ORIGINAL

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
SUSAN A. MARSHALL*
HARRY C. MARTIN
GEORGE PETRUTSAS
RAYMOND J. QUIANZON
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.
ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400
TELECOPIER
(703) 812-0486
INTERNET
www.fhh-telcomlaw.com

RECEIVED
AUG 2 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)
EDWARD F. KENEHAN
(1960-1978)

CONSULTANT FOR INTERNATIONAL AND INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT
812-0474
kersting@fhh-telcomlaw.com

DOCKET FILE COPY ORIGINAL

August 2, 1999

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

Re: MM Docket No. 99-25; RM-9208; RM-9242
Creation of a Low Power Radio Service

Dear Ms. Salas:

Transmitted herewith on behalf of Bott Broadcasting Company, Bott Communications, Inc., Community Broadcasting, Inc., Evangelistic Alaska Missionary Fellowship, Inc., New Wavo Communication Group, Inc., Pride Radio Licensee, Inc., Radio, Inc., South Central Communications Corporation, Trumper II Communications, L.P., Zimmer Radio of Mid-Missouri, Inc., Zimmer Communications, Inc., Big Mack Broadcasting, Inc., Lyle Broadcasting Corporation, ZRG of Illinois, Inc., and Zimmer Broadcasting Company, Inc. (collectively, "Joint Commenters"), are an original and four copies of their "Joint Rulemaking Comments," filed in response to the *Notice of Proposed Rulemaking*, MM Docket No. 99-25, 14 FCC Rcd 2471 (1999), in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Andrew S. Kersting
Counsel for the Joint Commenters

Enclosure
cc (w/ encl.): Certificate of Service (by hand)

No. of Copies rec'd 0+4
List ABCDE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: The Commission

JOINT RULEMAKING COMMENTS

Frank R. Jazzo, Esquire
Harry C. Martin, Esquire
Andrew S. Kersting, Esquire
Edward S. O'Neill, Esquire
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 N. Seventeenth Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

August 2, 1999

TABLE OF CONTENTS

Page

Summary iii

I. Introduction 1

II. Policy Matters 2

A. The Proposed LPFM Service Will Not Achieve Its Intended Objectives 2

B. The Proposed LPFM Service Would Result in an Even Greater Number of Unauthorized Broadcast Operations 11

III. Legal Matters 17

A. The FCC's Proposed Ownership Restrictions for the LPFM Service Will Not Survive Judicial Scrutiny Because They Are Inconsistent With the Telecommunications Act of 1996 17

B. The FCC's Proposal to Treat LP1000 Stations as a Primary Service is Inconsistent With Section 307(b) of the Act and the FM Allotment Priorities 20

IV. Technical Matters 21

A. The FCC's Proposal to Establish an LPFM Service is Inconsistent With Commission Proposals in Its *Technical Streamlining* Rulemaking Proceeding 21

B. The Proposed LPFM Service Would Cause Substantial Interference to Existing Full-Power FM Stations 23

C. The FCC's Proposal to Eliminate Second and Third-Adjacent Channel Separation Requirements is Inconsistent with the Commission's Longstanding Interference Protection Standards 27

D. Establishing an LPFM Service Would Significantly Hinder the Development of IBOC Digital Transmission Services 32

V. To the Extent the FCC Elects to Adopt an LPFM Service, the Commission Should Implement the Following Measures to Minimize the Harm that the New Service Would Cause to Existing Full-Power Stations 33

A. The LPFM Service Should Be Limited to a Noncommercial Operation 33

B. The FCC Must Impose a Mandatory Local Program Origination Requirement 34

C. The FCC Should Impose Maximum Height Restrictions On All LPFM Stations 35

D. The FCC Should Limit the Amount of Interference that LPFM Stations May Receive and Establish a Minimum Operating Requirement 36

E. The FCC Should Not Treat LP1000 Stations as a Primary Service, LP100 Stations Should Not Be Given a Priority Over FM Translators and Boosters, and Full-Power AM and FM Stations Should Be Permitted to Use FM Translators and Boosters to Enhance Their Existing Service Without Regard to LPFM Stations 37

F. The FCC Must Resolve All Mutually Exclusive Commercial LPFM Applications Through a Competitive Bidding Process 39

G. All LP1000 Stations Should Be Authorized Through An Allotment Process 41

H. In the Event the FCC Elects to Establish a Commercial LPFM Service, the Commission Should Make LPFM Stations Available to Daytime-Only AM Stations Regardless of Its Ownership Rules 42

VI. Conclusion 42

SUMMARY

The Commission's proposal to establish an LPFM service would not serve the public interest. As demonstrated herein, the proposed LPFM service would not meet any of the Commission's primary objectives of providing an increased opportunity for new entry into the broadcasting industry, enhanced ownership diversity, or an increase in local programming. Despite the proposed ownership rules for the LPFM service, the Commission cannot impose any ownership restrictions that are more restrictive than those mandated by the Telecommunications Act of 1996. Therefore, all existing broadcasters must be given an opportunity to apply for the proposed LPFM stations. Moreover, in the event the Commission elects to adopt a commercial LPFM service, all mutually exclusive applications for commercial LPFM stations must be resolved through a competitive bidding process, which is likely to put existing broadcasters in a much more advantageous position to acquire the proposed LPFM stations.

