

Before the

FEDERAL COMMUNICATIONS COMMISSION

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| In the matter of: |) | MM DOCKET NO. 99-25 |
| |) | |
| COMMENTS, re. |) | |
| |) | |
| Creation of a Low Power Radio Service. |) | RM-9208 |
| |) | RM-9242 |
| Adopted: January 28, 1999 |) | |
| Released: February 3, 1999 |) | |

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TO: THE FEDERAL COMMUNICATIONS COMMISSION:

Thomas M. Eells, pursuant to Section 1.415 and 1.419, (47 CFR) of Commission's Rules, submits comments on the Notice of Proposed Rule Making concerning the creation of low power radio service.

Noted in its INTRODUCTION, the purpose of the Commission is to consider authorizing the operation of new low-power FM (LPFM) radio stations which *"would provide a low-cost means of serving urban communities and neighborhoods, as well as populations living in smaller rural towns and communities ..."* (and) *"serve our goal of encouraging community participation and proliferation of local voices, while protecting the integrity of the spectrum."*

The high character qualifications of full power licensees must not be compromised by low power licencees, but to accomplish the goals, licensing policies for "low-power" service should emphasize "low-cost" for the procedure in obtaining a license and operation of the station, and only low nominal Commission fees for the LPFM services should be considered.

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COMMENTS ON SECTION III, A through H

Ownership consolidation of full power stations and other factors have contributed to exacerbating the difficulty of entering the full power broadcast industry and independent operators surviving. However, the survival of low-power operators is equally questionable if any unnecessary or unreasonable impediment is added to an already risk taking endeavor. Assuming low power station rules are adopted, to lower costs and consequent risks, the following comments are made.

All LPFM stations, where a need is shown, should be permitted to seek auxiliary frequencies where they are available.

Both LP1000's and LP100's should be open to both commercial and noncommercial applicants. Whether service area populations or local businesses will support a commercial operation of an LPFM should not be prejudiced, nor the quality of their programming. A noncommercial interest of whatever persuasion should have the same opportunity to compete for an audience along with any commercial operator and to accept the attendant risks. If both noncommercial and commercial interest can apply for all LPFM channels, auctions can be legally avoided and lotteries should be possible.

The Notice concedes that third adjacent channel protection is unnecessary and it appears most engineering studies now show second adjacent channel protection is also unnecessary. Paragraph 40 of the Notice and footnote 54 discourage a contour overlap approach due to processing burdens on

Commission staff and "a heavy burden on small LPFM applicants." Some applicants may willingly accept such a burden and staff burdens may be acceptable if principally borne by applicants, supported by extensive studies and engineering exhibits. Although full power stations must be fully protected, other possibilities should not be foreclosed at the outset. LPFM availabilities may be open in areas, avoiding some first adjacent and even co-channel protection due to terrain data. Special but reasonable fees could reasonably compensate Commission staff costs.

Adjacent channel and co-channel protection should be mainly based on minimum distance separations, however, exceptions should be allowed where lack of interference to full power stations can be shown conclusively or equipment at the LPFM's expense will eliminate the interference.

All LPFM's should have the option to freely accept interference from "receive no overlap" distance separations without limitations. Any mutual voluntary interference agreements between LPFM's and/or with full power stations should be permitted and without limitations.

LP100 stations will cost less to equip and operate than LP1000's, but cost is relative to most hopeful applicants. To expect a permanent license, once in operation, all LPFM's should be afforded the primary protection from unnecessary technical changes by any existing station.

Prohibiting an entity from owning more than one LPFM station in the same community is supported. However, defining a community or a market is problematic. Applicant's geographical definition attested with minimal

corroboration should be presumed irrespective of overlap to some other potential assigned community's 1 mV/m signal contour, nor should there be an arbitrarily predetermined "Designated Market Area."

Limiting ownership to "*five or ten stations nationally,*" will essentially not be national ownership. A minimum of twenty would accommodate the purpose of attaining efficiencies of operation.

Electronic filing by e-mail should be instituted, unless the Commission's development system delays adopting these new services. However, there should be no preliminary type automated self-check to explore the availability of a channel. The cost of defining a community and engineering studies for an available channel should be borne by the applicant prior to submission of the filing to avoid burdening the Commission with expensive service costs and frivolous inquiries. Minimal fees could ameliorate added applications expense.

