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March 18, 2013

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Attention: The Commission

Re: Request for Experimental Authority to Relax Standards for Public Radio Underwriter Announcements

Dear Ms. Dortch:

This application is made by the *Maricopa County Community College District* ("Maricopa") of Arizona. Maricopa is the noncommercial FM educational licensee ("NCE") of **KJZZ** (an NPR affiliate) and is jointly licensed with Arizona State University to operate **KBAQ** (one of the few remaining classical music format stations in the nation). Both stations operate in the Phoenix metropolitan area. Pursuant to Commission Rule 73.1510,[1] Maricopa submits this request for a grant of temporary Experimental Authority to conduct a limited and controlled demonstration project to test a modified loosening of the Commission's enhanced underwriting policies.[2]

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[1] 47 C.F.R. § 73.1510 (2009).

[2] *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting,* Second Report and Order, FCC 81-204, 86 F.C.C.2d 141 (1981) ("*Second Report & Order*"); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting,* Memorandum Opinion and Order, FCC 82-327, 90 F.C.C.2d 895 (1982) ("*1982 Memo Opinion & Order*"); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting,* Memorandum Opinion and Order, FCC 84-105, 97 F.C.C.2d 255.

Specifically, Maricopa requests that these policies be relaxed, on a three-year temporary and experimental basis, so that KJZZ and KBAQ would be permitted to conduct a demonstration project that permitted these stations to further enhance their underwriting announcements in the following manner:

1. Factually accurate information concerning interest rates available at underwriter banks, credit unions, automobile dealerships, and other local businesses;

2. Notification that an underwriter is having a sale or other special event, such as a special discount or promotion; and

3. Qualitative adjectives, particularly where the adjectives have a logogram quality that is factually-based, such as "certified," "accredited," "award-winning," "experienced," or "long-established." This would include publicly-determined rankings, such as those determined by U.S News & World Report for universities, or by the American Nurses Association for hospitals.

The purpose of this experimental demonstration project is to test the effects, if any, on listener satisfaction, program quality, and station revenue which might result from such a limited relaxation of the enhanced underwriting policies, and from a greater degree of Commission staff deference to the judgment of NCE broadcast stations regarding the content of underwriting announcements. Maricopa is aware that the Commission has recently revised Rule 73.1510 and other Emergency Radio Service rules in a manner that focuses entirely on technical or technological experimentation,[3] and is also aware that its own request for waiver relates to

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(1984) ("*1984 Memo Opinion & Order*"); and *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting,* Public Notice, FCC 86-161, 7 F.C.C. Rcd. 827 (1986) ("*1986 Public Notice*").

[3]*See Promoting Expanded Opportunities for Radio Experimentation and Market Trials Under Part 5 of the Commission's Rules and Streamining Other Related Rules*, ET Docket No. 10-236; *2006 Biennial Review of Telecommunications Regulations – Part 2, Administered by the Office of Engineering and Technology (OET)*, ET Docket No. 06-155; *Report and Order*, FCC 13-15, ____ FCC Rcd ________(January 31, 2013).

program content rather than technical issues. In connection with this request for Experimental Authority, therefore, Maricopa also requests a waiver of those portions of Commission Rule 73.1510 that, if not waived, might otherwise limit requests for waivers solely to technological issues. Such a waiver was granted by the Commission with respect to a waiver request it approved in the *International Expo Information Broadcast* matter.[4]

Alternatively, Maricopa requests a limited waiver of Commission Rules 73.503 and 73.621,[5] and of the Commission's enhanced underwriting policies for noncommercial stations,[6] including, to the extent necessary, a temporary suspension of strict enforcement of § 399b of the Public Broadcasting Act for the duration of the demonstration project as described above.[7]

I. **Reasons Why This New Demonstration Project Is Needed.**

Funding for public broadcasting has undergone profound change in the forty-five years since the Public Broadcasting Act[8] was adopted – both in terms of the "mix" of financial support relied upon by public broadcasters, and in terms of the Congressional attitudes toward such funding. As federal support has declined (and may ultimately be eliminated), it has become necessary to consider how NCE stations should be permitted to compensate for the loss of

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[4] *See, e.g., Intl. Expo Info. Broadcasters,* 89 F.C.C.2d 1374, 1378-79 (Fed. Commun. Commn. 1982).

[5] 47 C.F.R. §§ 73.503 & 73.621 (2009).

[6] *See Second Report & Order, 1982 Memo Opinion & Order, 1984 Memo Opinion & Order,* and *1986 Public Notice*, as cited *supra* in footnote 1.

[7] Maricopa recognizes that the Commission lacks authority to waive § 399b of the Public Broadcasting Act of 1967, 47 U.S.C. § 399b (1981). Maricopa's request for waiver, however, does not seek or require waiver of the statute. Rather, Maricopa simply proposes a temporary suspension of strict staff enforcement of the statute against its NCE stations, KJZZ and KBAQ, during the term of the demonstration project proposed in this Request.

