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Federal Communications Commission  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

To: Federal Communications Commission

**Statement of Mushtaq Kapasi**

Pursuant to 47 C.F.R. § 1.405, I hereby submit my statement on the above-referenced proposals for a low-power FM service.

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## I. Introduction

As a law student, my interest in low-power FM radio (LPFM) stems from fascination with the First Amendment and research for a Telecommunications and Free Speech class. But I am also a typical radio fan. Over the past several years I have listened to stations succumb to consolidation, standardization, and blandness. Nowadays the number of stations I can tolerate has plummeted, and I can usually find no more than two in a city that offer a fresh take on local music and news. At the same time, I am thrilled by the voices, music, and opinions populating the airwaves from low-power “pirate” stations. By most accounts more than 13,000 hopeful radio entrepreneurs have visited the FCC’s LPFM web page;<sup>1</sup> hundreds of low-power stations— of all races, political views, and eccentricities— have braved the threat of fines and forfeiture to venture on the air. I am convinced that the “public interest” would be well served by encouraging this type of station to develop.

Since I have little experience in the radio industry, this response is my modest attempt to tackle some of the non-technical questions raised in the Commission’s Notice of Proposed Rulemaking, from the standpoint of a citizen and listener hungry for meaningful radio that can flourish under the aegis of the law.

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<sup>1</sup> See Creation of a Low Power Radio Service, 64 Fed. Reg. 7577, 7578 (proposed Feb. 16, 1999).

## A. Scope of these reply comments

The FCC hopes to accomplish three goals with low-power FM: encourage community-oriented radio, bring in new radio broadcast owners, and spark diversity in radio voices and programs.<sup>2</sup>

In this response I will explore six questions tied to these aims. The first three concern what interests should operate and control the new service. Should LPFM be strictly commercial, noncommercial, or a combination of both? What kinds of ownership restrictions for LPFM stations would best serve the public interest? And what is the best way to license stations and ensure that they follow FCC rules?

The last three questions are primarily legal. To what extent can the FCC encourage minority ownership under current constitutional law? Should low power radio stations have to comply with the “political editorial” and other programming rules? And finally, may the FCC consider applications from formerly unlicensed radio operators?

## B. The short case for low-power FM

After the 1996 Telecommunications Act, the frenetic consolidation of broadcast radio stations has squelched diversity and localism in radio. Only 20 months after the law went into effect, nearly 4000 of 12,245 stations have swapped hands in deals worth over \$32 billion<sup>3</sup>— and the result has been a striking concentration of ownership. Since the passage of the Act, the number of independently owned stations has been cut in half,<sup>4</sup> while the top 10 owners doubled their holdings from 652 to 1132 stations. As of last year, CBS and Chancellor Media together commanded 53% of radio listeners in the nation’s top 10

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<sup>2</sup> See *id.* at 7577.

<sup>3</sup> See David Johnston, *U.S. Acts to Bar Chancellor Media’s L.I. Radio Deal*, N.Y. TIMES, Nov. 7, 1997, at C10.

<sup>4</sup> See Sarah Ferguson, *Rebel Radio*, VILLAGE VOICE, May 19, 1988, at 63.

metropolitan areas.<sup>5</sup> In the Washington, D.C. market, Chancellor alone owns eight stations.<sup>6</sup> Even more troubling is the decline in minority leadership within radio. In the two years following the passage of the 1996 Act, minority ownership of radio stations dropped from an already shameful 3.1% to 2.8%.<sup>7</sup>

As larger companies have adapted satellite feeds and automated programming to cut the cost of a hour of airtime, local owners have found it impossible to compete. Uniform formats that feature the same songs and programs across the nation have priced out of the market more personal, spontaneous programming. Despite their undisputed success in finding nationwide efficiencies, commercial broadcasters' claims to serve the *community* interest are tenuous; according to the Benton Foundation and the Media Access Project, only 0.35% of all broadcast hours were devoted to "local" public affairs shows.<sup>8</sup>

Even Chairman Kennard has decried what he calls "the unfortunate closing of opportunities for a lot of new entrants."<sup>9</sup> In such a powerful yet scarce medium as radio, it is alarming to drift toward a culture manufactured by marketing analyses and focus groups rather than left to human foibles. Although it would be untenable to strike down the 1996 Telecommunications Act or ban commercial stations from the airwaves, I believe that LPFM can help preserve the strange and the spirited on the radio dial— without threatening the commercial radio broadcasting industry.

Established radio interests argue that LPFM is superfluous since they already serve the myriad needs of radio listeners. Despite their flashes of creativity and marketing savvy, however, large-scale broadcasters like the National Association of Broadcasters and National Public Radio must intrinsically rely on attracting advertising "ears" or large-scale funding.

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<sup>5</sup> See *id.*

<sup>6</sup> See Paul Farhi, *Radio's Next Wave?*, WASH. POST, April 21, 1998, at C1.

<sup>7</sup> See Ferguson, *supra* note 5.

Low-power radio is by its nature local and entrepreneurial. Without an emphasis on the bottom line (apart from covering costs), LPFM offers more room for unjaded and unpolished voices. Its relative informality gives local listeners a chance to themselves participate in broadcasting. And LPFM's very smallness makes it an ideal medium for fringe communities— especially linguistic and ethnic minorities— often drowned out by the mass media. From New Haven's Radio Música, to Houston's "Freedom in the Trailer Park," to Decatur, Illinois' Black Liberation Radio, low-power stations have already shown a diversity unparalleled since the chaotic years of unregulated broadcasting.

Even when the particular area served by a low-power station does not have a homogenous audience demographic, a neighborhood station can serve as a melting pot of ideas, a public forum of the airwaves. Most low-power broadcasters in existence today loathe monotony in their messages; many of the most promising small stations operate much like public-access television, opening their studios to the community as a whole. Radio listeners can not only hear a multiplicity of viewpoints among low-power stations, but *within* them as well. One example is Steal This Radio in New York City. Originally founded by tenant activists, it has become an outlet for neighborhood political debates, alternative health care advice, and Spanish-language music.<sup>10</sup> Another is KIND Radio in San Marcos, Texas, which evolved from a mouthpiece for marijuana aficionados to a sounding board for local and state officials.<sup>11</sup> Such low-power stations have not lured audiences completely away from full-power stations, but their wide-based popularity shows that the general public would welcome an alternative to the large stations.

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<sup>8</sup> See Farhi, *supra* note 7.

<sup>9</sup> See Edward Lewine, *Radio Pirates Drop Anchor Together*, N.Y. TIMES, Jan. 10, 1999, § 14, at 4.

<sup>10</sup> See Barbara Olshansky & Robert Perry, *FCC Squelching of "Pirate" Stations Violates First Amendment*, LEGAL TIMES, May 17, 1999, at 18.

<sup>11</sup> See Ferguson, *supra* note 5.

