

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**

TO: The Commission

REPLY COMMENTS

**The State of Oregon, Acting By and Through the
State Board of Higher Education for the Benefit
of Southern Oregon University;
The WBEZ Alliance, Inc.;**
**The University of Washington;
Pacific Lutheran University;
Spokane Public Radio; and
University of the Pacific**

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SUMMARY

A group of five public radio licensees, consisting of the State of Oregon, Acting By and Through the State Board of Higher Education for the Benefit of Southern Oregon University, the WBEZ Alliance, Inc., the University of Washington, Pacific Lutheran University, Spokane Public Radio, and University of the Pacific (hereafter, jointly, APublic Radio Stations≡), file these Reply Comments in order to distill the most salient and significant points made by opponents of the NPRM during the initial round of Comments. In doing so, these Public Radio Stations wish to underscore the requirements of the federal Administrative Procedure Act, 5 U.S.C. section 553 *et seq.* that a rulemaking, particularly a rulemaking that departs abruptly and to a significant degree from prior agency precedent and policy, must be supported by strong rulemaking record. Rules promulgated without sufficient record support, based merely on the staff=s unsupported predictive judgments, have routinely been invalidated by the federal appeals courts.

These Public Radio Stations remind the Commission and staff of unrefuted points and arguments raised by such public broadcasting entities as the Corporation for Public Broadcasting, NPR, the Station Resource Group, and the Public Radio Regional Organizations, which demonstrate that the staff has failed to consider or account for the negative impact that Low Power FM will have on existing public radio stations and infrastructure. These Public Radio Stations also point out how the NPRM proposal ignores, disregards, or reverses long-standing Congressional and Commission policies that have favored expansion of access to public radio for the entire population. Finally, the Public Radio Stations show that many, if not most, proponents of low power FM have completely failed to distinguish between public and commercial radio. The Comments of such parties should be confined to their own terms.

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The State of Oregon, Acting By and Through the State Board of Higher Education for the Benefit of Southern Oregon University (ASate of Oregon≅), licensee of KSOR-FM, Ashland, OR and other stations, together with the following public radio station licensees: the WBEZ Alliance, Inc. (licensee of WBEZ-FM, Chicago, IL); the University of Washington (licensee of KUOW-FM and KCMU-FM, Seattle, WA); Pacific Lutheran University (licensee of KPLU-FM, Tacoma, WA); Spokane Public Radio (licensee of KPBX-FM, Spokane, WA); and University of the Pacific (licensee of KUOP-FM, Stockton, CA) (hereafter, jointly, APublic Radio Stations≅), through their attorneys, file these Reply Comments with respect to the above-captioned Notice of Proposed Rulemaking (ANPRM≅).

These Public Radio Stations file these Reply Comments in order to voice their concurrence with the initial Comments filed by several parties in this Rulemaking who expressed opposition to the proposal to create a low power radio service. They also wish to point out the errors found in Comments filed by certain proponents of the proposal. Upon review of the rulemaking record created thus far, the Public Radio Stations have concluded that the proponents

of low power FM radio have failed to make a rulemaking record sufficient to support creation of a low power service at this time. Rather, those proponents, like the Mass Media Bureau staff, have relied upon assumptions and wishful thinking, rather than concrete technical and legal support. The record is thus deficient and, as a matter of administrative law, cannot support for the rulemaking proposal. The NPRM should, therefore, be set aside at this time.

I The Focus of These Reply Comments.

In these Reply Comments, the Public Radio Stations will review Comments filed by other parties that they consider particularly significant for Commission's deliberations and decision-making in this rule making proceeding. The focus of this review, however, is not merely a survey of other parties' comments, or a mere concurrence. Rather, the Public Radio Stations approach this review from the perspective of black-letter principles of administrative law. The objective is to remind the Commission that it must fulfill the requirements of the Administrative Procedure Act, 5 U.S.C. section 553 *et seq.* (1998), if its rules are to withstand judicial review. In particular, rules that are promulgated without sufficient record support will be found arbitrary and capricious. As the **National Association of Media Brokers** reminds us all, rules that are based upon unsupported predictive judgments, rather than evidence, have often been found arbitrary and capricious (*see, e.g., Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), or worse (*see, e.g., Lutheran Church, Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998)). In these Reply Comments, the Public Radio Stations will highlight various Comments that point out significant deficiencies in the Staff's proposal or otherwise provide record evidence which must weigh heavily *against* promulgation of rules that would create a low power FM service

II Opponents of Low Power Radio Made Strong Technical and Legal Arguments that Cannot Be Refuted on the Existing Record.

