

F.C.C. 73-692

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| <p>In the Matter of AMENDMENT OF SECTION 73.593 OF THE COM- MISSION'S RULES WITH RESPECT TO USES OF FM MULTIPLEX CHANNELS OF NONCOMMERCIAL EDUCATIONAL FM STATIONS INVOLVING A CHARGE TO THE AUDIENCE</p> | | <p>Docket No. 19078 RM-1623</p> |
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REPORT AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. On November 4, 1970, responding to a petition filed by Educating Systems, Inc. (Educating), we issued a Notice of Proposed Rule Making in the above-entitled proceeding, in which we proposed to amend Section 73.593 of our rules to permit a noncommercial educational FM broadcast station, subject to appropriate safeguards, to accept payment of tuition fees for educational courses and other appropriate material broadcast on a multiplex basis pursuant to a Subsidiary Communications Authorization.

2. The petitioner was particularly interested in furthering the use of an instructional system utilizing multiple subcarriers, which it had developed and tested on an experimental basis, in which students with especially equipped receivers might listen to an instructor on one subcarrier and choose answers to questions posed by the instructor by depressing one of several buttons, each of which select other subcarriers carrying material appropriate to the correctness of the chosen answer. However, the proposition presented is of general application—whether a noncommercial educational FM station appropriately may charge “tuition or course fees” in connection with the kind of program material authorized to be broadcast over its subcarrier.

3. The Commission made a tentative finding “that to some degree the type of operation proposed by Educating, or the transmission of instructional types of programs on one or more subcarriers by a noncommercial educational FM station for a fee, could be conducted without undue “commercialization” of the educational FM service, and would be in the public interest; and offered for comment an amendment to Section 73.593 of its rules. The amendment to subparagraph (a) (1) of this Section, with new or modified provisions underlined, is set forth below:

§ 73.593 Subsidiary Communications Authorizations.

(a) * * *

41 F.C.C. 2d

(1) Transmission of programs which are noncommercial and in furtherance of an educational purpose, and which are of a broadcast nature but of interest primarily to limited segments of the station's audience. Illustrative services include: programs for presentation in classrooms; programs designed for special professional groups such as doctors, lawyers and engineers; materials designed for special interest groups, including those of ethnic, safety and technical orientations and the handicapped; and any use which would be permitted for a commercial FM station under § 73.293(a)(1), subject to the prohibitions against commercial operations and limitations as to purpose contained in this section and in § 73.503. *Uses under this subparagraph will not be considered "commercial" if there is charged either a per-course or per-pupil fee, where: (a) the material is presented by or for a bona fide educational institution; or if it is not, the licensee of the noncommercial educational FM station has investigated the material and deems it to be clearly of educational or public service value; (b) the payment is made to the educational institution or the noncommercial educational FM stations; and (c) the payments retained by the station licensee total no more than the approximate cost of conducting the SCA operation (including purchase or lease of equipment, course material, etc.) and general overhead and operational costs incidental to it. Where the material is presented by or for an educational institution, or other entity, the payments made to the station or directly to the institution or entity may also include the usual tuition fees charged for similar material presented otherwise.*

The modifications incorporated in the rule are for the purpose of insuring that the material broadcast for a fee, whether prepared by an educational institution, or not, is of an appropriate nature for educational SCA transmission, that the fee payment is made to the educational institution or other entity or to the station, and that the funds retained by the station licensee will not exceed the actual costs incurred by the station in the presentation of the program material.

4. Comments and reply comments, timely filed within the specified deadlines for those pleadings, of December 16, 1970, and January 6, 1971, respectively, were submitted by the following parties:

Comments

Bay Area Educational Television Association (KQED-FM) Corporation for Public Broadcasting (CPB) West Virginia Educational Broadcasting Authority National Association of Educational Broadcasters (NAEB) Educating Systems, Inc.

Reply Comments

Educating Systems, Inc.

5. All of those commenting support an amendment of the rules of the nature proposed, but certain of the parties take some exception to the specific language employed.

6. CPB notes that in stipulating that fees may be charged "per course or per pupil" the proposed rule may be interpreted as allowing such fee imposition only "for SCA services constituting formal instruction", even though other language in the rule which requires that program material be "clearly of educational or public service value" suggests that the charging of fees for a broader range of services is permitted. It is CPB's conviction that SCA operation has great potential for the provision of program services designed for special interest groups, such as the blind, the aged, or other social, ethnic or minority groups, but that the potential is unlikely to be realized fully unless licensees are able to recover the costs incidental to SCA operation.