The second major argument against LPFM arises from a fear of interference. National broadcasting associations like NPR and the NAB insist that the radio spectrum is overcrowded, and that legalizing LPFM will only worsen the congestion. Both of these claims are specious. First, the FCC continues to authorize “translator” stations— which are technically identical to micropower stations— to extend the reach of full-power broadcast stations. Even admitting that there may be no more room for full-power FM stations, the proliferation of translators shows that there still exist plentiful nooks among the airwaves.

And despite the explosion of unlicensed microradio, cases of interference up to now have been astonishingly sparse. The FCC often cites interference as one reason for closing down low-power stations, but the Commission necessarily *relies* on the fact that these stations violate the Communications Act’s license requirement.<sup>12</sup> Although the microradio movement, by most estimates, had already spawned more than 1000 unlicensed radio broadcasters by early 1998,<sup>13</sup> the Federal Aviation Administration had reported only one case of micropower interference from 1990 to 1997.<sup>14</sup> Cases of interference by *commercial* broadcasters have been much more dramatic.<sup>15</sup>

The lack of nefarious interference from “radio pirates” is not surprising. Unlicensed stations know that it is in their interest to keep from infringing on the airwaves licensed to larger broadcasters. Low-power radio operators know that they are violating FCC rules, but intentional interference with other stations has simply not occurred. In every documented case of pirate interruption of airport traffic signals, for instance, unlicensed stations used

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<sup>12</sup> 47 U.S.C. § 301 (1998).

<sup>13</sup> See Paul Davidson, *Radio Pirates Fight the Power*, USA TODAY, Feb. 27, 1998, at 1B.

<sup>14</sup> See Pete TriDish, *Questions and Answers about Micro-Radio* (last modified Nov. 28, 1998)

[http://www.radio4all.org/q\\_and\\_a.html](http://www.radio4all.org/q_and_a.html) > (citing research by Dharma Bilotta-Dailey and Tracy Jake Siska).

<sup>15</sup> The FAA has noted several cases of interference by broadcasters in Oregon, New Mexico, and Florida. In particular, the North Perry Airport in Florida has changed frequencies twice since 1976 to dodge interference from commercial stations; an FAA report indicates that a fatal midair crash near the airport may have been caused by an antenna farm two miles away from the airport. See TriDish, *supra* note 14.

equipment that wandered outside the FM band.<sup>16</sup> “Pirates” or not, current low-power broadcasters have taken pains to use unoccupied slices of the spectrum to ensure they do not interfere with established stations, both out of convenience to the average listener and to avoid accusations of sabotage from the Commission and full-power broadcasters.<sup>17</sup> Since even *illegal* low-power FM has avoided widespread bouts of interference, a *licensed* service will no doubt coexist peacefully with full-power stations.<sup>18</sup>

The final argument made against LPFM is that “webcasting” over the Internet gives low-power broadcasters an equally effective way to communicate with their audiences. The Internet has not only helped spark the LPFM movement,<sup>19</sup> it has also allowed unlicensed broadcasters to disseminate their programming in case the FCC shuts down their radio transmitters.<sup>20</sup> But the Internet— as a medium— is an imperfect substitute for local radio. No one denies the unbridled potential of the Internet to facilitate global communication. But there is a quite palpable difference between a call-in show and a message thread, between an impromptu concert on the sidewalk and streaming audio in a cubicle workstation. Low-power radio listeners can walk or take the bus to their nearby station, meet DJs face to face, and arrange for local gatherings in the studio. Radio can do nothing to foster cyber-communities, but it is much better suited to uniting real-life neighborhoods.

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<sup>16</sup> See Ferguson, *supra* note 5; cf. FCC Closes Down Unlicensed Radio Operation That Threatened Air Safety at Sacramento Airport, News Report No. CI 98-3 (Mar. 20, 1998).

<sup>17</sup> See, e.g., Stephen Dunifer, *Micropower Broadcasting— A Technical Primer* (last modified Dec. 3, 1998) <<http://www.radio4all.org/how-to.html>>

<sup>18</sup> Indeed, microradio flourished as a secondary service until the FCC’s 1978 decision to stop licensing low-power radio stations, codified at 47 C.F.R. § 73.511(a) (1998).

<sup>19</sup> Low power radio organizations populating the Internet include the Prometheus Project <<http://www.prometheus.tao.ca>>, the Microradio Empowerment Coalition <<http://www.radio4all.org>>, the Amherst Alliance <[www.personal-expressions.net/amherst\\_alliance/about.html](http://www.personal-expressions.net/amherst_alliance/about.html)>, and the World Association of Community Radio Broadcasters <http://www.web.net/amarc>.

<sup>20</sup> One example is The Womb, a popular unlicensed dance music station in Florida, which broadcasts simultaneously on the airwaves and on the Web. See Ferguson, *supra* note 5.

Perhaps more importantly to LPFM's intended audience, radio is far more accessible than the Internet. Today's average radio costs \$17;<sup>21</sup> a computer equipped with an Internet connection and suitable sound hardware costs almost \$1000.<sup>22</sup> And not surprisingly, access to the World Wide Web varies significantly by income<sup>23</sup> as well as race.<sup>24</sup> On the other hand, the radio is probably the most egalitarian of all communication technologies apart from the pencil. If the Internet could so easily take the place of radio, one wonders why the most profitable media companies have not left the airwaves entirely to broadcast in cyberspace. Low-power FM should remain—and thrive—in its natural home.

## II. Recommendations

### A. Allow for both commercial and noncommercial stations

The most fiery debate within the microradio movement revolves around commercialization. Unfortunately, many have simplified the discussion into a clash between socialists and capitalists, or Panglossians and pragmatists. But with the diversity and fluidity of the LPFM movement, it is risky to assert that either commercialization or noncommercialization will lead to more diverse, edifying programming. Up to now the most successful and admirable low-power stations have included both those who shun advertising and those who depend on it for survival.

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<sup>21</sup> Joel Brinkley, *Listening to Sounds of a Wave*, N.Y. TIMES, June 3, 1999, at G1.

<sup>22</sup> In July, 1999, Dell Computer advertised a low-end desktop, including modem and speakers but not Internet access, for \$899.

<sup>23</sup> See U.S. DEPARTMENT OF COMMERCE, FALLING THROUGH THE NET 6 (1999) (Households with incomes over \$75,000 are more than seven times as likely to have home Internet access than those with incomes less than \$10,000).

<sup>24</sup> See *id.* at 8 (Although 36% of Asian/Pacific households have Internet access, the numbers drop to 30% for whites, 16% for Hispanics, and 11% for African-Americans.).

Noncommercial LPFM would exclude owners whose profit motives squelched any devotion to the community interest. They can better avoid indirect censorship from corporate advertisers; they can freely broadcast voices that would fall outside a marketing plan or offend the most sensitive listeners. A fully noncommercial service would also allow more elementary and secondary schools to establish stations and expose their students to radio. And for the more civic-minded, noncommercial LPFM would result in less entertainment shows and more publicly sponsored programming like city council meetings and university lectures.