More importantly, the LPFM service, as proposed by the Commission, would cause substantial interference to existing full-power FM stations both within and outside their protected service contours. In addition, an LPFM service would significantly hinder the development of IBOC digital transmission services, and would result in a proliferation of unauthorized broadcast operations.

Nevertheless, in the event the Commission elects to establish an LPFM service, in order to ensure that the proposed LPFM stations attempt to fulfill their intended purpose of airing community-oriented programming designed to serve the needs and interests of their respective local service areas, LPFM stations should be restricted to operating on a noncommercial basis, so that they will not be subject to the competitive pressures associated with providing a commercial service and

can focus solely on airing community-oriented programming. The Commission also should impose a local program origination requirement and establish a minimum operating schedule for all LPFM stations.

Furthermore, in order to minimize the interference that would be caused to existing full-power stations, the Commission must maintain the existing second and third-adjacent channel protection standards. The Commission also must impose maximum height restrictions on all LPFM stations and restrict the amount of interference that such stations may receive.

For the reasons stated above, as well as the many others discussed herein, the FCC's proposal to establish an LPFM service should not be adopted.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: The Commission

JOINT RULEMAKING COMMENTS

Bott Broadcasting Company, Bott Communications, Inc., Community Broadcasting, Inc., Evangelistic Alaska Missionary Fellowship, Inc., New Wavo Communication Group, Inc., Pride Radio Licensee, Inc., Radio, Inc., South Central Communications Corporation, Trumper II Communications L.P., Zimmer Radio of Mid-Missouri, Inc., Zimmer Communications, Inc., Big Mack Broadcasting, Inc., Lyle Broadcasting Corporation, ZRG of Illinois, Inc., and Zimmer Broadcasting Company, Inc. (collectively, the "Joint Commenters"), hereby submit their joint comments in response to the Commission's *Notice of Proposed Rule Making* in MM Docket No. 99-25, 14 FCC Rcd 2471 (1999) ("*NPRM*"), in the above-captioned proceeding.

I. Introduction.

The Joint Commenters (and their respective affiliated entities) operate a total of 82 AM and FM broadcast stations in 13 states.[1] Each of these stations provides a high quality radio service to their respective communities, including news, weather, public affairs, and other non-entertainment programming designed to meet the unique needs and interests of their respective local service areas.

[1] Attached hereto as Appendix A is a listing of the various radio stations that are owned and operated by each of the Joint Commenters.

These joint comments address the relevant policy, legal, and technical considerations of the FCC's proposal to adopt a new low power FM ("LPFM") service. As demonstrated herein, the proposed LPFM service would not fulfill its intended purpose of promoting diversity, fostering localism, or facilitating new entry into the broadcast business. *See, e.g., NPRM* at ¶¶11-14. In addition, the proposed LPFM service would cause substantial interference to full-power FM stations, and would preclude proposals to introduce new services and expand or enhance existing broadcast services. Furthermore, an LPFM service would result in an over-abundance of FM stations, particularly in smaller markets, which would be another economic blow to independent operators of daytime-only AM stations and certain other stand-alone stations which already are in financial distress. For these reasons, as well as the many others discussed herein, the FCC's proposal to establish a new LPFM service should not be adopted.

II. Policy Matters.

A. The Proposed LPFM Service Will Not Achieve Its Intended Objectives.

In proposing a new LPFM service, the Commission stated that one of its goals was to "address unmet needs for community-oriented radio broadcasting." *NPRM* at ¶1. The Commission believes that "[l]isteners benefit from local programming, since it often reflects needs, interests, circumstances, and perspectives that may be unique to that community . . . ." *Id.* at ¶68. The Commission also noted that although certain LPFM stations may not be able to operate on a full-time basis, they "might still offer 'niche' programming and important community event coverage and news and weather bulletins, such as school closing announcements." *Id.* at ¶14.

