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Secretary
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Room TW-B204
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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 the Arkansas Broadcasters Association are an original and four copies of its comments in response to the *Notice of Proposed Rulemaking*, MM Docket No. 99-25, 14 FCC Rcd 2471 (1999), in the above-referenced rulemaking 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 Arkansas Broadcasters Association

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BEFORE THE

Federal Communications Commission

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

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To: The Commission

COMMENTS OF THE ARKANSAS BROADCASTERS ASSOCIATION

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SUMMARY

As demonstrated herein, the FCC's proposal to establish an 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 the amount of local programming. Moreover, the proposed LPFM service would cause substantial interference to existing full-power FM stations both within and outside their protected service contours. In addition, the proposed LPFM service would significantly hinder the development of in-band-on-channel (IBOC) digital transmission services, and would result in a proliferation of unauthorized broadcast operations.

In the event the FCC insists upon establishing an LPFM service, the Commission must maintain the existing second and third-adjacent channel interference protection standards in order to minimize the interference that would be caused to existing full-power stations. In addition, the Commission must impose maximum height restrictions on all LPFM stations, restrict the amount of interference that LPFM stations may receive, and require all LPFM stations to maintain a minimum operating schedule.

Furthermore, to help ensure that 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. The Commission also should impose a local program origination requirement. In the event the Commission elects to authorize a commercial LPFM service, all mutually exclusive applications for LPFM stations must be resolved through a competitive bidding process. Finally, the Commission cannot impose any ownership restrictions on LPFM stations that are any stricter than those mandated by the Telecommunications Act of 1996.

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

COMMENTS OF THE ARKANSAS BROADCASTERS ASSOCIATION

The Arkansas Broadcasters Association ("ABA") hereby submits its Comments in response to the Commission's *Notice of Proposed Rule Making*, MM Docket No. 99-25, 14 FCC Rcd 2471 (1999) ("*NPRM*"), in the above-captioned proceeding.

I. Introduction.

Members of the ABA operate AM and FM broadcast stations in the state of Arkansas. For many years, each of these stations has provided 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.

These Comments address the relevant technical, legal, and policy 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.

Establishing an LPFM service also 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 AM and FM stations which already are struggling to survive. 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. Technical Concerns.

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

In its *Technical Streamlining* rulemaking proceeding,[1] the FCC recognized that the FM band is extremely congested. The Commission's proposals in this proceeding are inconsistent with the efforts the FCC has taken in its *Technical Streamlining* proceeding to help alleviate that congestion and provide full-power FM stations with greater flexibility in locating their transmitter sites in an effort to enhance their existing service. For example, in its *Technical Streamlining NPRM*, the Commission stated that increasing congestion in both the reserved and non-reserved portions of the FM band significantly restrict operating stations from relocating their transmitters to better transmitter sites. *Technical Streamlining NPRM* at ¶3. The Commission also stated that "[c]ongestion in the reserved band has increased during the past twenty years, and demand for NCE FM licenses remains high." *Id.* at ¶60. The Commission's proposal to establish a new LPFM service is inconsistent with the above statements in the *Technical Streamlining NPRM* in which the FCC expressly acknowledged the congested nature of the FM band.

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[1] *1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rule Making* in MM Docket No. 98-93, 13 FCC Rcd 14849 (1998) ("*Technical Streamlining NPRM*"), *First Report and Order*, FCC 99-55 (released March 30, 1999) ("*Technical Streamlining First R&O*").

Moreover, certain proposals in the *Technical Streamlining NPRM* are designed to help FM stations enhance their existing service despite the congestion. First, the FCC has proposed to allow negotiated interference agreements between stations. The Commission believes that the FM band is so congested that certain service improvements cannot be implemented without the proposed new rule.[2] *Technical Streamlining NPRM* at ¶20. In addition, the FCC proposed the use of a point-to-point ("PTP") prediction model for the purpose of providing a more accurate prediction of interfering contours. *Id.* at ¶31. The Commission proposed the use of the PTP prediction model because of the congested nature of the existing FM service. This proposal reflects the Commission's desire to provide FM stations with additional flexibility in locating their transmitter sites, and, thus, a greater opportunity to enhance their existing service.

A further example of the Commission's recognition of the congested nature of the FM band is reflected in its proposal to create an additional intermediate class of station -- Class C0. The proposed Class C0 stations would have maximum and minimum antenna heights of 450 meters and 300 meters above average terrain, respectively. *Id.* at ¶43. The Commission proposed this new intermediate class of FM station because approximately 60% of Class C stations are not operating with maximum facilities. The Commission's current allotment scheme therefore "overprotects"

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[2] In proposing to permit negotiated interference agreements, the Commission stated as follows:

> Virtually all major and mid-sized markets, where we anticipate the greatest level of interest in negotiated interference agreements, receive service from five or more radio stations, our traditional measure of a well-served area. [footnote omitted] Opportunities for new full service or substantial facility improvements in these markets are extremely limited. *Congestion in the FM band* provides a major technical impediment to the further "urban clustering" of stations.

Technical Streamlining NPRM at ¶18 (emphasis added).

these facilities, and, consequently, effectively precludes proposals to introduce new services and/or expand existing services. *See Id.* at ¶¶42-44. The Commission's proposal to create a new intermediate Class C0 station is a further illustration of its effort to reduce overcrowding in the FM band.

