

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
) **MM Docket No. 99-25**
Creation of a Low Power)
Radio Service) **RM-9208**
Notice of Proposed Rulemaking) **RM-9242**

COMMENTS OF THE STATE OF OREGON

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SUMMARY

The State of Oregon opposes the low power FM radio proposal set forth in the Notice of Proposed Rulemaking (ANPRM). In its Comments, the State of Oregon first explains that, as the licensee of numerous NCE public radio stations, it is greatly concerned that the NPRM has not fully considered the negative impact LPFM would have upon the existing public radio infrastructure and public radio audiences.

The Comments first address the questions raised by the NPRM regarding whether LPFM licensees should be non-profit entities and LPFM stations should be operated noncommercially. On these issues, the State of Oregon strongly urges that LPFM stations should not be allocated only within the reserved band, which would result in a disproportionate negative effect on public radio. It also takes the position that, if any LPFM stations should be slotted in the reserved band, then such stations must meet the requirements of 47 C.F.R. § 73.503. The State of Oregon also warns that no LPFM station would be an adequate substitute for existing public radio service.

The Comments then consider the risks to existing public radio that are posed by LPFM, particularly by the NPRM's proposals to relax interference protection standards and to permit interference with or displacement of translator signals. With regard to the latter issue, the Comments point out that the federal and state governments have encouraged and fostered the development of public radio into statewide networks, particularly in rural or sparsely-populated areas, through the use of translators. This proposal threatens that nationwide system. Finally, the State of Oregon discusses its concerns, as raised by several Commissioners, that LPFM should not be allowed to interfere with or preclude the development of standards for digital radio implementation.

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The State of Oregon, acting by and through the State Board of Higher Education for the Benefit of Southern Oregon University, through its attorneys, files these Comments with respect to the above-captioned Notice of Proposed Rulemaking (ANPRM≡).

I. INTRODUCTION.

The State of Oregon opposes the creation of a low-power FM radio service (ALPFM≡) as that service has been proposed by the Commission staff in this NPRM. The primary basis for opposition is because such a service, as described and delineated in the NPRM, presents a grave risk that long-standing Congressional and Commission policies to assure access to public radio

service by all citizens will be undermined by the implementation of LPFM unless adequate protection from interference for existing full-power stations and associated translators.

The State of Oregon agrees with the serious concerns and reservations expressed by three of the Commissioners in their separate Statements which were appended to the NPRM. Unless and until those concerns are adequately addressed, the Commission should decline to implement the staff's proposal. The Mass Media Bureau staff, in its obvious enthusiasm for the proposed rule, has glossed over the preclusive effects of its proposals on existing radio service as well as on technological innovations which are still awaiting Commission action. The message in the three Commissioners' Statements, however, is a much more prudent one: the Commission should not rush into approving LPFM before a complete and accurate assessment of its impact on existing radio service and future technological advances has been thoroughly explored and its implications understood.

II. THE INTEREST OF THE STATE OF OREGON.

The NPRM speaks enthusiastically about LPFM as a means for achieving an increased citizens' access to the airwaves and providing a low-cost means of serving urban communities and neighborhoods, as well as populations living in smaller, rural towns and communities, without fully addressing its risks. Such goals, however laudable, should not be accomplished in a manner detrimental to existing stations, particularly FM public radio stations, and their listeners. The nation's public radio system, as it presently exists, already provides a relatively low-cost means of serving otherwise-underserved urban and rural communities. Likewise, public radio already gives citizens in the communities it serves the type of access to the airwaves that is not

always possible through commercial broadcasting.

The State of Oregon is the licensee of a numerous noncommercial educational (ANCE≡) public radio stations including ones which serve communities located in southern Oregon and northern California. Much of this area consists of small rural towns and communities located in areas which require the use of translators to permit reception. The State of Oregon is greatly concerned that LPFM stations will interfere with reception of its signal by its present listeners in these areas, especially if the Commission=s LPFM rules were to reduce or eliminate requirements for protection of public radio translators by the LPFM stations. Such a result would be directly contrary to the express legislative policy and directives of the Public Broadcasting Act: to expand and extend the reception of public radio to all citizens [47 U.S.C. §§ 390, 392, 396, *et seq*].

Although the NPRM requests comments on the interrelation between the Public Broadcasting Act and its proposals regarding ANCE≡-type LPFM stations, nothing in the NPRM indicates any intent to honor this long-standing Congressional policy to foster protection and expansion of full-power public radio service.

