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

In the Matter of	)	
	)	
Petitions for Low Power FM Broadcast	)	RM-9242
Service, Event Broadcasting Service, and	)	RM-9246
Microstation Broadcasting Service	)	RM-9208

MAY 2 2 1998

To: Chief, Mass Media Bureau

REPLY COMMENTS OF SACRED HEART UNIVERSITY, INC.

Sacred Heart University, Inc. ("Sacred Heart"), licensee of WSHU(FM), Fairfield, Connecticut, WSUF(FM), Noyack, New York, and various translator stations in New York and Connecticut, by its attorneys, hereby submits its Reply Comments in response to the Comments filed regarding the following Petitions for Rule Making: (1) Petition of J. Rodger Skinner, Jr. of TRA Communications Consultants, Inc. ("Skinner") for a new low power FM ("LPFM") broadcast service ("Skinner petition")[1]; (2) Petition of Gregory D. Deieso ("Deieso") for an event broadcasting service ("Deieso petition")[2]; and (3) Petition of Nickolaus E. Leggett for a microstation broadcasting service ("Leggett petition")[3] (collectively "Petitioners" and "the Petitions").

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1. *Proposal for Creation of the Low Power FM (LPFM) Broadcast Service*, RM 9242 (February 20, 1998); see also Office of Public Affairs, Reference Operations Division, Petition for Rule Making Filed, Public Notice, Report No. 2262 (March 12, 1998).

2. *Amendment of Part 73 of the Rules and Regulations to Establish Event Broadcast Stations*, RM No. 9236 (June 24, 1996); see also Office of Public Affairs, Reference Operations Division, Petition for Rule Making Filed, Public Notice, Report No. 2264 (March 18, 1998).

3. *Petition for a Microstation Radio Broadcasting Service*, RM No. 9208 (June 26, 1997); see also Office of Public Affairs, Reference Operations Division, Petition for Rule Making Filed, Public Notice, Report No. 2254 (February 5, 1998).

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In the event that the Commission decides to pursue the Petitions, Sacred Heart submits that, at minimum, any new LPFM, microstation, or event broadcasting service must provide adequate protection for FM translators such as Sacred Heart's and for other secondary services. LPFM, microstation, or event broadcasting services, if created, must not be given priority over secondary services such as FM translators.

However, Sacred Heart submits that the Commission should not issue a Notice of Proposed Rule Making on any of the Petitions. The Petitions do not satisfy the Commission's rules and contain no bona fide data demonstrating that the requested services are either necessary or beneficial to the public interest. Instead, the Petitioners offer as their rationale little more than the desire to curb the proliferation of pirate stations, a goal that is questionable at best. Legitimizing unlawful behavior should not be the Commission's objective and will not serve the public interest.

Moreover, even if viewed on the merits, the Petitions propose in an inefficient use of the spectrum in violation of Commission policy and precedent. The proposals would also cause enormous interference and short-spacing problems. Furthermore, the Petitions would vastly increase the workload of the already overburdened Commission staff, with a concomitant decrease in the quality of programming offered to the public.

BACKGROUND

1. Sacred Heart is the licensee of several non-commercial educational radio stations. Its primary stations are WSHU(FM) in Fairfield, Connecticut, and WSUF(FM) in Noyack, New York. Both of Sacred Heart's main stations have various FM translator stations in Connecticut and Long Island, New York.

2. Through the use of its FM translator stations, Sacred Heart provides valuable non-commercial educational programming to various communities in New York and Connecticut. In this regard, Sacred Heart provides service to Long Island, some parts of which are under-served by non-commercial educational stations. Sacred Heart's services are essential in those areas.

3. The Leggett petition proposes the creation of a service that would provide for very low power radio stations, serving an area of one to several square miles. Leggett petition at 1. Leggett asks the Commission to designate one AM and one FM channel for this "microradio" service and proposes the creation of geographic "cells" that each contain one station. Id. at 6-8. Leggett proposes that microradio stations receive 5 year licenses for a mere $50 license fee, and that station operators be permitted to build and maintain their transmitters without Commission approval. Id. at 8-9.

4. Skinner proposes the creation of a three-part LPFM service: (a) special event, limited time licenses ("LPFM-3 Special Event"); (b) stations that operate at one to fifty watts ("LPFM-2") with a loosely defined structure and indefinite hours of operation; and (c) stations that operate from fifty watts to three kilowatts ("LPFM-1") and closely parallel the operations of full-power stations. Skinner Petition at 10-12. Skinner also recommends eliminating second and third adjacent channel spacing restrictions. Id. at 15.

5. Deieso recommends creating an event broadcast service similar in nature to Skinner's LPFM-2 service using channel 200. Deieso petition at 6-8. Without endorsing any particular power level, Deieso posits a range of one to ten watts ERP as sufficient for most events. Id. at 8.

