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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

TO: THE COMMISSION

COMMENTS OF

THE NATIONAL ASSOCIATION OF MEDIA BROKERS

The National Association of Media Brokers ("NAMB") hereby submits its Comments in the above-referenced rulemaking proceeding to establish a Low Power FM broadcast service. The Commission released its *Notice of Proposed Rulemaking* in this proceeding on February 3, 1999. (FCC 99-6) (the "*NPRM*"). Originally, the Commission required that all comments be filed in less than 70 days, i.e., by April 12, 1999. However, in response to requests to extend the comment filing period, the Commission relaxed the filing deadline to August 2, 1999, 180 days after the *NPRM* was released. *Order*, FCC 99-112 (May 20, 1999). Therefore, these comments are timely filed.

The NAMB is a trade association whose members are primarily engaged in assisting and facilitating the sales and purchase of various media properties including radio, television and cable. As such, they have extensive knowledge of the economics of individual stations and the markets within which they operate.

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NAMB strongly objects to the manner in which this rulemaking proceeding has been conducted, and opposes the proposal to create a new Low Power FM broadcast service. As discussed more fully below, NAMB believes that the Commission should have released a Notice of Inquiry prior to adopting a Notice of Proposed Rulemaking in this proceeding. The adopted *NPRM* failed to propose any substantive rules, and raised questions that should have been fully examined prior to the adoption of an NPRM that would propose substantive rules. Furthermore, NAMB objects to the "rocket docket" nature of this proceeding. Currently, the Commission has had pending rulemakings regarding its broadcast attribution rules for more than two years, without taking any action or requesting any further comment on preliminary conclusions. Broadcasters and other interested parties from across the nation have been awaiting action in these dockets. In contrast, the Commission originally sought to compile a complete record in this proceeding in less than 70 days, has not proposed any substantive rules, and has failed to present an engineering study exhibiting the proposal's feasibility. Clearly, the substantive issues raised in this proceeding require a serious examination, and the Commission must not abdicate its role as the guardian of the spectrum by rushing through this proceeding.

NAMB ardently believes that the proposal to create an LPFM service will be devastating on the small and medium-sized radio markets if they are not limited to non-commercial status. In light of the Commission's adoption of Docket 80-90, which led to nearly 60% of all radio stations losing money in 1991, *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, fn. 3 (1992), it is clear that the broadcasting industry and its listeners will not be well-served by the introduction of thousands of new FM stations in the small markets. Nothing in the compiled history of the FCC supports the proposition that more

equals better. Indeed, common experience might be shown to demonstrate that "more" resulted in the 1980's with less vibrant programming, and only through the consolidation of the 1990's has radio been able to provide more diverse and creative programming to listeners. *Revision of Radio Rules and Policies*, 9 FCC Rcd 7183, ¶ 21 (1994).

Most importantly, the LPFM service can not be created through the relaxation of the FM separation rules. At the very least, LPFM stations must be required to comply with all separation requirements currently in place. If it is not possible to place LPFM stations in large markets, then perhaps the Commission should examine other methods to provide interested parties with access to broadcast stations. However, the current separation rules have saved the FM band from the same type of clutter and chaos that occurred in the AM band. The results of strict enforcement of reasonable engineering standards are an FM band clear of clutter with high quality stereo transmission. It is because of this engineering protection that over 80% of all radio listening is in the FM band. The AM expanded band proposals are a "too little - too late" attempt to correct the lax engineering standards that were applied in AM. NAMB objects to any attempt to "shoehorn" new LPFM stations through the relaxation of the current separation restrictions.

I. DISCUSSION

A. The Commission has Failed to Demonstrate that the Proposal will Not Cause Interference

In the *NPRM,* the Commission failed to propose substantive rules for which comments could be supplied. Specifically, the Commission failed to provide any studies whatsoever discussing the effects of its proposal to eliminate 2nd and 3rd adjacent channel protections. Instead, the Commission stated that it would eliminate such protections

because "these protections would limit substantially the number of channels available for low power radio generally and could preclude altogether the introduction of LPFM service in mid-sized and large cities." ¶ 42 These protection requirements have hitherto been held sacrosanct by the Mass Media Bureau, and its staff has refused to consider applications with short-spacing to 2nd and 3rd adjacent channels, instead requiring costly amendments and delaying consideration to some applications for more than one year.[1]

Concluding that "creating opportunities for new LPFM service should outweigh any small risks of interference to and from LP1000 and LP100 stations," the Commission proposed eliminating these restrictions, and placed the responsibility on the public to demonstrate that its proposal *would not* work, rather than providing a detailed study demonstrating that the Commission's proposal would not cause interference. ¶¶ 45, 50. However, it seems that meeting the burden of going forward by at least providing a study that demonstrates why the Commission's past rules no longer apply and why it would not be destructive to eliminate 2nd and 3rd adjacent protections for LPFM1000 and LPFM100 stations would have been the proper manner to proceed. Without a study, we are left to shadow box a negative proposition, i.e., that harmful interference will not be created, without the necessary data or technical rules to evaluate. Actually, it is not the proposition that harmful interference will not be created but the proposition that some undefined need for further diversity (more stations) is more important than protecting the service the public receives from the FM band, including stereo transmissions and hopefully soon, in-band on-

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[1] The Commission's staff classifies as defective and returns those construction permit applications that do not comply with the minimum spacing requirements of Section 73.207, including those applications that are short-spaced to 2nd and 3rd adjacent channels, pursuant to Section 73.3522(a)(6) of its Rules.

channel digital FM.

