

May 11, 1999

Secretary
Federal Communications Commission
The Portals
445 Twelfth Street S.W.
Washington, DC 20554

**Re: Docket No. MM 99-25
(aka RM-9208 & RM-9242)**

Dear Commissioners and Commission Staff:

Special Comments, Reiterating Opposition To Any Extension Of The Comment Deadline And/Or The Reply Comments Deadline. This document is being filed ELECTRONICALLY.

As you know, JOHN R. BENJAMIN AND CHARLES COPLIEN has already filed Written Comments in this Docket (dated March 21 1999; filed electronically on 03/22/99). We had planned to file only one other document -- Additional Comments in mid-May -- but now the NAB's request for ANOTHER Deadline Extension compels us to file THIS document as well.

We trust that the enclosed Special Comments adequately convey the intensity with which we oppose "a second bite at the apple" for the NAB.

This Extension Request, which we learned about ONLY through the trade press, is NOT a policy matter on which reasonable people can degree. It is, rather, a challenge to the FUNDAMENTAL RIGHTS of citizens to petition for a TIMELY redress of grievances -- and it is a violation of the COMMON COURTESY with which even political debates are usually conducted.

Unlicensed broadcasting since 1978 has given the NAB 20 years to study the risk of interference from Low Power Radio stations -- without, apparently, providing them with sufficient information to oppose the LPRS.

Further, the NAB has had notice since February of 1998 that the FCC was formally considering the re-legalization of Low Power Radio. Yet the NAB did not even decide to PROPOSE to START its study until 13 months later.

Oh, yes, the NAB needs an interference study!! It needs it because it has run out of excuses for delaying establishment of the LPRS.

The NAB is out of arguments and out of time. Now it is trying to stall through sham and bluster.

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We urge the Commission NOT to be "an enabler" for the NAB.

PLEASE do not reward the NAB's tendency to roll over opponents instead of trying to understand them and negotiate with them.

It takes TWO to negotiate -- but, so far, the NAB has not indicated ANY willingness to bend on ANY issue. For the sake of future harmony and stability in the world of radio, the NAB needs to learn -- RIGHT NOW -- that, sometimes, a refusal to compromise can lead to an outright defeat.

PLEASE teach the NAB that, at least at TODAY'S FCC, reason and respect count for more than arrogance and muscle.

You will be doing them a favor in the long run.

Sincerely,

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JOHN R. BENJAMIN AND CHARLES COPLIEN,
REITERATING OPPOSITION
TO ANY EXTENSION OF THE COMMENT DEADLINE
AND/OR
THE REPLY COMMENTS DEADLINE

Docket No. MM 99-25
(aka RM-9208 & RM-9242)

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as well -- for the same reasons we opposed the last one.

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In this regard, we incorporate by reference our Written Comments, Opposing Any Extension Of The Comment Deadline And/Or The Reply Comments Deadline (dated March 12, 1999).

Reiterating our March 12 filing "in a nutshell":

The NAB claims to need more time in order to complete an interference study -- but it has had 20 YEARS to complete an interference study!! From the start of the ban on Low Power Radio in 1978, Low Power Radio has been a cause of controversy -- and this controversy has been RISING, in spurts, to its present crescendo. Even if the NAB did not originally foresee the present eruption of interest, the NAB has been on notice since February of 1998 that the FCC was officially considering the re-legalization of Low Power Radio. Yet it waited 13 months after the initiation of Dockets RM-9208 and RM-9242, INCLUDING a month after the issuance of a Proposed Rule in Docket MM 99-25, before it even proposed to START an interference study.

Was the NAB so arrogant that it underestimated the power and persuasiveness of Low Power Radio activists, AND the courage of the Commission, leaving it flabbergasted when a Proposed Rule was actually issued? OR was the idea of an interference study held in abeyance all along -- so that, when and if the other lines of defense collapsed, the NAB would have yet another rationale for stretching out the process as long as possible?

It doesn't really matter. The NAB has had AMPLE opportunities to undertake an interference study before now. It should NOT be indulged further.

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TWO QUESTIONS FOR THE NAB

Annoyed as we are by this SECOND request for a comment period extension, we will now ask the NAB two questions -- On The Record -- that we were too courteous to ask last time:

1. For years and years and years, NAB, you urged wholesale prosecution of unlicensed broadcasters -- NOT just those who were PROVEN to be causing interference, but ALL unlicensed broadcasters -- BECAUSE, you claimed, ALL unlicensed broadcasting poses the risk of unacceptable interference (and might bring down airplanes). Yet NOW you claim to need an interference study before you can determine the interference potential of Low Power Radio stations. Hmm. So how come, NAB, you made all those sweeping statements about "pirate radio" BACK THEN -- when you hadn't even thought of the interference study you claim you need NOW?