In addition, the Commission believes that the inquiries and other expressions of interest it has received regarding a low power radio service indicate that an LPFM service could be an "outlet

for new voices and program services to serve the public." *NPRM* at ¶11. Accordingly, the Commission requested comments concerning whether a low power radio service could "provide new entrants the ability to add their voices to the existing mix of political, social, and entertainment programming, and could address special interests shared by residents of geographically compact areas." *Id.* at ¶12.

Despite the FCC's intentions, the proposed LPFM service will not achieve the Commission's primary objectives of providing an increased opportunity for new entry, enhanced diversity, and additional local programming. *See NPRM* at ¶57. LPFM stations[2] will provide only a very limited opportunity for new entry into the broadcasting business. As demonstrated below, the Commission cannot apply ownership rules to the proposed LPFM service that are any more strict than the restrictions mandated by the Telecommunications Act of 1996 ("1996 Act"). Because LPFM stations must be subject to the ownership restrictions set forth in the 1996 Act and the Commission's ownership rules governing secondary broadcast services, the proposed LPFM stations must be made available to existing broadcasters, including large group owners, who are likely to apply for LPFM stations in an effort to compliment and enhance their existing full-power services. If the Commission were to authorize LPFM stations on a commercial basis,[3] consistent with the Balanced Budget Act of 1997[4] ("Budget Act"), the Commission would be required to resolve all mutually

---

[2] Unless otherwise indicated, the term "LPFM station" as used in these comments is intended to refer to all three classes of proposed low power radio stations (*i.e.*, LP1000, LP100, and microradio stations).

[3] As demonstrated in Section V-A, *infra*, to the extent an LPFM service is authorized, it should operate only on a noncommercial basis.

[4] Pub. L. No. 105-33, 11 Stat. 251 (1997).

exclusive applications through a competitive bidding process and award the construction permit to the highest bidder.[5] Existing broadcasters would be in a much more advantageous position to bid on construction permits for LPFM stations than parties who do not hold other broadcast interests because (i) they are likely to have access to more funding due to the revenue generated through their existing broadcast operations; and (ii) they potentially could operate an LPFM station(s) more efficiently in conjunction with their existing broadcast operations in the immediate area. Therefore, because the vast majority of LPFM stations will be owned by existing broadcasters, the proposed LPFM service will not provide a meaningful opportunity for new entry into the broadcast industry. Indeed, the Commission acknowledged that its goals of providing "increased opportunity for entry, enhanced diversity, and new program services" will be difficult to achieve if LPFM stations are made available to existing broadcasters. *See NPRM* at ¶57.

For the same reason, the proposed LPFM service will not promote ownership diversity because the same persons and entities currently holding authorizations for full-power stations will hold the licenses to the LPFM stations. Thus, although the proposed LPFM service undoubtedly would result in more broadcast stations, it would not promote an increase in ownership diversity.

The proposed LPFM service also will not foster localism or result in new program services that will serve the public interest in any meaningful way. The *NPRM* indicates that very few LP1000 or LP100 stations can be authorized in metropolitan areas.[6] *See NPRM* at ¶¶44, 48. If this proves

---

[5] *See* Section V-F, *infra*.

[6] Appendix D to the *NPRM* demonstrates that if LPFM stations are required to comply with current interference restrictions, there will be few, if any, licenses available in most major markets. *See NPRM* at ¶50 and Appendix D. For example, an analysis by the Commission's staff indicates that no LP1000 or LP100 stations could be authorized in Denver, Colorado, and

(continued...)

to be the case, the vast majority of LPFM stations would be located in smaller radio markets. However, as demonstrated by the significant consolidation that already has taken place in smaller radio markets, there simply are not enough advertising dollars in small markets to support LPFM stations airing local programming. Due to the restricted power and limited coverage areas of LPFM stations, local businesses are not likely to spend their scarce advertising dollars purchasing time on LPFM stations because they know that only a very small portion (if any) of their target audience will listen to an LPFM station. Indeed, there is no reason to believe that residents will listen to an LPFM station in a small market when they can get more enhanced local news, public affairs, and other non-entertainment programming from existing full-power stations in the community. The resulting lack of advertising (or underwriting) revenue will significantly diminish an LPFM station's ability to air programming designed to meet the unique needs and interests of the local community because LPFM stations will not have sufficient funds to hire a news staff, public affairs personnel, or even live announcers. Moreover, in light of the substantial financial difficulties that currently plague many daytime-only AM stations and certain other stand-alone stations in smaller markets, it is highly unlikely that LPFM stations will operate on anything but a marginal basis. In the event LPFM stations are able to garner sufficient funds to remain on the air (perhaps only on a limited basis), due to their inherent inability to generate revenue, they will merely constitute an additional source of relatively inexpensive satellite programming, and will be able to provide little, if any, local programming. Therefore, LPFM stations will not foster localism because they will not provide local

---

[6](...continued)
no LP1000 and only three LP100 stations could be authorized in Minneapolis, Minnesota. *NPRM* at ¶44. If the Commission were to eliminate third-adjacent channel protection requirements, one LP1000 or four LP100 stations "might" be authorized in Denver, and perhaps as many as one LP1000 or nine LP100 stations could be located in Minneapolis. *Id.*

news, public affairs, or other non-entertainment programming designed to serve the needs and interests of their local community.