A number of parties who filed Comments about the potential impact of low power FM radio upon existing public radio service made strong and telling points which have not been (and simply cannot be) refuted by anything filed by Bureau Staff or by proponents' comments. The Public Radio Stations, in these Reply Comments, will underscore some of the most significant points and arguments made by such parties, specifically including the **Station Resource Group, the Corporation for Public Broadcasting, the Public Radio Regional Organizations, National Public Radio, the National Association of Broadcasters, the New Mexico Broadcasters Association, the National Association of Media Brokers, the International Association of Audio Information Services (formerly, the National Association of Radio Reading Services), and the United States Radio Listeners Association.**

1. Legal and Policy Arguments of Opponents.

Several commenters raised significant legal and/or policy arguments that, as a matter of administrative law, simply cannot be ignored in this rulemaking proceeding. These arguments clearly demonstrate the woeful inadequacies of the NPRM. Among the most significant Comments were the following:

Station Resource Group. The **Station Resource Group (ASRG)** pointed out that the Staff's legal reasoning is deeply flawed, based largely on wishful thinking about the applicability of the Telecommunications Act of 1996. As **SRG** noted (p.3, citing NPRM, & 59), the staff embarked upon this essentially-radical proposal with no more in the way of statutory support than a tentative belief that the Act would not apply to newly-created low power commercial

stations. Given that the statute's auction requirements, on their face, apply to all commercial radio regardless of size, the federal appeals courts and Congress itself are likely to bring a more rigorous legal analysis to this issue. As **SRG** stated, A Congressional intent cannot simply be ignored in this fashion. Staff's contrary assumption, premised upon no more than what it tentatively believes, is a poor foundation from which to embark upon an action so disruptive and potentially harmful to an existing industry.

Perhaps the strongest points made by **SRG** relate to the inconsistency of this proposal with the Commission's existing precedent and long-standing policies. An administrative agency cannot depart abruptly from its former precedent and policies unless it has made a very strong showing of the basis for so doing. **SRG**'s Comments focus on a number of prior Commission decisions which are directly contrary to the position taken by staff in this present NPRM. The first of these is Docket 20735, in which the Commission explored issues relating to the most efficient use of NCE FM radio channels. At the time of that proceedings, as **SRG** reminds us (pp. 5 - 8), low power NCE FM stations, not unlike those presently proposed and which purportedly served the same ends that the staff now trumpets for its LPFM proposal, were already authorized. The issue in Docket 20735 was whether to continue such authorization. To that end, the Commission evaluated low power NCE stations from the perspective of efficiency of channel use. The Commission concluded that these low power operations cannot be permitted to function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas and bring effective noncommercial educational radio service to many who now lack it (SRG Comments at 6, quoting *Second Report and Order*, 44 RR 2d 235, 238, 244

(1978).

In the more than twenty years since then, public radio B with the financial support of federal and state governments -- has consistently and successfully sought to achieve that goal of efficient and effective service to large areas. With no adequate explanation of why it has now abandoned that position, the staff seeks now to revive the specter of a proliferation of small inefficient NCE stations which, moreover, may result in lasting harm to the public radio service that has developed since Docket 20735 was concluded.

As in that proceeding, the issue here must also be efficient use of the broadcast spectrum, but the staff appears to have forgotten B or else, chooses to ignore B the difficult lesson learned in Docket 20735 -- that A competing equities \cong , on balance, favor spectrum efficiency in NCE allocation. An administrative agency cannot so cavalierly ignore such long-standing policy.

Furthermore, as **SRG** also brings to our attention, this policy has been re-affirmed by the Commission as recently as 1995. Reminding the Commission that spectrum efficiency is not merely a strong policy but also a statutory requirement under section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. section 307(b), **SRG** cited the Commission=s reasoning and decision in *Application for Review of Steven Paul Dunifer*, 1 CR 798 (1995). In that case, section 3307(b) was cited as the basis for ordering a forfeiture for the operation of an unlicensed low power station. The factors articulated by the Commission in that decision have not changed and still provide a strong statutory and administrative basis for rejecting the staff=s proposal. These factors included: A the public=s interest in . . . more efficient use of the spectrum, and . . . the particular interest of rural or distant communities in obtaining

access to noncommercial, educational programming. This is precisely the point that the State of Oregon and other public radio commenters made in initial Comments.