The State of Oregon believes that the risks and ramifications of LPFM, as proposed, have not been thoroughly explored and tested, and urges the Commission to reject the proposal or, at least, to delay action on this proposal until all questions of interference with present FM signals, as well as the technical impact that LPFM might have upon in-band on-channel (AIBOC≡) and other digital FM service have been resolved. The potential adverse impact upon public radio, in particular, indicates that, while paying lip-service to the legislative intent and directives of the Public Broadcasting Act, the staff does not fully comprehend how these

proposals might fatally injure public radio.

While it has made great strides in the years since enactment of the Public Broadcasting Act, public radio is still struggling to realize fully the role envisioned for it in the statute. To the extent that LPFM would compromise the availability of a public radio service to all citizens, the State of Oregon must oppose it. In these Comments, the State of Oregon will explain why it shares the concerns of these Commissioners about LPFM, and will provide a particular focus on the risk that LPFM might undermine the continued ability of public radio stations to provide the universal nationwide service called for in that statute and, until now, supported by Commission policies.

III. THE RISKS TO PUBLIC RADIO PRESENTED BY LPFM

The NPRM requests comment on several issues that directly or indirectly affect the present and future operation of public radio. The first and most specific of these issues are the questions raised in §§ 18 and 19 regarding the allocation of spectrum within the reserved portion of the FM band, channels 201-220 (88-92 MHz). The State of Oregon will first address these questions. Then, turning to other issues of general concern to all FM stations, will explore the particular ramifications of these issues for public radio.

A. LPFM Within the Reserved Band

The language used by the NPRM in §§ 18 and 19 regarding various proposals under consideration with respect to LPFM stations, the reserved band, and the requirements of the NCE rule (47 C.F.R. § 73.503) is somewhat ambiguous and confusing. It is unclear which of the following proposals staff means to convey:

- (1) should ANY LPFM that applies for a channel within the reserved band be required to

meet the eligibility standards of the rule (i.e., a non-profit educational organization using the station for noncommercial educational programming)?

(2) should ONLY those LPFMs that apply in the reserved band AND would have a preclusive effect upon any existing full-service NCE station be required to meet the rule=s standards; or

(3) should ALL LPFM stations be required to operate noncommercially and, therefore, to meet the rule=s requirements? In which case, would all LPFM stations would also be allocated within the reserved band alone?

A last question is whether any potential LPFM or microradio applicants would even be able to meet the rule=s eligibility requirements.

Taking these out-of-order, the State of Oregon first emphasizes that under no circumstances should LPFM or microradio services be shoe-horned into the reserved band alone (query #3). The adverse impact of such a provision would, in such circumstances, fall entirely upon the nation=s already-squeezed public radio stations, while the commercial radio band would remain unaffected by low-power stations. Such a result would violate not only the Public Broadcasting Act but also the Fifth Amendment=s guarantee of equal protection because of the disproportionate impact that would fall on NCE stations.

With respect to the other questions on which comment was sought, the State of Oregon strongly urges the Commission to insist that any applicant for any station within the reserved band -- full-power, low-power, or microradio B should be required to meet all the standards set forth in 73.503. This requirement should not be limited solely to those reserved-band applicants which

might have a preclusive effect upon the signal of an existing NCE station. As a practical matter, in fact, given that most if not all LPFM stations, if squeezed into the reserved band, would most likely pose some preclusive effect upon an existing public radio station, questions #1 and #2 posed by the NPRM may present a distinction without a difference. If the Commission adopts the LPFM proposal, it must assure that any and all stations that apply for frequencies within the reserved band would be required to comply with § 73.503. To require otherwise would mean that the scarce frequencies in that portion of the FM band would be taken away from stations that do comply with the rule and given to stations that do not, a result which would be directly contrary to the intent of Congress as consistently implemented by the Commission.

The NPRM also seeks comment on whether NCE operation and nonprofit status should be required for *all* LPFM applicants. The State of Oregon is concerned whether the staff intends, by setting this requirement, to therefore locate all LPFM within the reserved band. If that is the intention, then the State of Oregon would oppose this requirement, for the reasons stated above, particularly because of the disproportionate harm that would fall on public radio stations. If, on the other hand, the NPRM would require LPFMs to be noncommercial, educational, and non-profit, but would allow them to apply for any LP channel on the spectrum, other questions would remain: first, could any LPFM applicant truly qualify? and, second, could the MMB staff enforce these requirements? The State of Oregon seriously doubts whether the an affirmative answer can be given to either of these questions (the question of enforceability will be considered separately below). Finally, however, even if all LPFMs were required to be NCE stations, the fact remains that such entities would not be a reasonable substitute for public radio, technologically or content-wise, and should not be confused with the type of public radio service contemplated by the Public

Broadcasting Act and developed in compliance with Congressional and Commission policy.

