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June 2, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Overnight Delivery

Office of the Secretary
Federal Communications Commission
1919 M Street NW
Washington, DC 20554

**Re: Comments on Notice of Proposed Rulemaking
MM Docket No. 99-25**

DOCKET FILE COPY ORIGINAL

Dear Secretary:

Enclosed are one original and four copies of formal comments of the American Civil Liberties Union of Massachusetts, Radio Free Allston, and the Citizens' Media Corps on MM Docket No. 99-25. Please file them in the normal manner.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Marc J. Goldstein

MJG:mjg

cc: John T. Williams
Lori B. Silver
Sarah R. Wunsch
Stephen Provizer

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

IN THE MATTER OF
CREATION OF A LOW POWER RADIO
SERVICE

NOTICE OF PROPOSED RULEMAKING

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 99-25

**THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
RADIO FREE ALLSTON, AND THE CITIZENS' MEDIA CORPS'
COMMENTS FOR MM DOCKET NO. 99-25**

Introduction.

The American Civil Liberties Union of Massachusetts, Radio Free Allston, and Citizens Media Corps submit the following comments in the matter of Creation of Low Power Radio Service, MM Docket No. 99-25.

As a general matter, we applaud the FCC's effort, through the proposed rulemaking, to open the airwaves to a multitude of new voices. Creation of a low-power radio service has the potential to counteract many destructive trends in the current radio market: the concentration of ownership in large corporations, the loss of local programming, and the increasing lack of commitment to public service on the part of most large radio stations. Low-power radio has the potential to enhance diversity and localism, to provide public service programming that serves community needs, and to make radio station ownership accessible to the average citizen. The FCC must not lose sight of those important goals in implementing a low-power radio service.

To that end, we urge the FCC to adopt measures that will facilitate the development of a low-power radio service that is local, diverse and accessible without being subject to burdensome administrative regulations. We support the creation of a licensing scheme that would allow applicants to decide whether to operate on a commercial or non-commercial basis. We also

support restrictions on ownership, transferability, and residency that would provide structural incentives for community service and that would ensure that licenses for low-power stations remain accessible to individuals and community organizations.

General Comments.

I. THE FCC SHOULD PLACE ITS HIGHEST PRIORITY ON MAXIMIZING THE NUMBER OF 100-WATT AND 1-10 WATT STATIONS.

We believe that the proposed 100-watt and 1-10 watt secondary services have the greatest potential to serve the goals stated above without becoming miniature clones of current full-power FM stations. We fully support the commission's informal proposal to license micropower stations in the 1-10 watt range. We believe that maximum flexibility will be the key to proper implementation of an LPFM service and that there will undoubtedly be situations where only very low wattage stations will be feasible. These smaller LPFM stations could serve specific neighborhoods by broadcasting community events such as school board meetings and high school football games. They also could provide an outlet for discussion of community issues such as neighborhood development, education, and local news. Small LPFM stations provide neighbors with the opportunity to connect with each other through a medium that is affordable, accessible, and widespread.

We are concerned that the creation of a 1000-watt primary service would reduce spectrum available for 100-watt and 1-10 watt stations, especially in already-crowded urban areas. Although 1000-watt stations could provide new points of entry for entrepreneurs who would like to own full-power stations, that opportunity would come at the expense of average citizens who seek only to serve their communities and who cannot afford the equipment, construction, and operation costs necessary to operate a 1000-watt station. In addition, 1000-

watt stations likely would be subject to many administrative regulations that could be waived for 100-watt and 1-10 watt stations, such as the regulations encompassed in 73 C.F.R. § 73.000 *et seq.*

In short, a 1000-watt service carries all of the shortfalls of full-power FM stations and will achieve none of the benefits of small LPFM stations. Stations licensed at 1000 watts would demand a financial investment that is inimical to the accessibility and diversity at the heart of the LPFM proposal. We therefore believe that the 500 to 1000-watt tier should only be licensed in rural, uncrowded markets and that the licensing of LPFM stations at the lower power tiers should *never* be sacrificed for the sake of a 1000-watt station.

