

**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
)	
)	

**REPLY COMMENTS OF
NATIONAL LAWYERS GUILD,
COMMITTEE ON DEMOCRATIC COMMUNICATIONS**

The Committee on Democratic Communications of the National Lawyers Guild (CDC) hereby submits these Reply Comments to the Federal Communications Commission in the above matter. Given the volume of comments submitted and the abbreviated period of time given for reply, the CDC, of necessity, has not had an opportunity to read all of the comments on file with the Commission. Nevertheless, we have attempted to respond to those comments we believe are representative, and in particular, those comments that appear representative of the opposition to the Commission's Low Power FM ("LPM") proposal. We believe that our reply addresses the great majority of major issues raised in the initial comments.

I. THREE BASIC DECISIONS WILL ELIMINATE THE VAST MAJORITY OF OBJECTIONS RAISED TO THE COMMISSION'S PROPOSED LPM SERVICE

If the Commission implements the following policy decisions with respect to its proposed LPM service, most objections raised to this service will be eliminated:

1. Non-commercial operation only.

2. No 1,000 watt LPFMs (except possibly in extremely rural areas). Maximum LPFM effective radiating power (“ERP”) of 100 watts.

3. Minimize number of applicants with initial applicant criteria:

a. Licenses (and construction permits) should be non-transferable.

b. Local programming requirement: 75% local programming.

c. Operator requirements:

- One to an operator,
- Local residency and integration requirement,
- No operators with ownership interest in other mass media such as a radio station, TV station, telephone company, cable TV company, satellite broadcaster, daily newspaper, etc.

In the CDC’s initial comments, we anticipated and addressed many of the objections that have been raised to the Commission’s proposed LPFM service. We believe our initial comments were successful in this regard and continue to believe that most of the objections raised by opponents to LPFM can be overcome if the FCC follows the plan laid out in the CDC's initial comments.

To keep our reply to a reasonable length, we will not analyze each and every objection posed by commentators opposed to LPFM.¹ However, we would again reiterate that a large majority of objections to the Commission's proposed LPFM service become moot if the above three policy decisions raised by the CDC and other advocates of LPFM.

1. Non-Commercial Service.

¹ While a number of broadcasters have opposed implementation of LPFM, the comments of the National Association of Broadcasters (NAB) appear to represent a comprehensive summation of opposition

Many of the objections raised by opponents of LPFM apply only if the Commission authorizes a commercial LPFM service . The CDC addressed most of these objections in our initial comments. Again, the greatest hurdle to a commercial LPFM service is the Telecommunications Act of 1996 and the 1997 Budget Act. Initiating a commercial LPFM service in accord with those Acts might pose insurmountable legal and political challenges. These issues disappear if the Commission implements an entirely non-commercial LPFM service. It does not appear to be in the Commission's best interest to attempt to circumvent the 1996 and 1997 Acts, especially when a non-commercial LPFM service will provide the greatest diversity of voices and programming to a public whose local concerns are completely ignored by the rapidly consolidating radio industry.

2. No 1,000 watt LPFMs; 100 watt ERP maximum.

A variety of opposing commentators address issues related to a LPFM service that arise only if the Commission decides to license LPFMs of over 100 watts ERP. These commentators primarily focus on issues of signal and economic interference. Most of these problems are eliminated if the Commission authorizes only LPFM stations of 100 watts or less. The only exception that might have merit is permitting LPFM stations of up to 1,000 watts in extremely rural areas where possible interference is less likely to occur.

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3. Limit initial applicant pool with strong public interest criteria.

arguments. The CDC's three basic policy decisions outlined above are addressed, in part, to a large number of concerns raised in the NAB's comments.

When 99.99% of the American people are legally barred from using the most effective communications media in the nation, why would the Commission allow those few companies who already hold a broadcast license to also hold an LPFM license? When 99.99% of the residents of Cleveland or Minot or Springfield are legally barred from using the electronic media in their own cities or towns, why would the FCC allow corporations from New York, or Los Angeles, or Miami to operate one of the few LPFMs licensed in those towns?