The Commission's proposal to establish an LPFM service is inconsistent with the rationale supporting its decision nearly a decade ago to increase the maximum power level of Class A FM stations to 6 kw.[7] In response to its proposal to increase the maximum power level of Class A FM stations, the Commission received several hundred letters from licensees, general managers, and engineers of Class A FM stations in every region of the country. The Commission stated the following:

> If one fact is abundantly clear from this outpouring, it is that a substantial number of the persons most familiar with the day-to-day operation of Class A stations firmly believe that *the current 3000 watt power level is inadequate for these stations to be technically and economically competitive in the current radio marketplace environment, and that the proposed increase to 6000 watts would make a significant improvement in the ability of these stations to serve the public.*

Id. at 6380 (emphasis added). The Commission also noted that even those parties who opposed a blanket power increase for Class A FM stations did not question the need for such stations to operate with additional power. *Id.*

If 3000 watts ERP was an "inadequate" power level and significantly impaired the ability of Class A FM stations to serve the public, there is no reason to believe that an LPFM station operating with a power level of 1000 watts or less will be "technically and economically competitive in the current radio marketplace," or that it will be able to serve the public in any meaningful way. Although the cost of operating an LPFM station may be substantially less than a Class A FM station,

---

[7] *See Amendment of Part 73 of the Rules to Provide For an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power of Class A FM Stations*, 4 FCC Rcd 6375 (1989) (Second Report and Order).

the listening audience and advertising (or underwriting) revenue that an LPFM station may be able to garner will be of an equally lesser magnitude.

Moreover, the FCC increased the maximum power level of Class A FM stations to 6 kw at a time when the overall landscape of the broadcast marketplace was substantially different. Since that time, there has been significant consolidation in the radio industry as a result of the implementation of Docket 80-90 and the 1996 Act. Consequently, it would be much more difficult for LPFM stations to compete in today's broadcast marketplace than it was for 3000 watt Class A FM stations to compete with other full-power stations in 1989. Indeed, consolidation has given group owners the opportunity to achieve greater efficiencies by enabling them to combine resources and spread their expenses over several stations. These efficiencies typically enable group owners to serve the public through enhanced local programming, including news, weather, and other non-entertainment programming addressing the specific needs and interests of their respective service areas. Group owners also are able to provide a variety of formats on their respective stations which enables them to attract a broader listening audience, and, in turn, greater advertising revenues. Thus, today's group owner constitutes a much more formidable competitor in the broadcast marketplace than that which existed at the time the Commission increased the maximum power level of Class A FM stations to 6 kw.

Although the Commission has indicated that it will not entertain arguments in this proceeding concerning the economic impact of an LPFM service upon existing broadcast stations, it would be arbitrary and capricious for the Commission to ignore the competitive impact of its proposed LPFM service. Indeed, the economic impact of the Commission's proposed LPFM service is inextricably intertwined with its primary objectives of facilitating new entry into broadcasting, promoting

ownership diversity, and increasing the amount of local programming. To the extent LPFM stations are able to garner any advertising or underwriting revenue, there will be that much less of the radio advertising pie remaining for full-power stations. Although group owners may be able to absorb a slight reduction in their overall revenues by spreading their costs among their various stations, independent licensees of stand-alone stations are not so fortunate. Many would be forced to cut their operating expenses, which necessarily would result in a reduction in the quality of service to the public. Examples of such reductions include eliminating on-air staff, reducing and/or eliminating any news staff the station may have, and airing less local news, weather, public affairs, and other non-entertainment programming, or eliminating such programming altogether and airing only syndicated programming. Other stand-alone operators may be forced to sell their stations, which would result in further consolidation.

Although the FCC suggests that LPFM stations may be able to offer some form of "niche" programming not offered by other stations in the market, any such programming would result only in an increased variety of entertainment formats. It would not result in additional news and public affairs programming designed to serve the needs and interests of the local community. Thus, any increase in "niche" programming would not promote the Commission's fundamental objectives of fostering localism or increasing diversity of viewpoints.

