212: that the public knows by whom they are being persuaded. (See footnote 6, *supra*). As a general proposition, we believe that if programs, such as "Firing Line," for the most part receive a few major contributions and numerous minor contributions, it would be sufficient to identify the substantial underwriters and generally acknowledge the other underwriters. The substantiality or insubstantiality of contributions should relate to and be determined by the actual programming costs. However, the general reference to the minor contributors should also include a statement advising the public that a complete donor list is maintained and accessible through PBS or the individual public broadcast station, whichever is appropriate.

knowledgements in two respects: (1) the scheduling; and (2) the information that may be included in such acknowledgements. We will address these differences below.

12. First, the *Second Report* removed all timing and frequency restrictions for the broadcast of donor acknowledgements, whereas Section 399A contains a caveat: the scheduling of donor acknowledgements shall not interrupt regular programming. In other words, it is permissible to air such acknowledgements at "the beginning and end of programs . . . between identifiable segments of a longer program" or, in the absence of identifiable segments, in programming during "station breaks," such that the flow of programming is not "unduly disrupted."<sup>19</sup> The *Second Report* relied upon the reasonable, good faith judgments of public broadcast licensees to avoid commercial clutter and further considered audience resistance a sufficient deterrent to abuse. However, Section 399A does impose a limited restriction upon the timing and frequency of donor acknowledgements. Accordingly, we are changing our rules, pursuant to 47 U.S.C. § 303(r) and 47 U.S.C. § 399A(c), to conform to the "scheduling" restriction required by Section 399A. (See Appendix A).

13. Second, Section 399A also appears to differ from the *Second Report* with respect to the information that may be included in the donor acknowledgements, although Section 399A retains the *Second Report's* "promotion vs. identification" distinction. The *Second Report* provides that the acknowledgements may state, among other things, the donor's products lines or services. In delineating that information which may be incorporated in such acknowledgements, Section 399A explicitly authorizes the non-promotional use of the donor's *aural* or *visual logograms* and *location*, but is silent as to product lines or services. Despite this omission, we believe that by broadly defining the term "logogram," Congress, in fact, authorized that which was intended by the *Second Report*. Although the *House Report*, declared that "products or services [should not be] included as part of such announcements at this time," it proceeded to state:

Accordingly, it is the Committee's intent that a logogram could contain the broadcast of a corporate symbol, accompanied by the identification: "XYZ Oil Corporation, of New York, refiners of petroleum products," but could not contain: "XYZ Oil Corporation of New York, manufacturers of Super 94 unleaded gasoline;" or that a logogram could contain: "ABC, the telephone company of Maryland," but could not contain "ABC, the telephone company of Maryland, with a variety of telephones to serve you." The Committee intends that logograms be *value neutral*, and solely for the purpose of *generic identification*.

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<sup>19</sup> *House Report 97-82 supra*, at 24. We should point out that the *House Report* is very instructive since the Senate did not have a comparable provision, and Section 399A as proposed in H.R. 3238, *supra*, was fully adopted by the Conference Report with the amendment contained in 399A(c) empowering the Commission to further regulate in this area.

In allowing the use of logograms, the Committee reemphasizes the clear distinction made by the Commission in its decision, that they will be allowed to the extent they help identify a contributor without promoting him. No comparisons are allowed. No qualitative objectives are allowed.

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In allowing the use of slogans, the Committee sought to provide to radio the non-visual equivalent that is allowed for television through logograms. Allowable slogans must meet the "identification without promotion" test. Again, the entire announcement should be brief.

According to the the *House Report*, Section 399A further limits the *Second Report* which allegedly allowed for the "listings of products and services" in donor acknowledgements. *Id.* In this connection, it is noted that the *Second Report* did not contemplate or authorize the listing of products or services per se. Rather, the *Second Report*, at 155, emphasized that the mention of products or services should be "strictly" for identification purposes, and that any comparative, qualitative information was impermissible. It appears that Congress defined the term "logogram" in such a way as to embrace the *Second Report's* intended use of a donor's product lines or services for purposes of "generic identification," if such use is "value-neutral" (*i.e.*, non-comparative, non-qualitative).<sup>20</sup> It is thus our interpretation that under Section 399A, and the *Second Report*, the logogram may include a description of the donor's general product line or services, but may not include the specific listing or promoting of such. For example, it would be permissible for an acknowledgement to state, "General Motors, maker of automobiles and automobile accessories;" but it would impermissible for it to state, "General Motors, maker of Oldsmobile Cutlass, Pontiac Firebird, Buick Century, and Cadillac Eldorado" or "General Motors, maker of fine automobiles and automobile accessories."