Filing procedure could be separate for LP100's and LP1000's. The first-come, first-serve for filing would accommodate a "low-cost" for all LPFM's. The concern is, would it be fair to applicants who filed minutes after a rival. A solution could be a universal window of only one business day, but with ample public notice. If no application is then received that day for an available channel, a first-come, first-serve procedure should be provided thereafter.

Windows in general pose a problem of identifying all channels. It would be an impossible task to determine all LP1000's available, and the even greater number of LP100's for periodic window filings. Three window choices may be possible: first, regional filings; second, specific channel number filings, or third,

accepting all filings on one day with sufficient lead time public notice and a predetermined order of how filings will be considered, such as regional, channel specific or, preferably, LP1000 applications first and LP100's second. The third choice could be extended by quickly identifying all those of both class that are not mutually exclusive and to process them immediately. Mutually exclusive applications could be delayed in a queue for resolution in a manner and order as predetermined and published. However, if an application for a LP100 station is mutually exclusive with one for a LP1000, the LP1000 should be preferred. If a LP100 permittee could move to LP1000 status following Commission rules, it should be allowed.

Regional window filings could prejudice abutting regions whose windows were to be opened later. Specific channel windows could also cause problems of favoring certain channels where their acceptance would precipitate interference that might prejudice later windowed channels. The third choice of only a one day window appears to be fairest for all concerned, although it would cause a substantial but temporary clerical burden on the Commission.

In fairness, there can be no escape from many mutually exclusive applications, however the methods for accepting filings are tailored. If all LPFM channels are open to noncommercial and commercial applicants, lotteries are possible, yet a commercial applicant should receive preference over noncommercial applicants. If auctions are contemplated, the channel window must be opened prior to an auction date in order to determine if mutually exclusive applications actually exist. Paragraph 107 of the Notice appears to suggest a second auction window to

open after the first that may permit new parties to enter the bidding. Auctions should be restricted to those who filed applications in the first window. Otherwise, it would be manifestly unfair to the original first window applicants.

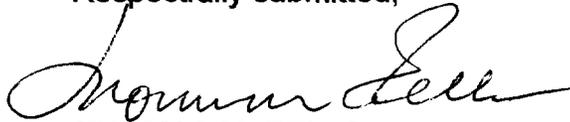
Auctions should be discouraged in any legal manner possible for all these low power services. By the Communications Act of 1934, as amended, the Commission has broad authority to grant licenses based on "*public convenience, interest or necessity.*" 47 U.S.C. Secs. 151, 301, 307, and 309. By the First Report and Order, in MM Docket 97-234, 13 FCC Rcd 15920 (1998), certain standards were set by the Commission relating to the Balanced Budget Act of 1997. The Commission has the authority and should modify those standards concerning newly created services. In its paragraph 106, the Notice shows that the Commission is obligated to avoid mutual exclusivity in application and licensing proceedings in specific ways and "*other means,*" in its accomplishment. Other means are suggested by reference to the Commission's Policy Statement on Comparative Broadcast Hearing, 1 FCC 2d 393. The comparative integration criterion was discredited by the decision in Bechtel v. FCC, 10 F.3d 875, however, the other five criteria are: the diversification of control of mass media communication, proposed program service, past broadcast record, efficient use of the frequency and the character of the applicants. Proposed programming and past broadcast record are not considered at length in the Notice. An abbreviated hearing on these two factors could be considered but LPFM applicants with current attributable ownership interest in any full power stations must be precluded. Persons or entities who have violated Commission rules,

regulations or have been denied licenses for cause in the past, or have operated unlicensed stations and felons should be excluded from ownership. Commercial applicants should receive preferences over noncommercial applicants in any preferential arrangement in mutually exclusive decisions.

All other Commission Rules and Regulations should apply to new LPFM applicants, permittees and licensees, without compromise.

DATED: April 9, 1999

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Thomas M. Eells".

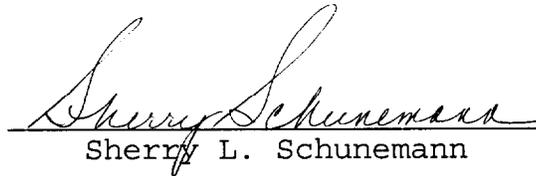
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Certificate of Service

I, Sherry L. Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Comments" were mailed this 12th day of April, 1999, by First Class U.S. Mail, postage prepaid, to the following:

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