[8] Public Broadcasting Act of 1967, 47 U.S.C. §§ 396 *et seq.*

federal support; yet, without some indication of how repeal or modification of § 399 of the Public Broadcasting Act might affect the nature of public broadcasting, or how listeners and private foundations might react to such changes, Congress and the Commission will lack an empirical basis for making judgments about potential effects.

In June 2012, in response to a Congressional directive, the Corporation for Public Broadcasting ("CPB") submitted a report, entitled *Alternative Sources of Funding Public Broadcast Stations ("Alternative Funding")*.[9] This *Alternative Funding* report is based almost entirely upon assumptions, polls, or focus groups, and lacks any type of empirical market testing of those assumptions. The report basically speculates on the effect of public radio or public TV advertising on audiences and on traditional sources of public broadcast funding, such as foundations, underwriters, membership, and fundraising drives. As might be expected under the circumstances of threatened loss of federal funding, the report predicts that these sources would dry up, resulting in a net loss, or only a slight incremental improvement, over the revenue that public stations had previously realized from these traditional funding sources.

Not only is the CPB Report based almost entirely on assumption, but it also looks at these funding sources as all-or-nothing extreme opposites. The alternatives presented are either all-out advertising, with little distinction from the presentation of advertisements on commercial radio, or else the present level of conservative underwriting announcements that adhere to current FCC guidelines, augmented by an annual or semi-annual fund drive. But suppose there

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[9] CPB, *Alternative Sources of Funding Public Broadcast Stations* (June 20, 2012). This report was provided by CPB in response to the Conference Report accompanying the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2012 (H.R. 2055) (*"Alternative Funding").*

were a middle path, and suppose it might be demonstrated that this middle path would not offend or drive away audiences, foundations, or membership renewals? Could public radio stations remain financially viable, even with diminished federal funding, if the guidelines were simply relaxed or – expressed another way – enhanced somewhat more than previous levels? And – suppose this option could be tested empirically?

Given the vagaries of the federal budget process, one cannot assume that federal de-funding is entirely off the table or that opponents of federal funding for public broadcasting have been dissuaded by the new CPB report. Before public radio stations potentially find themselves compelled to operate without federal support, it would be extremely useful for the Commission to learn whether some greater leeway in underwriting announcements, without complete surrender to advertising in the same style of commercial radio, might perhaps make up for the lost federal funding, without undermining programming quality, listener satisfaction, or continued foundation and donor support. Empirical data is needed so that policy-makers can take action on firmer ground than theoretical assumptions and focus groups.

Thus, whether Congress should ultimately decide to cease funding for public radio or not, the Commission, Congress and NCE broadcast stations will all benefit from the empirical data that could be generated by this demonstration project. Such data can provide the basis for future evidence-based rulemaking and policy development by the Commission and Congress, and could also help NCE broadcasters better understand the impact of increased dependence on private sector funding upon stations, content and listeners. The proposed demonstration waiver project would provide a means for gathering the needed data – in the representative, real-world setting of the greater Phoenix market – without a major disruption of public radio nationally. This proposed experiment focuses on two long-established and highly respected stations whose respective formats are representative of public radio stations generally, in that KBAQ has a classical music format while KJZZ offers a mix of news, public affairs, and jazz. If, during the course of the experiment, program quality declines, listeners become annoyed, or the support of foundations or donors decreases, similar impacts might reasonably be predicted throughout public radio. If, on the other hand, programs remain as high in quality as ever, if listeners accept a "more-enhanced" level of underwriting acknowledgments, and if foundation and donor support remains constant or increases, then the Commission, Congress, and the public would know whether public radio could withstand a loss of federal support if permitted some greater freedom in underwriting content, even if that leeway was still much less "commercial" than commercial radio advertising.

II. The Problem of Federal Funding.

Thirty years after the close of an inconclusive Congressional initiative that permitted public television stations more latitude in the content of underwriting announcements,[10] the fundamental policies upon which the funding of public radio and television has been grounded[11] are, once again, front and center before Congress.

In a discussion of public radio finances on its website, National Public Radio indicates the typical station funding mix and explains:

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[10] Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications to the Congress of the United States (October 1983) (—TCAF Final Report).

[11] Although the Congressional directive called for both public television and radio to participate in the experiment, ultimately, only a limited number of NCE TV stations did so.