By implementing the application criteria proposed by the CDC, the Commission will significantly limit the number of applications for LPFM service and avoid much of the administrative burden anticipated by those who object to LPFM.

In addition, we strongly support additional or alternative limiting criteria suggested by the National Federation of Community Broadcasters in their initial comments, which we discuss below.

II. RECEIVER ENGINEERING STUDIES SHOW THAT ELIMINATION OF SECOND AND THIRD ADJACENT PROTECTION FOR LPFM WILL GENERATE LITTLE SIGNIFICANT SIGNAL INTERFERENCE

If the above three basic policy decisions are implemented the only issue raised by the opposition which, if true, would have any significant merit is that of signal interference. However, efforts by the NAB, CEMA, NPR and others to demonstrate significant interference due to LPFM have been unsuccessful.

The CDC, as part of our original comments in this matter, submitted a receiver evaluation study prepared by the broadcast engineering firm Broadcast Signal Lab (“BSL”) prepared on behalf of a broad range of microradio proponents. The BSL receiver study shows that an LPFM service of 100 watts maximum with unregulated 2nd and 3rd

adjacency standards will produce extremely minimal receiver interference. Further, it appears that an inexpensive upgrade in the lowest quality radio receivers, which the economic marketplace would likely compel given the public's demand for microradio reception, will easily eliminate any remaining interference concerns.

The BSL study showed this primarily in two ways. First, those receivers tested for 2nd and 3rd adjacency interference showed essentially similar levels of interference as currently permitted with respect to 4th adjacent signals. Fourth adjacency is currently unregulated, and yet there appears to be no "real world" problem with 4th adjacency interference. Accordingly, unregulated 2nd and 3rd adjacencies should be expected to show similar results.² Second, it appears that most of the interference arising in connection with the BSL receiver study resulted from "blanketing" levels of test input, rather than to 2nd and 3rd adjacency interference. Because current regulations adequately address the elimination of blanketing interference within the vicinity of broadcast sites, the BSL receiver engineering study reveals that *de minimis* levels of interference, if any, will arise from the elimination of 2nd and 3rd adjacency requirements with respect to LPFM stations of 100 watts or less.

Four additional studies of signal interference have been submitted in the Comment portion of this proceeding. These studies were submitted by the National Association of Broadcasters (NAB), the Consumer Electronics Manufacturing Organization (CEMA), USA Digital Radio, Inc. (USADR), and the Office of Engineering and Technology, Federal Communications Commission (OET).

² In addition, it appears that no interference complaints have been filed with the FCC concerning grandfathered short-spaced stations.

The study by OET reaches essentially the same conclusion as the BSL study, i.e., that any interference arising from elimination of 2nd and 3rd adjacency requirements with respect to LPFM will be *de minimis*. However, the studies by NAB, CEMA, and USADR³ disagree.

In order to evaluate the merits of these various studies, Media Access Project commissioned a “Technical Analysis of the Low Power FM Service” by Wireless Valley Communications (WVC) of Blacksburg, Virginia. That study will be submitted to the FCC as part of Media Access Project’s Reply Comments in this proceeding. However, for our purposes it is important to note that the WVC analysis strongly supports the position of CDC, based on the studies of BSL and the OET, that any “real world” interference resulting from the elimination of 2nd and 3rd adjacent requirements with respect to LPFM will be extremely minimal.

Significantly, the WVC analysis finds that the NAB and CEMA studies show a “clear bias... to overstate the potential interference problems of LPFM.”⁴ Some of the primary conclusions reached by WVC are:

- The Commission’s current FM interference protection policy is designed with car radios in mind, and is therefore overly conservative with respect to fixed radios. In “real world” situations, fixed radios will do far better than might be indicated in test situations using FCC standards as a basis.

The NAB/CEMA studies appear to be purposefully designed to be misleading in this regard.

³ The USADR study, however, is primarily concerned with interference between LPFM and USADR’s proposed in-band-on-channel (IBOC) digital radio system.