Advocates for noncommercial LPFM have shown that these stations can support themselves through grants, donations, and volunteer help. Underwriting can also substitute for advertising, and could indirectly foster incisive and creative reporting that would be impossible with stations supported through commercials. Stations like Steal This Radio have proved that a low-power, noncommercial station can stay afloat with local volunteers and a small staff.

Another more oblique (but but potentially just as powerful) reason for noncommercial LPFM is Congress' 1997 auction law.<sup>25</sup> The language of the statute suggests that the only way the FCC can grant commercial radio licenses— even for low-power stations— is by auction.<sup>26</sup> Auctions will not apply to noncommercial stations on the reserved band (88–92 FM);<sup>27</sup> however, the fate of noncommercial stations applying for licenses *in the commercial section of the FM band* is up in the air.<sup>28</sup> It is a daunting prospect to decipher how the auction law should apply to LPFM as a whole, which will certainly see instances where commercial and noncommercial applications conflict. If the presence of commercial LPFM

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<sup>25</sup> Balanced Budget Act of 1997, 47 U.S.C. § 309(j) (1998).

<sup>26</sup> See Implementation of Section 309(j) of the Communications Act, 13 F.C.C.R. 15920 (1998).

<sup>27</sup> See 47 U.S.C. § 309(j)(2)(C) (1998).

applicants mandates auctions even for noncommercial stations, the noncommercial stations will have virtually no chance of gaining a foothold beyond the nether region of the FM dial.

Unfortunately, however, keeping commercial operations out of LPFM would exclude many potential stations, especially those geared to minority communities. “Noncommercial educational” is much more restrictive than “non-profit”<sup>29</sup>— even stations that have no desire to build up extra capital may not be able to support themselves without advertising. The cost of radio technology has dropped to within the reach of shoestring budgets, but a technically viable, consistently operating station must still pay for equipment maintenance, office space, tower rent, electricity and water, insurance for volunteers— and legal assistance.

Although many activist coalitions, political institutes, and religious groups already have already established organizations with dependable volunteer and fundraising pools, not all worthwhile community groups can rely merely on charity to meet the demands of running a radio station. If LPFM were restricted to noncommercial stations, I have no doubt that they could fill up the dial. But this would merely favor those who already have the money, connections, and supporters with free time. Many pirate stations have been lucky enough to collect donated equipment, garner funds from local sympathizers, and establish an Internet presence. Many other potential stations may not be so fortunate.

Allowing commercial low-power stations may actually encourage diversity, since radio dreamers will not have to risk their livelihoods to invest in a quality broadcast operation. Many station owners, especially minorities, have been shut out of radio by high start-up, operating, and maintenance costs. Since under current law, direct incentives to

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<sup>28</sup> See Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 13 F.C.C.R. 21167 (1998).

encourage minorities will probably not survive a constitutional challenge,<sup>30</sup> allowing commercial low-power radio may be the most straightforward way to lower the potentially fatal financial barriers.

Commercial LPFM will also prove a boon to local merchants. Many businesses cannot advertise on radio at all because of the high advertising rates charged by full-power stations or because they do not fit a centrally sculpted demographic.<sup>31</sup> A corner taqueria, a Korean-language bookstore, a neighborhood credit union, or a popular candlemaker may have neither the budget nor the ambition to air commercials across a large city. A low-power station that reaches a few miles or a few blocks could be the perfect medium to draw in customers. Allowing commercials would also give another outlet to other local media, like street-block newsletters or poetry journals, that would either not afford or would not interest a market-wide audience.

Despite the furious speculation both ways, I believe it is impossible at this point to tell whether commercials will save or ruin low-power radio. I would advise the FCC to allow commercial LPFM stations, but to temper the gravest concerns in two ways. First, the FCC should reserve part of the spectrum to noncommercial radio only. This could be the standard allotment for non-commercial educational stations (88–92 FM), but should be expanded if the cohabitation of commercial stations would force noncommercial applicants to bid for licenses. Second, as outlined in the next section, the Commission should impose strict ownership requirements to preserve the integrity of commercial LPFM.

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<sup>29</sup> Unlike a “noncommercial educational” station, a “non-profit” station as not inherently outlawed from selling advertising for financial support. See 26 U.S.C. § 501(c)(3) (1998).

<sup>30</sup> See discussion *infra* Part II.D. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

<sup>31</sup> Cf. Timothy Aepel and William M. Bulkeley, *Westinghouse to Buy American Radio*, WALL ST. J., Sept. 22, 1997, at A3 (In 23 of the country’s top 50 markets, three companies controlled more than 80% of advertising revenues.).

## B. Ownership restrictions

Leaving LPFM open to commercial interests raises the specter of vast networks of small stations devoted to advertising for large corporations. The best way to prevent this from happening is not to abolish commercial LPFM, but to restrict ownership to radio buffs tuned into their communities. The FCC might well borrow from its 1965 Policy Statement where the two primary objectives were “ (1) best practicable service to the public, and (2) diversification of the control of the media of mass communications.”<sup>32</sup> Unlike full-power broadcasting, low-power FM should not have a goal of enhancing commercial efficiencies.

First, the FCC should limit LPFM to small businesses, non-profit groups, and community associations. To keep out large broadcasters or other companies from taking over the LPFM stations, I support the Community Radio Coalition’s proposal to require owners of commercial LPFM licensees to meet the Small Business Administration’s definition of a small radio station, modified to impose a \$1 million limit on yearly gross revenues for the ultimate holding company. These restrictions are especially applicable to the microradio stations operating at 10 watts or less, to prevent shopping malls, department stores, or worldwide brand names from using a low-power station as its permanent loudspeaker. I would not restrict other forms of media from owning a low-power station as well, since the revenue cap in place for small businesses should itself ensure that these media are sufficiently diverse.

Second, the FCC should impose local ownership requirements for LPFM. The FCC would require owners to live within 25 miles of the transmitter location, preferably within

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<sup>32</sup> *In re* Simon Geller, 102 F.C.C.2d 1443, 1452 (1985).

the broadcast area of the station itself.<sup>33</sup> Of course, this would automatically keep an owner from claiming LPFM stations in more than one market. Hopefully, these ownership restrictions should allay the problems that came other services like low-power television, when the FCC had to handle a deluge of applications from “carpetbaggers” who often lived far from the place from which they intended to transmit.

Finally, the FCC should place limits on sales of LPFM construction permits, licenses, and stations. The market for full-power stations may remain in force, but a free market for LPFM would fuel another buying frenzy by international media conglomerates. I would propose that a license not transfer automatically when a station is sold. The license should revert to the public domain, and anyone with a potential station should be allowed to step into the fray for the open spot. With full power broadcasters, it may be unfair to rescind a license when a station is transferred because of the hefty investment in buying a broadcasting company. But low-power radio stations will be much smaller operations, and the risk of an unwise investment does not outweigh the threat of what could eventually become an auction for existing licenses.