> Federal funding is **essential** to public radio's service to the American public. Its continuation is critical for both stations and program producers, including NPR.
>
> Public radio stations receive annual grants directly from the Corporation for Public Broadcasting (CPB) that make up an important part of a diverse revenue mix that includes listener support, corporate sponsorship and grants. Stations in turn draw on this mix of public and privately sourced revenue to pay NPR and other public radio producers for programming.[12]

Although public radio stations have seen a steady erosion in levels of federal funding, recent events have come closer than ever before to de-funding the Corporation for Public Broadcasting, National Public Radio, and its member stations. In Congress, public broadcasting – particularly public radio – potentially faces a loss of federal support in the form of Community Service Grants, having already lost Department of Commerce PTFP grants for development of new and expanded public radio service.[13] The previous Congress saw several such attempts. In May 2012, Sen. Jim DeMint (R., S.C.) and Rep. Doug Lamson (R., CO) urged the heads of the respective Senate and House appropriations committees to defund CPB. Lamborn previously sought to defund NPR with a bill that passed 228-192 in the House in March 2011[14]

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[12] *See* National Public Radio, *Public Radio Finances*, http://www.npr.org/about/aboutnpr/publicradiofinances.html#member (January 8, 2013).

[13] *See, e.g.,* http://cnsnews.com/news/article/demint-and-lamborn-defund-npr-and-pbs *see also*, Public Law 112-10, *the Department of Defense and Full-Year Continuing Appropriations Act*, signed by Pres. Obama on April 15, 2011, which ended funding for the PTFP program. 112th Cong. (2011-12)

[14] *See* (http://cnsnews.com/news/article/house-votes-defund-national-public-radio). That same month, DeMint, with Sen. Tom Coburn (R-Okla.) introduced a bill to defund CPB, *see also*, Public Law 112-10, *the Department of Defense and Full-Year Continuing Appropriations Act*, signed by Pres. Obama on April 15, 2011, which ended funding for the PTFP program. 112th Cong. (2011-12).

III. <u>Exacerbation of Public Radio's Financial Strain by the Current Economic Recession.</u>

Public radio stations like KBAQ and KJZZ have been challenged by decreased federal support over the years, and now, as a result of the prolonged economic downturn, are also confronted with reduced funding from other sources. Many state legislatures have drastically cut back on funding for public radio, including for NCE stations licensed to state universities, colleges and school systems. In some states, the legislative cutbacks have reached 100%.[15] State university and school board licensees (many of them early pioneers in educational broadcasting and FM service) are also slashing broadcasting budgets or divesting themselves of NCE stations. Additionally, private sources of support, including underwriters themselves, have severely cut back as a result of the recession.

As these traditional revenue streams – federal, state, foundation, and listener – diminish, public radio stations have steadily grown more dependent on private underwriting announcements for financial support. Unfortunately, underwriters view commercial radio stations, with their more liberal advertising rules, to be a more effective option for their corporate and business goals than supporting public radio.

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[15] *See* Josh Stearns & Mike Soha, *On the Chopping Block: State Budget Battles and the Future of Public Media*, http://www.freepress.net/sites/default/files/fp-legacy/statefunding_final_2.pdf (Nov. 2011); *see also*, Dru Sefton, *Pubcasters keep funds in some state budgets*, http://www.current.org/wp-content/themes/current/archive-site/funding/funding1011state.shtml (June 21, 2010); Karen Everhart, *State aid down $85 million in four years*, http://www.current.org/wp-content/themes/current/archive-site/funding/funding1122state.html (Nov. 21, 2011); and Karen Everhart, *State after state decides how much to cut system aid*, http://www.current.org/wp-content/themes/current/archive-site/funding/funding1108states.html (Apr. 18, 2011).

IV. The Evolution of the Underwriting Rules under Section 399b of the Public Broadcasting Act.

The historical theme of the evolution of the underwriting rules has been one of continued liberalization as a necessary means to increase private financial support for public radio as federal financial support therefor has steadily eroded. The Section 399b restriction on advertising adopted in 1981 should not be considered in isolation but, rather, interpreted within the context of the original Public Broadcasting Act.[16]

In 1967, during the roll-out of President Johnson's Great Society, and following on the heels of the Carnegie Commission study, a publicly-funded, educational public broadcasting service was viewed as a significant public asset and worthy of the expenditure of public monies. The goals – to bring lifelong education into the home, to increase access to high quality cultural and public affairs programming, and to improve public discourse – were embraced by many Republicans as well as Democrats. National Public Radio was founded in 1970 while President Nixon was in office. The public broadcasting concept, as the legislative history shows, was that public stations should be protected from the presumed evils of commercialization through significant infusions of public funds.

