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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

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To: The Commission

COMMENTS OF KHWY, INC.

KHWY, Inc. ("KHWY"), pursuant to Section 1.415 of the Commission's Rules, respectfully submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding. 1/

In the *Notice*, the Commission has proposed to create a new tier of radio stations (collectively, "low power FM" or "LPFM"). The Commission tentatively has determined that such stations would provide sufficient public interest benefits to justify its obvious costs by providing an intensely local voice to community groups or other parties interested in broadcasting. 2/ Without the benefit of extensive practical studies, it also has tentatively concluded that the introduction of hundreds (or even thousands) of such stations will not interfere, at least to any substantial degree, with existing

1/ *Notice of Proposed Rule Making, Creation of a Low Power Radio Service*, MM Docket No. 99-25 (released February 3, 1999) ("*Notice*").

2/ *See Notice* at ¶ 1.

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primary radio services. 3/ It has suggested that the "very nature of" LPFM stations will be sure to "serve the public," 4/ and that such stations are critically necessary to "foster opportunities for new radio broadcast ownership, and promote additional diversity." 5/

KHWY is willing to accept, *arguendo*, that these propositions are both true and a sufficient basis to create new "low power" radio services that might add hundreds or thousands of new radio stations to the already congested FM band. However, as a condition to any approval of any LPFM service, KHWY simply asks that the Commission promise that any implementation of the proposal or any operation of an LPFM station is dependent on these propositions - each of which is fundamental to the reasoning underlying adoption of LPFM - remaining accurate. Specifically, the Commission should guarantee the following seven propositions:

1. *LPFM services will not interfere with existing radio services.*

Commission precedent establishes that any proposal that will cause any significant interference to existing services should not be adopted without certain and

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3/ *See id.* at ¶¶ 45, 48.

4/ *Id.* at ¶ 72.

5/ *Id.* at ¶ 1.

overwhelming public benefit. 6/ The *Notice* also makes clear that the Commission does not intend LPFM services to interfere with any future digital radio transmissions. 7/

KHWY agrees that LPFM services should not be adopted if they cause any objectionable interference. Accordingly, the Commission should be prepared to guarantee that LPFM services will not interfere with existing radio stations (or their future digital transmissions) before it authorizes a single LPFM station. At the very least, if objectionable interference does occur, the Commission should be able to promise that the LPFM station would cease operations and that the cause of the interference would be remedied promptly, i.e., within days, not weeks.

2. *Other broadcast stations should not be compelled to subsidize the regulatory costs associated with any new LPFM services.*

Nowhere in the *Notice* does the Commission attempt to suggest that full power radio stations have a public interest obligation to support LPFM. Broadcast stations already provide extensive public service -- a fact which the *Notice* implicitly admits by refusing to require all LPFM stations to comply with the public interest programming requirements fundamental to full power stations. 8/ Rather, the

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6/ *See, e.g., Amendment of Section 73.202(b), Table of Assignments, FM Broadcast Stations. (Denver, Colorado)*, 46 RR 2d 1379 (1980). There, the Commission rejected a short-spaced proposal for a minority-owned radio station in Denver, noting that "to justify a waiver of the Commission's rules on mileage separation requirements, the showing of need must be compelling." (citations omitted); *see also Quinnipiac College (WQAQ)*, 8 FCC Rcd 6285 (1993) (rejecting pleas of NCE-FM station to ignore spacing requirements despite lack of interference).

7/ *Notice* at ¶ 49.

8/ *See Notice* at ¶ 72.

Commission views LPFM as an independent radio service. Accordingly, it must require LPFM stations to defray any regulatory costs associated with their operations.

In particular, LPFM stations should be obliged to pay sufficient annual regulatory fees to remunerate, in their entirety, the costs of any Commission staff or resources employed to eliminate LPFM interference, write specific LPFM software, 9/ and provide other LPFM-related services. If an LPFM station does not pay its fee, it must terminate operations and the annual fee of all other LPFM stations proportionally increased.

3. *All LPFM stations must maintain a local focus.*

The Commission is willing to consider elimination of key interference safeguards - at least with regard to LPFM stations - because such stations will provide "community-oriented radio broadcasting." 10/ Accordingly, to continue to operate, such stations must be required to have a local studio. It would be paradoxical not to require a LPFM station, a main purpose of which is to respond to local concerns, to maintain a local studio that is staffed by one or more persons during regular business hours.

Moreover, such stations cannot be allowed to rely entirely on non-local programming sources. For instance, the Commission must forbid the creation of any "daisy chain" of LPFM stations -- whereby one station's programming is transmitted to another station located miles away leading to the elimination of any locally originated programming -- or any LPFM station's association with a network. The Commission's

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9/ *See Notice* at ¶ 95.