II. LPFM STATIONS SHOULD BE ALLOWED TO OPERATE AS COMMERCIAL OR NON-COMMERCIAL ENTITIES.

We believe that applicants for LPFM stations, particularly 100-watt and 1-10 watt stations, should have the option of operating the stations as commercial or non-commercial enterprises. Contrary to the views of some commentators, we believe that for-profit LPFM stations can and will offer community-oriented local programming. Allowing LPFM stations to accept commercial advertisements will enable stations to become stable, self-sustaining enterprises, with potential sources of revenue derived from local merchants and other advertisers seeking to reach the listening community. We believe that licensees should not be required to sacrifice financially in order to operate a LPFM station. However, the FCC should be sensitive to the possibility that commercial licenses may be misused by speculators and/or rendered unaffordable by auctions. Therefore, we recommend that the FCC enact ownership and eligibility requirements and a licensing process that will ensure commercial licenses will be used for the public interest and remain affordable. We will discuss these proposals further below.

Noncommercial LPFM stations also will play an important role in fulfilling the goals of a low-power service. Noncommercial stations most likely will offer programming that is civic-oriented (such as coverage of city council and school board meetings) and will provide volunteers and community members with access to a forum for discussion of local issues. We believe the FCC should allow individuals and community organizations to apply for noncommercial licenses, whether or not they have legal status as a nonprofit corporation.

III. THE FCC SHOULD ENACT STRICT OWNERSHIP AND ELIGIBILITY REQUIREMENTS.

The ownership and eligibility requirements discussed below provide crucial structural incentives for both commercial and noncommercial LPFM stations to operate in the public interest. These requirements should effectively reduce the pool of applicants to those who have a true interest in serving community needs. In addition, these requirements should ensure diverse ownership of LPFM stations and limit the economic value of such stations, so that if auctions become necessary, stations will not be priced out of reach of average citizens.

A. Limit ownership of LPFM stations to one per owner.

In order to enhance the potential for diversity and localism inherent in LPFM, the FCC should enact strict requirements limiting the number of LPFM stations that each person or entity can own. We believe that no person or entity should be allowed to own and operate more than one LPFM station locally and nationally. This ownership restriction will maximize the number of people who have access to the limited-number of LPFM licenses and increase the diversity of voices on the airwaves.¹

¹ We believe that § 202 of the Telecommunications Act of 1996 has no application to LPFM because Congress specifically directed the FCC to amend regulations applicable to current AM and FM broadcast stations. *See* Telecommunications Act of 1996, § 202(a) (directing FCC to modify 47 C.F.R. § 73.3555). In addition, Congress, in enacting numerical sliding ownership restrictions for local markets, clearly did not envision the addition of LPFM stations to the equation.

B. No LPFM Ownership by Owners of Other Mass-Media Outlets.

Cross-ownership restrictions are necessary to ensure that new voices have access to LPFM licenses and to ensure that the new LPFM service is not overtaken by current licensees, whose economies of scale and low start-up costs may place new entrants at a severe competitive disadvantage. Those who hold full- or low-power TV licenses and those with ownership interest in other mass media such as a telephone company, cable TV company, satellite broadcaster, and daily newspaper, etc., should not be allowed to own LPFM stations.

C. LPFM Owners Must Live Within 50 Miles of the Broadcast Studio.

A majority of any ownership group of a LPFM station should live within 50 miles of the broadcast studio. This requirement provides a sensible means to achieve one of the main goals of LPFM — increasing the amount of local programming – without imposing burdensome programming requirements. As has become apparent with full-power FM stations, absentee owners are more likely to adopt generic programming that is geared toward a mass audience and devoid of local content. Requiring local ownership increases the possibility that owners will be familiar with their listening audience and gear programming toward local issues of public concern.

D. Licenses and Construction Permits Should Be Non-transferable.

Considering that the FCC expects many more applicants for LPFM stations than available licenses, it makes no sense to award licenses to individuals or entities who have no interest in actually owning or operating a station. Transferable licenses and construction permits will only result in speculation and the creation of a secondary market where LPFM licenses can be obtained without regard to licensing priorities that favor diversity and localism. If a LPFM licensee decides that it no longer can own or operate its station, the license should be returned to

the FCC where it can be reallocated in accordance with the licensing procedures outlined in the following section.

