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# BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P.

ATTORNEYS AT LAW

RALEIGH, NORTH CAROLINA

JUN 8 1998

FCC MAIL ROOM

MAILING ADDRESS
POST OFFICE BOX 1800
RALEIGH, N.C. 27602

OFFICE ADDRESS
SUITE 1600
FIRST UNION CAPITOL CENTER
150 FAYETTEVILLE STREET MALL
RALEIGH, N.C. 27601

TELEPHONE 919-839-0300
FACSIMILE 919-839-0304

L.P. McLENDON, JR.
HUBERT HUMPHREY
EDGAR B. FISHER, JR.
W. ERWIN FULLER, JR.
JAMES T. WILLIAMS, JR.
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GREENSBORO OFFICE
2000 RENAISSANCE PLAZA
230 NORTH ELM STREET
GREENSBORO, N.C. 27401

WASHINGTON OFFICE
2000 L STREET N.W., SUITE 200
WASHINGTON, D.C. 20036

June 11, 1998

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

***Re: Docket Nos. RM-9208, RM-9242; RM-9246***

Dear Ms. Salas:

Transmitted herewith are an original and nine (9) copies of the Ex Parte Reply Comments of the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters in Docket Nos. RM-9208, RM-9242, RM-9246 pertaining to the creation of microstation radio broadcast service, low power FM broadcast service, and event broadcast stations.

Should any questions arise in connection with your consideration of this matter, please contact the undersigned.

Sincerely,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Mark J. Prak
Counsel to The North Carolina and
Virginia Associations of Broadcasters

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

| | | |
|---|---|---|
| In re Petitions of | ) | |
| | ) | |
| Nickolaus E. Leggett, Judith F. Leggett and Donald J. Schellhardt, Esq. | ) | RM-9208 |
| | ) | |
| For the Creation of a Microstation Radio Broadcast Service; | ) | |
| | ) | |
| J. Rodger Skinner, Jr. | ) | RM-9242 |
| | ) | |
| For the Creation of a Low Power FM Broadcast Service; and | ) | |
| | ) | |
| Gregory D. Deieso | ) | RM-9246 |
| | ) | |
| For the Creation of Event Broadcast Stations | ) | |

To: The Commission

**EX PARTE REPLY COMMENTS OF THE NORTH CAROLINA ASSOCIATION OF BROADCASTERS AND THE VIRGINIA ASSOCIATION OF BROADCASTERS**

Wade H. Hargrove
Mark J. Prak
BROOKS, PIERCE, McLENDON
HUMPHREY & LEONARD, L.L.P.
Suite 1600, First Union Capitol Center
Post Office Box 1800
Raleigh, North Carolina 27602
(919) 839-0300

June 11, 1998

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**Washington, D.C. 20554**

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| For the Creation of Event Broadcast Stations | ) | |

To: The Commission

**EX PARTE REPLY COMMENTS OF THE**
**NORTH CAROLINA ASSOCIATION OF BROADCASTERS**
**AND THE VIRGINIA ASSOCIATION OF BROADCASTERS**

The North Carolina Association of Broadcasters ("NCAB") and the Virginia Association of Broadcasters ("VAB"), by their attorneys, hereby file their joint Ex Parte Reply Comments in response to the comments filed in the above-captioned *Petitions for Rule Making*. NCAB and VAB are trade associations whose members operate radio and television stations licensed by the Commission to serve communities located in North Carolina and Virginia.

As argued in the filed comments of the NCAB and VAB, the Commission should deny the *Petition for Rule Making* ("*Petition*") to establish a micropower radio service. As a threshold matter,

the three *Petitions* disregard the practical and technical difficulties involved in implementing such a service. In addition, the creation of such a micropower radio service would undermine the Commission's efforts to crack down on illegal "pirate" radio stations. Further, the Petitioners' arguments that the creation of such a service would promote minority ownership and broadcast "diversity" ignore regulatory and marketplace realities.

* * *

## I. The Submitted *Comments* Amply Illustrate The Practical And Technical Difficulties Inherent In Implementing A Micropower Radio Service.