- The set of receivers selected by CEMA does not match the population of receivers presently in use by consumers.
- NAB and CEMA failed to use proper weighting criteria. According to CEMA’s own figures, car radios, while accounting for only 22.4% of radios in use, actually account for 44.4% of radio listening. In general, car radios show the best performance of nearly all radios. Therefore, a proper weighting of the role of car radios would show much less potential interference. The NAB’s “mapping study” in particular, completely ignores car radios. According to the WVC report, this “skews their sample... to a tremendous degree, utterly destroying any hope of applying the results to FM listening as it exists today.”⁵
- The selection of audio quality criteria used by NAB throws “serious doubt on the validity of the NAB test results.”⁶
- The NAB and CEMA/NPR studies did not test for a sufficient range of input levels.
- NAB’s interpretation of its test results indicates “intent to skew results toward a predefined conclusion”.⁷ WVC details at least 5 ways in which the NAB interprets its own test results in a deceptive or misleading manner. For example, the NAB often chooses the very worst results to provide a supposedly representative showing, and the

⁴ Media Access Project Reply Comments in MM Docket 99-25, Appendix: Technical Analysis of the Low Power Service by Wireless Valley Communications (hereinafter WVC), page 2.

⁵ WVC, page 32.

⁶ WVC, page 25.

⁷ WVC, page 26.

NAB produces a map of potential interference after the advent of LPFM, without showing a similar baseline map of current FM interference for comparison.⁸

- LPFM is unlikely to have any significant interference impact on an IBOC digital radio service.

Given the inherent flaws in the receiver engineering studies commissioned by opponents of LPFM, the CDC believes that the Commission should instead rely on the more objective studies conducted by Broadcast Signal Lab and the FCC's Office of Engineering and Technology. In addition, the CDC believes special attention should be paid to the reply analysis prepared by Wireless Valley Communications concerning the receiver engineering studies submitted in this proceeding.

III. ISSUES RELATING TO TRANSLATORS AND BOOSTERS

The CDC believes that the concerns expressed by many regarding the status of translators and boosters are adequately addressed in our initial comments. However, the CDC is willing to adopt a slightly broader policy in accordance with that proposed by the National Federation of Community Broadcasters ("NFCB"). The NFCB proposes treating repeaters differently depending on whether they are satellite- or terrestrially-fed. We believe this is a fair distinction which serves the public interest and which creates a clear line of demarcation that is easy to apply.⁹

1. Terrestrially-Fed Repeaters.

⁸ As the attached affidavits of Jeremy Lansman and Amanda Huron show, the FCC presently allows short spaced FM stations on the air within the protected contour of superpower stations, and a recent inspection of FCC files in connection with these stations reveals no complaints of interference.

⁹ In our original comments we divided repeaters into those which were "distant" from the main station's service area, as opposed to those which "filled-in" or were contiguous to the main station's service area. Our new definition "grandfathers" in additional stations which, while distant from the main station, are still terrestrially fed.

The CDC is willing to support the position that currently licensed terrestrially-fed repeaters should be “grandfathered” in. These repeaters should not be threatened by LPFM applicants and should have their signals protected within their licensed service area. As set forth in our initial comments, this should be so even if LPFM stations have primary status, while repeaters maintain secondary status.

National Public Radio (NPR) raises an additional issue. They express concern that new full power stations (which have primary status) “will dislocate existing translators and boosters [which have secondary status], and the presence of primary LPFM stations will make it more difficult, if not impossible, to find new sites for the displaced facilities.”¹⁰

This appears to be an odd concern. In most instances it would be beneficial for a new, local, full power, public radio station to replace a repeater of a distant station. After all, in many cases the repeater was licensed in the first place because there existed no local public radio station serving that community. However, we can imagine a number of situations where such a situation might disadvantage listeners to the repeater, either by losing a favored type of programming, or because listeners cannot receive good reception of the signal of the new station.

Accordingly, CDC believes it would be reasonable for the FCC to protect existing public radio repeaters against new full power public radio stations in some manner on a temporary basis. CDC is willing to accept a 5 to 7 year protection scheme during which repeaters may not be displaced by new full power stations. Upon expiration of this protected term, newer communications technologies (including the Internet) will likely be

¹⁰ Comments of National Public Radio, Inc. (NPR), p.26.

able to replace any repeaters that become displaced by local, community-based LPFM stations.