10/ *Id.* at ¶ 1.

refusal to propose such a network prohibition in the *Notice*, 11/ suggests a real tension underlying the Commission's proposal. On the one hand, it asserts that the need for LPFM is to ensure local programming; on the other, it posits that "programming does not have to be locally-produced to have interest . . . to listeners in any particular locale." 12/ As the latter would completely fail to distinguish LPFM services from other types of radio services, KHWY assumes that the Commission will resolve this tension by deeming LPFM as being nearly, if not entirely, local. Accordingly, the Commission should guarantee that such a local focus will be preserved.

4. All LPFM stations must be noncommercial.

The Commission grounds the creation of LPFM stations on the need for some broadcast outlet to serve as a community town crier. The service cannot be so justified if it simply should become another advertising arm of a local huckster. If LPFM stations could be owned by for-profit groups, it would prove far too easy for a local merchant to acquire such a station and transform it into a series of "junk broadcasts," complete with "great bargains" and "once-in-a-lifetime offers." Assuredly, such self-promotion is not the intended use of LPFM stations' valuable spectrum. Accordingly, the Commission should require all LPFM owners to be non-profit, and all LPFM stations to be noncommercial, as befits their intended purpose of community service.

11/ *Id.* at ¶ 68.

12/ *Id.*

5. *Each LPFM station must provide programming of substantial interest to a substantial segment of its community.*

Existing radio, as a mass media, must serve a diverse population, consisting of persons of all races, creeds, backgrounds, and residency, simply in order to be commercially viable. LPFM, with its comparatively lower costs, has comparatively far less incentive to provide programming attractive to any notable segment, and certainly not a broad cross-section, of a community. Rather, LPFM may well be used by fringe groups largely unrepresented in the mainstream media. Such fringe broadcasts, in many cases, do not accord sufficient public benefit to justify an LPFM service that is likely to adversely affect the present and future of radio. Accordingly, the Commission must require that any LPFM station demonstrates a continuing commitment to programming of general local interest. A station that fails to do so must be terminated on the grounds that LPFM service can only be warranted if it serves a substantial segment of its local community.

6. *No LPFM station can be assigned or otherwise transferred without express assurances from the proposed owner that the owner will fulfill the ideals justifying the entire service.*

The Commission has proposed not to restrict the sale of any LPFM station beyond the specific ownership limits outlined in the *Notice*. In refusing to require any certification by a proposed LPFM owner as to its intended use of the LPFM station, the Commission suggests that an LPFM station should be seen as no different from any other radio station -- even though other radio stations are required to adhere to more restrictive interference and other regulatory requirements.

But these LPFM stations must be subject to unique public interest standards to warrant their special treatment with regard to interference safeguards. The Commission has justified these stations as necessary to address specific issues of local programming and diverse broadcast ownership. If a proposed owner of an LPFM station is unable to promise that it will pursue such localism and diversity, that party cannot be deemed qualified to acquire an LPFM station. Moreover, if the Commission is unwilling to require potential buyers of LPFM stations to make such certifications, it is impossible for the Commission to presume LPFM stations will serve the specific role that justifies their existence and continuing special treatment.

7. *No LPFM station will be authorized in any designated market area in which existing vacant or non-operational frequencies exist.*

A key final premise of the LPFM proposal is that, in general, most regions lack sufficient allotments to enable parties to operate a full power station in their general area. Accordingly, the Commission should refuse to accept applications for an LPFM station in any designated market area (or similar geographic expanse) where unused AM or FM frequencies exist. LPFM services, after all, will be a permanent exception to the Commission's interference guidelines; such stations should not be allowed when a station that can meet all the Commission's requirements is available. 13/ It also makes little sense for the Commission to encourage local or minority entities to acquire a *low power* station when full power stations remain available in the area.

13/ *Cf. Ogden Television, Inc.*, 7 FCC Rcd 3116 (VSD 1992); *Townsend Broadcasting Corporation*, 62 FCC 2d 511, 512 (1976) (noting that no short spacing will be allowed if a fully spaced site is available).

CONCLUSION

To the extent the Commission cannot ensure that each of the above conditions will be met prior to any LPFM implementation, and to the extent the Commission cannot ensure that such conditions will continue to be met for as long as that LPFM service is to endure, the Commission should reject creation of any LPFM service. The benefits of the LPFM proposal are largely conjectural. If any of the service's alleged benefits do not prove true, the LPFM proposal has far too many public interest disadvantages to continue to be sustained. If the Commission does not think these basic criteria can be met at the present time and sustained as long as the service exists, it should reject the LPFM proposal outright.

Respectfully submitted,

KHWY, INC.

By: _____
Howard Anderson
President

August 2, 1999