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July 23, 1998

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BY OVERNIGHT MAIL

Office of the Secretary
Room 222
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: The American Civil Liberties Union of Massachusetts and Radio Free Allston's Reply Comments for RM No. 9208 and 9242

Dear Sir/Madam:

Enclosed please find The American Civil Liberties Union of Massachusetts and Radio Free Allston's Reply Comments for RM No. 9208 and 9242 and a Certificate of Service. Pursuant to 47 C.F.R. § 1.419(b) and (c), I have enclosed 12 copies.

Please call me if you have any questions about this document. Thank you.

Sincerely,

Lori B. Silver

LBS/kez
Enclosures

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF MICROSTATION RADIO BROADCASTING SERVICE PETITIONS FOR RULEMAKING	RM No. 9208 and 9242

THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AND RADIO FREE ALLSTON'S REPLY COMMENTS FOR RM NO. 9208 and 9242

Introduction.

The American Civil Liberties Union of Massachusetts and Radio Free Allston submit the following reply comments in response to RM No. 9208 and 9242, which advocate the establishment of a mechanism for licensing low-power or microradio broadcasting.

Microbroadcasting has a unique potential to revitalize communities by giving voice to ordinary citizens and community organizations that traditionally have been excluded from the airwaves. Many microradio stations around the country have fulfilled this vision by providing a forum for the discussion of local politics, cultural and social issues. These stations have demonstrated that microradio can be a powerful tool for enabling immigrants, minorities and low-income citizens to participate in the civic life of America. Allowing a multitude of new voices access to the air waves would further the core First Amendment and public interest values which the FCC was designed to serve.

We support a program for licensing low-power radio stations in a manner that utilizes a simple, low-cost application process and provides for licensed low-power stations that do not interfere with established stations' spectrums. While many commentators have discussed the

technical aspects of the rulemaking petitions, few have addressed the constitutional and statutory flaws of the FCC's current regulations.[1]

The FCC's current regulations that prevent microbroadcasters from receiving a license without a waiver ("the regulations")[2] fail to satisfy either strict or intermediate First Amendment scrutiny. The regulations violate the FCC's statutory mandate to operate in the "public interest" by hampering the dissemination of information from diverse voices that cannot find a place in America's public forum. Finally, licensing microbroadcasting would further First Amendment principles and the public interest by providing listeners with access to a greater range of voices, opinions and local programming. These compelling constitutional, statutory and public policy reasons mandate that the FCC provide regulations that license microbroadcasting.

Comments.

I. THE FCC'S PROHIBITION ON MICROBROADCASTING VIOLATES THE FIRST AMENDMENT.

The FCC regulations violate the First Amendment because they would not survive either strict or intermediate scrutiny. The regulations trigger strict scrutiny because they single out certain members of the press for disfavored treatment. Under the strict scrutiny test, the FCC cannot demonstrate that the regulations are sufficiently narrowly tailored to achieve a compelling government interest. Even if strict scrutiny did not apply to the regulations, the FCC would have serious difficulty demonstrating that the regulations are narrowly tailored to survive intermediate scrutiny, under the tests applicable to public forums or to content-neutral regulations with an incidental burden on speech.

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[1] These reply comments do not attempt to provide a comprehensive overview of the plethora of constitutional and statutory problems raised by the FCC's current regulations banning microradio. Instead, the comments highlight some of the most egregious problems.

A. The FCC's Regulations Do Not Survive Strict Scrutiny.

The FCC's regulations banning microbroadcasting trigger strict scrutiny by discriminating against certain speakers – small, community-based radio stations. "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 659 (1994). Indeed, the Supreme Court has repeatedly struck down laws that negatively affect only small, defined segments of the press. *See Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 229-230 (1987); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 591-592 (1983); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250-251 (1936).

Although such laws "are constitutionally suspect only in certain circumstances," the FCC regulations fit squarely into the circumstances defined by the Supreme Court in *Turner*.[3] 512 U.S. at 660 (internal citations omitted). By banning radio stations that broadcast at less than 100 watts, the regulations "target a small number of speakers, and thus threaten to distort the market

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[2] *See* 47 C.F.R. §§ 73.506(b), 73.512(c) (1998).

[3] Strict scrutiny may not apply "when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Turner*, 512 U.S. at 660-661. Broadcast regulations have been justified on the ground of physical spectrum scarcity. *See FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984). However, Judge Robert Bork has commented that "the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. . . . All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so." *Telecommunication Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 508 (D.C.Cir. 1986). Therefore, the FCC's decision to ban an entire category of broadcasters from the broadcast spectrum, particularly in light of technological communications advances, defies logic. The FCC cannot adopt regulations that increase the scarcity of radio frequencies and then rely on the historically bankrupt scarcity doctrine to justify the regulations.

for ideas." *Id.* (internal quotations omitted). Economically disadvantaged citizens, immigrants, minorities and community groups, who can barely afford to operate small stations and whose programming would substantively differ from programming offered by large corporate stations, have been excluded from the air waves.