1. Non-profit, Noncommercial Ownership and Operation of LPFM Cannot Be Assured and Will Not Provide an Adequate Substitute for What is Lost. The NPRM seeks comment on its proposal that all LPFM stations should be required to operate noncommercially and be owned by non-profit educational licensees. As nice as this proposal might sound, it is unrealistic, unenforceable, and ineffective. In the first place, Congress in the Public Broadcasting Act sought to foster a national public radio service, a service which has grown, with public and private support, into a high-quality and technologically-sophisticated system. Does the staff really believe that a disorganized multitude of tiny, localized, unrelated, low-budget, and nominally-noncommercial LPFM stations would be the functional equivalent of the public radio system that has been built by state universities, local school boards, and community not-for-profit organizations into the present public radio system? Does the staff think gaining such a station would adequately compensate a community for loss of reception of an existing translator-aided public radio signal? Such a comparison adds insult to injury. LPFM can only undermine public broadcasting as it exists today and as it is projected for the future. Requiring LPFM stations to meet the criteria of 47 C.F.R. § 73.503 will neither satisfy Congressional intent nor compensate the public for what it will lose.

Secondly, it is extremely unrealistic, if not downright disingenuous, for the staff to suggest a requirement of non-profit ownership and noncommercial operation for all LPFM stations. How does the staff propose to enforce such a requirement? Enforcement is particularly problematic in light of the proposal for a first-come/first-served application process, or when one considers that the Mass Media Bureau has already failed abysmally to police these requirements for full-service

NCE station applicants.

The State of Oregon has tried repeatedly to bring to the attention of the Bureau staff many examples of apparent trafficking in NCE licenses and construction permits by entities that claim to be non-profit organizations but are, rather, speculators and profiteers. Most recently, various parties, including the State of Oregon, filed comments in the rulemaking proceeding regarding appropriate procedures to resolve mutual exclusivity among NCE applicants.¹ These comments addressed the proliferation of sham NCE applications and the growing threat to public radio and to the integrity of the application process posed by such speculators. Given this sorry record, staff should be required to demonstrate how it intends to assure the integrity of the LPFM application process and how it proposes to enforce the non-profit status and noncommercial, educational operation of these new stations, when it has failed to do so with respect to full-power NCE station applicants.

B. Technological Risks of LPFM

The following issues, each of which was expressed as a particular concern by one or more of the Commissioners, have not been adequately addressed in the NPRM. These matters may well pose a grave risk to existing FM stations in general, and to public radio stations in particular and, for that reason, strongly suggest delaying implementation of the proposed rule until the extent of such risks has been fully determined. As a majority of Commissioners have warned, caution is called for at this time, rather than an impulsive leap into areas where the technological

¹ *Further Notice of Proposed Rule Making* in MM Docket No. 95-31, 13 FCC Rcd 21167 (1998), Comments of the State of Oregon, the Station Resource Group, and others.

impact has not yet been adequately assessed. As Commissioner Ness reminds us: AOne of the primary reasons for [the FCC=s] establishment was to avoid chaos on the airwaves.≡ The Commission should not lose sight of this fundamental role as it weighs the staff=s proposal and the comments filed in this proceeding. As new technologies and innovations are presented for consideration and implementation, the Commission would do well to keep in mind that, as for physicians, a government regulatory body=s primary watchword should be: AFirst, do no harm.≡

1. Interference with Existing FM Radio Signals. In his dissenting statement, Commissioner Furtchgott-Roth points out that, as a practical matter, the only way the staff=s LPFM proposal could be implemented would be by relaxation of current standards designed to protect the signals of existing stations from interference. The State of Oregon, having reviewed the NPRM and its Appendices, agrees with this assessment. As Commissioner Furtchgott-Roth notes, Commission staff Ahas made no effort to assess, much less quantify, the effect on . existing stations of eliminating these safeguards.≡ (NPRM, Dissenting Statement of Commissioner Harold W. Furtchgott-Roth, p. 1) (emphasis in original). It seems highly imprudent for the staff to propose relaxation of protection standards for full-power radio service without first having quantified the extent of risk to those stations whose signals may be impaired and whose listenership will be diminished. The relaxation will result in as negative an impact on public radio underwriting and fund-raising as it will have on commercial radio advertising revenues, for the simple reason that interference will shrink the size of the audience.