In its *Technical Streamlining* proceeding, the Commission also recognized that there are stations which have been reluctant to pursue coordinated facility changes because of the possibility that competing, mutually-exclusive applications may be filed which would conflict with their joint proposals. *Id.* at ¶13. The FCC concluded that precluding the filing of competing allotment and minor change proposals in this limited context would serve the public interest because the coordinated facility changes would result in enhanced service to the public. *Id.* at ¶13. Accordingly, in its *First Report and Order* in the *Technical Streamlining* proceeding, the Commission adopted a new rule to permit the filing of up to four related, simultaneously-filed minor change applications. *Technical Streamlining First R&O* at ¶14.

As demonstrated above, the FCC's proposal to adopt a new LPFM service is inconsistent with the Commission's proposals in its *Technical Streamlining* proceeding which are designed to relieve the existing congestion in the FM band and permit full-power stations to expand or enhance their existing service despite that congestion. It is beyond peradventure that the proposed LPFM service would significantly impair the ability of full-power stations to take advantage of the new rules that have been or may be adopted in the *Technical Streamlining* proceeding. Before authorizing a new LPFM service, the Commission should first determine the impact that the new rules adopted in the *Technical Streamlining* proceeding will have upon the existing congestion in

the FM band. Therefore, among its other deficiencies, the FCC's proposal to adopt a new LPFM service is premature.

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

As a result of the minimum distance separation requirements contained in Section 73.207 of the Commission's rules,[3] there are many instances, particularly in rural areas, where there is an open area between the protected service contours of full-power FM stations. These open areas often are not large enough to permit the allotment of an additional full-power FM station. However, many of these gaps are sufficiently large enough to permit the authorization of an LPFM station.[4] The Commission apparently believes that the authorization of an LPFM station in such an open area would not cause interference to nearby full-power FM stations, so long as the LPFM station's predicted service contour does not extend into the protected service areas of the full-power stations.

The Commission is simply wrong. The proposal to establish an LPFM service fails to recognize that the vast majority of full-power FM stations enjoy good reception well beyond their predicted service contours. This is particularly true in states such as Arkansas where the terrain is relatively flat throughout the state, excluding the Ozark region in the northwest. Indeed, there are many existing full-power FM stations that have a substantial number of regular listeners who are located outside the station's predicted service contour. If the Commission were to authorize LPFM stations in the open areas between the predicted service contours of full-power stations, many of the

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[3] *See* 47 CFR §73.207.

[4] 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).

existing listeners in those areas no longer would be able to receive the signal of their favorite full-power station because of the interference caused by the LPFM station.

Moreover, if the FCC were to take the position that an LPFM station would not cause interference to full-power FM stations because any interference would occur outside the full-power stations' predicted service contours, this would constitute a grave injustice to the listening public. Indeed, the Commission's position would completely ignore the perspective of those listeners who reside outside the predicted service contour of full-power FM stations. The average radio listener is not concerned with predicted service contours or other FCC technical niceties. The listener's only concern is that he or she be able to continue to receive the signal of his/her favorite station. Thus, regardless of whether the interference caused by an LPFM station occurs inside or outside the predicted contour of the listener's full-power station, the interference to the listener is the same because it precludes the listener from being able to continue to receive the signal of their favorite station.

The interference caused by LPFM stations authorized outside a full-power station's predicted service contour is significant for at least three reasons. First, the new LPFM service would not constitute a satisfactory replacement for the full-power service which it would destroy. Due to the restricted power and extremely limited coverage areas of LPFM stations, the LPFM service would not cover nearly as large an area (or population) as the former full-power service to which it would cause interference. In most instances, the loss of full-power service would be substantially greater than the limited gain in LPFM service. The loss of full-power service would be especially egregious in those instances where, due to the relatively low terrain, the LPFM station's signal (just as a full-power station's signal) extends well beyond its predicted service contour such that it overlaps with

a full-power station's protected contour. In this case, the LPFM station also would prevent those listeners who reside near the outer edge of a full-power station's protected contour from being able to continue to receive the signal of a full-power radio station.

In addition, there would be many instances where listeners located outside the predicted service contour of a full-power station -- who no longer would be able to receive the signal of the full-power station due to the interference caused by an LPFM station -- also would not be able to receive the signal of the interfering LPFM station. The signals of the two stations would effectively cancel each other out so that listeners in certain areas would be unable to receive an adequate signal from either the full-power or LPFM station.

Furthermore, because the Commission has proposed not to require a minimum operating schedule for LP100 or microradio stations, it is likely that many interfering LPFM stations would operate on only a periodic basis or for limited periods of time. As a result, the regular listeners of full-power stations who reside near the outer edge, or outside, the predicted service contour of their favorite station would have no way of knowing when they would be able to listen to certain programs on their favorite full-power station.

In all three of the circumstances describe above, the proposed LPFM service would violate one of the Commission's fundamental principles that the listening "public has a legitimate expectation that existing service will continue."[5] Indeed, in articulating this principle, the

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[5] *See, e.g., Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License,* 5 FCC Rcd 7094, 7097 (1990). In the above proceeding, the Commission stated:

> The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service

(continued...)