With all of the above ownership restrictions in place, a further “integration” requirement would be impractical and superfluous. The nebulous concept of “integration” requirements has spawned byzantine enforcement. And the other ownership restrictions should ensure well enough that owners stay involved with the day-to-day operation of their stations. Moreover, mandating “integration” is almost certainly beyond the FCC’s regulatory powers. The D.C. Circuit has ruled that the integration requirement was arbitrary and

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<sup>33</sup> It would be unfair to *require* that owners actually live within the broadcast area of the stations, since even LP 1000 stations generally do not have a range of more than 10 miles. See Creation of a Low Power Radio Service, 64 Fed. Reg. at 7587 app. B.

capricious unless the FCC could prove that it served the public interest,<sup>34</sup> and the FCC has not made any recent efforts to validate the integration requirement as an essential hurdle to earning a license.

These ownership restrictions should honor the goals of low-power radio, while not unduly preventing those with broadcast experience from contributing to low-power radio. Broadcasting luminaries and businesses excluded from low-power radio by these rules can still contribute by underwriting stations, through “incubation” programs for low-power entrepreneurs,<sup>35</sup> or even by producing their local shows.

### **C. Encourage local cooperation in LPFM licensing and rule enforcement**

With the advent of low-power FM radio, the FCC faces three major regulatory responsibilities— setting interference standards, licensing new stations, and enforcing its rules. I propose a flexible model to transfer much of the administrative burden to local citizens. Clearly, the devil is in the details, but low-power FM offers a unique opportunity to experiment with voluntary, community-based governance under the watchful eye of the FCC.

#### **Adaptable, localized interference standards.**

The most tangible benefit of recruiting local help would be a fairer, more compact distribution of LPFM stations than that which would result from the proposed minimum distance separations. With low-power broadcasting, the FCC is caught between a desire to allow as many stations as feasible and the administrative costs of less standardized interference criteria. Ideally, when deciding to grant a license for a station to operate at a particular power, the Commission should ponder factors like geography, weather,

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<sup>34</sup> See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993); see also *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992).

international borders, and the idiosyncracies of neighboring stations. But as the FCC correctly concedes, “minimum distance separations may be the best *practical* means of governing interference to and from low-power radio stations.”<sup>36</sup> This is a conclusion borne from experience—the FCC has learned that more comprehensive, fine-meshed approaches to interference protection require sophisticated computer programs, massive databases, and clerical nightmares for FCC staff.

If the FCC is to govern interference by itself, however, overly generalized minimum distance separations could preclude dozens—if not hundreds—of possible low-power stations. With the full protection requirements proposed by the FCC, only three LP 100 stations would be possible in Minneapolis, and not a single LP 100 or LP 1000 station would be available in Denver.<sup>37</sup> If the FCC does not relax its interference standards, the legalization of low-power radio may not serve any significant purpose at all; a new LPFM service that in practice allows no new stations in some areas may actually encourage the proliferation of pirate radio.<sup>38</sup> Relaxed interference standards for LPFM stations may be the only way to find unused spectrum in medium and larger markets and create any meaningful service of 100 watts or more.

A potential way out of this conundrum is to give final say over the distribution of stations in a given market to the low-power radio community and the citizens of those local areas—subject to the interference criteria and oversight of the FCC. Nationwide (and

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<sup>35</sup> See *infra*, Part II.D.

<sup>36</sup> Creation of a Low Power Radio Service, 64 Fed. Reg. at 7579 (emphasis added).

<sup>37</sup> These predictions are based on FCC staff analysis. See *id.* at 7587 app. B.

<sup>38</sup> Microradio advocates fear that the FCC's proposed interference criteria will not leave space for anything but a feeble LPFM service. See, e.g., Olshansky & Perry, *supra* note 10 (“For Steal this Radio and countless other microradio stations across the country, the FCC's current microradio rulemaking is merely a sham, even if the FCC withstands the mounting political pressures from established broadcasters to scrap the entire microradio proposal.”).

worldwide) microradio coalitions have already formed;<sup>39</sup> as the FCC's rulemaking proceeds, I expect local groups—linked by an enthusiasm for low-power radio—to naturally coalesce. Those interested in establishing low-power stations in a particular market could pool their resources and expertise to find room for many more stations in a particular area than would be possible with standard minimum distance separations or even with the FCC's contour overlap approach. The FCC would give final approval of the distribution of stations in a particular area, but the local organizations would shoulder responsibility for the quotidian work of interference protection.

Flexibility in station power, aided by local efforts, would allow the LPFM service to adapt from place to place and best serve individual markets. Some rural broadcasters, for example, might want 1000 watts to reach a large area. On the other hand, stations in a tightly knit neighborhood may only desire 20 watts. Moreover, many potential broadcasters would not be able to meet the demands of a higher-power LPFM license; the technology and equipment might be prohibitively expensive, and higher power may subject stations to the FCC's more stringent programming requirements.<sup>40</sup> Essentially, the distribution of stations and power levels should reflect the collective aims of the microradio community in a particular area—LPFM operators in one city may opt for a smattering of independently owned 10-watt stations, while those in another may decide to share time on a wide-range 1000-watt station. In the end the choice would foster local involvement and healthy experimentation.

There is little risk of increased interference from delegating authority to local microradio organizations to help determine workable power levels and transmitter locations. Even the most anarchic “pirates” have insisted that unlicensed radio stations should

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<sup>39</sup> See *supra* note 19.

minimize interference by using proper equipment<sup>41</sup> and scouring locations around the area for possible interference before going on the air.<sup>42</sup> While much of this circumspection is meant to avoid retaliation from the FCC and established broadcasters, in the end the reasons are simple: interference between adjacent stations harms both the existing station and the would-be broadcaster, and no listener should have to endure conflicting signals on the same frequency.

Low-power FM radio can informally combat interference much as ham radio has for years. In both types of radio, interference arises almost exclusively from unintentional equipment failure, and is easily solved through technical assistance from volunteer technicians and organizations.<sup>43</sup> If a station interferes maliciously, local community organizations can issue a warning to the offender. If the interference is especially egregious or continues despite the warnings, other stations can advise the FCC to invoke criminal proceedings. Based on the example of ham radio, I would predict that most interference problems will snuff themselves out locally without the FCC having to raise a regulatory finger.

#### **Enlist local citizens in the licensing process.**

Once a locality agrees how to distribute LPFM stations in a particular area, the major technical problem is solved. But a more pressing political problem remains: how to decide who gets a license? As with interference, the FCC can take a back seat to voluntary organizations for allocation and management of licenses. With LPFM, the interests and

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<sup>40</sup> See discussion *infra* Part II.E.

<sup>41</sup> See TriDish, *supra* note 14 ("A clean, stable signal is the way to go, and recent developments in circuit design put reliable low-powered transmitters within the budget of almost any group.")

<sup>42</sup> See Dunifer, *supra* note 17.