In 1981, the Commission issued the *Second Report & Order* in Docket No. 21136, in which it "evaluated the financial needs of public broadcasters as well as their obligation to provide a noncommercial service."[17] The *Second Report* "liberalized prior restrictions on

[16] Public Broadcasting Act of 1967, 47 U.S.C. §§ 396 *et seq.*

[17] *Commission Policy Regarding the Noncommercial Nature of Educational Broadcast Stations,* 90 F.C.C.2d 895 (1982) (*"1982 Declaratory Ruling"*). This Memorandum and Order responded to a petition for declaratory ruling and for clarification filed by a number of public broadcasting and other entities, seeking clarification and reconciliation of the proscriptions and

noncommercial broadcasters by amending 47 CF.R. § 73.503 and 47 C.F.R. § 73.621[.]"[18] The amendments sought to preserve "the essentially noncommercial nature of public broadcasting *within a minimal regulatory framework*... [while] it was hoped that [these] Sections..., as amended, would enable noncommercial broadcasters *to attract additional revenue and broaden their economic base. Stated another way, it was our hope that the liberalization on restrictions of donor acknowledgments would encourage more contributions*."[19]

Later in 1981, following the conclusion of the Advertising Demonstration Program conducted by TCAF, Congress amended the Public Broadcasting Act, adding new Sections 399a and 399b, which deal with essentially the same issues as the *Second Report*. The Commission pointed this out in the *1982 Declaratory Ruling*:

> The recent amendments to the Communications Act relating to public broadcasting reflect Congress' desire to ensure that the public telecommunications media remain 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.*[20]

At the same time, and for the same purpose of maintaining financial viability, the Public Broadcasting Amendment Act of 1981 also created the previously-mentioned Temporary Commission on Alternative Financing of Public Telecommunications "to undertake a study and aggressively explore alternative sources of funding[.]"[21] The so-called "Temporary Commission" or "TCAF" (chaired by then-Commission Chairman James Quello) conducted an

liberalizations of the *Second Report* with the terms of the amendments to the Public Broadcasting Act, sections 399a and 399b, passed by Congress later that year.

[18] *Id.* at 896.

[19] *Id. at 896-97.* (emphasis added).

[20] *Id.* at 897 (emphasis added).

[21] *Id.*

experimental project, the Advertising Demonstration Program, in which selected public television stations were permitted to carry limited advertising while a continuing evaluation was conducted by TCAF to determine the experimental project's impact, if any, on program quality, viewers and donor reaction, and revenues.[22] On October 1, 1983, TCAF delivered to Congress its Report (the "*TCAF Final Report*"), which concluded that:

> The Advertising Demonstration Program showed that limited advertising *added significant net revenues to participating television stations' budgets* under conditions where unions and copyright holders waived the right to renegotiate existing agreements. The demonstration program also discovered *no negative impact on viewing patterns, numbers of subscribers, or contributions* except that the data did raise a question concerning a possible adverse impact on the average contribution per subscriber. Also, under the conditions of the experiment, the [Temporary] Commission found *no advertising-related effects on programming.*[23]

Despite these positive results, various other considerations, including the possible risk of long-term negative impact on viewer support, ultimately caused the *TCAF Final Report* to recommend that the project should not be continued.

The *TCAF Final Report* also concluded that "[b]roadened guidelines for on-air credits for program underwriting (or general support grants) would provide additional revenue for public broadcasting" and explained that "the demonstration program showed that expanded underwriting credits generated additional revenues for participating stations."[24] Although gross revenues would not be as high for individual stations as they would be with even "limited

[22] No public radio stations participated in the project.

[23] This excerpt is quoted from the 1983 Executive Summary of the TCAF Report, which is published on the website of the *Current* Publishing Company (scanned from a document in the archives of America's Public Television Stations), as part of its Public Broadcasting Policy Base, at http://www.current.org/wp-content/themes/current/archive-site/pbpb/fcc/TCAFsumm83.html ("*TCAF Report*") (emphasis added).

[24] *TCAF Final Report, Exec. Summary.*

advertising," the *TCAF Report* further noted that "expanded underwriting credits" would result in more benefits than harms.[25] The *TCAF Report* stressed the essential need for "balance and diversity in funding sources...," pointing out the absolute need for continued federal funding at sustainable levels.[26] It states:

> Federal support stimulates other sources of revenue and is an *indispensable part of public broadcasting's financial base...* Federal support helps maintain the *crucial balance* in funding sources which is *essential to maintaining the unique character of public broadcasting.* Federal support, through matching incentives, stimulates other sources of revenue. Also, when it provides stable funding, federal support permits the long-term investment necessary for production of quality programs. While public broadcasting has become increasingly self-sufficient and should continue actively to pursue such a course, there is *no substitute for continued federal support.*[27]

The *TCAF Report*'s Recommendations to Congress stressed the need for continued federal funding. Three of the five recommendations involved federal funding, including setting "a target level of federal funding that provides a strong base that allows public broadcasting to maintain, expand and enhance the reach of its services," and "structuring federal funding so as to provide the optimum incentive for local stations to generate non-federal funds."[28] The *TCAF Report* also recommended Congress "continue the existing prohibition on advertising" while, at the same time, "further stimulate non-federal revenue sources" by:

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[25] *Id.*

[26] *Id.*

[27] *TCAF Report*, Executive Summary, Conclusions (emphasis added). The increasingly-possible loss of federal support necessarily forces us to deal with issues the *TCAF Report* considered unthinkable.