The submitted *Comments* amply illustrate the many practical and technical difficulties inherent in implementing a micropower radio service. It is axiomatic that the Commission's fundamental mission is to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 151. As the steward of the public interest, the Commission should do no harm to the existing radio service in considering the proposed micropower services. The interference which would result from implementation of these proposals would cause harmful interference to the existing AM and FM radio services. The Commission was created by Congress in 1934 to eliminate destructive interference and ensure a technically sound basis for our nation's system of radio broadcasting. Adoption of any or all of the Petitioners' proposals would create harmful, destructive interference to the existing AM and FM radio service. As it is, the Commission cannot now process non-commercial power increase applications in an expeditious fashion. Moreover, the Commission persists in applying outdated technical rules to the non-commercial band in order to guard against a "flood" of applications. The Docket 80-90 FM radio and low power television debacles of the

1980's must not be forgotten. Indeed, the era of "hard look" application processing was one the Commission and the public should never forget. The waste of public and private resources was palpable. The same sort of "pie in the sky" arguments that were made for Docket 80-90 FM stations and for LPTV are now made by the proponents of micropower radio. The Commission must not lose its institutional memory. If the Commission allows history to repeat itself, the only result of a micropower radio service will be increased paperwork for the Commission's already overworked staff and a diversion of scarce Commission resources with little or no tangible public interest benefit.[1]

Most glaringly, the Petitioners overlook the significant burdens that a micropower radio service will have on existing radio services that will soon be making the transition to digital radio. One of the Petitioners even acknowledged this upcoming change and tacitly admitted his opposition to the oncoming of the digital age:

> Since LPTV is a secondary-service, my station along with hundred of other "mom and pop" stations will be forced off the air by the rules created by the Commission in the digital television proceeding. It should be noted that in my petition for reconsideration of the digital rules, I suggest awarding a LPFM license to anyone bumped from their LPTV channel as a form of remuneration that would not cost the government anything.

J. Rodger Skinner, Jr., *Petition for Rule Making* at 5. While Skinner recognizes that the conversion to digital by full service television stations will force LPTV off the air, he fails to admit that the limited capacity of the radio band will also force low-power radio stations off the air as the digital conversion takes place. In fact, micropower broadcasting has the potential to jeopardize the

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[1] *See also Joint Statement of the Named State Broadcasters Associations* at 12-13.

development and implementation of the very technology (i.e. In-Band, On-Channel (IBOC)) that makes digital audio broadcasting possible.[2] Simply put, a service that is hostile to the technological advances revolutionizing the radio industry, such as micropower broadcasting, is not one that the Commission should be in the business of developing.

## II. The Creation Of A Micropower Radio Service Would Undermine The Commission's Commitment To Punish Pirate Radio Stations.

Next, the submitted *Comments* support the NCAB's and VAB's position that creation of a micropower radio service at this time would undermine the Commission's ongoing commitment to seek out and punish illegal "pirate" radio operators. Indeed, the creation of a "CB-like" micropower radio service would only serve to further blur the line between legal and illegal radio operators. The operation of "pirate" radio stations is presently one of the Commission's most nettlesome problems. *See, e.g.*, *Mr. Brewer the Pirate Doesn't Rule Waves, He Just Makes Them*, Wall St. J., Oct. 21, 1997 (discussing pirate radio operator whose motto is "License? We don't need no stinking license."). It is also common knowledge that the Commission has dedicated considerable resources to removing such miscreants from the air. If the Commission permits micropower radio to go forward, however, the Commission will have tacitly admitted that it lacks not only the resources but also the institutional morale to stop this significant offense to the federal regulatory scheme. The end result will be the erosion of the Commission's authority to enforce both the law passed by Congress in 1934 and its own regulations. In other words, to approve the development of

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[2] *See Comments of National Association of Broadcasters* at 13-25; *Consolidated Comments of USA Digital Radio, L.P.* at 5-9.

micropower radio would constitute a tacit admission of the Commission's failure to successfully police "pirate" radio operators.