Commission has never made any distinction between listeners who reside either inside or outside a station's predicted service contour.[6] Although Chairman William Kennard has repeatedly indicated that he does not intend to implement the proposed LPFM service in a manner that would cause interference to existing full-power stations,[7] there can be no dispute that the proposed LPFM service would deprive many listeners of the ability to continue listening to their favorite full-power radio stations.

C. In the Event the FCC Elects to Establish an LPFM Service, the Commission Must Maintain the Second and Third-Adjacent Channel Protection Requirements.

The FCC must maintain the existing second and third-adjacent channel distance separation requirements in the event it insists upon establishing an LPFM service. In its *Report and Order* in *Grandfathered Short-Spaced FM Stations,*[8] the Commission eliminated the second and third-adjacent channel distance separation requirements for "grandfathered" short-spaced stations (*i.e.*, those stations at locations authorized prior to November 16, 1964, that do not meet the distance separation

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[5](...continued)
benefits that may result from reallotting of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, *a reception service*, or both.

Id. at 7097 (emphasis added).

[6] *See, e.g.*, 47 CFR §74.1203 (an FM translator or booster station will not be permitted to continue to operate if it causes any actual interference to, *inter alia*, the direct reception of the off-the-air signals of any authorized broadcast station).

[7] *See, e.g., News Release*, "*Statement of FCC Chairman William E. Kennard at Roundtable Discussion of Low Power FM*" (May 13, 1999) (stating that the FCC must implement its proposed LPFM service "in a way that protects existing broadcast signals and does not impede the conversion to digital radio").

[8] *See Report and Order* in MM Docket No. 96-120, *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840 (1997).

requirements of subsequently adopted Section 73.207 of the Commission's rules, and have remained continuously short-spaced since that time).[9] In the same proceeding, the Commission expressly stated: "We have no intention of relaxing second-adjacent channel and third-adjacent channel spacing requirements as allotment and application criteria."[10] The Commission explained that interference between second and third-adjacent channel stations generally results in interference in the immediate area of the transmitter of the interfering station, and is actually a substitution of service in that area.[11] Therefore, if the Commission were to establish an LPFM service without maintaining the second and third-adjacent channel interference protections, the proposed LPFM service also would cause substantial interference to existing full-power FM stations *within* their protected service contours.

As demonstrated in Appendix D to the *NPRM*, if the second and third-adjacent channel interference protections were eliminated, there would be sufficient spectrum available for a substantial number of LPFM stations to be authorized as a result of this proceeding. In fact, it is likely that several LPFM stations could be authorized within the protected contour of any one full-power FM station. This would result in several pockets of interference to the full-power station around each of the LPFM stations' transmitters. Although the Commission has repeatedly indicated that it does not intend to implement its proposed LPFM service in a manner that would adversely affect existing broadcast stations, the proposal to eliminate the second and third-adjacent channel

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[9] *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd at 11841, n.2.

[10] 12 FCC Rcd at 11848, ¶25, citing *Notice of Proposed Rulemaking*, 11 FCC Rcd 7245, ¶25 (1996). The FCC made the same statement in the concluding paragraph of that section of its Report and Order. 12 FCC Rcd at 11849, ¶29.

[11] *Id.* at 11849, ¶27.

interference protections would have precisely this effect. Indeed, the elimination of the second and third-adjacent channel interference protections would deprive a substantial number of existing listeners of the ability to continue to receive the signal of many full-power stations, even though the listeners reside well within the protected contours of the full-power stations.

Furthermore, the FCC's proposal to establish an LPFM service without maintaining the second and third-adjacent channel protection requirements is inconsistent with *Grandfathered Short-Spaced FM Stations* and its *Technical Streamlining NPRM.* In its *NPRM* in this proceeding, the Commission noted that it eliminated the third-adjacent channel protection for full-power grandfathered short-spaced stations, including stations which operate with substantially more power than LP1000 stations.[12] The Commission failed to state, however, that, in the same proceeding, it refused to eliminate the second and third-adjacent channel separation requirements for all other commercial FM stations. The Commission's reference to its elimination of the second and third-adjacent channel protection standards for grandfathered short-spaced stations -- without stating that it refused to eliminate such requirements for all other commercial FM stations -- is grossly misleading. Indeed, the Commission repeatedly stated in *Grandfathered Short-Spaced FM Stations* that it had "no intention of relaxing second-adjacent channel and third-adjacent channel protection requirements as allotment and application criteria."[13]

Moreover, in its *Technical Streamlining NPRM*, the FCC proposed to revise the Section 73.215(e) spacing table to provide all commercial FM stations with a minimum of six kilometers of

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[12] *NPRM* at ¶43, citing *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd at 11847-49.

[13] *Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd at 11848-49, ¶¶25, 29 (citing *Notice of Proposed Rulemaking*, 11 FCC Rcd 7245, ¶25 (1996).

relief from the Section 73.207(a) spacing requirements.[14] The Commission believes that its proposal would "significantly increase licensees' flexibility to identify sites that provide sufficient spacing to second- and third-adjacent channel stations." *Technical Streamlining NPRM* at ¶37. Nevertheless, consistent with its earlier determination in *Grandfathered Short-Spaced FM Stations*, the Commission maintained the second and third-adjacent channel protection requirements as allotment and application criteria under Section 73.207. Thus, the *Technical Streamlining NPRM* demonstrates that, as recently as June 1998,[15] the Commission intended to maintain the second and third-adjacent channel distance separation requirements for FM stations.