2. Satellite-Fed Repeaters.

On the other hand, satellite-fed repeaters should not be grandfathered in. These satellite-fed repeaters of far distant stations provide far less overall value to the public than a locally based LPFM station originating local programming and providing access opportunities for local citizens.¹¹

Notwithstanding the above, all future LPFM stations should have primacy over repeaters of any sort, whether terrestrial or satellite fed.

Since the elimination of low power (less than 100 watt) stations in 1978, the full-power public broadcasting system has had over 20 years to grow and strengthen itself, with great success. Many public radio stations have developed a large network of repeaters that extend their reach far beyond the primary service area. This has, quite laudably, brought public radio to isolated and rural areas that would otherwise be far poorer for its absence. However, the full power public radio stations have had ample time to build their repeater networks. It is only fair that those who wish to create local, community-based radio stations in urban, rural and isolated areas should now be given the priority to do so, at least prospectively.

IV. ISSUES RELATING TO UNDERWRITING, DIGITAL RADIO (IBOC) AND APPLICATION PROCESSING

¹¹ NPR mentions two situations in Colorado where satellite-fed repeaters bring public radio to very small towns from nearby Colorado public radio stations. In addition, the Comments of REC in this proceeding recommend that Alaska be treated differently on this question because of the number of extremely small towns separated by great distances. CDC does not oppose some exception to bring equitable balance in these situations. For instance, where there is an already existing statewide public radio system, or where satellite-fed repeaters currently transmit the signals of public radio stations within the same state, or within a certain reasonable "local area," satellite-fed repeaters could be grandfathered in.

The comments of the National Federation of Community Broadcasters (NFCB) contain several interesting ideas and concepts aimed at resolving a variety of issues associated with the implementation of LPFM. We endorse a number of these concepts. Others, which we do not specifically endorse, we feel are worthy of consideration.

In addition, Minority Media and Telecommunications Council (MMTC) proposes a licensing procedure which we believe has considerable merit and should be seriously considered by the FCC.

1. Underwriting and Fundraising: Limited to Station Support Only.

The NFCB proposes noncommercial underwriting guidelines that would disallow paid advertising solicitations for non-profit entities. In addition, all underwriting or fundraising proceeds would be devoted to station support. Stations would be forbidden to remit the proceeds from fundraising to related or unrelated third parties.

The CDC opposes any form of underwriting for non-commercial LPFM. However, in the event underwriting for LPFM is permitted, CDC endorses the policy set forth by NFCB. Further, in the event underwriting is not permitted, CDC supports NFCB's position that all other fundraising proceeds must be devoted to station support and not remitted to related or unrelated third parties.

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2. Digital Radio (IBOC).

With respect to concerns involving a future digital radio (IBOC) service, the NFCB suggests that television channels 60-69 or 51-59 could be used to relocate the

entire FM band, thereby allowing digital radio and LPFM to be engineered in from the beginning. NFCB also observes that, with the introduction of digital radios, all radio receivers will eventually become obsolete. This creates an opportunity for the FCC to require more rigorously engineered radio receivers in the future.

CDC strongly concurs with both points raised by the NFCB.

3. Limiting the volume of applications.

The NFCB also proposes a number of methods for limiting the volume of LPFM applications. One proposal involves requiring a small “processing” fee on all applications. CDC agrees that a processing fee may help reduce the volume of LPFM applications, but we believe the amounts proposed by NFCB are too high for many LPFM advocates. Accordingly, for 100-watt LPFM applicants CDC proposes an application fee of \$100, and for 10-watt LPFM applicants CDC proposes an application fee of \$50.

The NFCB also proposes an “open” filing window. We are unsure of the ramifications of this procedure. On the one-hand, CDC remains concerned that a first-come, first-served procedure may favor wealthier applicants who are prepared to file immediately, over small community groups who may require more time to prepare. NFCB’s “open” window proposal does address many of the issues and difficulties raised by a narrow window filing. Accordingly, CDC believes that an “open” window filing procedure, or some variant, should be seriously examined by the FCC.