Furthermore, despite the Commission's intentions, the proposed LPFM service actually would reduce the amount of local programming aired on all broadcast stations and diminish ownership diversity. As the Commission is well aware, the implementation of Docket 80-90 had a significant impact upon the radio industry because it resulted in an over-abundance of FM stations, particularly in smaller markets. Many of the stations that were allocated as a result of Docket 80-90

have not survived as stand-alone entities due to the limited advertising revenue in smaller markets. With respect to those independent stations that have survived, many of these stations operate with a satellite-delivered format and air little, if any, local programming. The impact of an LPFM service upon independent broadcasters in smaller markets would be similar to that which occurred as a result of Docket 80-90 because it, too, would result in an over-abundance of FM stations. However, unlike Docket 80-90, which at least resulted in the allotment of additional full-power FM stations, LPFM stations would operate with restricted power and have very small coverage areas. Thus, not only would they be subject to an even greater disadvantage than Docket 80-90 stations, but they would provide substantially fewer public interest benefits. Indeed, because the Commission proposed not to require a minimum operating schedule for LP100 and microradio stations,[8] many LPFM stations would operate only on a periodic basis or for limited periods of time.

The over-abundance of stations that would result from an LPFM service would be another economic blow to independent operators of daytime-only AM stations and certain other stand-alone stations in smaller markets, which already are struggling to survive. Just as was the case with Docket 80-90, LPFM stations could have just enough of an impact upon the operating revenues of these struggling full-power stations such that they no longer may be able to air local programming, or otherwise continue to air local news, public affairs, and other non-entertainment programming to the same extent that they do today. Thus, an LPFM service would reduce, rather than enhance, the amount of local programming in smaller radio markets.

---

[8] The Commission proposed not to establish a minimum operating schedule for LP100 and microradio stations "unless and until it is shown to be necessary." *NPRM* at ¶77.

In addition, the economic impact of an LPFM service also may force already-struggling full-power stations in smaller markets to sell out to group owners or even go off the air, both of which would diminish ownership diversity. Moreover, as a result of the Commission's proposal to treat LP1000 stations as a primary service, there will be many instances where the proposed LPFM service would enable group owners to acquire an additional full-power station in a radio market where they otherwise would have been precluded from doing so by the multiple ownership rules. For example, if two LP1000 stations were to be authorized in a "radio market" in which there currently are 28 radio stations, the relevant radio market then would have 30 radio stations. This would mean that those group owners who previously could have owned only six commercial stations in the market now could own an additional full-power station.[9] Therefore, an LPFM service also would result in further consolidation in the radio industry.[10]

As demonstrated above, the establishment of an LPFM service would merely exacerbate the already over-saturated conditions in smaller radio markets, while providing few, if any, countervailing public interest benefits. Although the Commission's motives for establishing an LPFM service are laudable, the proposal does not take into account the economic realities of the

---

[9] *See* 47 CFR §73.3555(a)(ii) and (iii).

[10] The Commission has expressed concern regarding the consolidation which has occurred in the radio industry since the passage of the 1996 Act:

> [C]onsolidation may have a significant impact on small broadcasters and potential new entrants into the radio broadcasting business by driving up station prices, thereby exacerbating the difficulty of entering the broadcast industry and of surviving as an independent operator.

NPRM at ¶10.

current broadcast marketplace, will never achieve its intended objectives, and is likely to reduce, rather than enhance, ownership diversity by causing further consolidation in the radio industry.

B. The Proposed LPFM Service Would Result in an Even Greater Number of Unauthorized Broadcast Operations.

During the approximate one-year period from May 5, 1998, through May 7, 1999, the FCC issued no less than 21 news releases reflecting its efforts to shut down as many as 56 unlicensed radio stations.[11] As the Commission noted in the *NPRM*, unlicensed radio operators not only violate the statutory and regulatory prohibitions against unlicensed broadcasting, but they also utilize equipment of "unknown technical integrity." *NPRM* at ¶65. Illegal radio transmissions are of significant concern not only to the FCC, but to all authorized broadcast stations and the public at large because of the potential for harmful interference to authorized radio operations, including public safety communications and aircraft frequencies.[12] *Id.* Although the Commission has issued repeated warnings to pirate radio operators requesting them to cease their unlawful operation, many unlicensed broadcasters have persisted in their unlawful activity. *Id.* at ¶66.

The proposed LPFM service, particularly the LP100 and microradio stations, raises a substantial concern regarding whether authorizing an LPFM service would effectively serve as a veil of legitimacy for unlawful broadcast operations. The Commission acknowledged that many of those

---

[11] Attached hereto as Appendix B is a listing of the news releases the FCC issued during the above time period regarding unlicensed broadcast operations.