OR, as a prosecutor in a criminal trial might put it:

"Which time were you lying, NAB? Back THEN, when you didn't need an interference study to justify shutting down stations, or even throwing people in jail, in the name of avoiding interference? Or NOW -- when you can't even

assess the interference potential of LEGAL, LICENSED AND REGULATED Low Power without doing a multi-month study?”

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2. NAB, your Chief Executive Officer, Edward Fritts, stated a few years ago that ALL unlicensed broadcasters should be arrested, REGARDLESS of whether they were actually causing interference, because “The law is the law.”

Really. Well, we have a question for you:

How much respect for the law are YOU showing, NAB?

Technically, of course, you are within your legal rights in requesting a comment period extension. You are even within your legal rights in refusing to take the Commission’s earlier “No” for an answer -- although the act does imply a certain disrespect for the Commission’s considered judgment.

You are, as they say, “in technical compliance” with the law.

You are also savaging the SPIRIT of the law. You are asking for an interference study that you don’t need, and could have done much earlier if you DID need it, and you are doing this for the unstated purpose of “buying time” in a proceeding that is going against you.

Were we to judge YOU by the same harsh and unrelenting standard that YOU have applied to ALL unlicensed broadcasters, we would have to conclude that you are engaged in the moral equivalent of obstruction of justice.

Fortunately for you, our own standard of judgment is NOT as harsh and unrelenting as yours. We are NOT attempting to demolish Disney or sizzle CBS,

and we are NOT closed to “good faith” negotiation and compromise.

We know a “hoodwinking” when we see it, however -- AND we’re gonna call ya on it.

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THE COURTROOM CONNECTION

It has occurred to us that the NAB may be laying the groundwork (or adding to the groundwork) for a possible lawsuit against the FCC in the event a meaningful, and workable, LPRS is approved. In this context, the NAB may be planning to portray the FCC’s partial denial of its first Extension Request, and perhaps its TOTAL denial of a second Extension Request, as an arbitrary exclusion of relevant evidence from the record and a preclusion of the NAB’s ability to make a complete case.

Unfortunately for the NAB, we have lawyers, too (humble though their compensation may be) and we know a thing or two about Building A Record.

Therefore, we are inserting this Sub-Section into our Special Comments as a direct message to any future judge(s) who may be reviewing this Docket.

Our message is simple:

We urge any future reviewing judge(s) to look carefully at the details of the proceedings in FCC Dockets No. RM-9208 and RM-9242. These proceedings

came BEFORE this Proposed Rule AND provided much of the foundation for it.

Specifically, these two simultaneously running Dockets collected public

comments on two different Petitions For Rulemaking by private citizens:

RM-9208 (submitted in July of 1997 by Nick Leggett and Judith Fielder Leggett of

Virginia, joined by Don Schellhardt of Connecticut) and RM-9242 (submitted in

March of 1998 by Rodger Skinner of Florida).

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There is NOTHING ambiguous, in the Notices for these Dockets, about the Commission's intention to fully and officially consider Low Power Radio as an issue. There is NO indication, from these proceedings OR any of the rest of a multi-decade public debate over Low Power Radio, that interference would not be one of the central issues. There is NO evidence that the NAB, at any point in this debate, was EVER reticent about addressing the interference question due to a lack of technical knowledge about it.

Throughout the progress of these preparatory proceedings, the NAB knew clearly what the Commission was doing. Yet the NAB never asked for a comment period extension -- or even mentioned that it planned to complete a technical study of possible Low Power Radio interference.

We also note that the Commission was demonstrably OPEN TO INPUT throughout the initial proceedings in Dockets No. RM-9208 and RM-9242.

Although the NAB never asked for a comment period extension, other parties did

-- in succession -- and all of them received an extension in short order.

Ultimately, the Dockets were open from early February of 1998 (in the case of RM-9208), and mid-March of 1998 (in the case of RM-9242), until late JULY of 1998. The Commission was hardly being “high handed”: if anything, it was being overcautious.

We conclude, therefore, that the Commission was equitable and open in its procedures: displaying willingness to hear ALL relevant evidence, offering ample time for comment and signaling clearly its official interest in Low Power Radio.

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The “high handed” party in this instance is the NAB, which has suddenly declared, more than A YEAR after the onset of Commission deliberations, that it needs a technical study it has never needed before ... that, as the voice and arm of an industry with net profits in the billions, it cannot complete the necessary study in less than several months ... AND that the Commissioners, the Commission staff, the Low Power Radio advocates and everyone else involved, who HAVE “done their homework” and met their deadlines, should just “hurry up and wait”.