Another factor identified in *Dunifer* which remains an issue and has not been adequately addressed by staff is that a low power station could not co-exist with a nearby high power station; the interference would be too destructive. . . . Even the lesser interference experienced at the edge of the high power station's contour would be unacceptable from a public interest standpoint because the low power station

would cause objectionable interference to reception by the audience of the primary station's signal. Such interference would be difficult to identify and correct, and would serve to lower the quality of the FM broadcasting service. *Dunifer*, 1CR at 803, quoted in **SRG** Comments at 9.

SRG also points out that the Commission held in *Dunifer* that the preclusive effects of licensing low power stations would be contrary to the principles and mandate of Section 307(b), yet nowhere in the NPRM does the staff explain why this statutory provision and the Commission's long-standing interpretation of it suddenly seem to no longer matter. What, if anything, has supposedly changed? The staff does not say. However, as a matter of administrative law, the staff *must* be able to justify and explain any and all departures from past precedent. With Commission actions such as *Dunifer* and Docket 20735 in existence, the Commission cannot go forward with a rulemaking that will effectuate the precise results it has previously ruled contrary to the mandate and principles of the statute that it must enforce. **SRG**'s arguments highlight a major deficiency in the staff's reasoning and a basic principle of administrative law that the staff has disregarded.

Another area ignored by the NPRM but emphasized in the Comments of **SRG** and other public broadcasting entities is the fact that Corporation for Public Broadcasting (AC.P.B.) funding would not be available for low power NCE stations, which would be unable to meet

CPB=s criteria for funding. Nor would such stations be eligible to receive capital funds from the National Telecommunications and Information Administration (ANTIA≅) of the U.S. Department of Commerce. The Public Radio Stations can only conclude that the staff failed to consider the present-day economic realities of public broadcasting when it proposed the NCE elements of its NPRM. How does the staff imagine that all these new little NCE stations will be funded and financed? Why did the staff not realize that its proposal cannot be accommodated within -- in fact, is directly contrary to -- the public policy and implementation systems developed for and by public broadcasting?

New Mexico Broadcasters Association. The Comments of the **New Mexico Broadcasters Association (NMBA)** also pointed out inconsistencies and contradictions between the NPRM and prior Commission policies and decisions. The NPRM, for example, glaringly ignores a major finding from the recent *Technical Streamlining* rulemaking¹ that the FM band, particularly the NCE FM band, is extremely congested at present. Where, in that congested band, is room to be found for a proliferation of underfunded inefficient low power NCE stations? This inconsistency is nowhere addressed in the NPRM yet, as a matter of administrative law, it should have been.

¹ *1998 Regulatory Review B 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 Rdc 14849 (1998)(*ATechnical Streamlining NPRM≅*), *First Report and Order*, FCC 99-55 (released March 30, 1999), (*ATechnical Streamlining First R&O≅*).

The **NMBA** also emphasized that the proposal to eliminate second- and third-channel separation requirements is inconsistent with the Commission's long-standing interference protection standards. **NMBA** points out that the NPRM would essentially permit interference *within* existing protected service contours. [**NMBA** Comments at 31 - 32, citing *Grandfathered Short-Spaced FM Stations*, MM Docket No. 96-120, 12 FCC Rcd 11840, 11841, n.2, 11848 - 49 (1997)]

Attached to the **NMBA** Comments are copies of letters from individual members of the association, including KUNM-FM, one of the major public radio stations in the state, which is licensed to the University of New Mexico. Like KANW-FM and KENW-FM (which were highlighted as examples of efficient statewide public radio networks in the State of Oregon's initial Comments), KUNM(FM) points out that it has

seven translators that serve small communities on the perimeter of [its] signal area that would not be able to receive public broadcasting because of the mountainous terrain of northern New Mexico. We are concerned that these translators will be knocked out of service by LPFM signals that will interfere with them.≡ (Letter of Roland Cowell, Chief Engineer, and Richard S. Towne, General Manager, attached to **NMBA** Comments).