In the same proceeding, the FCC also proposed to eliminate the inconsistency between commercial and noncommercial station interference protection standards, which further demonstrates its concern regarding second and third-adjacent channel interference. Specifically, the Commission proposed to modify Sections 73.509 and 74.1204(a) of its rules to specify a 100 dBu interfering contour for second-adjacent channel NCE and FM translator stations. The Commission stated that the 100 dBu contour "better identifies areas of potentially degraded or lost service within a station's protected service area caused by another station operating on a *second adjacent channel*."[16] The

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[14] In proposing to revise Section 73.215(e) of its rules, the Commission noted that for second and third-adjacent channel stations, the contour protection rule generally limits the amount of relief from the Section 73.207 spacing requirements to no more than three kilometers, and, in some cases, provides no relief at all. As a result, stations with second and third-adjacent channel spacing problems have, in many instances, less flexibility to relocate their facilities than they had under the former Section 73.207 waiver policies that permitted spacing waivers up to six kilometers. *See Technical Streamlining NPRM* at ¶¶36-37.

[15] The FCC's *Technical Streamlining NPRM* was released on June 15, 1998. *See* 13 FCC Rcd 14849 (1998).

[16] *Technical Streamlining NPRM* at ¶56 (emphasis added).

FCC's effort to eliminate the inconsistency between commercial and noncommercial service with respect to second-adjacent channel interference demonstrates the Commission's recognition that second-adjacent channel interference still exists.

The only explanation the Commission offered in its *NPRM* in this proceeding for the apparent change in its position regarding second and third-adjacent channel interference is contained in the following statement:

> Relaxed interference standards for low power FM stations may be the only way to "find" sufficient spectrum in medium and larger markets to create any new viable service of 100 watts or more.

NPRM at ¶44. Even assuming, *arguendo*, that eliminating second and third-adjacent channel protection requirements may be the only way to "find" sufficient spectrum for LPFM stations in certain markets, that does not constitute a sufficient basis for eliminating these interference protection standards. As demonstrated above, the Commission's proposal to eliminate the second and third-adjacent channel interference protection requirements is blatantly inconsistent with its decision to retain those requirements in two recent rulemaking proceedings. The Commission offered no evidence whatsoever to suggest that the potential for second and third-adjacent channel interference is any less with respect to its proposed LPFM service than it was at the time it adopted *Grandfathered Short-Spaced FM Stations* and its *Technical Streamlining NPRM*. Indeed, rather than present any evidence to suggest that its proposed LPFM service would not pose a threat of second and third-adjacent channel interference, the Commission merely requested comment on "the original rationale for 2nd- and 3rd-adjacent channel protection and the extent to which circumstances have changed in such a way to support relaxation of these protections." *NPRM* at ¶46, n.65. The only circumstance that has changed since the issuance of *Grandfathered Short-Spaced FM Stations* and

its *Technical Streamlining NPRM* is that the Commission has not been able to "find" sufficient spectrum for its proposed LPFM service. Therefore, in the event the Commission elects to eliminate the second and third-adjacent channel protection requirements with respect to LPFM stations, the Commission must demonstrate that establishing an LPFM service and eliminating the second and third-adjacent channel protection requirements would not cause interference to full-power FM stations. In light of its recent determinations in *Grandfathered Short-Spaced FM Stations* and its *Technical Streamlining NPRM* to maintain the second and third-adjacent channel interference protection requirements, it is unlikely that the Commission will be able to do so.

The FCC's proposal to eliminate the second and third-adjacent channel interference protection requirements also is inconsistent with its decision to increase the maximum power level of Class A FM stations to 6 kw.[17] In electing not to establish a 6 kw power increase across the board, the Commission specifically acknowledged that a blanket power increase would result in interference to the service of larger class stations. Accordingly, the Commission concluded that the public interest would not be served by imposing "an involuntary coverage reduction on Class B stations." The Commission further stated: "While a selective increase in power is consistent with the public interest, it should not be accomplished at the expense of reducing coverage or interfering with other existing facilities." *Id.* at 6381. As demonstrated above, the proposal to eliminate second and third-adjacent channel interference protection requirements would result in an involuntary coverage reduction on the part of existing full-power stations by causing interference to their existing facilities. The elimination of these separation requirements also would degrade the quality of FM

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[17] *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).

service and cause many of the same problems that have plagued the AM broadcast service. The FCC should, instead, maintain the second and third-adjacent channel separation requirements and protect the integrity and quality of FM service as a whole.

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

The Commission proposed to permit LP1000 stations to operate with up to 1000 watts at an antenna height of 60 meters above average terrain. The Commission stated, however, that antenna heights greater than 60 meters above average terrain would be permitted, so long as the station makes an appropriate downward adjustment in its effective radiated power ("ERP") such that the predicted 1 mV/m signal contour radius would not exceed 14.2 kilometers. *NPRM* at ¶23, note 35.

In the event the FCC elects to establish an LPFM service, the Commission must adopt maximum antenna height restrictions for each class of LPFM station. In the FM service, it is well established that the greater a station's antenna height, the greater distance the station's signal generally will extend because it will be less affected by intervening terrain. Thus, if an LPFM station were to operate with an antenna height greater than 70 meters above average terrain and an equivalent reduction in operating power (such that its predicted 1 mV/m signal contour would not exceed 14.2 kilometers), the LPFM station likely could extend its actual (rather than predicted) service and interfering contours well beyond what they would be if the station were operating with 1kw at 60 meters HAAT.