<sup>43</sup> The FCC has for decades relied on volunteers from the American Radio Relay League to informally monitor ham radio interference and informally solve technical problems that come up. See AMERICAN RADIO RELAY LEAGUE, RADIO COMMUNICATION HANDBOOK 10 (1994).

types of broadcasters will certainly vary widely.<sup>44</sup> It may be impossible to foster compromise among a conservative think tank, an animal-rights group, and a conspiracy theorist vying for the same frequency. But it is worthwhile, as a first step, to encourage agreements such as time-share schedules or directional antennas. If informal cooperation proves impossible, then the FCC could enlist the local political process. For example, the Commission could grant city councils the option of formulating their own microradio policy, or even rely on local referenda to resolve conflicting license applications. The idea is to put the future of LPFM in the hands of the local citizens rather than the conglomerate dealmakers.

But if the political experiment breaks down and none of these options turn out to be workable, the Commission should fall back on the default strategy of allocating licenses on a first-come, first-served basis. Even though auctions are mandated for commercial licenses, I fear that they would probably defeat the purpose of low-power stations. Most LPFM stations will operate on a gossamer budget, with little cash available for submitting bids. Even with strict ownership requirements in place, the mere presence of an auction would deter small-scale community stations and favor established commercial broadcasters with the means or backing to recoup the costs of bidding for a first-time license. The FCC should do everything in its power to exempt both commercial and noncommercial LPFM from auctions, even lobbying Congress to make a statutory exception if required.

The options are wide open for bringing the LPFM licensing process closer to the local stations and to the listeners who hope to enjoy them. Low-power radio is a brilliant opportunity to experiment with a new model for radio regulation, one that encourages the local radio players to determine their own fate in a way that lifts much of the burden off the

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<sup>44</sup> Unlicensed radio operators, past and present, sprawl all over the ideological map—they include a New York anarchists, New Jersey college students, the Christian Promise Keepers, a local California agricultural fair, and Texas drug-legalization advocates. These groups share little besides a yen for low-power radio.

FCC. I would be especially interested in comments from LPFM advocates on these proposals and other creative ways to equitably allocate licenses.

#### **Allow stations to help enforce FCC regulations**

No matter how much authority the FCC delegates to local organizations, microradio coalitions cannot shoulder all of the agency's responsibilities in governing low-power radio. But they could still ease some of the FCC's most onerous and most mundane administrative hassles. They could alert low-power stations which threaten to interfere with other broadcasters. They could help resolve listener complaints about coverage, indecency, and political-editorial rules. They could ensure that stations meet technical requirements, offer advice on license renewals, and disseminate information about the latest radio regulations. The FCC would ensure in the end that its rules are followed, but the listeners themselves would be more involved in the political and regulatory process. The commercial broadcasters already have some forms of informal control in place, and the amateur radio community has a celebrated history of managing itself and policing its users to avoid interference. Despite their ideological differences, I believe that LPFM stations can work together if it will encourage more stations, more coverage, and better service to their local residents.

#### **D. Encourage minority ownership, but avoid race-based programs**

The FCC faces a tough road in pursuing one of its major goals for low-power radio—programming diversity. Over the past 25 years the Commission has sought variety in opinions and shows by encouraging racial and ethnic minorities to participate in radio. Granted, it is still hotly debated whether getting more minorities involved in radio

necessarily leads to more diverse broadcasts.<sup>45</sup> But it does not defy common sense that radio operators will favor content that reflects their own background and experiences,<sup>46</sup> and that the absence of certain groups can perpetuate stereotypes on the airwaves.<sup>47</sup> In any case, minorities are still severely underrepresented in the broadcasting industry; the “color-blind” free market in radio mandated by the 1996 Telecommunications Act has suffocated diversity by any measure. Chairman Kennard and the FCC deserve praise for viewing low-power radio as a vehicle to give excluded groups a chance to enter the radio world. Today, however, the Commission must tread lightly to avoid the sword of constitutional law.

The FCC's has tried an assortment of employment and ownership initiatives in hopes of diversified programming. The minority ownership efforts— notably tax certificates,<sup>48</sup> the “distress sale” policy,<sup>49</sup> and preferences in comparative hearings<sup>50</sup>— hover in constitutional purgatory. And the employment programs, exemplified by the Equal Employment Opportunity (EEO) rules,<sup>51</sup> crumbled last year before a wrathful D.C. Circuit Court.<sup>52</sup>

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<sup>45</sup> For a taste of the unsettled debate, compare *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 570 (1990) (Brennan, J.) (“From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience”) with 497 U.S. at 626 (O'Connor, J., dissenting) (“To the extent that the FCC cannot show the nexus to be nearly complete, that failure confirms that the [minority ownership programs] do not directly advance the asserted interest [of diverse programming], that the policies rest instead upon illegitimate stereotypes, and that individualized determinations must replace the FCC's use of race as a proxy for the desired programming.”).

<sup>46</sup> See, e.g., Akousa Berthwell Evans, Current Topic, *Are Minority Preferences Necessary?*, YALE L. & POL'Y REV. 380, 404-05 (1990) (using interviews with black radio station owners to find a link between ownership and programming content).

<sup>47</sup> See, e.g., Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. (1996) (arguing that underrepresentation of blacks in the television industry leads to racial stereotyping).

<sup>48</sup> See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 982 (1978) [hereinafter *Minority Broadcasting I*]; Commission Policy Regarding the Advancement of Minority Ownership, 48 Fed. Reg. 5943, 5945 (1983) [hereinafter *Minority Broadcasting II*].

<sup>49</sup> See *Minority Broadcasting I*, 68 F.C.C.2d at 983; *Minority Broadcasting II*, 48 Fed. Reg. at 5946.

<sup>50</sup> See *Minority Broadcasting I*, 68 F.C.C.2d at 982.

<sup>51</sup> See Implementation of Commission's Equal Employment Opportunity Rules, 9 F.C.C.R. 6276 (1994).

<sup>52</sup> See *Lutheran Church*, 141 F.3d at 344.

The FCC's earliest strategy to encourage minority radio ownership, and the only one wholly relevant to a newly minted LPFM, is preference in comparative hearings. The 1973 decision which mandated race-conscious efforts to promote diversity among radio owners took pains to avoid "affirmative action" program: "No quota system is being recommended. . . . We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded."<sup>53</sup>

Unfortunately, the preferences hardly boosted minority ownership. There were simply too few hearings, and not enough minority applicants for whom extra "merit" in comparative hearings would actually make a difference. So in 1978, the FCC launched two more initiatives—the "distress sale" policy, which allowed broadcasters in danger of losing their licenses to transfer them to minorities at a price below fair market value; and the tax certificate program, which gave broadcasters hefty tax breaks for selling their facilities or properties to minority-controlled interests. Neither of these programs applies immediately to low-power radio, since no one yet has any licenses to transfer. But their relative success<sup>54</sup> does show that if enough minorities actually seek to launch low-power stations, economic incentives can work to encourage diversity.