In this context, the somewhat cavalier attitude evidenced in the Joint Statement of Chairman Kennard and Commissioner Tristani is surprising. To characterize the technological

and financial impact of implementing LPFM without adequate protection from interference as an inconvenience is a gross underestimate of the risks to which existing stations, public and commercial, will be exposed. As Commissioner Ness warns:

There are real questions regarding potential adverse effects on . . . interference protections, particularly with respect to second adjacent channels. . . . The record that will be developed over the next few months must provide an objective technical basis for low power FM service. (Statement of Commissioner Susan Ness, p.1).

Commissioner Powell has likewise expressed his concerns about proposed relaxation of interference protections, and urges the parties to develop a full, objective record regarding potential interference problems that might result from creation of these new classes. He promises to be very interested in understanding the spectral ramifications . . . and . . . to consider interference questions very seriously before taking final action. (Separate Statement of Commissioner Michael K. Powell, p. 1).

The State of Oregon shares the concerns of these Commissioners, but also wonders whether the comments of interested parties, however thorough and extensive, are enough to make an adequate record. Pro-or-Con comments should not be viewed as a substitute for the staff's prior and greater obligation with respect to this record. Staff should be required, in the first instance, to conduct the type of extensive technical testing and evaluation that is needed in order, as Commissioner Furtchgott-Roth explains, to assess . . . [and] quantify the effect on existing stations of eliminating interference protections. The staff should not be permitted to shift its burden to those who file comments in these proceedings. Commenters are necessarily limited in their ability to respond in a truly significant way to these technological issues because the staff has

failed to provide the type of scientific data to which meaningful comments can be addressed.

So far as the State of Oregon can determine from the NPRM, the staff is not really concerned about interference that will be caused by LP1000 stations to second or third adjacent channels. In fact, the staff is willing to tolerate and permit that level of interference. The State of Oregon is most particularly alarmed at the potential risk that would be posed to public radio signals, which are often relatively small themselves and, for the most part, tightly grouped within the relatively-small protected band. What will happen to the integrity and quality of these stations= signals? The staff may not care, but the Commission should keep in mind that the nation=s public radio service is presently the primary, if not only, available source for serious in-depth news and public information programming in most communities.

In the new radio markets that have resulted from relaxation of the ownership rules, with consequent greater concentration and loss of content diversity, public radio more than ever offers the primary if not the only source for the type of programming that commercial broadcasting has largely abandoned. If public radio stations are now to be squeezed, and their signals diminished, by LP1000s, LP100, and microradio stations (none of which will have the resources or capabilities to duplicate public radio=s sophisticated news-gathering and high quality programming), the result can only be a further Adumbing down≡ of content across the entire spectrum, including the reserved band. Public radio and its audience need the Commission=s protection from LPFM interference and from trivialization of the scarce resource that is the reserved band.

2. Public Radio Translators Must Be Protected. The NPRM requests comment on

staff's proposal that translator stations, as a secondary service, would not be afforded protection from LPFM interference. Loss of such protection would be highly detrimental to public radio stations, particularly to stations in those states where extensive public radio networks have been developed often with federal state government financial support in order to assure reception of public radio programming throughout the state, including remote rural areas.

As stated above, Southern Oregon University is the licensee of several stations, including more than 40 translators, which it utilizes in order to transmit its signal to rural areas that would otherwise not have access to public radio programming. State governments and state institutions of higher learning have found the use of translators to be a more efficient means of reaching all citizens of the state than a balkanized patchwork of low-budget separately-transmitting stations might provide. Oregon is but one example of a state where such networks have been developed with state taxpayer support, with the intention that no citizen however isolated or remote his or her community will be out of range of a public radio signal. Particularly in the western states, the whole structure of public radio is based upon networks of translators. These networks have been built with funding specifically provided by the Public Telecommunication Facilities Program (PTFP) of the National Telecommunications and Information Administration [NTIA] of the Department of Commerce in accordance with the directives of 47 U.S.C. § 392 (a), as well as through local and state governmental funds. The infrastructure thus created represents the expenditure of many tens of millions of tax dollars, an infrastructure that will be largely destroyed or rendered ineffective if its translator networks lose protection from interference.