As demonstrated above, LPFM stations are likely to cause significant interference to full-power stations operating in the same area. LPFM stations would cause even more interference to the signals of full-power stations if they were to operate with antenna heights significantly higher than 60 meters above average terrain. Therefore, to the extent all three classes of the proposed

LPFM stations are established, the Commission should impose maximum height restrictions of 70 meters HAAT for all LP1000 stations, and 40 meters HAAT for all LP100 and microradio stations.

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

Assuming, *arguendo*, the FCC elects to authorize an LPFM service, the Commission should establish strict guidelines governing the amount of interference that LPFM stations are permitted to receive. As will be demonstrated in greater detail herein, LPFM stations would be unable to generate sufficient revenues to air local programming that serves the needs and interests of their respective service areas. Moreover, LPFM stations would exacerbate the conditions of an already overly-congested FM band, preclude proposals to introduce new services, and significantly impair the ability of full-power stations to either expand or enhance their existing services. In addition, LPFM stations would cause significant interference to full-power FM stations both within and outside their protected contour, and would not constitute a satisfactory replacement service. The proposed LPFM service also poses a significant threat to the development and implementation of in-band-on-channel ("IBOC") digital transmission services. Therefore, in light of the substantial public interest factors which weigh heavily against establishing an LPFM service, the Commission should not authorize any LPFM station if it is predicted to receive more than a *de minimis* amount of interference, *i.e.*, more than 5% of its predicted service area. Furthermore, the Commission should impose a minimum operating schedule to require all LP100 and microradio stations to operate no less than two-thirds of the total hours between 6:00 a.m. and 6:00 p.m., local time, Monday through Saturday.[18]

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[18] The Commission proposed to require LP1000 stations to maintain the same minimum hours of operation as are required of the lowest class of full-power stations, *i.e.*, generally two-thirds of their authorized hours between 6:00 a.m. and midnight. *NPRM*, at ¶76. In the event the (continued...)

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

In its *NPRM*, the Commission acknowledged that its "understanding of future IBOC systems is preliminary," and that it does not have a complete understanding of the negative impact that establishing an LPFM service would have on the transition to digital IBOC technology for FM stations. *NPRM* at ¶49. The Commission further stated: "Clearly, we need to better understand the potential impact of second-adjacent channel LPFM protection standards on the successful development of an IBOC system." *Id.* Accordingly, in proposing to permit negotiated interference agreements between FM stations in its *Technical Streamlining NPRM*, the Commission specifically sought comments addressing how its proposal might affect the development and implementation of IBOC digital radio systems. *Technical Streamlining NPRM* at ¶27.

As demonstrated in both the *NPRM* in this proceeding and the *Technical Streamlining NPRM*, before the FCC establishes an LPFM service, the Commission must first gain more knowledge regarding IBOC digital conversion in order to determine the extent to which the proposed new LPFM service is likely to impair the development and implementation of the new digital transmission technology. This is true with respect to all three classes of the proposed LPFM service. Furthermore, due to the FCC's admitted lack of knowledge regarding IBOC systems, the Commission must maintain the second and third-adjacent channel protection requirements in establishing an LPFM service in order to ensure adequate protection for the future development of IBOC digital conversion.

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[18](...continued)
FCC establishes an LP1000 service, this minimum operating requirement should be adopted.

III. Legal Concerns.

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 Telecommunications Act of 1996 ("1996 Act") do "not apply to a service that did not exist in 1996."[19] *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 (i) prohibit any individual or entity from owning more than one LPFM station in the same community (*id.*), and (ii) 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 should not 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 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

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[19] 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).

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 Balanced Budget Act of 1997[20] ("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.[21] 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

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

[21] *See NPRM* at ¶104.

> broadcast multiple ownership rules, which have the objective of fostering maximum competition in broadcasting (footnotes omitted).[22]

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 -- would operate with restricted power, have limited coverage areas, and would 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 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 rational 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 that apply to full-power radio stations.

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[22] *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*").

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

In the event the FCC elects to establish a commercial LPFM service,[23] the Commission's proposal to resolve mutually exclusive applications for commercial LPFM facilities through a competitive bidding process (*see NPRM* at ¶104) must be adopted in order to comply with the Budget Act.

Section 309(j)(1) of the Communications Act of 1934, as amended (the "Act") (as amended by Section 3002(a) of the Budget Act), makes abundantly clear that if mutually exclusive applications are filed for "any initial license or construction permit," "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . . ." 47 U.S.C. §309(j)(1). Moreover, in its *Auction Order* (establishing standards for auctions of broadcast facilities), the Commission stated that, based upon the express language of Section 309(j)(1) of the Act, "auctions are mandatory for *all secondary commercial broadcast services* (*e.g.*, LPTV, FM translator and television translator services)." *Id.* at ¶9 (emphasis added). The Commission also stated that Section 309(j)(1), as amended, no longer restricts the type of spectrum license which may be awarded through the competitive bidding process, or requires an affirmative public interest determination that the use of an auction will serve the statutory objectives. *Id.* The Commission further stated:

> Nothing in the statutory language or in the accompanying legislative history indicates that the requirement to use competitive bidding for "any initial license or construction permit" is limited to full-power radio and analog television stations, or that Congress intended such a limitation. Nor are secondary commercial broadcast service licenses exempted from the auction requirement under Section 309(j)(2),

[23] As demonstrated in Section IV-C, *infra*, the LPFM service (if authorized) should operate only on a noncommercial basis.