The Commission should have released a Notice of Inquiry seeking comment on the same issues raised in the *NPRM*. In light of the fact that the Commission prepared only a cursory study examining the availability of spectrum, a Notice of Inquiry would have at least provided the public with an opportunity to fully consider the LPFM proposal, and prepare the necessary studies. At the very least, as discussed below, the Commission should extend the deadline for the completion of such studies. Certainly, it cannot adopt a Report and Order prior to their completion.

B. "Rocket Docket" Methods Dangerous in this Proceeding

As discussed above, the Commission failed to complete the necessary studies demonstrating that its LPFM proposal would not cause increased interference to existing FM stations. In addition, the Commission has exacerbated this failure by attempting to push this proceeding through all procedural steps in record time.

The Commission initially proposed to require all comments be filed in 71 days from the issuance of the *NPRM* , and only provided an additional 30 days to prepare reply comments. Arguably, the LPFM proposal is one of the most profound changes in the broadcast industry since the adoption of the FM and Television Table of Allotments plans. However, despite the importance of this proceeding, the Commission intended to complete the record in less than 100 days!

The Commission did extend the filing date for Comments in the instant proceeding an additional six weeks. *Order*, DA 99-542 (Mar. 19, 1999). Stating that it was concerned "with the public interest in a prompt resolution of this proceeding," it denied a request to extend the comment period further, despite the petitioners' stated need to conduct the

interference studies lacking from the *NPRM*. Subsequent to this *Order*, the Commission granted a further extension of time, equaling six months from the issuance of the *NPRM*. *Order*, FCC 99-112 (May 20, 1999). In granting the further request, the Commission acknowledged that pending engineering studies "may enable the Commission to identify the range of potential digital radio design parameters" and the effect of LPFM on the introduction of digital radio, but declined to extend the comment period any further. ¶6. Instead, the Commission will rely on the parties conducting the studies "to keep [the Commission] apprised of relevant developments." *Id.*

Therefore, despite the fact that the engineering studies, which should have been prepared by the Commission prior to the issuance of the *NPRM*, will not be completed until the fall of 1999, the Commission refused to extend the comment date beyond August 2, 1999. Rather, the parties preparing the necessary engineering studies are expected to continue the studies, and provide the results when completed. There are no assurances, however, that the proceeding will not already be concluded. Moreover, the public will not be provided an opportunity to review and comment on the engineering studies, even if they are made part of the record. Should the Commission review these studies, and base its decisions on the studies' results, without providing an opportunity for notice and comment, the Commission will have violated the provisions in the Administrative Procedures Act, 5 U.S.C. § 553 (1998).

The Administrative Procedure Act requires all federal agencies to provide adequate notice and a reasonable period for comment regarding proposals for substantive changes in an agency's rules. *Id.* § 553(b). In those cases where the Commission has failed to provide adequate notice of such a substantive change in its rules, and/or failed to provide

a reasonable period for comment, the adopted rules have been remanded for further study. *See Reeder v. FCC*, 865 F.2d 1298 (1989). Furthermore, even if the final LPFM rules are considered a "logical outgrowth" of the *NPRM*,[2] the Commission must remain "open enough" upon the filing of the engineering studies, so that the studies' results may be properly considered. *Reeder*, at 1304 (*citing McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C.Cir.1988).

Thus, the Commission must provide additional time for the proper engineering studies to be completed and commented upon *prior to* the adoption of the final LPFM rules. The proper course of action would be for the Commission to issue a *Further Notice of Proposed Rulemaking* once the engineering studies are completed, so that a complete record may be developed. In no event should the Commission either ignore the engineering studies, or fail to provide additional time for public review and comment.

C. Repeating the Sins of our Fathers

In 1990, the radio industry was in severe trouble. According to the Commission's own study, more than one-half of all radio stations failed to make a profit. *Report and Order*, Revision of Radio Rules and Policies, 7 FCC Rcd 2755, ¶ 2. (citing *Overview of the Radio Industry*, Mass Media Bureau, Jan. 1992, at 5.). Three years later, the problems persisted, with over 300 radio stations silent. *Memorandum Opinion and Order*, 7 FCC Rcd 6387, ¶ 2 (1992).