IV. LICENSING PROCEDURES FOR COMMERCIAL AND NON-COMMERCIAL STATIONS SHOULD PROMOTE LOCALISM AND DIVERSITY.

A. General Licensing Policies Should Prioritize Applicants With Community Support

First, we propose that only one application be accepted per applicant. This would be determined by the duplication on more than one application of any individual or corporate signatories or affiliates with one corporate, financial, or community entity. Should an applicant submit multiple applications, the first will be accepted for review and all subsequent applications will be discarded. This will help eliminate the common tactic of filing hundreds or thousands of applications, many of them blatantly fraudulent, in hopes that the bad ones will not be noticed in the crush of applications.

We acknowledge the difficulty of designing a licensing process that prioritizes local, public service-oriented applicants without imposing unconstitutional or unrealistic institutional burdens. We propose that the licensing process for commercial and noncommercial applicants contain three basic elements: pre-notification, prioritization and accountability.

1. Pre-notification.

All potential licensees should send a letter of intent to the FCC at least 60 days prior to the filing deadline. Within a week following that date, the FCC will inform all applicants by mail of the name, phone number and address of all other applicants. [In areas with no competitors for licenses, this is obviously unnecessary]. This notification will allow applicants the opportunity to communicate and potentially collaborate on applications. This, along with the single application limit mentioned above, will result in a great decrease in paperwork for the

FCC. The FCC would have discretion to implement the pre-notification requirement in such a way to reduce any unnecessary administrative burden, perhaps by utilizing the Internet.

2. Prioritization.

We propose the following:

a. Top priority be granted to applicants who can demonstrate broad community support. This can be done either through letters from local citizens and public-service organizations and/or petitions. We would grant this same priority to previous operators of stations (licensed or unlicensed) with a proven record of broad-based public service broadcasting.

b. The next level of priority be granted to applicants who will program in a language that would otherwise not be available on the local radio dial.

c. The next level of priority be granted to educational or governmental institutions who submit plans for a "public access" program. For this purpose, a board comprised of representatives of the institution and the local community should be present.

3. Accountability.

First, we propose a relatively low, 25% local content requirement as a filter to eliminate applicants who would exclusively use syndicated and or satellite programming. We broadly define local content to mean programming that originates from the station.

Second, all interested potential licensees must publish a brief (500-word), specific description of the programming they plan to provide in the local paper of record. This information will not be unlike that available in a Public Inspection File, but will also contain plans for citizen participation or other information listed in the "prioritization" section above.

Third, one year later, the description by the winning licensee will be republished, along with testimony from the station stating clearly how they implemented that plan in the past year. At the same time, a brief description of how the license of a station can be challenged by a citizen will also be published.

Fourth, no licensing or governmental body will be asked to evaluate and challenge a license. The burden for such a challenge will fall to the citizens of that community. If such a challenge is initiated, the FCC will then make an evaluation as to whether or not the owners misled the public about the station's programming. If it is determined that the station owners have misled the public, their license will not be renewed, but will be issued to someone else, following the procedures outlined above. If no challenge is issued or if no discrepancy is found, the license will be renewed for three years, at which point the above process will be repeated. Following that three-year period, the re-licensing process will occur every four years.

B. Auction Safeguards Will Be Necessary to Serve The Public Interest.

We understand that the 1996 Telecommunications Act may require the FCC to auction licenses for mutually-exclusive commercial LPFM stations. If the FCC concludes that the auction requirement stated in 47 U.S.C. § 309(j) applies to such licenses, the FCC should take steps to ensure that LPFM licenses remain accessible, diverse, and oriented to local programming.

First, the FCC should attempt to reduce the number of applications for mutually exclusive commercial licenses by implementing the pre-notification and accountability recommendations discussed above. Second, the FCC should enact the ownership, eligibility and transferability restrictions for LPFM stations discussed above, which would effectively reduce the economic value of LPFM stations and thus ensure that ownership remains accessible to the average citizen.

Finally, the FCC should design bidding preferences similar to those enacted for full-power stations that would give priority to applicants who in the following order: (1) demonstrate broad community support; (2) agree to programming in a language not otherwise represented on the local airwaves; and (3) who have never previously owned or operated a radio station.