> which enumerates the certain types of spectrum licenses that are not subject to competitive bidding. . . . The Conference Report states that "[a]ny mutually exclusive applications for radio or television broadcast licenses received after June 30, 1997, shall be subject to the Commission's rules regarding competitive bidding, including applications for *secondary broadcast services* such as low power television, television translators, and television booster stations. [footnote omitted]. This list of secondary broadcast service licenses is illustrative rather than exhaustive.

13 FCC Rcd at 15924, ¶10 (emphasis in original). Therefore, there is no statutory basis for excluding the proposed LPFM service from the general auction requirements of Section 309(j)(1) of the Act.

In adopting auction rules for its proposed LPFM service, the Commission should not adopt any alterations or modifications to its auction procedure that will not be applied in the auction process of other broadcast services. The Commission should do no more than provide mutually exclusive applicants for LPFM facilities with a brief period after the filing of their short-form applications in which to attempt to resolve the mutual exclusivity between their respective applications. *See Auction MO&O* at ¶64.

Furthermore, as stated in the *Auction MO&O*, the Budget Act creates a presumption that reserve prices and minimum opening bids are in the public interest. *Auction MO&O* at ¶51. The Commission also stated that, in connection with its previous auction proceedings, the Wireless Telecommunications Bureau has found that the use of reserve prices and minimum opening bids serves the public interest objectives of Section 309(j) of the Act by promoting competition, disseminating licenses among a variety of applicants, promoting efficient spectrum use, and recovering a portion of the value of the spectrum for the public. *Id.* Thus, because the Commission has elected to use reserve prices and minimum bids in the auction of both full-power and secondary

broadcast services, including LPTV stations and FM and television translators, these procedures also must be employed in auctions for LPFM facilities.

C. 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.

The FCC's proposal to treat LP1000 stations as a primary service has the potential to preclude FM allotments in a manner which is inconsistent with Section 307(b) of the Communications Act and the FM allotment priorities.[24] For example, if a party files a rulemaking petition seeking to bring a first local service to a specific community, and that proposal conflicts with a previously filed LP1000 application (or existing LP1000 station), the petitioner's proposal would be precluded by the LP1000 application regardless of whether the proposed full-power FM station would serve a substantially greater area and population, including white or gray area. Therefore, the Commission's proposal to treat LP1000 stations as a primary service should not be adopted because it would preclude certain FM allotments in a manner that would be inconsistent with Section 307(b) of the Act and the FM allotment priorities.

IV. Policy Concerns.

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

[24] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The criteria for determining the comparative preferability of a proposed FM allotment are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. *Id.* at 91.

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 would not meet the Commission's primary objectives of providing an increased opportunity for new entry, enhanced diversity, and additional local programming. *See NPRM* at ¶57. First, LPFM stations would provide only a very limited opportunity for new entry into the broadcasting business. As demonstrated above, the Commission cannot apply ownership rules to the proposed LPFM service that are any more strict than the restrictions mandated by the 1996 Act. As a result, the proposed LPFM stations must be made available to existing broadcasters, who are likely to apply for LPFM stations in an effort to compliment and enhance their existing full-power services. In the event the Commission elects to establish a commercial LPFM service, existing broadcasters are likely to be in a more advantageous position to bid at auctions for LPFM facilities because of their ability to generate revenues through their existing broadcast operations. Therefore, because the vast majority of LPFM stations would be owned by existing broadcasters, the proposed LPFM service would 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 would not promote ownership diversity because the same persons and entities holding full-power authorizations would hold the licenses to the LPFM stations. Thus, although the proposed LPFM service may result in more broadcast stations, it would not promote an increase in ownership diversity.

The proposed LPFM service also would 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.[25] *See NPRM* at ¶¶44, 48. If this proves 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

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[25] Appendix D to the *NPRM* demonstrates that if LPFM stations are required to comply with current interference restrictions, there will be few or no 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 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.*

listen to an LPFM station. Indeed, there is no reason to believe that residents would listen to an LPFM station in a small market when they can get more enhanced news, public affairs, and other non-entertainment local programming from existing full-power stations in the community. The resulting lack of advertising (or underwriting) revenue would significantly diminish an LPFM station's ability to air programming designed to meet the unique needs and interests of the local community. 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 would merely constitute an additional source of satellite programming and would provide little, if any, local programming. Therefore, LPFM stations would not foster localism because they would not provide news, public affairs, or other non-entertainment local programming designed to serve the needs and interests of their local community.

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 diversity 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 ownership diversity.

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. 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. Moreover, because the Commission proposed not to require a minimum operating schedule for LP100 and microradio stations,[26] many LPFM stations would operate on a periodic basis or only 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 AM and FM 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 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.