Under *Turner*, it is a central duty of the Court to analyze whether particular regulations are "structured in a manner that carries the inherent risk of undermining First Amendment interests" by allowing for the "dangers of suppression and manipulation." *Id.* at 660-661. The current regulations prohibit microbroadcasters from receiving a license without a waiver from the FCC, which is not confined by any statutory or regulatory standards.[4] Forcing microbroadcasters to rely on an ad hoc process places microbroadcasters at the mercy of the FCC's unfettered discretion, and raises the constitutionally dangerous prospect of content or viewpoint discrimination. Indeed, this was the exact problem that concerned the Supreme Court in *Turner*.

For the FCC's current regulations to withstand strict scrutiny, the FCC must clearly demonstrate that its current regulations "are narrowly tailored to further a substantial government interest." *See, e.g., FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984). Even if the regulations may in part serve some essential public value, the regulations "must restrict as

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[4] A federal district court in *U.S.* v. *Dunifer* has held that the waiver process is not constitutionally overbroad because of standards incorrectly imposed by the D.C. Circuit. *See* 1998 WL 315121, *7 (N.D.Cal. 1998), citing *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1156 (D.C.Cir. 1969). The *Dunifer* Court failed to consider that *WAIT Radio* never addressed "to what extent the overbreadth principle of First Amendment cases narrows the range of administrative discretion consistent with the general standard of 'public interest' and places a special burden on the [FCC] not to maintain its general rules in an instance or class of instances not strictly furthering the policy of the regulation." *WAIT Radio*, 418 F.2d at 1159.

little speech as possible to serve the goal." *Turner*, 512 U.S. at 680 (O'Connor, J., dissenting). The current regulations, when combined with the FCC's uniform refusal to issue waivers to urban microbroadcasters, are not narrowly tailored to serve the FCC's interest in protecting large stations from interference. Indeed, the FCC's consistent refusal to issue any waivers to microradio stations seeking to operate in commercially competitive markets proves that the process is a constitutional mockery.

B. The FCC's Regulations Do Not Survive Intermediate Scrutiny.

1. The regulations fail to consider the radio broadcast spectrum's status as a public forum.

The radio broadcast spectrum is a public forum, which requires First Amendment protection. A public forum is defined as public property which has "been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *International Society of Krishna Consciousness, Inc., et al.* v. *Lee*, 505 U.S. 672, 679 (1992), quoting *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 515-16 (1939). Even limited public forums have been held to encompass venues that have not traditionally been considered public forums, but have been opened temporarily by the government for the same purposes as public forums. *See Perry Educ. Ass'n.* v. *Perry Local Educators' Ass'n., et al.*, 460 U.S. 37, 45-46 (1983); *see also Cornelius* v. *NAACP Legal Defense and Education Fund, Inc., et al.*, 473 U.S. 788, 802-803 (1985). Within a public forum or limited public forum, government may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* at 45 (internal quotations omitted).

The radio broadcast spectrum exhibits all the characteristics of a public forum. The Supreme Court has considered the broadcast spectrum to be public property. *See CBS, Inc.* v.

FCC, et al., 453 U.S. 367, 395 (1981) (stating the broadcast spectrum is "a valuable part of the public domain") (internal citation omitted). Further, Congress has acknowledged the public ownership and purpose of the broadcast spectrum by authorizing regulations, only so long as they serve "the public interest, convenience, and necessity." 47 U.S.C. § 303 (1998). Radio traditionally has been used to promote the free exchange of ideas. Because the broadcast spectrum is public property and has a long-standing practice and use of permitting speech, it should be considered a public forum.[5]

The FCC's blanket prohibition of microbroadcasters from receiving licenses is not narrowly tailored to meet the government's interest. While microradio can technically be licensed via a waiver, the denial of waiver is a foregone conclusion as the FCC's own records clearly show. As of this date, only two waivers have been granted, and the FCC has not allocated one urban microradio frequency.[6] Contrary to the original theory of spectrum scarcity, new technology, made available since 1978, makes it possible for microradio broadcasters to reach their audiences without interfering with other licensed broadcasters' signals. The FCC's continued prohibition of microradio frequencies, when this exclusion is not technologically necessary to meet the state interest in preventing interference, has created a regulatory scheme not narrowly tailored and violative of the First Amendment.

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[5] This conclusion is shared by the chairman of the FCC, William Kennard, who during his tenure as the FCC's general counsel described the broadcast spectrum as either a public forum or limited public forum. W. Kennard & J. Nuechterlein, *Heeding Congress' Call on Kids' TV*, Legal Times, Jan. 8, 1996 at 29.

[6] The sole FCC exceptions to its regulations were waivers granted to an isolated Indian village on an Alaskan island and to a Navajo community located in a mountainous region of New Mexico. *See In re: FM Translator Station K211AX, Klawock, Alaska*, (waiver granted by FCC staff letter dated Sept. 9, 1985); *In re: BPFT-82051410 Through IU Ramah Navajo School Board, Inc., et al.*, (waiver granted by FCC staff letter dated Nov. 8, 1982).

