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## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

#### 15 CFR Part 2301

[Docket Number 950613151-5304-02]

RIN 0660-XX02

#### Public Telecommunications Facilities Program (PTFP), National Endowment for Children's Educational Television (NECET), Telecommunications and Information Infrastructure Assistance Program (TIIAP)

**AGENCY:** National Telecommunications and Information Administration, Commerce.

**ACTION:** Final Policy Statement and Conforming Rule Amendments.

**SUMMARY:** The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, is publishing a Final Policy Statement modifying the interpretation of its policy on the use of NTIA-funded equipment and materials in connection with sectarian activities and making conforming rule amendments.

**EFFECTIVE DATE:** December 22, 1995.

**FOR FURTHER INFORMATION CONTACT:** Jana Gagner, (202) 482-1816.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

On June 20, 1995, the National Telecommunications and Information Administration, U.S. Department of Commerce (NTIA), published a notice in the Federal Register proposing to modify NTIA's interpretation of its policy regarding the use of Federal grant funds awarded by NTIA in connection with sectarian activities.<sup>1</sup> Eight parties filed comments in response to the Notice.<sup>2</sup> Based on these comments and current jurisprudence, NTIA is hereby modifying its prior interpretation of its rules, which prohibited the use of

NTIA-funded equipment, facilities, and materials in connection with any sectarian activities, no matter how incidental.

Under its new interpretation, NTIA will retain its present requirement that grant funds not be used for purposes the "essential thrust of which are sectarian,"<sup>3</sup> but will modify its interpretation of this requirement as follows. No more than an attenuated or incidental benefit may inure to a sectarian interest if a grantee uses NTIA-funded facilities in connection with a sectarian activity. In addition, the use must fall within the broad scope of a grant program's statutory purposes. A grantee cannot, however, use NTIA grant funds primarily to support sectarian interests.

For the reasons discussed below, NTIA believes that this approach is consistent with current jurisprudence.<sup>4</sup> We also discuss below in greater detail the issues raised in the June Notice regarding NTIA's policy on sectarian activities.<sup>5</sup> NTIA's interpretation of its prior policy, comments received by NTIA in response to the Notice, and the application of NTIA's new policy to each of its grant programs. Our discussion is informed by relevant First Amendment jurisprudence, including the recent Supreme Court holding in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995).

##### II. Background

*NTIA's Prior Policy.* In 1979, the Public Telecommunications Facilities Program (PTFP) of the NTIA adopted a rule prohibiting funding for any equipment, facilities, and other materials that would be used for any purposes the essential thrust of which is sectarian.<sup>6</sup> NTIA's interpretation of this rule has prohibited use of NTIA-funded facilities and materials in connection

with any sectarian activity.<sup>7</sup> In implementing this "bright-line" policy interpretation, NTIA relied upon *Lemon v. Kurtzman*.<sup>8</sup>

NTIA's policy interpretation did, however, permit the "presentation in an educational or cultural context of music or art with a religious theme [or] of programs about religion. It [also did] not preclude distribution of instructional programming of a secular nature to church-related educational institutions."<sup>9</sup> In addition, sectarian-affiliated organizations could generally apply for grant funds,<sup>10</sup> subject, of course, to the prohibition on the use of NTIA-funded equipment, facilities, and materials for purposes the essential thrust of which is sectarian. NTIA's two newer grant programs, the National Endowment for Children's Educational Television (NECET) and the Telecommunications and Information Infrastructure Assistance Program (TIIAP), also adopted the same policy and interpretation.<sup>11</sup>

In enforcing this policy over the years, NTIA required grant applicants to certify that they would comply with its policy by signing an assurance to that effect.<sup>12</sup> By relying upon this assurance, NTIA avoided evaluating programming schedules for sectarian content as a routine practice. Such evaluation occurred only if information contained in the application itself suggested that the applicant would violate NTIA's policy, a complaint was filed with NTIA, or NTIA otherwise became aware of information that suggested that its policy was being or would be violated. By not routinely evaluating program content and information transmitted using NTIA-funded equipment and materials, NTIA avoided excessive Government entanglement with religion,

<sup>7</sup> This interpretation stems from policy statement, *infra* fn. 11 and was applied in the Fordham case.

<sup>8</sup> 403 U.S. 602 (1971). The constitutional test set forth in *Lemon*—and the consistency between NTIA's new policy interpretation and that test—are described in section III.A. of this policy statement, *infra*.

<sup>9</sup> Public Telecommunications Facilities Program; Report and Order, 44 FR 30898, 30902 (1979) (Report and Order).

<sup>10</sup> *Id.* at 30,900-30,901. Previously, organizations organized for primarily religious purposes were ineligible to apply for a PTFP planning grant, although their affiliates were eligible to apply. See 15 CFR 2301.4(b)(2). We are revising this rule to be consistent with the new policy adopted herein, such that applicant eligibility will be the same for both construction and planning grants. See the conforming amendments to § 2301.4 (a) and (b).

<sup>11</sup> 60 FR 15636 (1995); 60 FR 8156 (1995).

<sup>12</sup> The applicant "will not use or allow the use of the facilities for essentially sectarian purposes for as long as the Applicant possesses or uses the facilities . . . ." Public Telecommunications Facilities Program, Grant Application, Assurances, no. 30, at 9.

<sup>1</sup> 60 FR 32,142 (1995).

<sup>2</sup> The following eight parties filed comments in response to the Notice: Representative Richard Burr, the Corporation for Public Broadcasting, Fordham University, National Public Radio, North Carolina Public Radio Association, Lisa Owens, Southern Public Radio, and Wake Forest University.

<sup>3</sup> 15 CFR 2301.22(d). "Sectarian" is defined at 15 CFR 2301.1 as "that which has the purpose or function of advancing or propagating a religious belief." The PTFP regulation at 15 CFR § 2301.22(d) provides, "During the period in which the grantee possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the grantee may not use or allow the use of the Federally funded equipment for purposes the essential thrust of which are sectarian." NTIA considers these phrases to mean the same thing.

<sup>4</sup> See *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995); *Zobrest v. Catalina Foothills Sch. Dist.* (Zobrest), 113 S.Ct. 2462 (1993); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

<sup>5</sup> Notice, *supra* note 1.

<sup>6</sup> See 44 FR 30898 (1979) for explanation of NTIA's previous policy. PTFP's regulation regarding sectarian programming appears at 15 CFR 2301.22(d).