Nevertheless, proponents of microstation radio contend that introduction of such a service will lead to a reduction in the number of pirate radio operators.[3] This argument, however, is analogous to a statement that the Internal Revenue Service will reduce the number of people who cheat on their taxes by legalizing certain types of tax fraud. Microstation radio supporters have simply not provided any credible evidence that the number of pirate radio operators will actually decrease with the introduction of low power radio;[4] they have also failed to submit any evidence suggesting that microstation radio will not *increase* the number of pirate stations--that is, to show that "pirate" radio will not worsen after the introduction of microstation radio. The fact of the matter is that those individuals who are willing to flout the Commission's rules will do so, with or without the existence of microstation radio.

## III. The Petitioners' Arguments That the Institution of a Micropower Radio Service Would Promote "Diversity," Despite Their Good Intentions, Ignore Market Realities and Recent Judicial Decisions.

Petitioners' frequent reference to the mantra of "diversity" is insufficient to justify the creation of a technically flawed service such as micropower radio. Like many others that have argued their cause to the Commission, Petitioners assert that their proposals will increase minority representation in the broadcasting industry. Unfortunately, like those other individuals, Petitioners have failed to present concrete evidence that the creation of a new service will contribute to any

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[3] *See e.g., Comments contained in Appendix of Comments of National Lawyers Guild Committee on Democratic Communications.*

[4] *See Comments of Radio One, Inc.* at 6-7; *Comments of Roswell Radio, Inc.* at 3-4.

lasting minority presence in radio. To the contrary, history teaches that broadcast licenses -- whether held by members of minority groups or otherwise -- will flow to those persons who most value the right to operate a station. *See, e.g.*, *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992). Unless the Commission imposes restraints on the ability of minority holders of micropower broadcasting licenses to sell such licenses, there can be no guarantee that development of such a service would benefit women and minorities in any sort of significant and lasting way.[5]

The Commission should evaluate the Petitioner's diversity argument in light of the D.C. Circuit Court of Appeals' recent ruling in *Lutheran Church - Missouri Synod v. FCC*, 1998 WL 168 712 (D.C. Cir. 1998). In *Lutheran Church*, the D.C. Circuit invalidated the Commission's equal employment opportunity (EEO) regulations for radio stations. In reaching that conclusion, the court observed the following about the frequent invocation of the term "diversity" made by litigants before the Commission:

> The regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny.
>
> Perhaps this is illustrative as to just how much burden the term "diversity" has been asked to bear in the latter part of the 20th century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ("affirmative action" has only a temporary remedial connotation) and as a synonym for proportional representation itself. It has, in our view, been used by the Commission in both ways. We therefore conclude that its EEO regulations are unconstitutional . . .

The Commission should heed the D.C. Circuit's admonition in *Lutheran Church*. Absent credible evidence demonstrating that a micropower radio service will actually enhance minority

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[5] A rule imposing such restraints, of course, would present serious legal issues.

ownership of broadcast stations, the Commission should view with skepticism the suggestion that "diversity" of ownership of the media would be enhanced in any significant way by implementation of this proposal. This is not to say that diversity of ownership of the media by persons of various ethnicities is not a good thing. It is. But, it has yet to be demonstrated how such outcomes can be successfully achieved in a fashion which is consistent with the Constitution. In this case, the suggestion that a micropower radio service will be a significant means of advancing minority ownership would be a cruel hoax -- as were Docket 80-90 and LPTV. If the Commission truly desires to advance minority ownership of broadcast properties, it should devote its resources to the development of programs, like the tax certificate program, which assist in providing minority entrepreneurs with financing to acquire broadcast stations.

## Conclusion

For the reasons discussed above, the Commission should deny the various *Petitions for Rule Making* to establish a micropower radio service.

Respectfully submitted,

**NORTH CAROLINA ASSOCIATION OF BROADCASTERS**

**VIRGINIA ASSOCIATION OF BROADCASTERS**

By _____
Wade H. Hargrove

By _____
Mark J. Prak

Their Attorneys

June 11, 1998

BROOKS, PIERCE, McLENDON
HUMPHREY & LEONARD, L.L.P.
Suite 1600, First Union Capitol Center
Post Office Box 1800
Raleigh, North Carolina 27602
(919) 839-0300