

alternative radio voices. Such a service is needed to counteract the industry consolidation which has significantly reduced viewpoint diversity in the industry. Moreover, the Commission should exercise its authority to adopt ownership limits and ensure that low power FM stations present new and different perspectives. The Commission's proposals to limit ownership of low power stations to new voices consists with Congressional intent as expressed in both the Telecommunications Act of 1996 ("1996 Act") and the Balanced Budget Act of 1997 ("1997 Budget Act").

A. The FCC Should Adopt a Low Power FM Service to Counteract Consolidation in the Radio Industry.

Numerous studies indicate that implementation of the 1996 Act resulted in the creation of large radio conglomerates.¹³ These reports undermine broadcasters' arguments that consolidation did not lead to "mega" companies. *See* NAB comments at 4. While NAB argues that most markets retain a sufficient number of standalone or duopoly stations, *see* NAB comments at 4, Attachment A, the Commission's own research demonstrates that the 1996 Act has prompted unprecedented growth of large radio companies which have squeezed out independent stations. As the Commission noted recently in *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, MM Docket No. 91-221, MM Docket No. 87-8 (rel. Aug. 6, 1999) ("*1999 Local Broadcast Ownership Order*"):

[T]here already has been a high degree of consolidation in the broadcast industry since passage of the 1996 Act Over 2,100 radio stations changed hands in 1996 and again in 1997, and 1,740 changed hands in 1998. At the national level, the number of owners of commercial radio stations has declined by 12.1 percent from 5,133 to 4,512. This decline is primarily due to mergers between existing owners.

¹³ *See* Civil Rights Organizations Comments at 7 n. 27, citing Kofi Ofori, Karen Edwards, Vincent Thomas, and John Flateau, *Blackout? Media Ownership Concentration and the Future of Black Radio* (1996); and Anthony DeBarros, "Radio's Historic Change: Amid Consolidation, Fear of Loss of Diversity, Choice," *USA Today*, July 7, 1998, at 1A-2A.

At the local level, there has also been a downward trend in the number of radio station owners per market. Since passage of the 1996 Act, the average number of radio station owners across all radio metro markets declined from 14 to 11, a loss of about three owners per market. The top 10 radio metro markets experienced an average loss of 5 owners per market, from about 33 owners to about 28 owners per market. The smallest radio metro markets (markets 101-268) experienced an average loss of about two owners per market, from about 10 owners to 8 owners. Further, the top owners in each metro market generally account for an increasing share of total radio advertising revenues in these markets. For example, the top four radio owners in each metro market, on average, account for more than 91 percent of their metro market's total revenues, compared to about 83 percent in March 1996. This increasing level of ownership concentration suggests that it is appropriate for us to move prudently so that we can monitor consolidation to prevent harm to competition and diversity.

Id. at ¶¶ 38-39 (footnotes omitted).

As a result of consolidation, AMFM and Clear Channel each owned over 450 stations, *see* Elizabeth A. Rathbun, "Radio Control: Top 25 Claim 19% of Stations," *Broadcasting and Cable*, August 30, 1999, at 26-28, ***and these two companies are also merging***. Elizabeth A. Rathbun, "Count 'em: 830," *Broadcasting and Cable*, October 11, 1999, at 12-16.¹⁴ Group owners have gained control of local markets. For example, by the end of 1997, CBS Radio owned 8 of the 64 stations in Los Angeles and AMFM owned 8 of 44 stations in Washington, D.C.¹⁵

NAB's conclusions about the effects of consolidation are inaccurate, in part, because its method of analysis is flawed. *See* NAB comments, Attachment A. In its study, NAB examines each market individually. It defines "standalone" stations as "not owned in combination with any other local station," NAB comments at 4, and fails to indicate how many of these "standalone" stations are part of large national conglomerates that do not currently have other stations in that particular

¹⁴ *See also* Anthony DeBarros, "Amid Consolidation, Fear of Less Diversity, Choice," *USA Today*, July 7, 1998 at 1A-2A.

¹⁵ *Id.*

market.