The natural resistance to such treatment, by the Commission AND the Low Power Radio movement, CANNOT be painted successfully as “arbitrary and capricious” behavior or any other denial of due process. This resistance to the NAB’s request is rational, and even necessary, behavior -- in the face of a frivolous attempt to manufacture an issue, “at The Eleventh Hour”, as a way

to stave off a richly deserved defeat.

The NAB should send its law firms Back To The Drawing Board.

“That dawg won’t hunt.”

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THE CONGRESSIONAL CONNECTION

While we are addressing requests for delay, we also note that some powerful Congressional legislators have urged the Commission to delay action, or even SUSPEND action, on Low Power Radio.

To its great credit, the Commission has not been intimidated. We thank the Commission for its courage.

For our part, we wish to address the argument, by some, that the Commission should not disregard what Congress has told it to do.

We agree completely. The Commission should not disregard what Congress has told it to do.

We add, however, that THE WAY Congress tells the Commission what to

do -- under our CONSTITUTIONAL framework of government -- is to persuade 50% plus one of the voting legislators in one House of Congress to vote "Yes" on a piece of legislation; then persuade 50% plus one of the voting legislators in the other House of Congress to vote "Yes" on the same legislation; then work out any differences in a House/Senate Conference Committee (whose Conference Report must then be approved by 50% plus one of the voting legislators in each House of Congress) and, finally, either: (1) persuade the President of the United States to sign the legislation; or (2) persuade at least 67% of the voting legislators, in each House of Congress, to override the President's veto.

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Further, before this convoluted process can even begin, 50% plus one of the voting members of the Subcommittee with jurisdiction must vote "Yes" -- followed by 50% plus one of the voting members of the FULL Committee with jurisdiction. After that, IF the legislation passes on the floor, the process of Committee consideration -- including Hearings and voting -- has to start all over again in the other House of Congress.

This process is neither simple nor direct. It is "designed for accuracy, not speed" -- to block legislative action that is impetuous or otherwise ill-considered.

The legislative process ALSO has the effect of preventing even a POWERFUL legislator -- even the Chairperson of a House Subcommittee or

the Chairperson of a FULL Senate Committee -- from speaking in the name of the entire Congress. The only way such a legislator can make such a claim is by pointing to legislation which has passed both Houses of Congress, been signed by the President or survived a Presidential veto, and become a statute. Otherwise, the legislator may speak with the POWER of political muscle -- but cannot speak with the AUTHORITY of law.

We are not so foolish that we would shrug off the words of a powerful Committee or Subcommittee Chairperson. Obviously, any words from such a legislator must carry great weight, especially at an institution such as the Federal Communications Commission. Nevertheless, a single powerful legislator in Congress, or even a handful of strategically placed legislators, can claim no LEGAL authority to COMPEL action -- or inaction -- by the Commission.

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If such LEGAL authority is claimed, it must be based in a LAW.

Otherwise, the Commission is free to "Just Say No".

At present, we submit, there IS no Congressional directive that the FCC must abandon the licensing of Low Power Radio stations. The federal statutes that are "on the books" NOW -- that represent the intentions of 50% plus one of the voting legislators in each House of Congress, sealed into law by a Presidential signature or a veto override -- DO NOT tell the Commission what to do about Low Power Radio.

Those federal statutes are SILENT on Low Power Radio, leaving the

decisions on this subject ENTIRELY up to the Commission's discretion (within the parameters of Constitutional requirements, of course).

Just as the Commission INITIATED its ban on Low Power Radio without requiring advance approval from Congress, so the Commission is free to END the ban without advance approval from Congress. None of the changes in federal communications law since 1978 have changed this fact of life.

If the Commission wishes to KEEP its discretionary authority, in the face of a possible legislative assault on it, the Commission should USE its discretionary authority. In military circles, it is a general rule of thumb that TAKING an objective -- in the face of resistance -- requires 3 times the forces that are needed to DEFEND the same objective. In politics, it is well known that an interest which someone is still striving to gain can be blocked more easily than a VESTED interest can be overturned.

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Thus, the best chance for the Commission to retain its authority in this area is to "stay on track" -- so that, within the near future, it can present Congress with the accomplished fact of a meaningful, workable Low Power Radio Service.

In the meantime, we note For The Record that at least 29 Members of the House of Representatives have written to the FCC in SUPPORT of Low Power Radio. Their primary spokesperson has been Representative David Bonior of Michigan, House Democratic Whip and a powerful legislator in his own right.

CONCLUSIONS

For the reasons set forth herein, we urge the Commission to deny, WITH PREJUDICE, any and all requests for extension(s) of the comment period in Docket No. MM 99-25.

Respectfully submitted,

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