[28] *TCAF Final Report,* Executive Summary, Recommendations.

> directing the Federal Communications Commission to modify its policies concerning underwriting acknowledgments to permit public broadcasters to identify supporters by using brand names, trade names, slogans, brief institutional-type messages, and public service announcements.[29]

The balance to be struck, according to the *Temporary Commission* members, was essentially the same as that reached by the Commission in the *Second Report* and that was elucidated by Congress in the legislative history accompanying the 1981 amendments to the Public Broadcasting Act – federal funding would provide one side of that balance while, on the other side of the fulcrum, liberalized underwriting acknowledgments should be permitted to permit NCE stations to generate non-federal revenue sources.

In 1984, the Commission issued its *Third Report*, in which it again noted that Congress had enacted the 1981 amendments "to ensure that the public telecommunications media remained financially viable in the wake of substantial reductions in federal funding by expanding public broadcasters' ability to generate increased private financial support."[30] This *Third Report* resulted in the Commission granting permission for the so-called "enhanced" underwriting announcements which permitted inclusion of: "(1) a logogram or slogan that identifies but does not promote; (2) location; (3) value-neutral descriptions of a product line or service; (4) trade names, product or service listings that aid in identifying the donor."[31] A *Fourth Report*, issued by the Commission in 1986, added a further gloss on the enhanced underwriting policies and permitted telephone numbers to be broadcast.[32]

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[29] *Id.*

[30] *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 97 F.C.C.2d 255, 263 (1984) ("*Third Report*").

[31] *Id.* at 265.

[32] *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 7 F.C.C. Rec. 827, 827-28, 1992 WL 695229 (1992) ("*Fourth Report*").

Today, nearly thirty years after the *TCAF Report*, it has become far less likely that the present-day Congress, or a future assembly, would approve a report containing similar recommendations to continue federal funding. Each year, as the process of setting the budget for public broadcasting becomes more adversarial and continued federal funding seems more precarious, the concept of a complete phase-out of federal funding in the not-too-distant future has become increasingly possible.

If Congress were to eliminate funding for public broadcasting – or just public radio – what alternative financial options will be provided? Presumably, the standard concept of balance between federal and private funding, including underwriting, will come into play – as federal funding is decreased, greater latitude in underwriting announcements should be permitted. Whether § 399b of the Public Broadcasting Act would be repealed, or simply modified, is an open question.

V. **Maricopa's Proposed Experimental Waiver Project.**

As the Commission noted in the *Third Report*, public radio stations "reported a dramatic increase in donations and underwriting" after the rule changes of 1981 and 1982.[33] It is no surprise that corporate and business underwriters respond positively to liberalization of underwriting restrictions; thus, business community underwriting is the primary source within public radio's funding mix where an increase might be achieved to help offset diminished federal funding.

[33] *Third Report* at 257-58, and footnote 10 (NPR reported that "total revenues for NPR member stations from program underwriting grants... increased dramatically" from $4.2 million to $7 million in a single year "due to more relaxed policies concerning acknowledgments").

To test this theory in a radio context (since the TCAF project involved only public TV stations), Maricopa proposes conducting a limited-term experiment, lasting no more than three years, during which it would test a set of "more enhanced" underwriting acknowledgments. The experiment would test whether these relaxed policies increase station underwriting revenue and whether other funding sources react negatively, while providing the Commission, the public broadcasting community and, ultimately, Congress with empirical data regarding the probable effects of repeal or modification of Section 399b in connection with federal de-funding.

Maricopa assures the Commission that it is not proposing a total relaxation of current standards, but merely a controlled and limited experiment in relaxation of the present policies. This demonstration project would permit the KJZZ and KBAQ stations to experiment with the following three further enhancements of underwriting announcements:

1. Underwriting announcements would be permitted to include factually-accurate information concerning interest rates available at underwriter banks, credit unions, automobile dealerships, and other local businesses;

2. Underwriting announcements would be permitted to include notification that an underwriter was having a sale or other special event, such as a special discount or promotion; and

3. Qualitative adjectives could be used, particularly where the adjectives have a logogram quality that is factually-based such as "certified," "accredited," "award-winning," "experienced," or "long-established." This would include publicly-determined rankings, such as those determined by U.S News & World Report for universities, or by the American Nurses Association for hospitals.

These parameters are consistent with – and a logical extension of – underwriting content that was permitted in the *Xavier University* decision,[34] and also in the more recent Enforcement

[34] *Memorandum Opinion & Order*, F.C.C. 90-111, 5 F.C.C. Rec. 4920 (1990).