In 1990, the Supreme Court narrowly upheld these ownership initiatives.<sup>55</sup> Justice Brennan's majority opinion in *Metro Broadcasting* found the underrepresentation of minority owners to be a result of systematic societal discrimination. Even the statistics, Brennan noted, "fail[ed] to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations, many minority broadcasters serve geographically limited

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<sup>53</sup> TV 9 v. FCC, 498 F.2d 929, 937-38 (D.C. Cir. 1973).

<sup>54</sup> From 1978 to 1995, the tax certificate program helped minorities purchase 288 radio stations. See Bill McConnell, *Push for Minority Tax Certificates*, BROADCASTING & CABLE, Mar. 29, 1999 at 9.

<sup>55</sup> *Metro Broadcasting*, 497 U.S. at 547.

markets with relatively small audiences.”<sup>56</sup> But five years later, a more conservative Court dismantled the underpinnings of *Metro Broadcasting*, ruling that all racial preferences were inherently suspect.<sup>57</sup> The *Adarand* case clearly “overruled” *Metro Broadcasting*<sup>58</sup> but since *Adarand* was about government construction contracts, its true implications for radio are not crystal clear. Under one interpretation, *Adarand* explicitly invalidated the FCC preferences upheld in *Metro Broadcasting*; under another, *Adarand* only revamped the *constitutional test* for racial preferences, leaving an open question of whether the FCC policies would survive strict scrutiny. Either way, until the connection between minority ownership and programming diversity is proved with hard numbers, the ownership programs will not survive a court challenge.

But there are ways to encourage minority participation in low-power radio without explicitly targeting racial minorities. The main barrier for many minorities is not institutional racism but a more subtle form of prejudice. With unstated discrimination in the banking community—one study cited by the FCC suggested that blacks are 60% more likely to be denied loans than similarly situated whites<sup>59</sup>—the Commission has a chance to narrow this discrepancy indirectly through economic programs. First, the FCC can revamp its tax certificate program to help local entrepreneurs start up radio stations and encourage outside investment in small stations.. Second, the Commission should expand its “incubator” programs, so that existing broadcasters get incentives to help finance, mentor, and train both commercial and noncommercial low-power stations.<sup>60</sup>

Minority preferences in employment, however, are virtually dead after *Adarand* and *Lutheran Church*. Originally, the Commission’s EEO programs consisted of “processing

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<sup>56</sup> *Metro Broadcasting*, 497 U.S. at 553–54.

<sup>57</sup> See *Adarand*, 515 U.S. at 227.

<sup>58</sup> *Id.*

guidelines,” requiring stations to compare the racial makeup of their employee rolls with that of the local labor force. When this started to seem more like thinly veiled affirmative action, the FCC switched to a more “efforts-based” approach. Stations had an obligation under the EEO guidelines to seek referrals from minority organizations, promote minorities in a nondiscriminatory fashion, and evaluate their employment practices against the available recruitment pool.<sup>61</sup> Last year, in *Lutheran Church v FCC*, the D.C. Circuit Court applied *A darand* to strike down the EEO rules as violating the 14<sup>th</sup> Amendment. *Lutheran Church* ruled that an interest in diverse programming is not enough to justify even the slightest racial preferences in hiring.<sup>62</sup> The bottom line seemed to be that without clear proof of past discrimination, the mere mention of race would doom an employment program. Under *Lutheran*, for the FCC even to *encourage* racial preferences would run afoul of the latest court decisions, because stations would see the numerical goals as quotas they had to fill if they wanted to keep their licenses.<sup>63</sup>

Even though the FCC is currently revising its EEO guidelines to conform to *Lutheran*, and most major broadcasters have pledged “voluntary cooperation” with EEO-like programs, the Commission should not immediately mandate diversity in employment for low-power radio. First, the average small radio outlet, with a tight budget, fluid organizational structure, and constant volunteer turnover, will simply not be equipped to handle the administrative burden of complying with a full-blown EEO program. Also, imposing a racial mix upon the staff of every individual LPFM station would lead to a rash of homogenous “diveristy” reminiscent of typical TV news. From what I have seen, the

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<sup>59</sup> See *Minority and Female Ownership of Mass Media Facilities*, 10 F.C.C.R. 2788, 2791 n.25. (1995).

<sup>60</sup> *Cf. Minority and Female Ownership of Mass Media Facilities*, 10 F.C.C.R. at 2791-94.

<sup>61</sup> See 47 C.F.R. § 73.2080(c) (1998).

<sup>62</sup> See *Lutheran Church*, 141 F.3d at 354-355.

<sup>63</sup> See *Lutheran Church*, 141 F.3d at 354.

microradio movement has by its nature drawn minorities into its ranks, without depending upon the official “equal opportunity” programs crafted by full-power broadcasters. Until low-power radio *as a whole* shows signs of racial imbalance, the FCC should concentrate on ownership, and let the hiring practices evolve from there.

#### **E. Enforce programming rules with larger LPFM stations**

The Communications Act and FCC regulations impose an assortment of programming requirements on radio broadcasters. The FCC, in my view, has made a reasonable distinction between LP 1000 stations and those operating at lower power.<sup>64</sup> Case law and past FCC rulings imply that LP 1000 stations should have to adhere to these requirements, both statutory and regulatory. Weaker stations should be exempt from the statutory programming limitations and should get respite from the most onerous regulatory requirements.

The two most influential programming requirements—the “reasonable access”<sup>65</sup> and “equal opportunity”<sup>66</sup> laws—are enshrined in the U.S. Code. The reasonable access law gives the FCC authority to revoke a license “for willful or repeated failure to allow reasonable access or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.”<sup>67</sup> The equal opportunity requirement requires a licensee who “permit[s] any

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<sup>64</sup> See Creation of a Low Power Radio Service, 64 Fed. Reg. at 7582 (“We expect the very nature of LP100 and microradio stations will ensure that they serve the public. Therefore, we are disinclined to put the burdens of complying with specific programming requirements on these licensees, particularly given the size of their stations and the simplicity we are striving for in this service.”).

<sup>65</sup> 47 U.S.C. § 312(a)(7) (1998); 47 C.F.R. § 73.1944 (1998).

<sup>66</sup> 47 U.S.C. § 315 (1998); 47 C.F.R. § 73.1941 (1998).

<sup>67</sup> 47 U.S.C. § 312(a)(7) (1998).

person who is a legally qualified candidate for any public office to use a broadcasting station” to “afford equal opportunities to all other such candidates for that office.”<sup>68</sup>

FCC regulations impose several more “public interest” programming requirements on broadcasters. Most of these rules, including those on station identification,<sup>69</sup> sponsorship identification,<sup>70</sup> recorded programs,<sup>71</sup> lottery advertising,<sup>72</sup> and broadcast hoaxes,<sup>73</sup> are simple to follow and hardly dramatic even for the lowest-power station. The one potential exception among the non-statutory regulations is the “personal attack” rule, requiring a station that attacks the “honesty, character, integrity, or like personal qualities” of a person to give the victim a chance to respond on the air.<sup>74</sup>

Two questions come up when applying these rules to low-power radio. First, does LPFM fit the statutory definition of “broadcasting” for the purposes of the programming requirements? And second, would imposing the programming requirements on LPFM stations further Congress’ and the FCC’s goals in enacting these rules?