If the FCC concludes that it must auction mutually exclusive commercial licenses without these safeguards, we believe the FCC should require that all low-power stations be operated on a non-commercial basis. This would allow the FCC to utilize a weighted system following the priorities that we have outlined above.

Technical Comments.²

V. DIGITAL RADIO

While we understand the potential importance of Digital Audio Broadcasting (DAB) to the radio industry and American consumers, we believe that for several reasons, the implementation of LPFM should take precedence over any *potential* problems with In Band On Channel (IBOC). First, as stated in previous comments, we believe that a new band solution will ultimately prove to be the only workable digital solution. Second, the specifications presented in the USA Digital Radio (USADR) digital radio proposal implied that LPFM and IBOC are not mutually exclusive. Third, the intent of LPFM to allow for new radio voices must take constitutional and statutory precedence over – or work hand-in-hand with – technological changes.

A lesson may be drawn from Digital Television (DTV), where a commission (PIAC) was established that recommended a number of public interest provisions be implemented in

² The ACLU of Massachusetts does not take a position with regard to the technical comments that follow.

exchange for the new broadcast channels that will become available to broadcasters, including public access channels.

We think it unfortunate that no comparable committee is contemplated for digital radio, but as with DTV, the implementation of any digital radio system should be seen as an opportunity to confirm the public interest aspects of broadcasting and provide *increased*, not *decreased* access.

It is also worth noting that the implementation of any digital system will necessitate the marketing of new receivers capable of understanding a digital signal. This would then open up the possibility of utilizing an extended FM band, *i.e.*, channel 6, for the exclusive use of LPFM.

VI. TRANSLATORS

Especially in light of the use of translators far beyond their original purpose of filling gaps in protected signal contour coverage, LPFM stations should be given licensing preference over translators. We also believe that no existing translators should be “grandfathered in” and that all frequencies that translators reside on may be applied for by LPFM applicants.

VII. CLASS D STATIONS

Many Class D stations have been providing vital public service broadcasting since 1978. They should therefore be given licensing preference for available 50- to 100-watt LPFM frequencies.

VIII. COVERAGE AREAS

Because of the expense involved in erecting towers or renting tower space, many stations may choose to utilize existing structures – buildings, billboards, dormitories, water towers, etc. – to mount their antennas. These structures may or may not conform perfectly to the suggested measurements. Because of that, we would like to see the maximum Effective Radiated Power (ERP) be defined not by the arbitrary limit of 100 watts at 30 meters, but that instead it be 1

mV/m (60 dBu) signal contour at a distance of 5.6km from the transmitter. For example, a station could compensate for having an antenna mounted 15 stories up by lowering their wattage to achieve a 1 mV/m at 5.6km.

This same principle should also apply to the "microradio" subclass, except that the maximum limit would be 1 mV/m (60 dBu) at 3.2km, the equivalent of a 10-watt transmitter at 30m height above average terrain (HAAT).

We will take this opportunity to voice our failure to understand why the FCC has retained a wattage "gap" between 11 and 49 watts. By so doing, the FCC has decreased options in a situation where the greatest flexibility is called for. We strongly suggest extending the 50- to 100-watt tier down to 20 watts.

IX. SECOND- AND THIRD-ADJACENT PROTECTION

Third-adjacent protection can and should be eliminated.

No blanket judgment should be made about second-adjacent protection, as decisions should be made on a case-by-case basis, with local conditions determining the result. If an applicant can produce a conclusive engineering study showing that a LPFM station will not cause interference while on second-adjacent and any pre-existing station cannot prove otherwise, the license should be granted and that pre-existing station should have no legal recourse to disrupt the future of the LPFM.

X. MINIMUM DISTANCE REQUIREMENTS

Especially in light of minimum distance requirements that are biased against areas like the Northeast, we propose that second-adjacent minimum-distance requirements be waived. In second adjacent situations, signal contours should become the defining factor.

XI. PRIMARY VERSUS SECONDARY SERVICE

We believe that calling LPFM secondary or primary is only relevant in relation to certain details. For example, LPFM stations should be willing to accept a higher than normal level of interference (secondary). By the same token, LPFM stations should have primacy over translators (primary).

The most difficult aspect of the question is dealing with any interference potentially caused by an LPFM station. If the procedure we describe in the second adjacent section is adhered to (an unchallenged engineering study by the LPFM), then we feel that LPFM station should be granted primary status relative to the full-power stations around it.