Bureau ruling in *Letter to University of Washington Board of Regents ("UWBR")*,[35] which recognized the significance of including factually-accurate information concerning state-licensed and certified services in underwriting announcements. In *UWBR*, the Enforcement Bureau found phrases such as "unique eyewear for every face" and "a skilled staff dedicated to helping people find frames and lenses to suit individual needs," in the context of an announcement regarding optometrist and optician services, to be "within the bounds of what is allowed under *Xavier* and other pertinent Commission precedent."[36]

Maricopa proposes the following additional parameters and conditions for this limited experiment:

(a) The "additionally-enhanced" acknowledgments will not interrupt programming, but will continue to air at the beginning or end of programs, or at natural breaks such as intermissions;

(b) Maricopa will collect and retain in its public files copies of all letters and emails from listeners and other members of the public commenting on underwriting announcements and other members;

(c) Maricopa will collect and retain other data to show community reaction; and

(d) Maricopa will appoint a panel of experts to monitor and report to the station management on the continued quality of its programming, both for the classical music format of KBAQ and the news, public affairs, and jazz music format of KJZZ.

Maricopa proposes that it would conduct periodic evaluations to compare parameters such as (1) revenue enhancement; (2) potential revenue offsets due to possible listener backlash; (3) audience feedback and satisfaction; (4) programming metrics, including continued quality

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[35] Letter from William H. Davenport, Chief, Investigation and Hearings Division, Enforcement Bureau, to University of Washington Board of Regents, (EB-05-IH-0613) (July 25, 2006) ("*UWBR*") (copy attached).

[36] *UWBR* Letter Decision at 3

and licensee ability to fund more locally-produced programming; (5) public criticism and editorial reactions; and (5) feedback from foundations and other non-profit grant-making bodies. Such data collection, evaluations, and reports will, of course, be made available to Enforcement Bureau/Media Bureau staff. A sample of the "more-enhanced" underwriting announcements that Maricopa proposes is attached to this Request as Exhibit 1.

VI. Legal Standards for Granting a Waiver.

As the U.S. Court of Appeals for the District of Columbia Circuit explained in *WAIT Radio v. FCC*:

> an application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.[37]

In *WAIT Radio*, the D.C. Circuit recognized the "need for serious consideration of meritorious applications for waiver."[38] According to the Court, a waiver application is meritorious when the applicant provides reasons justifying the waiver and the waiver will not result in a disservice to the public interest. When such reasons are "stated with clarity and accompanied by supporting data," the waiver request is "not subject to perfunctory treatment, but must be given a 'hard look.'"[39] The Commission pointed out in *International Expo Information Broadcasters*, that "[t]he threshold question that arises with any waiver request is not whether the applicant violates a particular rule but rather whether the policy underlying the

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[37] *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (1969).
[38] *Wait Radio v. FCC*, 418 F.2d at1157.
[39] . *Id.*

rule would be circumvented by the waiver, and whether the public would benefit by the waiver."[43]

Maricopa's request for waiver does not undermine the public interest served by Commission Rules 73.503 and 73.610. First, Maricopa seeks a only a limited waiver for a relatively short time period in an experiment which will generate data that will be relevant to inform future Congressional and Commission policy choices. And, second, Maricopa has committed itself to providing the Commission with a level of access to the generated data as the Commission may require. Maricopa does not propose this waiver simply to secure greater income from its underwriting program; rather, Maricopa wishes to determine whether relatively minor "tweaks" to the existing standards might help it and other NCE radio stations survive the possible reduction or end of federal funding.

Furthermore, the two Maricopa operated stations – KJZZ and KBAQ – are both highly respected public radio stations that broadcast programming of the highest quality (much of which is locally self-produced) and have long records of high-quality public service. Maricopa is an important educational institution – the largest community college in the United States – that is unwilling to shock or offend its devoted members and audience or to sully its own reputation. It is actually very appropriate that this licensee would step forward with an offer to test whether public radio formats like classical music (KBAQ) or news, public affairs, and jazz music (KJZZ) can protect their unique sound while expanding the scope of what may be aired about its underwriters.

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[43] *Intl. Expo Info. Broadcasters, Inc.*, 89 F.C.C.2d at 1379.

This requires a delicate balance but, if public radio is to survive potential impending federal funding cuts, then Congress, the Commission, the public broadcasting community, and the American public will all need accurate, current information regarding such issues as whether public radio formats can be preserved and whether loyal members and listeners will be offended. The waiver proposed in this Request will help every party involved in this decision process – Maricopa, NPR, the Commission, Congress, and the Executive branch – by providing relevant data upon which to make that decision. Any skepticism the Commission might have regarding Maricopa's proposal can be easily dispelled by monitoring and sampling of the programming, coupled with surveys and focus group exercises that Maricopa intends to conduct on a regular basis.

For these reasons, it is appropriate for the Commission to give this waiver request a hard look, rather than reject it out-of-hand like the *Network of Glory* proposal.[42] The Commission should look beyond its existing rules and guidelines for enforcement of § 399b and toward the very real possibility that this and other sections of the Public Broadcasting Act, might someday be repealed. Maricopa has demonstrated a meritorious application for this waiver, which will serve the underlying public interest in preserving public broadcasting while doing so at less cost to the federal government.