Even if the Commission accepts NAB's methodology, NAB's findings demonstrate a high degree of consolidation. According to NAB's study, more than 70 percent of stations are commonly-owned with another station in their local market. *See id.*

Both NTIA and the Commission have concluded that these market trends make it almost impossible for new entrants, especially minorities and women, to break into the broadcasting market.¹⁶ *NTIA Report*, at 2.¹⁷ NAB's claim that "many stations are still owned independently or in small combinations, and thus could be acquired by new entrants," NAB comments at 5, is untrue, because station prices are inflated and out of reach of most new entrants.¹⁸ The Commission recently noted its concern that:

¹⁶ NTIA notes that most minority owners attribute the drop in ownership to changes in the local radio ownership rules.

¹⁷ *See* The National Telecommunications and Information Administration, U.S. Dept. of Commerce, *Minority Commercial Broadcast Ownership in the United States: August 1997 - August 1998* (visited Aug. 26, 1999) <<http://www.ntia.doc.gov/opadhome/minown98/main.htm>> ("*NTIA Minority Ownership Report*"). The NTIA found that:

Minority owners report that passage of the Telecommunications Act of 1996, which directed the Federal Communications Commission to eliminate the multiple ownership rule and relax the local ownership rule for radio stations, has contributed to media consolidation, higher stations prices, and more competition among broadcasters for advertising revenue. Many of the minority broadcast owners . . . report that their businesses are affected by media concentration spurred by the passage of the Telecommunications Act.

Id. *See also*, Civil Rights Organizations Comments at 11-14 (explaining how low power FM would foster minority ownership).

¹⁸ Peter Kaplan, "Wave of Mega Mergers Signals Changes Across Radio Dial: Critics Fear less Diversity, More Expensive Ads; New Giants Emphasize Efficiency, Experimentation," *Washington Times*, Aug. 4, 1997, at D12 (reporting that the price of radio stations increased 20% from 1995 to 1997).

greater consolidation of ownership in broadcasting makes it more difficult for new entrants -- parties that own no or only a few mass media outlets -- to enter this industry. This is particularly the case for minorities and women who are underrepresented in broadcasting.

1999 Local Broadcast Ownership Order at ¶13 (footnote omitted). Statistics demonstrate the validity of the Commission's concerns. In 1997, the number of black-owned FM stations dropped 26 percent, while the number of Hispanic-owned stations decreased 9 percent.¹⁹ Nationwide, only two FM stations are owned by Asian-Americans and only three are owned by Native Americans.²⁰ Moreover, additional industry consolidation is likely in response to the Commission's new ownership rules relaxing radio/television cross-ownership restrictions. *See 1999 Local Broadcast Ownership Order* at ¶¶ 9-10.²¹

Industry consolidation has continued to accelerate during pendency of this *NPRM*, most notably with the recent acquisition of CBS by Viacom and by the merger of Clear Channel and AMFM. The AMFM merger with Clear Channel "creates a radio company that can reach an audience previously enjoyed only by network television." Rathbun, "Count 'em: 830" at 12. As media giants merge to form ever more powerful conglomerates, their competitors naturally feel the pressure to keep up: "[T]he acquisition of CBS by Viacom is not merely the largest media marriage ever. It also accelerates the pressure and momentum for further deals and the entertainment industry."²² AMFM Chairman Thomas Hicks admits that the CBS-Viacom merger was in the back of his mind when he agreed to merge with Clear Channel. Rathbun, "Count 'em: 830" at 16.

¹⁹ DeBarros at 1A-2A.

²⁰ *Id.*

²¹ *Id.*

²² Bernard Weinraub, "Act I in an Opus of Hollywood Deals," *New York Times*, Sep. 8, 1999 at C15.