DISCUSSION

I. IF IMPLEMENTED, ANY NEW LOW POWER SERVICE MUST PROTECT SECONDARY SERVICES SUCH AS FM TRANSLATORS AND MUST NOT HAVE RIGHTS SUPERIOR TO THOSE OF ESTABLISHED STATIONS OR LISTENERS

6. Sacred Heart recognizes that the Commission may wish to pursue Petitioners' proposals, notwithstanding the concerns addressed below. Sacred Heart submits that the Commission must not do so without considering the fate of FM translators and other secondary services that are overlooked in the Petitions.

7. Petitioners propose that the services they seek should have rights superior to those of FM translators and other secondary services, without any showing that such superior rights are warranted in fact or permissible by law. Indeed, Petitioners gloss over the fact that their proposals would have devastating effects on FM translators. As commenter Educational Media Foundation ("EMF") has noted, the Commission should follow its practice of protecting existing services and the listeners they serve. EMF Formal Comment, at ¶ 2. Existing audiences must continue to receive service, and FM translators should not be expected to lose their investments of time and money to serve the interests of pirates who wish to become legitimate. Id. at ¶ 2-3.

8. Sacred Heart recommends that these new services, if permitted, should not be given priority either over existing translators or translators seeking to establish new services. As commenter Saga Communications, Inc. ("Saga") points out, there are more than 2900 FM translators that will lose out to LPFM licensees, with a staggering loss to the public they serve. Saga Comments, at 2. Particularly with respect to Skinner's proposed primary service LPFM-1 stations, secondary service FM translators will be forced off the air pursuant to 47 C.F.R. § 74.1203. Thus, Petitioners'

proposals represent little more than a "trade-off" of FM translators for LPFM services. Saga Comments at 3. The real losers in such a bargain would be the listeners.

9. The public interest in maintaining FM translators is particularly strong in the case of those that provide service to under-served listeners that would otherwise have no access to non-commercial educational programming. Such translators are especially deserving of protection from the new LPFM services that seek to replace them.

10. Thus, if the Commission goes forward with the LPFM proposals, Sacred Heart suggests that any and all classes of low power service must be secondary, unprotected facilities that are obligated to protect existing and proposed full service and secondary facilities such as FM translators. See generally Comments of Communications Technologies, Inc. ("CTI"), especially at ¶ 1.

11. Most importantly, the Commission must ensure that the listening public receives the most diverse and far-reaching service possible. FM translators are far superior to LPFM stations in reaching a large, diverse audience, and are therefore deserving of protection from LPFM stations. Consequently, if the Commission pursues such services, it should carefully delineate the protection standards required of such stations so that FM translators and other secondary services are not shut down, to the public's detriment.

II. THE PETITIONS ARE NOT SUPPORTED BY ADEQUATE DATA AND DO NOT SATISFY THE COMMISSION'S REQUIREMENTS FOR RULE MAKING

12. The Commission need not even consider the merits of the Petitions because they are deficient under the Commission's Rules and should be rejected. Section 1.401(c) of the Commission's Rules requires that petitions for rule making set forth not only the substance or text of the proposed rule, but also the facts, arguments, and data supporting the proposed rule changes. 47 C.F.R. § 1.401(c).

Furthermore, the Commission must deny any petition that does not contain sufficient reasons supporting the proposals it contains. 47 C.F.R. § 1.407. The burden rests with Petitioners to demonstrate that the services they propose warrant the initiation of a formal proceeding. Amendment of Section 73.658(k) of the Commission's Rules, 63 F.C.C.2d 500 (1977) at ¶ 5. As the Joint Statement of the Named State Broadcasters Associations ("Joint Statement") makes clear, Petitioners fail to satisfy these requirements. See also Comment and Reply Comments of Cosmopolitan Enterprises of Victoria, Inc., licensee of KTXN-FM (Victoria, Texas) ("Cosmopolitan").

13. Here, Petitioners rely on little more than opinion, speculation, and their own personal hobbies to support their proposals. Indeed, the Petitions lack engineering studies or other pertinent data demonstrating that Petitioners' technical arguments are well-founded. Nor do Petitioners offer any facts demonstrating the need for more radio stations. See Radio One, Inc.'s Opposition to Petition for Rule Making, at 3-5.

14. The only demonstrated need for the new services is the desire of Petitioners to further their interest in their hobbies. Petitioners make no convincing showing that the collective well-being of the public will benefit from their proposals. Yet it is the public interest -- and not individual interests -- which Commission licensees are charged with serving.

15. Petitioners speculate that the addition of the services they propose would somehow foster the growth of small business and minority-owned enterprises. They offer no data supporting the assertion that small businesses and minorities will flock to the airwaves if the Petitions are granted. In fact, it is just as likely that, should small and minority business owners avail themselves of new services (if offered), the proliferation of stations will result in increased competition and increased

interference, making it harder for them to remain economically viable. The net result would likely be that such businesses would not survive, and the quality and variety of programming offered to the public would suffer.

16. Without an adequate factual and technical basis to support the Petitions, the Commission need go no further. The Commission should reject the Petitions because they fail to satisfy the requirements for a petition for rule making. Instead, the Commission should devote its limited resources to proposals that offer more promise to the public's enjoyment of radio services.