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[42] Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Lola Stradford Richie, Network of Glory, (EB-05-IH-0613) (July 25, 2006) ("*UWBR*") ("Network of Glory ")

VII. <u>This Request for Waiver is Distinguishable from the Request of *Network of Glory*.</u>

Maricopa does not, as *Network of Glory* did, seek a waiver of § 399b of the Public Broadcasting Act. Obviously, the Commission cannot grant a waiver of a statute. Rather, this limited request for waiver asks the Commission to permit enhancements that are somewhat broader but, nevertheless, of the same nature as those it already permits in the enhanced underwriting guidelines. The *Network of Glory* request was not well-conceived; it lacked specific limitations and guidelines, and was basically little more than a request to permit the station to broadcast advertisements.

While the Commission cannot waive the statute, it can and does waive its own rules for good cause, and can also suspend enforcement of its rules or of statutory requirements in order to permit evaluation of an appropriate and worthwhile experimental project. The waiver proposed herein by Maricopa does not propose advertisements, is limited in scope and duration, and will generate data that may be useful to the Commission, other public broadcasters and, ultimately, Congress and the White House. Approval of such a project will serve the public interest and will assist the Commission in its development of appropriate future policy regarding the potential de-funding that looms over NCE stations.

VIII. Maricopa's Requests for Experimental Authority and for Waiver Should Be Granted.

Maricopa has provided sufficient clarity and supporting data to meet the standards set forth in the *WAIT Radio* decision and in *International Expo*. Maricopa is not seeking permission to advertise; rather, it seeks only to experiment with a "more-enhanced" set of parameters for underwriting announcements, for a limited period of time, but long enough that valuable data can be developed and shared with the Commission and Congress. Given the existing circumstances of economic difficulties and of the serious risk of public stations losing government funding, this proposal warrants a hard look. The public interest will not suffer but, rather, will be served if the waivers sought in this proposal are granted; it will be served because the purpose of the proposed demonstration is to find a way, with minimal disruption, to ensure the continuation of NCE service to benefit the public interest, as Congress strongly affirmed in passing the original Public Broadcasting Act and the 1981 amendments.

Maricopa's request for experimental authority (and for waivers as necessary to meet the standards for granting experimental radio authority in a non-technological situation) is, likewise, worthy of serious and creative consideration. The Commission's ruling in *International Expo* demonstrated its willingness to allow a station to "push the envelope" somewhat in pursuit of a demonstration project that would ultimately serve the public interest.

Legislative action to cut federal funding from public radio will cause disruption and major changes in this service whether or not Congress also repeals or modifies Section 399b. Complete repeal would plunge public radio into the advertising market – much to the dismay of most NCE stations and their listeners, and the consternation of many commercial stations facing new competitors for advertising revenue. On the other hand, a complete cut-off or severe reduction of federal funding, without modification of either Section 399b or the Commission's underwriting rules and policies, is likely to result in financial disaster at many public radio stations.

Maricopa's request presents an appropriate opportunity for the Commission to determine where the middle path might lie. How much leeway should the Commission give public radio stations to compensate for the loss of federal funding, while still protecting the unique aspects of public broadcasting deemed in the public interest by Congress? Which additional "enhancements" would be sufficient, but not go too far? This proposal for an experimental demonstration project, with suitable waivers as needed, is intended to provide evidence-based answers to these puzzling policy questions so that the Commission and the industry will have an adequate frame of reference for future statutory or regulatory changes. The "more-enhanced" guidelines proposed for this project are not overly commercialized, and are unlikely to lead to member backlash.

At the time of the 1981 public television experiment, a major concern was that public television viewers and foundation donors would be so repelled by advertising on those public television stations that they would cut back on donations and that membership levels would fall. Even though the 1981 experiment produced no evidence of viewer backlash and no reduction in program quality, these concerns nevertheless persist. Furthermore, the 1981 experiment ultimately involved only public television since no public radio stations chose to participate. While it is highly unlikely that the relatively minor further enhancements sought by Maricopa will offend its listening audience, Maricopa believes that it is important to determine whether public radio today, like public TV in 1981, be spared any negative effects. To this end, Maricopa intends to closely monitor listener and member reaction to its broadcast of "more-enhanced" announcements such as those proposed in this Request, and to share that data with the

Commission and Congress. As the Commission might well imagine, public radio listeners in Phoenix and elsewhere are well aware that federal and state funding for public broadcasting is in peril. It will be interesting to learn whether the average listener prefers slightly-enhanced underwriting announcements at the end of programs over longer and more sustained fund-raising drives.