14. To recapitulate, public broadcasters may broadcast: (1) donor acknowledgements which inform but do not promote (*i.e.*, the donor's logogram, may include a general description of product lines or services, as well as the donor's location); (2) announcements which promote the goods, services or activities of profit entities deemed in the public interest for which no consideration is received; and (3) announcements which promote the goods, services or activities of non-profit organizations, whether or not consideration is received. However, public broadcasters may not schedule announcements so as to interrupt regular programming.

<sup>20</sup> In fact, the example of "XYZ Oil Corporation of New York, refiners of petroleum products" is similar to that found in the *Second Report*, wherein the Commission stated:

[w]hile an announcement identifying Exxon Corporation, producer of petroleum products would be permissible, announcements identifying Exxon as the producer of "fine" or the "best" petroleum products would be prohibited. [*Second Report, supra* at 155.]

*Petition for Clarification*

15. The petition urges the Commission to clarify the *Second Report* by assuring public broadcasters that it is permissible to air brief promotional-fundraising announcements on behalf of non-profit performing arts organizations during the intermission features of broadcasts furnished by such organizations.<sup>21</sup> The petition is specifically tailored to the intermission features, and the announcements contained therein, of Metropolitan Opera's performance broadcasts. Metropolitan Opera described its intermission features as an integral part of its broadcasts. According to Metropolitan Opera, its intermission features include discussion "on the history of opera, the works of particular composers, the theory and styles of operatic music, or the Metropolitan Opera itself, such as a backstage look at the opera, an interview with performers, the history of the Metropolitan Opera, or an account of its current program." In addition to this information format, the intermission feature may contain brief fundraising announcements (three to four minutes of a twenty minute intermission) which may include direct solicitation of contributions or indirect requests for support through the offering of premiums or membership in the Opera Guild, an auxiliary organization which supports the Metropolitan Opera.

16. Relying upon language of the *Second Report*, concerning fundraising on behalf of third parties,<sup>22</sup> the petitioner contends that the broadcast of fundraising activities (*i.e.*, auctions, marathons) on behalf of organizations other than the licensee which would significantly alter or suspend regular programming is prohibited,<sup>23</sup> but that the broadcast of promotional fundraising announcements which do not interrupt regular programming is permissible. Since the announcements on behalf of non-profit performing arts organizations occur during intermission periods and do not significantly alter regular programming, the petition states that the announcements are allowable under the *Second Report*. Moreover, it is stated that the *Second Report* affords public broadcasters greater discretion and specifically authorizes them, on their own, to air announcements promoting or urging support of performing arts organizations if the licensee determines that it would be in the public interest to do so. Specifically, the petition states:

The exercise of a licensee's discretion with regard to announcements publicizing the Metropolitan Opera's fund raising activities is the same whether the licensee itself

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<sup>21</sup> The petition for clarification was filed by the Metropolitan Opera Association, Inc. (Metropolitan Opera). A formal opposition to the petition was filed by NPR and an informal opposition was filed by Minnesota Public Radio. Metropolitan Opera filed reply comments.

<sup>22</sup> *Second Reports, supra*, at 157-158.

<sup>23</sup> "Suspended programming" denotes broadcast material which goes beyond a mere announcement, and as such disrupts normal programming.

originates the announcement or whether the licensee chooses to air a broadcast performance which incorporates these announcements during the intermission feature.