Despite the continuing threat of consolidation, some commenters paint an idyllic picture of minority opportunities in the radio industry. For example, CPB argues that the status of minority participation in and ownership of public radio stations is good and likely to get better. *See* CPB comments at 5. However, CPB's statistics refer only to *non-commercial* stations and fail to account for the number of new stations overall, especially in *commercial* radio. *See NTIA Minority Ownership Report*. Moreover, CPB's own research shows a decline between 1997 and 1998 in the percentage of minority employees of public radio stations.²³ The same research shows a 9.4% decrease in the number of public radio hours produced by minorities between FY 1996 and FY 1997.²⁴

B. Low Power Stations Will Benefit the Public by Providing Diverse Local Programming.

As several commenters note, the unprecedented consolidation of the radio industry has adversely affected the listening public by creating homogenous programming and limiting the availability of news and public affairs.²⁵ NAB's argument that low power stations are unnecessary because format diversity has increased since the 1996 Act, *see* NAB comments at 6, lacks merit for several reasons. In making arguments about format diversity, NAB continues to ignore the

²³ *See* Corporation for Public Broadcasting, *Public Broadcasting and the Needs of Minority and Diverse Audiences and Public Broadcasting's Services to Minorities and Other Groups* (July 1, 1998) (visited Aug. 30, 1999) <<http://www.cpb.org/research/reports/minority/1998/minstations.html>>.

²⁴ *Id.*

²⁵ *See, e.g.,* NLG-CDC comments, at Introduction; Civil Rights Organizations Comments at 7-8.

repeatedly-stated First Amendment goals pursued by the Commission.²⁶

An evaluation of diversity must focus on source diversity not format diversity. The Commission stated:

Some question whether diverse outlets and sources lead to diverse viewpoints, or whether our rules are necessary to promote diversity, suggesting that commonly owned outlets can produce diverse viewpoints equally as well as separately owned outlets. We disagree with these arguments. As the Commission stated when it adopted the newspaper/broadcast cross-ownership rule, ". . . it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run."

See 1999 Local Broadcast Ownership Order at ¶ 22 (footnote omitted). *See also Associated Press v. United States*, 326 U.S. 1, 20 (finding that "[the First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .").

Consolidation reduces the number of entities who select among available programming or

²⁶ Moreover, even if format diversity were relevant, NAB's study describes only negligible increases. Specifically, NAB cites a 0.2% increase in number of formats across all markets since 1997. *See* NAB comments at 6, Attachment B. This figure is insignificant, particularly in light of the fact that the number of stations increased during this same period. *See NTIA Report*. In addition, NAB's method of counting formats, *see* NAB Comments at 7, further undermines its analysis. By considering a station that offers adult contemporary programming and urban programming as distinct from stations offering *either* (but not both) of these formats, NAB has lost sight of the needs of the listeners. In this context, a reporter from *The Washington Post* recently evaluated the effects of consolidation on listeners, concluding,

[W]hat's already clear is that the listener is the loser. In recent months, I have asked executives at several big radio companies to cite examples of the new diversity of programming they had promised. Not a one came up with anything but slight variations on the standard, bland "adult contemporary" music formats that dominate the dial.

Marc Fisher, "The Great Radio Rebellion, The Turned Off Fight Back," *Washington Post*, June 2, 1998, at D1.

produce programming, thereby limiting alternative voices available to the public. Although, for example, three stations owned by a single company might put three different radio formats on the air, they will inevitably share financial goals. It is unlikely that any of the three commonly-owned stations will run a news story that will offend a local advertiser or run counter to the interests of a corporate parent. The significant market power of these stations makes it difficult for single station owners to compete, thus increasing the likelihood that they too will consolidate.

In addition, as UCC, *et al.* note in their comments, the wave of consolidation has resulted in a reduction in public affairs and news programming. This change reflects an increase in “the number of absentee owners of broadcast stations . . . [whose] reigning mentality [is] . . . [to] cut costs, squeeze money from new properties and fight for every last dollar.”²⁷ While proponents of greater consolidation claim it allows them more funds for public affairs and news programming “[t]he group broadcast owners cannot concurrently pump money into local programming and ‘squeeze money’ from their new stations.”²⁸ Thus, owners have increased syndicated programming and reduced the number of local public affairs shows. *See UCC et al.* comments at 2.

Radio station owners’ increased reliance on out-sourcing stems from their interest in improving earnings to validate higher stock valuations.²⁹ In other words, station owners are keeping the cost savings from increased efficiencies rather than using the money to better serve the public.

²⁷ Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 *CommLaw Conspectus*, 269, 280 (1997), citing Mark Gimein, “Groups Look to Cut Costs, Set the Pace,” *MediaWeek*, Sept. 9, 1996, at MQ28.