Additionally, the information that Maricopa proposes to add to its underwriting copy is not inherently commercialized in itself; rather, the enhancements proposed will result in more information being provided to listeners, which will ultimately benefit those listeners. It is a black-letter principle of economics that markets function better when consumers and other participants have more information. The three added enhancements proposed by Maricopa will each, in its own way, serve to provide more information to members of its audience. For example, consumers deserve to know what interest rates financial institutions are offering before traveling to that institution and, potentially, settling for a lower-than-preferred rate once they get there. For these reasons, concern about consumer protection risks or the tone of announcements is misplaced.

Public radio underwriters know that an announcement whose tone sounds or looks too "commercial" – or any other crass advertising practices tolerated by some commercial stations – will be off-putting to the public radio audience. The limited enhancements proposed by Maricopa may result in more information being conveyed, but the actual announcements will remain as low-key and unobtrusive as they are now. Another factor not yet tested in changes in audience tolerance levels. Public radio listeners today, like everyone else, are so bombarded by advertisements – from websites, print pages, painted-over city bus windows, re-named sports stadiums and public buildings – that they are unlikely to find the limited further enhancements sought by this waiver offensive. In fact, they are likely to prefer listening to further-enhanced underwriting announcements than putting up with several extra weeks of an on-air fundraising drive.

Finally, this waiver should be granted because the rationale that was specifically put forward to justify the original enhancements in the early 1980s is still valid. Maricopa proposes to serve as a pilot program to help ascertain whether these additional enhancements will result in higher levels of underwriter support, thus compensating for reduced levels of federal (and state) support, without leading to excessive commercialization of public radio or offending listeners and donors. These were the main issues at the time of the last "enhancement" of the underwriting rules and remain so today.

IX. **Conclusion.**

For the above reasons, Maricopa respectfully requests that the Commission take a hard look at the unique facts of its proposal and grant this limited waiver of Commission Rules 73.503 and 73.621. In the alternative, Maricopa respectfully requests the Commission grant Maricopa permission to conduct an experimental demonstration project on a time-limited and parameter-limited basis, reporting back to Commission staff specific data generated by the project on a periodic basis. Granting this waiver would be both equitable and appropriate under these specific circumstances, and would advance the public interest by helping to determine how best to fund public broadcasting at the present time and in the future. Finally, the specific parameters of this proposal are admittedly experimental and limited to these two stations in one market, and therefore, would not create a general precedent.

Respectfully submitted,

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Susan M. Jenkins
Counsel for Maricopa County Community College District

EXHIBIT 1

(Sample copy for "more-enhanced" underwiting announcements)

<u>Underwriting announcements would be permitted to include factually-accurate information concerning interest rates available at underwriter banks, credit unions, automobile dealerships, and other local businesses</u>;

KBAQ /KJZZ is supported by… BMW North Scottsdale, featuring the 2013 135 I-S convertible for **3.19 percent A P R**. Now available at the Scottsdale 101 Auto Collection or B M W North Scottsdale dot com.

KBAQ/KJZZ is supported by…Wells Fargo. Now offering Certificates of Deposit **with rates up to two point five annual percentage yield**. More at Wells Fargo dot com

<u>Underwriting announcements would be permitted to include notification that an underwriter was having a sale or other special event, such as a special discount or promotion;</u>

KBAQ/KJZZ is supported by… The Scottsdale 101 Auto Collection, hosting its **annual Garage Sale on Memorial Day Weekend** – with more than 400 new and used vehicles on display at Scottsdale Road and the Loop 101 or online at Penske Auto Mall dot com.

<u>Qualitative adjectives could be used, particularly where the adjectives have a logogram quality that is factually-based such as "certified," "accredited," "award-winning," "experienced," or "long-established." This would include publicly-determined rankings, such as those determined by U.S News & World Report for universities, or by the American Nurses Association for hospitals.</u>

KBAQ/KJZZ is supported by… Changing Hands Bookstore, presenting a book-signing by **Nobel Laureate Gabriel Garcia Marquez**, author of Love in the Time of Cholera. Thursday, April 11 at 7 PM. Reservations at Changing Hands dot com.

KBAQ /KJZZ is supported by… Subaru Superstore of Chandler … a local, family owned and operated dealership. Unveiling the new 2013, all-wheel drive Outback, **an Insurance Institute for Highway Safety Top Pick**. Online at Shop Subaru dot com.

KBAQ / JZZ is supported by… The Guerra Plastic Surgery Center… working with patients to bring their aesthetic vision to reality… **board-certified** cosmetic surgeons with 25 years of experience. Information at My Face and Body dot com.

KBAQ/KJZZ is supported by US Airways… (long pause) … **Ranked Number 4 by the US Department of Transportation for on-time performance**. U S Airways dot com.

(For profit university):
KBAQ/KJZZ is supported by the University of Phoenix… offering an **accredited** Masters of Education program for working teachers to advance their careers. Enrollment Open House on Thursday, March 14th. Teachers dot Phoenix dot EDU.