This is not a trivial question involving public radio fear of competition from LPFM.. Rather, we are talking about the potential marginalization or, worse, loss of state-wide translator networks whose development was actively encouraged by Congress and by Commission policies and paid for with taxpayer funds. As the NPRM notes, Congress=s stated goal in section 392 of the Act was to strengthen the capacity of existing public . . . radio stations to provide public telecommunications services to the public.≡ The NPRM=s proposal regarding translators would greatly weaken, not strengthen this service. Such a proposal demonstrates a shocking lack of understanding on the part of MMB staff of the policies, practices, and history of state and federal government commitment to public broadcasting for the past 40 years.

Western states, such as Colorado and New Mexico, provide a good example of how state public radio systems use translators. New Mexico, for example, is a sparsely populated state, largely rural, which has used translators in order to permit its relatively few full service public radio stations to reach beyond their communities of license into rural areas. Although the fifth largest state in area, it has only two cities with populations in excess of 100,000, a low per-capita income, and a high percentage (about 50%) of ethnic minority citizens (primarily Hispanic and Native American).

KANW(FM) is a public radio station licensed to the Albuquerque Board of Education. Through the effective use of translators, it has been able to broadcast throughout much of the northern half of the state a programming mix which includes NPR and Public Radio International programs, national and local news, instructional programming, and culturally-relevant music and events. This popular public radio service can be heard far beyond its city of license in vast rural areas and extremely small towns -- communities which, on an individual basis, simply could not

sustain a more locally-originated public radio station. KANW=s service has been developed into this significant state-wide resource through the use of translators.

Similarly, Eastern New Mexico University, in Portales, has extended the reach of its public radio station, KENW(FM), throughout much of the state=s eastern High Plains, an area of far-flung rural farms and ranches, dotted here and there with small towns, some barely larger than a crossroads. As these New Mexico stations illustrate, translators have proven to be not only the most cost-effective but, often, the *only* feasible means of bringing public radio to small communities located great distances from populated areas. Translators have proven to be a wise government investment, an investment which will be lost if not protected from LPFM interference.

Moreover, LPFM is simply not an adequate substitute for the public radio systems promoted by the Public Broadcasting Act that have developed with federal, state, local, and private support in order to provide fair and equal access to all state residents. An LP100 or an LP1000 station could not provide effective coverage of such vast areas. The range of even the larger of such stations would not encompass much more than two or three ranches. Ironically, the more likely effect of an LPFM station slotted in some small town on the Llano Estacado would be to block reception of KNEW or KANW.

The Commission should look long and hard at the impact of LPFM on the public radio infrastructures that have been created over the last thirty years, largely with public funding. The statutory language and intent are clear that public radio should be available to all citizens. MMB staff cannot realistically assume that requiring LPFM licensees to be non-profit or to operate noncommercially would either satisfy the legislative directive or provide any meaningful substitute

for the existing public radio system, whose reception might be disrupted. Rather than threatening that system, as this NPRM would, the Commission should continue to implement Congressional policy to encourage its growth by restricting LPFM stations from interference with public radio translators.

3. Preclusion of Future Technological Advances. Like commercial broadcasters, public radio stations have eagerly anticipated the implementation of rules that will permit the development and use of such new technologies as in-band on-channel (AIBOC \cong) and other digital technologies. The NPRM=s proposals may well have a preclusive effect on the ability of existing stations, public as well as commercial, to make effective use of these technologies. The State of Oregon believes it is premature to pursue LPFM until after the Commission has first addressed such pending matters as the establishment of technical standards for digital FM. Because of the lack of Commission direction to date, no one in the public radio industry is really in a position to estimate with any certainty such questions as how existing FM translators will function with whatever digital system is ultimately adopted or, in fact, whether the proposed relaxation of the existing interference standards for LPFM will adversely affect the coverage and functionality of digital radio when it is launched. Meaningful comment on this issue is thus precluded, except to urge the Commission not to take any action on LPFM when any possibility exists that conversion to digital technology by FM radio stations might be adversely affected. Unless and until staff can adequately assess and quantify such effects, the Commission should postpone action on LPFM until after digital FM standards have been adopted.

IV. CONCLUSION.

The Commission should reject LPFM service as it has been set forth in this NPRM. At the

very least, it should require the staff to quantify -- and disclose -- any and all adverse effects that may result for existing radio service and the full impact which LPFM may have on future development of digital radio service.. The Commission should be particularly mindful of the potentially devastating effects of this proposal upon the public radio system and should not permit LPFM to diminish or compromise that system or the infrastructure which supports it.

Respectfully submitted,

THE STATE OF OREGON, ACTING BY AND THROUGH
THE STATE BOARD OF HIGHER EDUCATION FOR THE
BENEFIT OF SOUTHERN OREGON UNIVERSITY

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