Also noteworthy within the **NMBA** Comments is the letter from Matt C. Martinez, General Manager of Sangre de Cristo Broadcasting Co., Inc., licensee of KNMX, Las Vegas, New Mexico. Mr. Martinez points out that Sangre de Cristo will soon be going on the air with a new FM station. Unlike its larger namesake in Nevada, the community of Las Vegas, New Mexico is a small town set in a mountainous rural area of farms and small villages. Many of the residents of these communities are Hispanic. Mr. Martinez expresses strong concerns that his family's investment of time, money, and commitment to the community will be undercut by interference from low power stations.

This and other letters from individual commercial broadcasters should serve to remind the staff that not all commercial radio is owned by large multiple owners -- at least, not yet. Small individual owners like the Martinez family or like Sandi U. Bergman of Bergman Broadcasting Company, Inc., KSEL AM/FM, Portales, NM, and KSMX(FM), Clovis, NM, already provide local ownership and a diversity of programming and point of view in towns and villages in rural areas like much of New Mexico or, for that matter, the southern Oregon- northern California area. The impact of interference from low power stations could be the proverbial last straw that forces these existing full-power local family-owned operations onto the market, resulting in further consolidation. Once again, these comments point out how poorly reasoned the NPRM is: in many cases, low power radio will not result in the goals sought by staff and, may, in fact, be counter-productive.

The **Corporation for Public Broadcasting (CPB)**, in its Comments, likewise stresses how radical a departure this proposal is from prior Commission decisions and policies. For many years, since the passage of the Public Broadcasting Act, the Commission has recognized the importance of wide-area coverage for public radio stations. **CPB** points out that nothing has changed in the underlying considerations which the Commission, in the past, found so compelling for protecting the development of public broadcasting. **CPB** has, in fact, demonstrated numerous ways in which those policies are even more important today. Yet, the NPRM's proposal is diametrically opposed to the Commission's prior public broadcasting policies and will fatally undermine the system that Congress, the Commission, the NTIA, and CPB have fostered throughout this period.

Finally, **CPB** points out various ways in which the staff's proposal appears poorly thought

out and not well-supported. Like SRG, CPB notes the extent to which the NPRM puts forward the goals it seeks to achieve with LPFM as supposition or prediction (Aguess≅ or Abelief≅ is not too strong a characterization), without supporting evidence and without much regard for the underlying legal, administrative, and policy-based realities. Examples of such policy-making-through-wishful-thinking include the staff's unsupported and, in fact, inaccurate, assumptions regarding the practicality of the various means it proposes for achieving diversity and minority ownership (CPB Comments, pp. 12 -15).

SRG (Comments, pp. 10 - 13) had also pointed out that the NPRM is premised on Aprophecies≅ or Ahighly idealistic assumptions≅ predicting that new LPFM stations would not only be owned by ethnic minority group members, but also would be able to exist without any visible means of support or, at least, Awithout concern for financial support≅ (quoting from NPRM, & 11). Such staff assumptions are replete with qualifying terms such as Amight≅ and Aperhaps≅. Terming the NPRM's proposals in this regard, as **SRG** has done, Aa field of dreams≅ is not too strong a criticism. An administrative agency which seeks to embark upon a proposal which will have such a far-reaching impact upon so many people and business must offer far stronger support than vague hopes that the money will somehow be provided and the little guy will prevail. Those of us who have struggled for many years to keep public broadcasting financially viable in our communities know only too well that finding sufficient revenues to maintain an NCE FM radio service is a constant challenge.

For the staff to assume that low power NCE stations can somehow, somewhere find sufficient financial support to remain viable suggests that the staff is naive and has not tested its

proposal against the existing realities of noncommercial radio. Such analytic laxity staff cannot be excused. Further, nothing put forward in the Comments of proponents of this NPRM offers any more concrete support. Like the staff, the proponents of LPFM speak in generalities and paint rosy pictures, using terms like Agreater access≡ and Ademocratization.≡ Nothing in their Comments, however, offers more concrete assurance that neither Congress nor the courts nor the invisible hand of market forces (which affect public as well as commercial broadcasting) will prevent these dreams from being realized.