Based on case law and FCC precedent, all but the lowest-power radio stations would fall within the category of broadcasters subject to the programming rules. Congress defined broadcasting as the “dissemination of radio communications intended to be received by the public.”<sup>75</sup> More specifically, “radio communication” denotes “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.”<sup>76</sup> What matters is not

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<sup>68</sup> 47 U.S.C. § 315 (1998).

<sup>69</sup> 47 C.F.R. § 73.1201 (1998).

<sup>70</sup> 47 C.F.R. § 73.1212 (1998).

<sup>71</sup> 47 C.F.R. § 73.1208 (1998).

<sup>72</sup> 47 C.F.R. § 73.1211 (1998). The constitutionality of this rule is now suspect, especially in states where gambling and lotteries are legal. See *Greater New Orleans Broad. Ass’n, Inc. v. FCC*, 119 S. Ct. 1923 (1999).

<sup>73</sup> 47 C.F.R. § 73.1217 (1998).

<sup>74</sup> 47 C.F.R. § 73.1920 (1998).

<sup>75</sup> 47 U.S.C. § 153(o) (1998).

<sup>76</sup> 47 U.S.C. § 153(b) (1998).

the number of potential listeners in the radio world, but an “intent for *public* distribution.”<sup>77</sup> LPFM certainly seems to fall under such a gaping description.

Even so, the FCC, the courts, and Congress have somewhat inconsistently applied the programming rules to different media. The FCC ruled that a college radio station which had not been subject to the political-editorial rules when its signal was confined to a radius of a few hundred feet would be subject to the requirements once it expanded its area.<sup>78</sup> The D.C. Circuit even overturned an FCC decision *not* to extend the reach of equal opportunity provision to teletext, ruling that this silent, add-on service did count as “broadcasting.”<sup>79</sup>

Given these applications of the programming requirements, it is surprising what media they *do not* reach. For example, the FCC exempted subscription television programs from having to provide reasonable access for political broadcasting during prime time hours since it would have subverted the purpose of STV— “uninterrupted entertainment programming.”<sup>80</sup> The FCC followed the general principle that a station may block out reasonable periods of time in which it could deny all access.<sup>81</sup> And services like the Internet and cable, which fall outside “broadcasting” for First Amendment purposes<sup>82</sup> have so far proved impervious to the reasonable access and equal opportunity rules.

In recent years, the programming requirements have also lost much of their punch. With the reasonable access law, the FCC has given stations wide latitude to restrict their

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<sup>77</sup> *Functional Music, Inc. v. FCC*, 274 F.2d 543, 548 (D.C. Cir. 1958) (emphasis in original), *cert. denied*, 361 U.S. 813 (1959).

<sup>78</sup> See *In re* Request by Inter College Radio Network, 29 F.C.C.2d 451, 451 (1971).

<sup>79</sup> See *Telecommunications Research and Action Ctr. and Media Access Project v. FCC*, 801 F.2d 501, 512 (D.C. Cir. 1983).

<sup>80</sup> Commission Policy on Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d at 1093.

<sup>81</sup> *Telecommunications Research*, 801 F.2d at 512.

<sup>82</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997) (distinguishing the Internet from broadcasting for indecency purposes); *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978) (distinguishing cable from television and radio).

candidate programming to convenient time slots.<sup>83</sup> The FCC and the courts have also watered down the equal opportunity statute<sup>84</sup> (notably by expanding the exception for “bona fide news events”<sup>85</sup>) and the personal attack rule so much that they pose little burden on most broadcasting stations.<sup>86</sup> Indeed, the loopholes have stretched so wide that the FCC is on the verge of scrapping the political editorial rules altogether.<sup>87</sup> Smaller stations will be rightly concerned about the relative cost of allowing equal time for dozens of candidates for every election. In the end, they may shy away from airing one person’s point of view for fear of the cost and hassle of airing the opposing point of view— not to mention their vulnerability to a lawsuit that could prove fatal, win or lose.

The only real criticism of the weakening of the rules is that it has locked out many third-party, fringe candidates from radio.. For full-power stations, these concerns are legitimate. But ironically, neighborhood stations are ideally suited for giving time for less established or less moneyed candidates of all political stripes. In effect, low-power FM could fill any political void created by the continued dilution of the programming requirements.

#### F. “Amnesty” for previous non-licensed broadcasters

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<sup>83</sup> See, e.g., *In re* Complaint of Ross Perot, 11 F.C.C.R. 13109 (1996) (rejecting contention that broadcasters should tailor “reasonable access” to a candidate’s campaign strategy).

<sup>84</sup> See, e.g., *Fulani v. FCC*, 44 F.3d 504 (2d Cir. 1995) (deeming a “town meeting with Ross Perot” on ABC’s *Nightline* a “bona fide news interview” exempt from the equal opportunity rule); *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987) (allowing broadcasters to sponsor presidential debates that exclude third-party candidates).

<sup>85</sup> 47 C.F.R. § 315(a)(4) (1998).

<sup>86</sup> See, e.g., *Letter to Loretta Smith*, 9 F.C.C.R. 7814 (1994) (ruling that calling someone a “stalker in a government conspiracy” is not a personal attack); *In re* Personal Attack Against Bree Walker Lampley, 7 F.C.C.R. 1385 (1992) (ruling that assailing a mother’s decision to give birth to a potentially deformed baby is not a personal attack).

<sup>87</sup> The FCC commissioners recently deadlocked, 2-2, on the issue, with Chairman Kennard not voting. Even the two Commissioners voting to keep the rules indicated a need to “streamline” them. See *Repeal or Modification of P.A. and Political Rules*, \_\_\_ F.C.C.R. \_\_\_ (1998).

Unlicensed low-power broadcasters pose a tough dilemma for the FCC. They have violated both the decades-old statute<sup>88</sup> and the FCC's rules<sup>89</sup> which prohibit broadcasting without a license. Also, as the FCC pointed out in the NFRM, unlicensed broadcasters have often pieced together equipment of "unknown technical integrity."<sup>90</sup> The simplest solution would be to bar these "radio pirates"—at least those who continued to broadcast after February, 1999—from low-power radio. The FCC's rules on character qualifications, on their face, would certainly imply such a result. But given the uncertainty over the legalization of LPFM, the role of "radio pirates" in pioneering microradio, and the FCC's ample discretion under the character qualification rules, I propose that a history of unlicensed broadcasting in itself should not automatically disqualify.