[12] In March 1998, the Commission closed down an unlicensed radio operation in Sacramento, California, which had interrupted air traffic control communications on four separate occasions. *NPRM* at ¶65, citing *News Release*, Report No. CI 98-3 (March 20, 1998). The Commission also shut down unlicensed broadcast operations that were causing harmful interference to air traffic control communications at the Miami and West Palm Beach, Florida, airports. *Id.*, citing *New Release*, Report No. CI 97-12 (October 24, 1997).

who previously have broadcast illegally are likely candidates for LPFM and microradio licenses. *See NPRM* at ¶67. The limited nature of the service proposed to be provided by LP100 and microradio stations would make such services extremely difficult to police.[13] If the licensee of an LP100 or microradio station were to find that its station's signal is not covering a desired area, there is very little disincentive to prevent the LPFM operator either from increasing the station's power above its authorized limit, or moving the station's transmitter to a more advantageous (albeit unauthorized) location. The unlawful operation of LP100 and microradio stations would go undetected unless and until it causes interference to other authorized radio operations. However, verifying the unauthorized operation of an LP100 or microradio station will be difficult because these stations may operate only on a periodic basis or for limited periods of time. Moreover, unlike unlicensed radio stations, which the FCC currently is attempting to shut down, LP100 and microradio stations would have the substantial benefit of being able to operate under a veil of legitimacy due to the fact that the station itself is an authorized facility, which would make their unlawful operation much more difficult to detect.

Furthermore, the Commission's proposal to institute a transmitter certification requirement for microradio stations as a means of preventing adjacent-channel interference will not prevent the use of uncertified equipment. The substantial number of unlicensed radio operations, and the

---

[13] The FCC proposed that LP100 stations operate with maximum facilities of 100 watts effective radiated power ("ERP") at 30 meters (98 feet) height above average terrain ("HAAT"), which may enable them to achieve a 60 dBu contour distance of 3.5 miles. *NPRM* at ¶30. If authorized, microradio stations would operate with a maximum ERP of between 1-10 watts at the same height. The 60 dBu contour of microradio stations would extend only 1-2 miles, depending on the station's power. *Id.* at ¶34. The Commission stated that microradio stations would provide "only very limited coverage, such as for schools, small neighborhoods, subdivisions, or town centers." *Id.*

stubborn refusal of such operators to terminate their unlawful operation despite repeated warnings from the Commission, strongly suggests that any "certification" requirement will be no more effective than it was with respect to Citizens Band radio services. Indeed, low power radio transmitters will be readily available at relatively low cost at many local retail stores. Moreover, as demonstrated below, there is a plethora of information regarding low power broadcasting on the Internet. The strong likelihood that many microradio operations will utilize uncertified equipment, despite the proposed certification requirement, should be of utmost concern to the Commission, especially considering that "uncertified equipment has on *numerous occasions caused dangerous interference to aviation frequencies*." *NPRM* at ¶35 (emphasis added).

The FCC simply is not equipped to police the unauthorized operation of LPFM stations. As the Commission is well aware, the Compliance and Information Bureau's ("CIB's") staff has been significantly reduced to the extent that it is currently operating with only a fraction of the field offices that previously existed. The staff in the various FCC field offices have more work than they can handle in trying to police existing full-power stations without having the additional responsibility of attempting to police the operations of the substantial number of LPFM stations that may be authorized as a result of this proceeding. The only means by which the unlawful operation of an LPFM station (in the manner described above) would be discovered is if an affected full-power FM station(s) receives a sufficient number of interference complaints from its listeners that it decides to investigate the source of the interference. In the event a full-power station finds that an LPFM station is, in fact, operating unlawfully, the full-power station must then notify the FCC's regional field office and hope that the CIB's staff elects to investigate the unlawful operation in a timely manner. Due to the substantial number of potential LPFM stations, it is reasonable to anticipate that

there may be a proliferation of similar complaints regarding other LPFM stations, and that it may be months before the FCC's field office can act on any one complaint. Moreover, before the FCC can revoke the license of any LPFM station (assuming the circumstances warrant such action), the Commission must first hold an evidentiary hearing. In the meantime, those listeners of the affected full-power FM station(s) would continue to be deprived of at least one source of primary FM service, and air traffic (including commercial airline passengers) would be subject to the continuing risk of dangerous interference to aviation frequencies.

Furthermore, despite the FCC's enforcement efforts, there continues to be a substantial interest in operating unlicensed broadcast stations. For example, this past spring, an Internet company, "About.com," ran a series of radio advertisements in the Washington, D.C. area regarding its guide to "Pirate/Free Radio" broadcasting.[14] The Pirate/Free Radio home page contains, among other items, a comprehensive listing of various types of information regarding the operation of unlicensed radio stations, such as sources for purchasing low power radio transmitting equipment, the "Free Radio Bookstore," and technical information concerning AM, FM, and short-wave radio stations, antennas, and tuning guides.[15] In addition, the home page contains a series of articles regarding unlicensed broadcast operations. About.com also provides its own FCC "Enforcement Action Database." The database includes a detailed analysis of all of the FCC's enforcement actions,

---

[14] Attached hereto as Appendix C is a selection of materials which have been obtained from About.com's Pirate/Free Radio home page.