These problems were caused by the proliferation of AM and FM stations competing in each market, causing substantial market fragmentation. The main source for this market

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[2] *Edison Elec. Institute v. OSHA*, 849 F.2d 611, 621 (D.C.Cir. 1988) (citing *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C.Cir. 1980).

fragmentation was the introduction of over 700 FM stations pursuant to the rules adopted in Docket 80-90. *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, ¶2 (1992); *See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 FCC 2d 152 (1983). Most of these limited-power stations were introduced in small to medium-sized markets. *Id.*

As such, in the *Revision to Radio Rules and Policies* rulemaking proceeding, the Commission substantially increased the level of permissible consolidation in the local market, and on a national scale. In this commenter's view and experience, this rule change action saved the radio broadcasting industry from the overwhelming fragmentation and loss of financial support that was occasioned by the Docket 80-90 stations. This trend culminated with the enactment of the Telecommunications Act of 1996, which dramatically increased the level of permissible concentration in the local radio markets, and eliminated all national ownership restrictions. Pub. L. No. 104-104, 110 Stat. 56, § 202(b) (1996).

Therefore, only through consolidation was the radio industry saved from the market fragmentation caused, in large part, by Docket 80-90. Now, the Commission intends to create an entirely new FM radio service, and create more market fragmentation in the local radio market. Past experience convinces us that the introduction of the LPFM services will cause tremendous chaos in the local radio market, even without considering the enormous potential for interference through the relaxation of separation rules.

Petitions for rulemaking to add more FM channels fully complying with existing FM spacing requirements are still being filed on a daily basis. Almost all of these petitions request allocations to small markets because the major markets are fully allocated. That there is a great diversity of voices is attested to by the fact that under the existing FCC rules

most large markets have 45 or more radio stations. Even Omaha, Nebraska, the 78th MSA, has more than 45 stations. We are not suffering from a lack of diversity. To destroy or harm the quality of existing FM service to supposedly provide greater diversity is not justified under existing diversity considerations.

D. The LPFM Service will Cause Substantial Interference to Existing FM Stations.

Section 73.207 of the Commission's rules establishes the permissible minimum distance separation from co-channel, and first, second, and third adjacent channels. 47 C.F.R. § 73.207 (1998). Such separation distances were created to establish an "interference-free" signal within a station's protected service contour. *NPRM*, ¶ 39.

However, the *NPRM* proposed to eliminate the 2nd and 3rd adjacent channel protections. *Id.* ¶ 42. Specifically, the *NPRM* stated that, since "these protections would limit substantially the number of channels available for low power radio generally and could preclude altogether the introduction of LPFM service in mid-sized and large cities," the Commission is "inclined to authorize low power service without any 2nd and 3rd adjacent channel protection standards." *Id.* As discussed above, though, the Commission has not conducted engineering studies to support this "inclination." Instead, it has solicited the public "to assess the level of risk of increased interference to stations in existing FM services" resulting from the elimination of the 2nd adjacent channel protection, "against the additional service to the public that could result" from the introduction of the LPFM service. ¶ 46.

As such, it is apparent that the Commission is willing to jeopardize the signal quality of existing FM stations in order to carry out its goal of introducing the LPFM service. Beyond failing to conduct a comprehensive study as to the effect of the LPFM service itself,

the Commission, through an abbreviated notice and comment period, is eliminating the possibility for a third-party to present evidence of such interference.

Essentially, the Commission has concluded that the LPFM service can not be introduced under the current rules; and, rather than conclude that the proposal therefore is not possible, it has taken the illogical step of eliminating the underlying safeguard protecting the integrity of the FM service -- minimum distance separations. It has failed, though, to provide any evidence that supports its predictive judgements. In the past, Commission decisions that are based on predictive judgements, rather than evidence, have been found to be arbitrary and capricious. *See Bechtel v. FCC*, 10 F.3d 875 (D.C.Cir. 1993). Should the Commission choose to adopt rules that would overturn portions of Section 207 of its Rules, based on predictive judgements, rather than engineering evidence, the same result can be expected.

If there is no room for even LPFM stations in the larger markets, then there should be none. If the Commission believes that smaller communities need additional voices, and the allocations can be made within the existing engineering standards, then such allocation should be non-commercial, meeting the "needs" identified in the NPRM without destroying the economics of small market commercial radio stations which provide such outstanding service to their communities. These existing small market stations are truly "all things to all people" and are entitled to better treatment than is being proposed by the FCC. These stations are the cornerstones of our nationwide radio service.

II. CONCLUSION

The National Association of Media Brokers strongly suggests that the Commission decline to adopt the LPFM proposal outlined in the *NPRM*. The *NPRM* fails to provide any meaningful analysis on which NAMB could comment. Furthermore, the Commission has failed to justify the "rocket docket" nature of this proceeding, certainly in light of the serious impact that the LPFM service would have on the existing broadcast radio service. In addition, NAMB respectfully notes that the Commission has already pushed the radio industry to the point of ruin with Docket 80-90, and the LPFM proposal would certainly be a return to marginalizing the operation of many stations in small and medium-sized markets. Finally, regardless of its other concerns, NAMB strenuously objects to the elimination of the cornerstone of the FM Table of Allotments, i.e., Section 73.207, without a full and comprehensive study of its impact.

Respectfully submitted,

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