2. The FCC regulations fail under the *O'Brien* test.

Even if the public forum analysis did not apply, the FCC regulations fail to satisfy heightened scrutiny demanded by the Supreme Court in *U.S.* v. *O'Brien*, 391 U.S. 367 (1968). In the analogous situation of cable broadcasting, the Supreme Court held that intermediate scrutiny applies to content-neutral restrictions that impose an incidental burden on speech. *Turner,* 512 U.S. at 662, citing *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989); *O'Brien*, 391 U.S. at 377. Under the *O'Brien* test, a regulation will be upheld if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

The government's interest in allocating the radio broadcast spectrum to prevent interference must be analyzed in light of its corresponding interest in providing outlets for local broadcasting. The "importance of local broadcasting outlets 'can scarcely be exaggerated.'" *Turner,* 512 U.S. at 663, quoting *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). Likewise, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner*, 512 U.S. at 663.

The FCC must meet its burden of demonstrating that its regulations actually prevent interference and "will in fact alleviate these harms in a direct and material way." *Id.* at 664 (internal quotations omitted). The Government must provide "empirical support" or "sound reasoning" to justify regulation of expressive activity in furtherance of its asserted interests. *Id.* at 666, quoting *Century Communications Corp.* v. *FCC*, 835 F.2d 292, 304 (CADC 1987). In this case, the FCC has not demonstrated that any technologically-based evidence supports its restriction on licensing microbroadcasters. First Amendment doctrine demands that the FCC

reevaluate its adherence to outmoded technological assumptions about microbroadcasting, in light of recent technological innovations that ensure spectrum integrity.

In addition, the regulations on their face are not narrowly tailored to promote "a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation omitted). There is no evidence that the FCC's efforts to prevent interference would be less effective if the FCC were to license microbroadcasting. Furthermore, the regulations "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* The government's interest in preventing interference does not justify a total ban on low-power broadcasting without differentiating between low-power broadcasting which does or does not cause substantial spectrum interference. The ban "suppress[es] a great quantity of speech that does not cause the evils that it seeks to eliminate ..." *Ward*, 491 U.S. at 799, n. 7, citing *Martin* v. *Struthers*, 319 U.S. 141, 145-146 (1943). The regulations, therefore, are not narrowly tailored and violate the First Amendment.

II. THE FCC'S REGULATIONS BANNING MICRORADIO VIOLATE ITS STATUTORY MANDATE TO OPERATE IN THE "PUBLIC INTEREST."

The present regulations violate the FCC's mandate to operate in the pubic interest by denying the public access to microradio broadcasts. The FCC is required to promulgate only those regulations that serve "the public interest, convenience and necessity," and that "generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303, 303(g) (1998). In addition, the public interest standard "'invites reference to First Amendment principles' . . . and, in particular, to the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources." *FCC* v. *National Citizens Commission for Broadcasting, et al.*, 436 U.S. 775, 795 (1978) (internal quotations omitted).

The current regulations do not take into account the right of listeners to receive

information from diverse sources located in their community – a core First Amendment right. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) ("[It] is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.") (internal citations omitted). The Supreme Court has acknowledged that the location of a source of information is significant, as it provides information about a speaker's identity. *See City of Ladue et al.* v. *Gilleo*, 512 U.S. 43, 56 (1994). Microradio, then, as an inherently local source of information, has unique and inherent value for listeners that lies well within the public's interest protected by the First Amendment.[7] Therefore, the current regulations violate the FCC's mandate to serve the public interest.

III. LICENSING MICRORADIO ADVANCES FIRST AMENDMENT VALUES AND THE PUBLIC INTEREST.

By amending its regulations to provide a constitutionally based licensing scheme for microradio, the FCC could achieve a win-win policy. Microradio, as a local provider of unique news and information, serves both public interest and First Amendment values. Further, by amending regulations to provide discreet frequencies for microradio, the FCC would continue to protect other broadcasters from interference. New technology in microradio broadcasting has made this "win-win" opportunity possible. Congress also has directed that the FCC should take advantage of such opportunities: "it shall be the policy of the United States to encourage the provision of new technologies and service to the public." 47 U.S.C. § 157(a) (1998).

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[7] For example, in Allston, a neighborhood of Boston, Massachusetts, microradio station Radio Free Allston won accolades from the Boston City Council, which in a resolution dated July 28, 1997, recognized the microradio station's service to the Allston community. Radio Free Allston's programming was noted for its discussion of important community issues. Radio Free Allston was supported by the Allston Civic Association, the Allston-Brighton Healthy Boston Coalition, the Irish Immigration Center, the Brazilian Immigration Center, the Allston Business Association and the Allston-Brighton Historical Society.

To this end, a regulatory scheme providing for the allocation of frequencies to microradio would further the core purposes of the FCC to make available "to all the people of the United States, without discrimination . . .[a] radio communication service with adequate facilities at reasonable charges . . .." 47 U.S.C. § 151 (1998).

Conclusion.

For the above reasons, we respectfully request that the FCC evaluate the petitions for rulemaking and its current regulations in light of controlling First Amendment principles and the FCC's statutory mandate.

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Dated: July 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1998, a copy of The American Civil Liberties Union of Massachusetts and Radio Free Allston's Reply Comments for RM No. 9208 and 9242 was served via overnight delivery upon the Federal Communications Commission and via U.S. Mail upon the other individuals:

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