National Public Radio has joined **CPB** and the **Public Radio Regional Organizations (APRRO≡)**, in pointing out the various ways in which the staff seems unaware of or has ignored the incompatibility of this proposal with long-standing policies that favor the development and protection of public radio infrastructure. The Comments filed by the PPRO, in particular, raise issues of great concern to the Public Radio Stations B the vulnerability of public radio translator and booster stations to displacement by and interference from LPFM . Such a result, **PPRO** cautions, would threaten existing service, especially in the West, where Athere are vast areas where stations rely on getting coverage, and listeners rely on getting service, beyond the normal protected contours of public radio stations.≡ The staff has completely disregarded this issue. Yet, as NPR, CPB, the PRRO, and the State of Oregon all pointed out in their respective initial Comments, long-standing Commission policy, as well as NTIA grant policies which implement the Public Broadcasting Act, have long favored the expansion of existing public broadcasting service into and throughout unserved areas by means of translators and booster facilities. The NPRM, if implemented, threatens not only to overturn those policies but actually to undermine

that infrastructure itself.

III Technical Arguments of Opponents.

Perhaps even more glaring than the manner in which the staff has glossed over legal precedent, Congressional intent, and long-standing Commission policies is the staff's substitution of wishful thinking and assumptions on technical matters for the type of evidence that is needed to support a rulemaking. The standard is particularly rigorous when a rulemaking proposes a radical reversal of prior agency policies and standards. The Comments of **SRG**, once again, cannot be disregarded in this proceeding.

SRG has detailed numerous examples of the NPRM's use of wishful thinking or predictive judgments rather than evidence, for instance this sweeping generality: *AOn balance, we believe that creating opportunities for new LPFM service should outweigh any small risk of interference* (NPRM, &45, quoted in SRG Comments at p. 13, emphasis added). **SRG** points out that the Commission in the NPRM hypothesizes . . . interference in . . . only very limited areas (NPRM & 50); that it assumes that LPFM will have no effect on existing co-channel stations (NPRM, & 42); and that existing protection standards will prevent stations from receiving harmful interference from first-adjacent LPFM stations (NPRM, & 42).

SRG cites the CEMA study, which totally refutes these unfounded and mistaken assumptions. Both the CEMA study and the NAB study refute the staff's belief that authorizing LPFM service without imposing any third-adjacent channel protection requirements would entail little risk of interference . . . (NPRM, & 43, cited in SRG Comments at 19).

Terming the staff's assumption-filled approach dangerously simplistic, **SRG** points out that

A[i]nterference is a function of≡ both theoretical and practical factors which the staff has not assessed, does not seem concerned about, and Aassumes . . . is simply a matter of physics, not perception≡ (SRG Comments at 20).²

The staff=s overall assumption about interference B that any such effects of LPFM *Amight well be insignificant*≡ (NPRM, & 45, quoted in SRG Comments at 22, emphasis added) is breathtaking in its blithe disregard for the need for hard evidence as well as for the adverse consequences that will fall on millions of people if its assumptions are wrong. As **SRG** stresses, the Commission released this NPRM for comment before doing any kind of field or lab studies and, furthermore, the results of the CEMA and NAB studies point to the need for further studies,

²One of the most shocking aspects of this entire process is that the staff seems to have failed to take into account the concerns of the Federal Aviation Administration when preparing this NPRM -- in fact, they appear not to have even consulted the FAA before releasing the NPRM. Why else would this sister agency be reduced to filing comments in order to remind the staff of risks presented by LPFM of Ainterference to critical aeronautical safety systems.≡ (Department of Transportation, FAA, Comments at p. 1). It appears that the staff has ignored not only the Department of Commerce, whose NTIA is vitally concerned with an area B public broadcasting=s infrastructure B that may be adversely affected by LPFM, it has also ignored another cabinet department whose area of jurisdiction should have been uppermost in the staff=s mind. The staff, apparently, felt no obligation to secure FAA clearance before making its proposal public.

particularly Areal world≅ field studies. **CPB** has termed the drastic nature of the change that is being contemplated a proposal Afundamentally to change the character of radio and potentially compromise what radio does best B *broadcast* to sizable populations with signals that can be received easily and over large distances by both target and general populations≅ (**CPB** Comments at 3, emphasis in original).