In a related context, the petition states, "Certainly, a request for donations or the offering of memberships or publications which support or promote nonprofit performing arts organizations such as the Metropolitan Opera should raise fewer concerns about commercial like programming than the explicit promotions of goods and services [for which no consideration has been received] which the Commission has expressly approved." Therefore, it is argued, that a public broadcaster should be able to exercise discretion in determining whether such announcements are in the public interest, and if so, be able to air them. Finally, it is contended that the *Second Report's* prohibition against announcements promoting the sale of program-related materials by or on behalf of program suppliers was intended to ensure that such offerings are motivated by public interest considerations rather than the economic interest of the offerer. The petition concedes that non-profit performing arts organizations that provide live program offerings over public broadcast stations are program suppliers, but argues that the solicitation of contributions for such non-profit organizations could hardly be considered to be motivated by a commercial gain. Rather, such contributions are necessary to ensure continued quality programming particularly in light of the prospective reductions in appropriations to the National Endowment of the Arts, which will adversely affect such organizations.

17. In comments opposing the petition, it is argued that the flexibility afforded to public broadcasters in the *Second Report* is limited to the "on-air promotion of off-air fundraising activities."<sup>24</sup> The *Second Report* is thus interpreted as prohibiting the broadcast of any direct fundraising activity, in the form of brief announcements as well as suspended programming, which inures to the benefit of any individual, organization or entity other than the licensee. To hold otherwise would place public broadcasters in the position of a general charitable fundraiser. Moreover, it is argued that if direct fundraising activity is allowed, the distinction between commercial and noncommercial stations will be weakened.

18. A reply comment was filed in which the petitioner essentially reiterates its position that the *Second Report's* prohibition against on-the-air fundraising activities for third parties applies only to those activities which substantially alter regular programming. According to the petitioner, to accept the position presented in the opposing comments would

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<sup>24</sup> "Off-air fundraising activities" refers to transitory, nonbroadcast events for which an admission charge is required, or goods or services are offered for sale. Prior to the *Second Report*, public broadcasters were not permitted to promote such events, or even mention the admission fee, on the air. However, the *Second Report* permits the public broadcasters to promote such community events "in any manner they choose," in the absence of consideration.

mean that a "public station receiving no consideration could freely promote sales of goods and services by profit-making organizations, but could not broadcast any announcement requesting donations to a non-profit organization." Moreover, petitioner states that such a position will constrain public broadcasters in their exercise of the wide discretion afforded them under the *Second Report*. Finally, petitioner argues that the *Second Report* is content-neutral, and does not distinguish between direct and indirect promotional announcements and certainly is not limited to "on-air promotion of off-air fundraising activities."

19. In view of the conflicting interpretations of the *Second Report*<sup>25</sup> as it relates to announcements which directly or indirectly solicit funds for non-profit performing arts organizations during programming furnished by such organizations, we believe that it is necessary to clarify public broadcasters' responsibilities in this area. Under the consideration received rule, the public broadcaster may air announcements that promote goods, services or activities of any individual or entity, for which no consideration is received. The rule was not limited by the nature or content of the particular broadcast—*i. e.*, the rule was not limited to on-the-air promotion of off-the-air fundraising events. The rule is limited by the public broadcasters' determination that such promotion is in the public interest, and in this area, the *Second Report* accords public broadcasters great latitude. The furnishing of live or taped performances by organizations such as the Metropolitan Opera to public broadcasters for airing would constitute consideration.<sup>26</sup> As such, the consideration received rule would have barred any brief announcements which directly solicited contributions or support for such organizations. However, given the non-profit status of such organizations, the receipt of consideration would no longer prevent the broadcast of the announcements under the *Second Report*, as revised to reflect the Congressional mandate of Section 399B. Therefore, the broadcast of such announcements are permissible.

20. The *Second Report* also prohibited broadcasts that promote the sale of program-related goods or services by program producers and suppliers (1) where the cost was more than nominal; or (2) where consideration had been received; and (3) where the offering was designed to further the economic interest of the offerer, as opposed to the general interest of the public.<sup>27</sup> This principle was based upon the Commission's belief that such

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<sup>25</sup> Metropolitan Opera, as well as PBS, view the broadcast of these fundraising announcements, made in connection with the programming, as a matter for licensee discretion. The law firm of Schwartz, Woods and Miller believes that a waiver is appropriate. NPR and Minnesota Radio considers such announcements to be inappropriate and precluded by the *Second Report*.

<sup>26</sup> The contribution of programming material or funds for programming constitutes consideration, and as such the contributor must be acknowledged. See 47 C.F.R. § 73.1212.