In addition, the economic impact of an LPFM service 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

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[26] 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.

would diminish ownership diversity. Further, as a result of the Commission's proposal to treat LP1000 stations as a primary service, there are 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 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.[27] Therefore, an LPFM service also could result in further consolidation in the radio industry.[28]

As demonstrated above, the establishment of an LPFM service would merely exacerbate the already over-saturated conditions in smaller radio markets, while providing very few 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 current broadcast marketplace, would never achieve its intended objectives, and is likely to reduce, rather than enhance, ownership diversity by causing further consolidation in the radio industry.

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

[28] 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.

Nevertheless, in the event the FCC elects to institute a commercial LPFM service, the Commission must -- consistent with the ownership restrictions mandated by the 1996 Act -- ensure that licensees of daytime-only AM stations have an opportunity to apply for LPFM stations as a means of complimenting their existing service. The opportunity to do so would promote diversity by enabling many struggling daytime-only AM stations to continue to operate as stand-alone entities by enhancing their ability to compete more effectively in their respective market. Permitting daytime-only AM stations to apply for LPFM stations also would promote localism by enhancing their ability to provide news, public affairs, and other non-entertainment local programming that would better serve the needs and interests of their respective service areas.

B. The Proposed LPFM Service Would Result In a Proliferation 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.[29] 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.[30] *Id.* Although the Commission has issued

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

[30] The Commission noted that in March 1998 it closed down an unlicensed radio operation in Sacramento, California, which had interrupted air traffic control communications on (continued...)

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 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.[31] 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 to prevent the LPFM operator from either 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 almost certainly would go undetected unless and until it causes significant interference to other authorized radio operations. 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

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[30](...continued)
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).

[31] The FCC proposed that LP100 stations operate with maximum facilities of 100 watts ERP at 30 meters (98 feet) HAAT, which may enable them to achieve a 60 dBu contour distance of 3.5 miles. *NPRM* at ¶30. Microradio stations will operate with a maximum ERP of between 1-10 watts at the same height. The 60 dBu contour of microradio stations will 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.*

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 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, such that it is 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. Assuming the 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 not unreasonable 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 could revoke the license of any LPFM station (assuming the circumstances warranted such action), the Commission must first hold an evidentiary hearing. In the meantime, those listeners of the affected full-power FM station(s) will continue to be deprived of at least one source of primary FM service.

Furthermore, despite the FCC's enforcement efforts, there continues to be a substantial interest in operating unlicensed broadcast stations. For example, earlier this 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.[32] 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

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

stations, antennas, and tuning guides.[33] 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, 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 B.

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.[34]

Finally, the About.com web page contains an article which makes abundantly clear that the FCC's proposal to authorize an LPFM service will 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":

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[33] 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 B.

[34] 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 B hereto.

> 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 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.[35]

Contrary to the FCC's 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 an LPFM service is established. 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 likely would result in the expenditure of substantial resources by both the Commission and its full-power FM licensees in their efforts to

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[35] A complete copy of the article is contained in Appendix B hereto.

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 illegally will continue to do so, demonstrates that the Commission's proposal to institute an LPFM service could 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.

C. The LPFM Service Should Be Limited to a Noncommercial Operation.

In the event the FCC elects to establish an LPFM service, all LPFM stations should be restricted to operating on a noncommercial basis. Restricting the LPFM service in this manner would help ensure that all LPFM stations attempt to fulfill their intended purpose of providing locally-originated, non-entertainment programming designed to serve the needs and interests of their respective local communities. Limiting the LPFM service to a noncommercial operation also would increase the availability of such stations to educational institutions and non-profit entities.[36]

As the Commission noted, most LPFM stations will need to generate revenue in order to remain operational. However, the need for station revenues does not dictate that LPFM stations must operate on a commercial basis and attempt to generate funds through the sale of advertising. Due to their restricted power and limited coverage areas, it is highly unlikely that LPFM stations would be able to garner any meaningful revenues through the sale of advertising. Nevertheless, because

[36] In licensing LPFM stations, the Commission should retain the eligibility requirements contained in Section 73.503 of the Commission's rules. *See* 47 CFR §73.503.

of their noncommercial operation, LPFM stations may be able to obtain limited funding through underwriting provided by certain local businesses and community organizations.[37] Moreover, limiting LPFM stations to a noncommercial operation would help promote localism by encouraging LPFM stations to develop specialized programming that may serve the currently unmet needs and interests of a limited audience group. This specialized programming also might enhance an LPFM station's ability to generate underwriting revenues by making the station more attractive to certain local businesses and organizations whose products and activities are directed towards a narrow segment of the local community.

D. All LP1000 Stations Should Be Authorized Through An Allotment Process.

In the event the Commission establishes a commercial LPFM service, all LP1000 stations should be authorized through an allotment process. As stated above, the Commission has proposed that LP1000 stations would operate as a primary service, and generally be subject to all of the Part 73 rules applicable to full-power FM stations. *See NPRM* at ¶73. LP1000 stations also would be authorized to operate with substantially more power than the minimum ERP for Class A FM stations, and would cause substantial interference to full-power FM stations both within and outside their protected contours. Therefore, in order to minimize the amount of interference that would be caused to existing full-power stations, the Commission should adopt an allotment procedure whereby interested parties are required to file a petition for rulemaking seeking the allotment of an LPFM

[37] Even if the proposed LPFM service were to be limited to a noncommercial operation, the ability of LPFM stations to obtain underwriting funds from local businesses and community organizations still would have an adverse impact upon full-power stations because they both would attempt to garner revenues from the same pool of prospective local advertisers/underwriters. Indeed, in today's broadcast marketplace, there is not a significant distinction between the efforts made by commercial stations to obtain advertising revenues and those by noncommercial stations to obtain funds through underwriting.

channel to a specific community (or portion thereof) before permitting any application to be filed for that facility. The allotment procedure would permit the Commission to consider all mutually exclusive proposals together (including any counterproposals that may be filed), and allot an LPFM channel to the specified community at a location which would cause the least interference to existing stations and otherwise best serve the public interest. After the new channel is allotted, the Commission then could hold the requisite auction for the new LPFM facility and award the construction permit to the highest bidder.