The Comments filed by the **United States Radio Listeners Association (USRLA)** warn that, under the staff=s proposal, the Aradio broadcasting industry is about to embark down a path that will ultimately lead to the disappearance of free over-the-air radio and the rise of subscription-based radio broadcasting services≅ (Comments, at 2). Before the Commission dismisses this as apocalyptic hyperbole, it should consider the similarities between its own overly-optimistic assumptions and these ultimately-pessimistic ones. Neither the Commission staff nor the proponents of low power FM service have done the hard work necessary to provide evidence, as opposed to assumptions, in support of their proposal. The burden of proof is on the staff and other proponents of low power FM, a burden they have failed to sustain as a matter either of logic or of administrative law.

IV The Comments of Proponents of LPFM Do Not Provide Sufficient Evidence to Support the Proposed Changes in Commission Rules and Policies.

The Arush to rulemaking≅ and substitution of predictive judgments for evidence which characterizes the staff=s approach is matched by the Comments of most proponents of the NPRM. For example, the **Minority Media and Telecommunications Council (AMMTC≅)** did not even want to give the **NAB** sufficient time to conduct and complete its study on technical effects, and urged the Commission to deny the **NAB**=s request for an extension of time. **MMTC**

likewise glosses over interference problems. Even though an industry expert has warned of the need for thorough investigation of the potential impact of LPFM on digital radio, **MMTC** would be satisfied (and thinks the industry and Commission should be satisfied also) with the grudging *Ahope*≡ that while *Athere* will be some interference≡ it can *Aprobably* be made acceptable≡ (MMTC at 1, n.1, emphasis added).

MMTC's comments do not even mention public radio or consider the impact of low power FM on existing public radio stations and their listeners. To read **MMTC**'s comments, one would think that public radio did not exist. Furthermore, **MMTC**'s assumptions are simply irrelevant to existing NCE realities and policies. Similarly, the Comments of the **ACLU of Massachusetts, Radio Free Allston, and Citizens Media Corporation (AACLU, et al.)** ignore the existence of an extensive nationwide public radio system, treating the FM broadcast spectrum as if it were made up solely of commercial stations. These comments are particularly short-sighted in their treatment of translators, ignoring the role translators have played in the implementation of Congressional, Commission, and NTIA policies that seek to ensure that public radio signals reach populations that might otherwise have no access to public radio.

So absent is public radio from the comments of most LPFM proponents that the Public Radio Stations believe that such comments must be considered irrelevant. Parties that have failed to take into account the impact of LPFM on existing NCE FM stations should not receive any consideration by the Commission when it seeks to determine whether to locate any LPFM stations within the reserved band. Comments which treat deal only with problems and policies associated with commercial broadcasting should not be permitted to influence the Commission's decision-

making process with respect to public radio and the reserved band. Rather, such comments should be limited in their impact to the specific issues and problems they address in commercial broadcasting.

The following comments, among others, have ignored the unique aspects of public radio and should be disregarded whenever an issue has a particular or disparate effect on NCE or public, as opposed to commercial, radio: the Communication Workers of America; the Citizens Telecommunications and Technology Advisory Board of the City of Seattle; the McChesny Assign-on letter²; and the College Radio Task Force. This list is not exhaustive; numerous other pro-LPFM commenters have either forgotten about the distinctions between public and commercial radio or have chosen to disregard the fact that existing public radio stations, which do not present any of the problems of industry consolidation or lack of diversity which this proposal seeks to address, will be harmed by LPFM, particularly by the nominally-noncommercial-but-unregulated LPFM these commenters seem to favor. The Public Radio Stations urge the Commission not to mix apples and oranges when it evaluates these comments: comments which are limited to only one category of stations should apply only to that category.

These commenters have also glossed over the impracticality of their proposals in much the same manner as the staff has done in the NPRM. None of these commenters gives any consideration regarding how or why LPFM could or should be exempted from the Telecommunications Act of 1996 or how the Commission could successfully ignore the implications of the *Bechtel*, *Lutheran Church*, or *Lamprecht v. FCC*, 958 F. 2d 382 (D.C. Cir. 1992) decisions. Rather, they have substituted in place of legal analysis the same kind of wishful thinking and predictive judgments that were rejected by the D.C. Circuit in those decisions. That

court has consistently presented the Commission with the same lesson, a lesson which the Commission consistently disregards B it cannot make policy choices without concrete support for the choices that it makes. Likewise, Comments that are based on opinion rather than evidence cannot be used to support a rulemaking that effectuates a major change in policy and administrative precedent.

V The Commission Cannot Rely for Support Upon Its Newly-Released Study Without Permitting Further Notice and Opportunity for Comment.