[15] About.com's pirate broadcasting home page includes a guide to buying pirate radio equipment such as transmitters, transmitter cooling equipment, antennas, and other audio equipment. As an example, the list includes a Canadian company advertising its "own line of low power FM transmitters," and another company which touts itself as providing "one-stop shopping for your FM broadcasting needs." *See* Appendix C.

including the total number of enforcement actions, the number of enforcement actions taken in each state and month, the type of spectrum involved, and the specific type of action taken (*i.e.*, raids, visits, mail, fines, etc.). The database also includes a series of charts and graphs which provide a summary of the FCC's various enforcement actions. *See* Appendix C.

Moreover, the About.com web page includes an article concerning a 50-watt unlicensed radio station known as "Free Radio Berkeley." The article indicates that, despite a U.S. Federal Court injunction, Free Radio Berkeley apparently returned to the air on April 11, 1999.[16]

Finally, the About.com web page contains an article which makes abundantly clear that the FCC's proposal to authorize an LPFM service would have no effect whatsoever with respect to either eliminating or reducing the number of pirate broadcast stations. In an article entitled, "No Retreat - No Surrender", Stephen Dunifer, the founder of Free Radio Berkeley, states that the FCC's proposed LPFM service will not discourage his "electronic civil disobedience":

> I have said it before and will continue to say it - our greatest asset is the ability to put radio stations on the air, demonstrating to all concerned how inexpensive and easy (relatively) it is to do. By taking the course of non-violent electronic civil disobedience we forced the FCC to this point. It is not the time to decrease the pressure but it is time to keep increasing it. Let them consider the prospect of hundreds, thousands of new stations going on the air. . . .
>
> We can do this. I and others in the engineering group are working on new transmitter designs that will be much easier to operate. We have other technical surprises as well.
>
> I will not be content with a few crumbs from an ever diminishing slice of pie carved from an ever shrinking pastry. It is the whole damn pie shop and bakery, that is what

---

[16] The article states that Free Radio Berkeley was "[e]stablished as a Free Speech voice, a direct challenge to the FCC regulatory authority[,] and as a means to break the corporate stranglehold on the free flow of information, news and cultural expression . . . ." About.com Pirate/Free Radio, dated April 11, 1999. A copy of the complete article is contained in Appendix C hereto.

> we need to seize. In the art of war the battle goes to the one who determines the field and rules of engagement. If the FCC wants to declare war on people exercising their inalienable right of Free Speech then let them reap the whirlwind of a major public relations disaster.

About.com, "No Retreat - No Surrender" - Pirate/Free Radio, dated February 6, 1999, p. 3.[17]

Contrary to the FCC's apparent expectations, establishing a new LPFM service would result in a substantial increase in the number of pirate broadcasters. As stated above, the FCC shut down no less than 56 unauthorized radio stations during the period from May 1998 - May 1999. Many of these unlicensed operators persisted in their unlawful activity despite repeated warnings from the Commission. Indeed, Mr. Dunifer's above-quoted statements make clear that he and other pirate broadcasters have no intention of complying with the FCC's regulatory authority, regardless of whether the FCC elects to establish an LPFM service. In light of the substantial number of LPFM stations that could be authorized as a result of this proceeding, the LPFM stations would effectively camouflage pirate broadcasters, making it much more difficult to detect unauthorized broadcast operations.

As demonstrated herein, the proposed LPFM service would result in the expenditure of substantial resources by both the Commission and its full-power FM licensees in their efforts to police the unlawful operation of LPFM stations and other unlicensed broadcast stations. Because the LPFM service has merely been proposed by the FCC, it is not possible to present the Commission with actual illustrations of the unlawful operation of LPFM stations. Nevertheless, the substantial number of unlicensed radio operations that the Commission has shut down over the past year, as well as the strong likelihood that many of those individuals who previously have broadcast

[17] A complete copy of the article is contained in Appendix C hereto.

illegally will continue to do so, demonstrates that the Commission's proposal to institute an LPFM service would open the floodgates to a multitude of unauthorized broadcast operations. For this additional reason, the FCC's proposal to establish an LPFM service should not be adopted.

III. Legal Matters.

A. The FCC's Proposed Ownership Restrictions for the LPFM Service Will Not Survive Judicial Scrutiny Because They Are Inconsistent With the Telecommunications Act of 1996.