E. The FCC Must Impose a Mandatory Local Program Origination Requirement.

In light of the Commission's stated purpose in proposing to establish an LPFM service and the significant countervailing public interests that weigh heavily against establishing such a service, the Commission cannot afford to give LPFM licensees the same discretion as full-power stations in determining "what mix of local and non-local programming will best serve" their respective community. *See NPRM* at ¶68. In order to ensure that all LPFM stations attempt to fulfill their intended purpose of airing community-oriented programming that "reflects the needs, interests, circumstances, and perspectives" unique to their community (*id.)*, the Commission must impose a minimum local program origination requirement for all LPFM stations (including microradio stations) such that their overall programming must be comprised of no less than 80% local originated programming.

F. The FCC Should Not Treat LP1000 Stations as a Primary Service, Nor Should LP100 Stations Be Given a Priority Over FM Translators and Boosters.

In its *NPRM*, the FCC proposed to treat LP1000 stations as a primary service. *NPRM* at ¶27. The FCC proposed to treat LP100 stations as a secondary service, but suggested that they should receive priority status over FM translators and boosters. *Id.* at ¶¶30, 33.

Assuming, *arguendo*, the FCC elects to establish an LPFM service, all LPFM stations should operate on a secondary basis. If LP1000 stations were licensed as a primary service, and/or LP100 stations were given priority over FM translators and boosters, the LPFM stations would preclude full-power FM stations from using translators or boosters to enhance their existing service where the service provided by the LPFM stations and translators/boosters is mutually exclusive. Therefore, the FCC's proposal would significantly impair the ability of full-power FM stations to enhance their existing service.

Before establishing a new LPFM service, the FCC first should make every effort to support existing full-power stations, particularly AM stations. Many AM stations have long suffered from a weak signal and poor reception. The ability to use FM translators to provide fill-in service within their existing contours would provide AM stations with a critical means of enhancing their service. Moreover, if the Commission were to permit daytime-only AM stations to use FM translators at night, this also would help to aid many primary service stations that are in severe financial distress and might otherwise be forced off the air due to their relatively weak signal and inability to operate at night.[38]

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[38] In the *NPRM*, the FCC refused to consider a proposal to permit AM stations to use FM translators to provide fill-in service because, according to the Commission, that proposal is not "sufficiently related" to the goals in this proceeding. *NPRM* at ¶3, n. 3. The Commission's (continued...)

In light of the substantial financial investment and service to the public provided by AM and full-power FM stations, the licensees of such stations should have the opportunity to utilize FM translators and boosters in an effort to enhance their existing service without regard to the proposed LPFM stations. Accordingly, all LPFM stations should operate on a secondary basis and be subject to displacement by full-power FM stations. LPFM stations also should be subject to displacement by FM translators used by any full-power station (including AM stations) to fill in gaps in their existing service areas.

In the unlikely event the FCC were to afford LP1000 stations primary status, at the very least, FM translator and booster stations which pre-date the launch of LPFM service should receive grandfathered interference protection from LP1000 stations. Further, FM translators and boosters should not be treated on a secondary basis *vis-a-vis* LP100 stations. In the event the Commission elects to treat them in such a manner, all existing translators and boosters should receive grandfathered interference protection from LP100 stations.

V. Conclusion.

As demonstrated herein, the Commission's proposal to establish an LPFM service would not serve the public interest. The proposed LPFM service would not meet any of the Commission's primary objectives of providing an increased opportunity for new entry, enhanced ownership diversity, or an increase in the amount of local programming. More importantly, the proposed LPFM service 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

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[38](...continued)
refusal to consider the above proposal will have an adverse effect on the ability of AM stations to improve their existing service through the use of FM translators, and should be reconsidered.

the development of IBOC digital transmission services, and would result in a proliferation of unauthorized broadcast operations.

In the event the Commission insists upon establishing some form of LPFM service, the Commission must maintain the existing second and third-adjacent channel protection requirements in order to minimize the interference that would be caused to existing full-power FM stations. The Commission also must impose maximum height restrictions on all LPFM stations, restrict the amount of interference that such stations may receive, and impose a minimum operating requirement.

Moreover, to ensure that LPFM stations at least attempt to fulfill their intended purpose of airing community-oriented programming designed to serve the needs and interests of their respective local communities, LPFM stations should be restricted to operating on a noncommercial basis. The Commission also should impose a local program origination requirement, so that a minimum of 80% of their programming is locally-originated.

Finally, in the event the Commission elects to authorize a commercial LPFM service, all mutually exclusive applications for LPFM stations must be resolved through a competitive bidding process. Furthermore, the Commission cannot impose any ownership restrictions that are stricter than those mandated by the 1996 Act.

Respectfully submitted,

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