III. THE PETITIONS MUST BE REJECTED ON THE MERITS BECAUSE THEY ARE TECHNICALLY UNSOUND AND DETRIMENTAL TO THE PUBLIC INTEREST

A. The Petitions Propose An Inefficient Use of the Spectrum

17. The Commission has previously determined that operating stations below the minimum effective radiated power of 100 watts is an inefficient use of the spectrum. Changes to the Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 FCC 2d 240 (1987); see also 47 C.F.R. § 211. This minimum power level ensures that a significant number of listeners can receive a station, rather than a small number in a limited geographic area.

18. The Leggett and Deieso petitions propose services that operate below this minimum power level. The Skinner petition proposes services that operate both below and above the minimum. All services that operate below the minimum have already been found to be inefficient, and should not be considered further.

19. Skinner also proposes services well in excess of 100 watts, i.e., services that are not truly "low power" at all. Stations above the 100-watt minimum already have service obligations and interference protections. The Commission need not establish new rules for these stations. However,

for those stations below 100 watts, it is wrong to give these stations the protection given to existing services without having them meet the same service obligations.

20. Utilizing minimum power levels allows the Commission to provide a 'stable, efficient, and diverse radio telecommunications service." Stephen Paul Dunifer, 11 FCC Rcd 718, 722 (1995). As discussed at length in the Comments of the National Association of Broadcasters ("NAB"), Petitioners have shown no compelling reason to waiver from that goal. NAB Comments, at 4-7. Sacred Heart agrees that Petitioners' proposals will undermine that goal and must not be permitted.

21. Furthermore, the Commission has already rejected efforts to allow program origination at the local level in the context of FM translators. Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 5 FCC Rcd 7212, 7219 (1990); Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 8 FCC Rcd 5093, 5097 (1993). The services the Petitioners propose are similar to the program origination sought by FM translators and rejected by the Commission as inefficient. Since Petitioners' proposals seek the creation of services that are unquestionably inefficient, the Petitions should be denied.

B. The Petitioners' Proposals Would Yield Undue Interference and Short Spacing

22. Many commenters have recognized that Petitioners' proposals would create insurmountable technical problems. For example, KSNM-FM and KXDA-FM(Las Cruces, New Mexico) recounted first-hand experience with the interference problems caused by neighboring low-power pirate stations. KSNM-FM/KXDA-FM Comments, at 1. The interference created by LPFM stations would impair the rights of the broadcast public to listen to the radio without interference. Comments of Alan H. Kline, at ¶ 5. Petitioners ignore the listeners and instead suggest that

interference to other stations is acceptable. The Commission should not allow Petitioners to sacrifice the rights of the listeners in so cavalier a fashion.

23. Sacred Heart will not attempt to explore the interference problems in great detail, as numerous commenters have already done so at length. However, Sacred Heart wishes to emphasize that the interference and short-spacing problems posed by Petitioners' proposals are alone sufficient to warrant denying the Petitions. Accordingly, the Commission should reject the proposed low power services.

C. The Proposed Services Would Tax The Commission's Limited Resources

24. Petitioners' proposals would create the need for Commission staff intervention at many levels. The Commission's resources are already severely taxed, and could be better spent on endeavors more likely to benefit the public. As explored more fully by numerous other commenters, such as the NAB (NAB Comments at 33-36) and the Named State Broadcasters Associations (Joint Statement at 12-13), this problem supports denial of the Petitions as well.

D. The Proposed Service Reward Those Who Violate The Law

25. Petitioners' thinly-veiled purpose is to provide a legitimate means for those who flout the law to become part of the legitimate broadcast community (assuming as Petitioners do that those who so easily violate the law would actually seek to become legitimate licensees if the opportunity presented itself). Petitioners offer no valid explanation why illegal activity should be rewarded with the Commission's stamp of approval.

26. Skinner would have the Commission believe that the actions of pirate operators are akin to "acts of civil disobedience" and that their quest to occupy the airwaves parallels the civil rights

movement. Skinner's Addendum and Reply Comments, at ¶ 72. This characterization insults both the civil rights movement and the Commission, and must not be taken seriously.

27. Furthermore, there is no reason to believe that pirate operators would stampede to get licenses if the Commission were to offer LPFM services. Those who believe they are above the law are likely to continue in that mistaken notion, even if licenses become easier or cheaper to obtain. Most importantly, it is fundamentally unfair to reward those who have defied the Commission at the expense of the public and to the detriment of legitimate broadcasters. Accordingly, the Commission should deny the Petitions.

CONCLUSION

As set forth above, the Commission must ensure that any new low power services adequately protect FM translator stations and other secondary services so that the public continues to enjoy quality programming in a wide geographic area. However, the Commission could instead reject the Petitioners' proposals altogether because they do not pass muster under the Commission's rules. Even if considered on the merits, the Petitions propose services that are inefficient, damaging to the public interest, and undeserving of further attention from the Commission.

Respectfully submitted,

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