The Commission "tentatively" concluded that the ownership limits set forth in the 1996 Act do "not apply to a service that did not exist in 1996."[18] *NPRM* at ¶59. Instead, the Commission proposed to adopt strict local, national, and cross-ownership restrictions for the LPFM service which would prohibit, *inter alia*, a party holding an attributable interest in a full-power broadcast station from holding any interest in an LPFM station. *Id.* at ¶¶57, 59. The Commission also proposed to prohibit any individual or entity from owning more than one LPFM station in the same community (*id.*), and, on a national basis, proposed to permit parties to own no more than five or ten LPFM stations (*id.* at ¶60).

In the event the FCC elects to establish an LPFM service, the proposed ownership restrictions cannot be adopted because they do not comply with the 1996 Act. The sole basis for the Commission's tentative conclusion that the 1996 Act does not apply -- because the LPFM service did not exist in 1996 -- does not constitute a sufficient legal basis for refusing to apply the ownership limits set forth in the 1996 Act. Indeed, following the FCC's reasoning, there is nothing

---

[18] Section 202(a) of the 1996 Act eliminated all restrictions on the number of radio stations that could be owned nationally. Section 202(b) of the 1996 Act significantly relaxed the Commission's local radio ownership rules (*e.g.*, permitting an entity to own up to eight radio stations in the largest markets). *See* 47 CFR §73.3555(a).

to prevent the Commission from creating certain new classes of full-power stations (*e.g.*, Class C0 FM stations) and applying stricter ownership constraints to those stations than the restrictions contained in the 1996 Act, merely on the basis that these new classes of stations also did not exist in 1996.

Moreover, despite the Commission's rationale for not applying the ownership restrictions mandated by the 1996 Act, the LPFM service also did not exist at the time the 1997 Budget Act was enacted. The Commission failed to offer any explanation, however, concerning why the ownership restrictions set forth in the 1996 Act would not apply to LPFM stations, but the LPFM service would be subject to the competitive bidding requirements contained in the 1997 Budget Act.[19] The FCC's stated reason for not applying the relaxed ownership restrictions contained in the 1996 Act is inherently inconsistent with its recognition that an LPFM service would be subject to the Budget Act, and simply does not constitute a sufficient legal basis for ignoring the express statutory language of the 1996 Act. The Commission's proposed ownership restrictions are violative of the 1996 Act, and, if adopted, will not survive judicial scrutiny.

Furthermore, the FCC's proposed ownership restrictions regarding the LPFM service are in sharp contrast to the Commission's existing ownership rules regarding its LPTV service and other secondary broadcast services. In discussing the anti-collusion rule in the context of broadcast auctions, the Commission stated as follows:

> Given the secondary status, limited coverage areas and restricted power of LPTV and translator stations, no limit has ever been placed on the number of these stations that any person or entity may own, and they are not subject to any of the Commission's

---

[19] *See NPRM* at ¶104.

> broadcast multiple ownership rules, which have the objective of fostering maximum competition in broadcasting [footnotes omitted].[[20]]

Accordingly, the Commission revised its auction rules so that attributable interests in existing LPTV and television and FM translator stations will not be counted among an applicant's other mass media interests in determining its eligibility for a new entrant bidding credit in any broadcast or secondary broadcast auction. *Id.* at ¶75.

The FCC's ownership rules governing existing secondary broadcast services also make clear that the ownership restrictions for the proposed LPFM service must be no more restrictive than those in the 1996 Act. With respect to LP100 and microradio stations, they too -- like LPTV stations and other existing secondary broadcast services -- will operate with restricted power, have limited coverage areas, and will operate on a secondary basis. Even assuming, *arguendo*, the FCC elects to treat LP1000 stations as a primary service, the Commission has proposed to authorize LP1000 stations to operate with up to 1000 watts, which greatly exceeds the minimum ERP for Class A FM stations. Thus, LP1000 stations potentially may have larger coverage areas than certain under-powered Class A FM stations. In light of the substantial similarities between (i) LP100/microradio stations, and existing LPTV stations and other secondary broadcast services -- all of which are not subject to the Commission's multiple ownership rules -- and (ii) LP1000 stations and certain Class A FM stations, there is no legal basis for applying strict ownership restrictions to the proposed LPFM service. The Commission simply cannot, consistent with the 1996 Act, apply tighter ownership restrictions to LPFM stations than those applied to full-power radio stations. As

---

[20] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order* in MM Docket No. 97-234, 13 FCC Rcd 15920 (1988), ("*Auction Order*"), *recon. granted in part,* FCC 99-74, ¶64 (released April 20, 1999) ("*Auction MO&O*").