Under the 1934 Communications Act, "all applications for stations licenses . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station."<sup>91</sup> Though somewhat nebulous in the past, the definition of "character" has evolved over the past 15 years from the common moral meaning to a more practical one—focused on honesty toward the FCC and compliance with its rules and policies.<sup>92</sup> Here the character qualifications pull no punches: "[A]ny violations of the Communications Act, Commission rules or Commission practices can be said to have a potential bearing on character qualifications."<sup>93</sup>

Despite the seemingly airtight case against past infringers upon FCC rules, however, the Commission has granted itself considerable leeway to consider the particular

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<sup>88</sup> 47 U.S.C. § 301 (1998).

<sup>89</sup> 47 C.F.R. pt. 15 (1998).

<sup>90</sup> Creation of a Low Power Radio Service, 64 Fed. Reg. at 7581.

<sup>91</sup> 47 U.S.C. § 308(b) (1998) (emphasis added).

<sup>92</sup> Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1189 (1986)

<sup>93</sup> *Id.* at 1209.

circumstances. The FCC clearly stated that it “is not . . . bound ‘to deal with all cases at all times as it has dealt with some that seem comparable,’ and it frequently occurs that decisions turn on meaningful distinctions found in the course of case-by-case reviews.”<sup>94</sup> I can imagine nowhere else more suited for such “meaningful distinctions.” The FCC remains “free to exercise . . . discretion in situations that arise.”<sup>95</sup> In the end, “not all violations are equally predictive.”<sup>96</sup>

If previously unlicensed operators have local support and can assure the FCC that they will comply with the Commission’s rules once a license is granted, they should not have a mark against them for past violations. Such a “pardon” for hardly injurious violations of radio law would not be without precedent. For example, early amateur radio operators skirted the letter of the law of the 1912 Radio Act by operating at wavelengths above 200 meters, because they would have been wiped out as a class otherwise.<sup>97</sup> Many of these plucky amateurs grew up to vanguard the first nationwide, mainstream broadcasting stations a decade later.<sup>98</sup>

The history of the FCC’s licensing standards also confirms that credit should be given to localized service. From its inception, the FCC intended radio stations to fill “a need for an additional avenue of expression of the cultural, educational, religious, and commercial interests of the community.”<sup>99</sup> The Commission rewarded those who, like many unlicensed microradio operators today, had built up a loyal fan base and tapped into local talent.

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<sup>94</sup> *Id.* at 1182 n.10 (citation omitted).

<sup>95</sup> *In re* Character Qualifications, 5 F.C.C.R. 3252, 3252 (1980), *quoting* Guardian Federal Savings and Loan Ass’n v. Federal Savings and Loan Insurance Co., 589 F.2d 658, 666 (D.C. Cir. 1978).

<sup>96</sup> *Id.* at 1210.

<sup>97</sup> See CLINTON B. DESOTO, TWO HUNDRED METERS AND DOWN 34 (1936).

<sup>98</sup> See generally ERIC BARNOUW, A TOWER IN BABEL 195–201 (1967).

<sup>99</sup> *In re* H.E. Studebaker, 1 F.C.C. 191, 191 (1934) (“The applicant appears to be prepared to present and arrange programs suited to local needs. . . . [H]e will have the cooperation of the local people in presenting a local broadcast service.”); see also *In re* Charles Henry Gunthorpe, Jr., 1 F.C.C. 177, 177 (1934) (“Programs outlined provided for a general local service. Considerable local talent was listed by the applicant as available for presentation.”).

Ironically, the LPFM movement would not have existed if it were not for “radio pirates” who defied the FCC’s licensing rules in what they consider acts of civil disobedience. Without these pioneers the LPFM petition would probably never have raised the Commission’s eyebrows. Unlicensed broadcasters have shone light on the potential for LPFM, alerted lawmakers to the worth of the new service,<sup>100</sup> and even sparked the very petitions for rulemaking that led to the proposed rules.<sup>101</sup> Recent challenges to the constitutionality of the FCC’s 20-year-old ban on low-power radio<sup>102</sup> show that the unlicensed broadcasters would be happy to operate with a legitimate license if given the chance. The FCC allowed that even an applicant involved in serious misconduct might have an application granted if she could “show the ability to operate in the public interest with no likelihood of future misconduct.”<sup>103</sup> And when “character” doesn’t implicate the applicant’s basic qualifications, it should no longer matter when comparing rival applicants.<sup>104</sup> Admittedly, there is a vocal handful of activists who would rather broadcast freely and illegally than bow to the FCC, but the vast majority would gladly follow the rules in exchange for a license to put their shows on the air.

With LPFM in particular, the fact that radio operators broadcasted without a license does not necessarily imply that they will violate FCC rules once they are granted a license. Unlicensed operators have operated in good faith. It is hard to imagine that the recent instances of airport interference cited by the FCC<sup>105</sup> arose from sheer mischief; why would a

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<sup>100</sup> Twenty-eight U.S. Representatives have signed a letter in support of LPFM, urged on chiefly by the microradio movement. See Letter from U.S. Rep. Barney Frank to U.S. House of Representatives (Mar. 17, 1999).

<sup>101</sup> See Julie Lew, *Radio’s Renegade Low Watt “Pirate” Fights FCC*, N.Y. TIMES, Dec. 8, 1997, at D12.

<sup>102</sup> See *Free Speech v. Reno*, No. 98 Cir. 2680 (S.D.N.Y. Mar. 18, 1999); *United States v. Dunifer*, 997 F. Supp. 1235 (1998); cf. *United States v. Any and All Radio Station*, No. 97-3972 (8th Cir., decided Feb. 26, 1999) (affirming the right to challenge constitutionality of FCC microradio regulations in a federal district court).

<sup>103</sup> *Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d at 1229

<sup>104</sup> See *id.* at 1183.

<sup>105</sup> See *FCC Closes Down Unlicensed Radio Operation*, *supra* note 16.

“pirate” broadcaster target air traffic controllers and bypass the local radio audience? Even the FCC, which has confiscated transmitters from dozens of stations over the past two years, seems to concede that its main concern has been breaking the law— not malicious interference.

Finally, the currently unlicensed broadcasters know the most about low-power radio, and are essential to developing a quality legalized service. If the FCC is looking for people with experience in broadcasting, they could do no worse than to let these veterans be an integral part of the new movement. They will prove essential to help other stations get off the ground, to set standards for interference and quality, and as community leaders in the microradio movement. A policy that shuns many of the most fervent, enthusiastic, and qualified LPFM broadcasters will seem to many like a cynical attempt to fracture the low-power radio community. Unfortunately, efforts to encourage self-governance and local involvement will surely falter without the participation of all microradio. Although radio pirates and the FCC portray themselves as enemies, for the most part both sides aim for quality, community radio free from interference. If they are shut out of low-power FM, they will likely continue to broadcast illegally. The LPFM crowd will be torn between new legalized operators and old pariahs; the perennial fears of interference, up to now a red herring, could become a reality.

Respectfully submitted,



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