<sup>27</sup> For purposes of discussion, we are assuming that the cost of program-related materials which are promoted during the intermission features of performance broadcasts by program suppliers, such as Metropolitan Opera, is not nominal.

announcements are "overtly commercial" and was an extension of prior case law that prohibits promotional broadcasts of the licensee's or the licensee's agents' outside business or financial interests.<sup>28</sup> However, since direct promotional fundraising announcements sponsored by non-profit organizations are now permissible, we believe that this aspect of the *Second Report* should also reflect that change. Accordingly, public broadcasters may now air announcements that promote program related materials sold by non-profit organizations, including the station itself. To allow announcements that promote the goods, services and/or activities of non-profit organizations, but prohibit the offering of program related material by a non-profit program supplier, would indeed be inconsistent and arbitrary. In addition to the foregoing, a public broadcaster may in its discretion broadcast brief announcements; (1) which directly or indirectly raise funds for the non-profit performing arts organizations in connection with programming furnished by such organizations; and (2) which would not interrupt regular programming. By so ruling, we must emphasize that public broadcasters are *not* required or obligated to air these or any other fundraising announcements. Public broadcasters may in the exercise of their good faith judgement do so if they determine that such announcements ultimately serve the public interest. Although we are relaxing our policies regarding promotional announcements to an even greater extent than permitted under the *Second Report*, we should also emphasize that we will continue to follow *Ohio State University*, 38 RR 2d 22 (1976), to the extent that public broadcasters are generally prohibited from engaging in fundraising activities on behalf of any entity other than the licensee where such activities substantially alter or suspend regular programming.<sup>29</sup>

### *Petitions for Reconsideration*

21. The petitioners requested that the Commission reconsider the policies set forth in the *Second Report* on substantive and procedural grounds.<sup>30</sup> They stated that the *Second Report* established new rules that

<sup>28</sup> See *Fordham University*, 18 F.C.C. 2d 209, 210-211 (1969); compare *WFLI, Inc.*, 13 F.C.C. 2d 846, 847 (1968); *Crowell-Collier Broadcasting Co.*, 14 F.C.C. 2d 358 (1966).

<sup>29</sup> It should be noted that the Commission recently granted a waiver of 47 C.F.R. § 73.621 to Greater Washington Educational Telecommunications Association, Inc. (GWETA), licensee of noncommercial educational television station WETA-TV, Washington, D.C., FCC 82-198 (April 22, 1982). The waiver allowed GWETA to broadcast a three hour fundraising program for the Wolf Trap Foundation to assist in its restoration efforts after a fire destroyed its facilities. The Commission determined that a waiver was warranted under the unique circumstances presented there.

<sup>30</sup> Petitions for reconsideration were filed by: the National Association of Broadcasters (NAB); and were jointly filed by the Committee to Save KQED, the Association of Independent Video and Filmmakers Inc., the Citizens Committee on the Media (Chicago), the Chicago Citizens Cable Coalition, Public Media Center and the Committee to Make Public Television Public (referred to collectively as the Committee to Save KQED). Oppositions to the petitions were filed by the PBS, the Corporation for Public Broadcasting (CPB), the law firm of Dow, Lohnes and Albertson on behalf of

“radically depart” from the Commission’s previous policies, which prohibited public broadcasters from operating in substantially the same manner as commercial stations by proscribing the broadcast of commercial or commercial like matter on noncommercial stations.<sup>31</sup> It is argued that this radical departure was procedurally deficient since it was made: (1) without a complete understanding of the nature and goals of public broadcasting; (2) without a clearly articulated, well “demonstrated factual or policy basis;” and (3) without affording the public sufficient notice and opportunity to respond to the action taken, in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b).

22. Substantively, the new rules are said to suffer from the lack of adequate standards to guide public broadcasters in carrying out their responsibilities and to protect against abusive practices. The following matters were specifically referred to as generating confusion or inviting abuse:

- (1) What is meant by consideration and when must consideration be received so as to preclude the broadcast of promotional announcements?<sup>32</sup>
- (2) At what point does an acknowledgement promote, as opposed to identify, the donor?
- (3) When does mention of the origination point, in a remote broadcasting context, promote an establishment?<sup>33</sup> and
- (4) How will commercial clutter be avoided without any time limitations on suspended fundraising activities?