In cases where LPFM stations cause unexpected and ongoing interference, our goal is to negotiate a compromise in order to avoid costly and lengthy FCC or court interventions. LPFM operators should make good faith efforts to reduce their power to avoid interference problems. If they do not make this effort, it is not the LPFM stations which should be in jeopardy, but the licensees.

Also, assuming this good faith effort, applications by full-power stations to increase wattage or cover area should only be granted when such expansion does not threaten the existence of nearby LPFM stations.

XII. BANDWIDTH

The FCC has asked for comments about whether LPFM stations can or should operate within reduced bandwidths. The concern is that the survival of these stations will be jeopardized because of income lost through the abandonment of subcarriers or listeners lost due to monophonic broadcasting, which would reduce a station's ability to raise money through advertising.

In response, we would like to ask that these decisions be considered in light of the intent of this new service to allow new voices on the radio dial. By extension, this means that the more new and diverse stations which are created, the more the service fulfills its stated purpose. Technical decisions that will allow stations to operate with the smallest possible "footprint" are consistent with this purpose, as they will allow for the greatest number of new stations.

Structuring technical parameters so that these stations have smaller footprints is also a way of ensuring they will be used in the way the FCC intends. That is, insofar as simplification is stressed and income-producing elements are de-emphasized, this provides a disincentive for those who would otherwise seek to utilize low-power frequencies simply in order to generate profits.

The FCC also should bear in mind that stations at either the 1-10 or 50-100-watt levels will be run almost exclusively by volunteers and that those which are run by non-profits will be eligible for grants to help allay operating costs. These, along with reduced fees and filing burdens, should bring the cost down to easily manageable levels.

Ultimately, rather than try to introduce an alternative to lotteries or auctions that might be unconstitutional or otherwise burdensome to the FCC, we suggest that the technical parameters for LPFM be conceived in such a way that the licensing pool becomes, to some extent, self-screening so that greater diversity can be achieved.

XIII. 1-10W STATION

We believe that 1-10W stations, like 100-watt stations, should be allowed to operate on any part of the dial where there is space. We also recommend that 1-10 watt stations also be allowed to operate on channels 198, 199, and 200 (87.5, 87.7, and 87.9) as long as interference to channel 6 is not an issue.

Conclusion.

In summation, we would like to re-emphasize those positions which we share with these other groups who are also filing extensive comments in favor of this NPRM: the CDC, the Amherst Alliance, the Microradio Empowerment Coalition, the Recorded Entertainment Company, and Boston LPFM.

First of all, these groups share the belief that the microbroadcast 1-10 watt service should be instituted. We also feel that the 1-10 and 100-watt tiers are the heart and soul of this proposal and that if the 1000-watt service is instituted at all, it should never be at the expense of stations at the two lower power levels.

Secondly, all of these commentators strongly suggest that ownership be limited to a single station locally and nationally, that licenses be non-transferable, and that no cross-media ownership be allowed.

While there are differences among us as to whether the service should be commercial or non-commercial, all of these commentators share the belief that groups which are committed to generating local programming should be given licensing preference and that the cost of licensing be held to a minimum.

Further, all of these commentators suggest exploring the possibility of allowing 10-watt stations to operate on channels 198, 199, and 200 (87.5, 87.7, and 87.9) as long as interference to channel 6 is not an issue.

Finally, Americans have grown used to the idea that the most practical and efficient way to operate radio is on the corporate scale, and in some ways and instances, it is appropriate to implement capital-intensive technology that can propagate 100,000 watts of power into the airwaves. But this group of commentators is bound together by the fact that we can envision the

use of radio on a human scale. Perhaps this means that we believe it is more important to a community that a Town Meeting be available than the fact that it must be broadcast in mono. Perhaps we feel it is more important that an ordinary citizen get access to a microphone than it is that the microphone cost a thousand dollars, or that the faltering presentation of an amateur disc jockey is more than made up for by the unusual music they play.

We believe that if properly instituted, LPFM presents the opportunity to develop stations, built on a human scale, that can have a tremendous revitalizing effect on our communities.

Respectfully submitted,

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