As the **National Association of Media Brokers** commented, the Commission staff has rushed this matter through on what NAMB refers to as a Arocket docket.[≡] Although the Public Radio Stations disagrees with the NAMB regarding its position that LPFM should be limited to NCE stations, we find it impossible to disagree with this characterization of the unseemly rush with which the Commission staff seems to be pushing this rulemaking proposal. The Commission has declined to extend the deadline for initial comments beyond August 2, even though its own study had not yet been released and studies were not expected to be completed until the fall. It grudgingly allowed only a 16-day extension for reply comments, even though its own technical study by the Laboratory Division was not released until several days after the initial comment period was almost concluded. Given the complexity of the technical issues, parties that wish to analyze that study and test its conclusion will, as a practical matter, be precluded from doing so effectively.

As NAMB argues, the Commission method of proceeding has failed to provide effective notice or opportunity for comment, which will result in a violation of the APA, 5 U.S.C. section 553, should these studies actually be relied upon by the Commission in formulating the rules that

may be promulgated. Citing us to *Reeder v. FCC*, 865 F. 2d 1298 (1989), NAMB points out that rules which make so major a substantive change in existing rules and policies will be invalidated and remanded for further study if the Commission has failed to provide adequate notice or a reasonable amount of time, under the circumstances, for meaningful comment. The Commission must allow sufficient opportunity for comment on these engineering studies so that the results of these studies may be properly considered by commenters and the Commission. *Reeder*, at 1304, cited by NAMB at 7.

However, as noted above, it was not until several days *after* the initial comment period was closed that the Commission released the results of its own study (ASecond and Third Adjacent Channel Interference Study of FM Broadcast Receivers≡, Project TRB-99-3 Interim Report, July 19, 1999, Technical Research Branch, Laboratory Division, Office of Engineering and Technology, FCC) (released August 5, 1999). If the issues were not so vital to the radio stations of this country, the obvious nature of this ploy would be almost funny. One would believe it inconceivable that the Commission would close this proceeding without extending the comment period for a long enough period to permit meaningful responsive comments and testing of the study=s conclusions. An administrative agency should not show so little regard for the letter and spirit of the Administrative Procedures Act. A rulemaking that is invalidated or remanded because of a violation of APA procedural requirements or because it is arbitrary and capricious and not sufficiently supported by the record, is the equivalent of no rulemaking at all. It is, in fact, worse, because of the waste of everyone=s B including the agency=s B time and resources in the interim. For the Commission to simply release this study, deny additional time for comment and only 16 additional days for reply comments, and then to fight the NAB=s FOIA

request is hardly the way Congress directed agencies to make policy under the APA. The Public Radio Stations must wonder, as the entire industry and public must also wonder, whether the Commission has already decided how it intends to vote and will simply disregard any comments which disagree with that decision.

VI Conclusion.

It makes no sense for the Commission to rush to judgment as it has to date in this proceeding. Why is the Commission and its staff in such a hurry on this one subject? *Current*, the bi-weekly newspaper that covers public broadcasting, quotes a knowledgeable public radio consulting engineer as characterizing the low power NPRM as Aa steamroller and something that [Chairman] Kennard wants very, very badly≡ [ADon=t undercut us with low-power FM, public radio urges,≡ *Current*, Vol. XVIII, No. 15 (August 16, 1999), p. 15]. If this is indeed the case, then the Public Radio Stations remind the Commission and staff that it is one thing to want something in the worst way, but quite another thing entirely, especially for an agency whose actions are subject to the APA, to try to *get* it in the worst way. So far, the Commission has proceeded in the worst possible way with this NPRM, cutting corners, relying on wishes, naivete, and procedural irregularities, such as playing Ahide the ball≡ with this Laboratory Division study.

The courts, particularly the D.C. Circuit, have demonstrated little patience when agencies behave in this manner. The Commission must, at the very least, disclose every aspect of its study, re-open the comment period to permit meaningful comment upon the technical issues, and base its ultimate decision upon real evidence, not the hopes and unfounded predictions of LPFM proponents and Bureau staff.

Respectfully submitted,

**The State of Oregon, Acting By and Through the
State Board of Higher Education for the Benefit
of Southern Oregon University;
The WBEZ Alliance, Inc.;**
The University of Washington;
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Spokane Public Radio; and
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