It is feared that the authorization of promotional announcements (even in the absence of consideration), and more importantly, the failure to establish defined guidelines in the above noted areas, will ultimately erase the distinction between commercial and noncommercial stations. The com-

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various noncommercial licensees, the law firm of Schwartz, Woods & Miller on behalf of various noncommercial licensees, WGBH Educational Foundation (licensee of WGBH-TV, WGBX-TV, WGBH(FM) Boston, and WBGY-TV Springfield, Massachusetts), NAPTS and NPR. NAB and the Committee to Save KQED filed replies. Responsive comments were filed by the law firm of Schwartz, Woods and Miller, NPR and NAPTS.

<sup>31</sup> *First Report and Notice of Proposed Rule Making*, 69 F.C.C. 2d 200, 204-207 (1978); *Noncommercial Educational Stations*, 26 F.C.C. 2d 339, 341 (1970); *Sixth Report and Order*, 41 F.C.C. 148, 166 (1952).

<sup>32</sup> The Commission noted that if promotional announcements on behalf of a commercial entity are broadcast and preceded or followed by a donation from that entity, questions would be raised under the consideration received rule. The Commission stated that the “proximity” between the announcement and the donation would be viewed as a “significant factor” in evaluating public broadcasters’ good faith judgments, but declined to prescribe “minimal time periods” to gauge their conduct. *Second Report*, *supra* n. 18 at 155-156.

<sup>33</sup> Remote broadcasting refers to those situations where programming originates from a place other than the licensee’s studio in the licensee’s community—*e.g.*, live broadcasts from nightclubs, theatres and athletic stadiums. The Commission determined that on-the-air promotion of the broadcasting event, if “reasonably related” to the production of the program, would not constitute consideration.

ments opposing the petitions generally supported the *Second Report* on both procedural and substantive grounds. The parties, mostly public broadcasters or those associated with the public broadcasting media, perceive the Commission's liberalized policies as providing opportunities to enable them to survive the imminent Federal funding reductions. They do not anticipate abusive practices or a trend toward the commercialization of the media, given the fact that public broadcasting licensees (comprised of governmental, educational and community bodies) are committed to serving the public interest and will face audience resistance if that commitment falters.

23. The *Second Report* undeniably marked a departure from the Commission's prior regulatory posture concerning public broadcasting in general and its fundraising activities in particular. The fact that the *Second Report* altered established regulatory policy or that the rules adopted differed from those proposed, does not mean that the promulgation of the new rules was arbitrary or in violation of the notice requirements of 5 U.S.C. § 553(b). Our *Second Report*, which was premised upon our current understanding of the nature of public broadcasting, established a minimum regulatory framework within which public broadcasters were accorded wider discretion and greater flexibility in their programming determinations, and in their ability to plan for and develop increased non-Federal financial support. The *Second Report* eliminated prior restrictions and an array of highly proscriptive rules that were deemed unnecessary to preserve an essentially noncommercial service and that were constitutionally suspect (*see* para. 2 *supra*). We should point out that Congress not only ratified our action, but further relaxed our policies<sup>34</sup> by: (1) permitting the use of visual as well as aural logograms; and (2) limiting the prohibition against sponsored announcements promoting goods or services to those paid for by profit entities. (*See*, paras. 7 and 10, *supra*.) Moreover, in compliance with the Administrative Procedure Act, the public was afforded sufficient notice and opportunity to comment. The *Second Report* terminated a two year proceeding in which we published a *Notice of Inquiry*<sup>35</sup> and a *First Report and Notice of Proposed Rule Making*.<sup>36</sup> In our *Notices* we proposed specific rules, apprised the public of the areas under consideration, and solicited comments. The comments received were made public and generally alluded to in the *First Report, surpa*. The inherent nature and purpose of a rule making proceeding is open-ended, to allow the agency to analyze and assess the viability and the impact of the proposed rules. We carefully assessed the rules, as

<sup>34</sup> But for the restriction upon the scheduling of donor acknowledgements, Sections 399A and 399B are more liberal than the *Second Report*.

<sup>35</sup> *Notice of Inquiry*, FCC 77-162 (March 15, 1977), 42 Fed. Reg. 15927 (March 24, 1977).

<sup>36</sup> 69 F.C.C. 2d 200 (1978).