In their comments, the Minority Media and Telecommunications Council (MMTC) proposes that a first application window be reserved for “minority broadcasting training institutions, including historically Black colleges and universities, Hispanic serving

institutions and Native American training centers, as well as non-college based minority broadcast schools.”¹²

MMTC’s proposal is detailed, reasonable, thoroughly researched and well-documented. In particular, MMTC fully documents the past history of state-sponsored discrimination that has left the broadcast industry with severe under-representation of minority owned and operated stations. MMTC also details extensive FCC complicity in supporting and reinforcing this state-sponsored discrimination well into the 1970’s. Because of this significant history of discrimination against minority broadcasters, CDC is convinced that MMTC’s proposal has substantial merit and should be given serious consideration by the FCC.

4. Removing application conflicts.

In their initial comments, NFCB also proposes a number of methods for removing applications conflicts. CDC believes some of these methods are interesting and should be given due consideration by the FCC. Examples of conflict-reduction methods endorsed by the CDC include:

- a. Allowing for liberal channel and coverage changes to allow applicants to remove conflicts;
- b. Allowing applicants to specify “back-up” channel choices;
- c. Allowing applicants to submit applications without a specified frequency, with the FCC in charge of assigning an appropriate frequency;
- d. Allowing the FCC to adopt a “prohibited contour overlap” processing system; and

¹² Comments of Minority Media and Telecommunications Council (MMTC), page v.

e. Allowing applicants to mutually waive claims of harmful interference between themselves.

V. THE RELATIONSHIP BETWEEN LPFM AND FULL POWER PUBLIC RADIO

The CDC also strongly endorses the joint Reply Comments submitted in this proceeding by the Citizens Media Corps', the ACLU of Massachusetts, and Radio Free Allston responding, primarily, to comments filed by the Corporation for Public Broadcasting (CPB) and National Public Radio (NPR). Rather than repeat those comments in full, CDC wishes to highlight and emphasize those points that we believe are most important:

1. The National Public Radio Service Already Provides Almost Universal Coverage.

In their initial comments, the Corporation for Public Broadcasting ("CPB") states,

"(CPB) is concerned that the introduction of LPFM stations into the FM band, particularly into reserved noncommercial frequencies, will frustrate the goal of making public radio universally available throughout the nation.

However, CPB then goes on to admit that over 91% of the nation's population has access to at least one public radio station. It also appears that over 50% of the nation's population have two or more public radio stations readily available to them.¹³ These figures do not even include availability via cable FM, the Internet and, very soon, direct satellite radio service. In addition, nothing in the Commission's LPFM proposal prevents additional public radio stations or repeaters of such stations from applying for licensing. In

¹³ There are 2,040 noncommercial FM stations in the U.S. according to Broadcasting and Cable Magazine, August 23, 1999, p. 56. This does not include repeaters. In its comments in this matter, National Public Radio states that there are 694 public radio stations in the U.S. n(Comments of NPR, p.8, footnote 17).

very rural areas that may not already have access to public radio, spectrum scarcity is far less of a problem than in more densely populated areas.

Accordingly, the creation of a LPFM service will not prevent the nation from receiving adequate public radio coverage. Rather, the proposed LPFM service should serve to supplement a largely “national” public radio service with local, community-oriented non-commercial programming that is otherwise unavailable to listeners throughout the country

2. A National Public Radio Services Does Not Necessarily Provide Diverse Local Programming.

In their comments, CPB and NPR contend that public radio already provides diverse local programming.¹⁴ This assertion may be true of the approximately 10% of non-commercial stations that are members of the National Federation of Community Broadcasters (NFCB). But the large majority of NPR affiliates carry a very limited palette of local public affairs and news programming. And even a large percentage of this music programming is nationally distributed, primarily via satellite.

Very little local diversity, both in entertainment and non-entertainment programming, is found in current local public radio programming in most markets. In fact, many public radio stations intentionally avoid controversial public affairs and arts programming along with non-mainstream music formats in order to increase audience share and maximize fundraising revenue. Because diversity, not “efficiency” is the goal of the First Amendment, the FCC should implement a non-commercial LPFM service in order to return diversity and localism back to the radio spectrum.