7. To clarify what it believes to be the intention of the proposed rule, to which it subscribes, CPB suggests that the portion of the text of the rule which states that "Uses under this subparagraph will not be considered 'commercial' if there is charged either a per-course or per-pupil fee . . ." be revised to read "Uses under this subparagraph will not be considered 'commercial' if there is charged a per-course, per-pupil or other fee . . .".

8. NAEB notes that while the last sentence of the proposed rule recognizes that the broadcast material may be presented by or for an educational institution *or other entity*, and payments may be made to the institution or *entity*, the alternative represented by the underlined language is omitted from subparagraph (b) of the proposed rule, i.e., for consistency's sake, that (b) should be made to read "the payment is made to an educational institution *or other entity* or to the noncommercial educational FM station . . .".

9. The modifications suggested by CPB and NAEB are for the purpose of making more clear that the SCA program material for which a fee is charged need not necessarily be prepared by an "educational institution" if it is of educational or "public service value". The latter term causes the West Virginia Educational Broadcasting Authority some difficulty. It believes that while the educational station licensee would have little difficulty in determining whether a program offering has "educational value", "public service value" is an ill-defined term, and its employment as an alternative test of the eligibility of particular course material for the imposition of fees "could well be a source of abuse". It therefore suggests that this term be stricken, so that the sole criterion to be applied in determining whether a fee may be charged for program or course material, whether furnished by an educational institution or not, will involve the assessment of its "educational" value.

10. The comments strongly support rule amendments which would permit the imposition of charges for a rather broad range of services presented over the subcarrier of the noncommercial educational FM station. The rule which we are adopting is framed in accordance with this approach. However, on further consideration of all of the factors involved, we have found it necessary, if the public is not to be misled as to basic nature of the program material for which it is being asked to pay, that a clear distinction be drawn between those offerings prepared, sponsored, and supervised by an educational institution, constituting formal instructional or institutional credit material, and those programs which, while they may be of considerable value to their intended audience, do not have the imprimatur of an educational institution.

11. Accordingly, without limiting the freedom of action of the station to make charges for appropriate program material, we have re-drafted the proposed rule to establish the distinction described above, and to require that the noncommercial educational FM station make clear for prospective subscribers to a program series or course of instruction the instrumentality primarily responsible for its preparation and presentation.

12. Since the rule which we are adopting differs substantially in structure from the one we had proposed, the specific changes in wording in the proposed rule suggested by the parties no longer has pertinence. However, we believe that the rule, as now revised, by establishing a separate category of programs, not presented under the auspices of an educational institution for which a charge may be made, provides the clarification of intent which the parties sought to achieve by their suggested changes.

13. Accordingly, IT IS ORDERED, That, effective August 13, 1973, Part 73 of the Rules and Regulations IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX

1. Section 73.593(a) (1) is amended to read as follows:
§ 73.593 Subsidiary Communications Authorizations.

(a) * * *

(1) Transmission of programs which are noncommercial and in furtherance of an educational purpose, and which are of a broadcast nature but of interest primarily to limited segments of the station's audience. Typical services may include: programs for presentation in classrooms; programs designed for specific professional groups, such as doctors, lawyers, and engineers; programs intended to serve the special needs and interests of the aged, the handicapped, particular social and ethnic groups, and for those in a specific trade or sharing a common interest or hobby; programs for individualized remedial or advanced learning needs; and any use permitted for a commercial FM station under § 73.293(a) (1), subject to the prohibition against commercial operation and the limitation as to purpose contained in this section and in § 13.503, such limitation especially including those non-instructional services customarily provided by commercial firms. Uses permitted under this subparagraph will not be considered "commercial", when charges are made for the service rendered, under the circumstances and subject to the conditions set forth hereunder:

(i) A per-course, per-session, per-seminar, per-pupil or other appropriate fee is charged for formal or informal instructional material, presented by, with or for a *bona fide* educational institution. Payment of the fee shall be made to the noncommercial educational FM station or to the educational institution; such fee may include, in addition to the station expenses detailed in (iii), below, the usual tuition charged for similar material presented by other means.

(ii) A charge is made for a program or series of programs, informational or generally instructional in nature, intended to meet the special needs and interests of one or more of the groups the station is authorized to serve under its SCA. Payment of the charge shall be made to the noncommercial educational FM station.

(iii) Payments retained by the station shall total no more than the approximate cost of conducting the SOA operation (including purchase or lease of equipment, course material, personnel services, etc.) and the general overhead and operational costs attributable to such operation.

(iv) A noncommercial educational FM station offering program material subject to fee or other charge shall clearly indicate in any broadcast or printed solicitation to prospective enrollees whether the material falls into category (i) or (ii), above, so that informational and general educational materials are not represented as formal instructional or institutional credit programs.

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