3. Listenership Outside the Service Area of Full Power Stations Should Not be Grandfathered In by the Commission.

The argument that full-power non-commercial stations will lose some listenership outside their protected service area is unavailing and should be ignored by the Commission. Stations are not legally or practically guaranteed any protection beyond their designated service areas. Full-power applicants routinely deprive other stations of listeners outside of their primary service area.

In addition, as long as the stations are not co-channel, a higher quality receiver or other modifications can easily allow listeners to continue to receive a channel they received previously. In addition, as more stations simulcast their signal via the Internet, cable FM, and/or direct satellite, distant listeners residing beyond a station's service area will continue to have access to programming transmitted by those media.

4. The Arrogance of Power.

The CDC remains astounded that the government-protected oligarchy of public (and commercial) broadcasters fail to understand, or even acknowledge, basic First Amendment principles. We are not, after all, talking about selling shoes. We are talking about the fundamental right of free speech using a public forum (the airwaves) in a self-governing democracy. The right of free speech over the public airwaves is an increasingly rare one given the rapidly consolidating Disney/Viacom/GE/Clear Channel broadcast network. Indeed, the old maxim that freedom of the press belongs only to those who own one is especially relevant in an era where radio outlets regularly exchange hands for hundreds of millions of dollars.

¹⁴ In the interest of fairness, we must note that NPR states frequently in its comments that it does not oppose LPFM in concept, that it welcomes additional, diverse, local voices, and that its members cannot

Given the above, we note two comments from public broadcast entities that, to our ear, prove our very argument that public broadcasting has become a closed, arrogant, safe, and self-perpetuating club, uninterested in admitting new members with less than blue-blood pedigrees.

In this regard, the Corporation for Public Broadcasting states, “The LPFM proposal threatens to turn... into a hodgepodge of little stations with a fragile and limited listener base.”¹⁵ In addition, Southern Oregon University (attempting to masquerade as the State of Oregon) states that LPFM will result in, “...a disorganized multitude of tiny, localized, unrelated, low-budget ... stations.”¹⁶

Maybe it is our bias, but the above scenario sounds to us remarkably like the state of the media that existed in the United States at the time the First Amendment was drafted -- and that sounds pretty good to us. CPB and Southern Oregon University may have conveniently forgotten, but many of us recall that the First Amendment was written precisely to protect that anarchic collection of unwashed and opinionated voices that they so fear. The First Amendment most certainly was not written to promote administrative convenience and spectrum “efficiency,” nor was it written to protect the limited monopoly enjoyed by career bureaucrats reluctant to program controversial voices or musical works written after 1893 for fear of alienating their affluent subscriber base.

CONCLUSION

Because the Commission must regulate the airwaves in the public interest, and because the airwaves must be regulated in accordance with the dictates of the First

meet all local needs. NPR premises its opposition primarily on its analysis of the signal interference issue.

¹⁵ Comments of the Corporation for Public Broadcasting (CPB), p. ii.

¹⁶ Comments of The State of Oregon [actually Southern Oregon University in disguise], p.9..

Amendment, it is imperative that the Commission implement a non-commercial LPFM service that is locally operated, locally programmed, community-oriented and truly “low-power.” The Commission now has in its possession several receiver engineering studies concluding that the implementation of such a LPFM service with reduced 2nd and 3rd adjacent protection will produce little additional signal interference. Given the significant changes in the broadcasting industry, including increased consolidation of ownership throughout the 1980s and 1990s, the decrease in minority ownership of broadcast outlets (despite an increasing minority population in this country) and the corresponding reduction in content diversity, implementation of a non-commercial LPFM service is an important first step in returning true diversity to the airwaves. As numerous mainstream voices such as the Los Angeles Times have noted, “The FCC’s most important goal should be protecting the public interest, which means remembering that the airwaves are a public trust. [The Commission’s] microradio plan is a significant, if modest, step towards that goal.”¹⁷

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¹⁷ Los Angeles Times (unsigned editorial), “Diversity for the Radio Waves,” September 13, 1999.