²⁸ *Id.*, citing Chuck Taylor, “Westinghouse, Infinity Merger Fuels Consolidation Concerns,” *Billboard*, July 6, 1996.

²⁹ DeBarros at 1A-2A.

The owners' financial success is reflected in the 107 percent increase in value of the Bloomberg/Broadcast & Cable radio index, compared with the S&P 500 index's 31 percent rise.³⁰ In 1996 and 1997 the value of radio stations increased by 13.8 billion dollars, resulting from a 10 percent increase in station value in the first year of the 1996 Act and a 22 percent increase in the second year.³¹ Clearly very few, if any, of the benefits from the increased scale economies have been passed on to the consumers whom the stations are licensed to serve.

Low power stations are one means of counteracting this trend toward homogeneity. They will succeed only in areas in which the audience seeks diverse alternative programming. Thus, NAB and CPB's arguments that low power FM stations' limited reach will not provide a useful service to underserved communities are incorrect. These commenters maintain that low power stations will have too small an audience to generate the investment necessary for quality programming. *See* NAB comments at 56-57. *See also* CPB comments at 7. Small all-volunteer stations will not need large spending budgets. Those that are able to raise sufficient funds will succeed. Some non-commercial stations may not prove to be economically viable, but that is no reason to preclude interested individuals and groups from seeking to create a valuable service. Incumbent broadcasters represented by NAB and CPB are refusing others the same opportunity they received -- the chance to create a successful station.

In addition, low power stations may bring additional benefits to the community by inspiring existing stations to improve their programming. While some broadcasters suggest that low power

³⁰ *Review of the Radio Industry, 1997*, MM Docket No. 98-35, March 13, 1998, at 21.

³¹ John M. Higgins, "As Broadcasters Giveth, They Taketh in Billions," *Broadcasting & Cable*, Apr. 6 1998, at 80.

stations will adversely impact existing stations, especially in small markets, *see, e.g.*, NAB comments at 54, Attachment C; Athens Broadcasting Co. comments at 4-5, in reality, low power stations are likely to provide a spur of competition. The FCC has no duty to maintain the economic viability of any radio station that does not meet local needs.

Some commenters argue that the Commission should rely on Internet webcasting as means of promoting diversity. *See* Clear Channel Communications comments at 25. *See also* NAB comments at 8. As the Commission acknowledged in the Notice at ¶12, and UCC, *et al.* explained in their comments, however, because access to Internet service is expensive, it is not sufficiently widely available to be considered an alternative to radio, which is nearly ubiquitous in this country.³² Webcasting radio broadcasts is also very expensive for the program producer. Moreover, CPB's suggestion that small community groups reach their audience through digital wireless services is even less sustainable. *See* CPB comments at 14-15. These digital services are not widely available, and the small underserved audiences that low power FM is intended to reach are the populations least likely to have access to this sophisticated and expensive technology.

C. Congress Intended to Preserve Diversity While Relaxing Some of the Broadcast Ownership Rules.

In its comments, NAB argues that the 1996 Act demonstrates that Congress intended the current consolidation of the radio industry and FCC should not undo Congressional policy. *See* NAB comments at 5. In fact, Congress stated expressly that the Commission must implement the Act in a manner promoting both competition and diversity. Thus, the Commission must balance the

³² *See also 1999 Local Broadcast Ownership Order* at ¶ 33 (stating that recent econometric study finds that other advertising media are not good substitutes for radio advertising and that radio advertising probably constitutes a separate antitrust market).

twin goals of Congress. As the Commission noted,

Whether or not a particular ownership combination may have anticompetitive effects in the sale of advertising time or other markets in which broadcasters compete, it may nonetheless reduce the diversity of independently owned voices in a community. Congress implicitly recognized this in amending the local radio ownership rules in the 1996 Act. Although these amendments significantly relaxed these rules, they nevertheless maintained a set of radio ownership limitations. Congress promoted diversity separate and apart from competition. Indeed, Section 202(b) of the 1996 Act, which sets forth the new limitations, is titled "Local Radio *Diversity*." Moreover, in discussing the radio-television cross-ownership rule, the Conference Report to the 1996 Act noted "the potential for public interest benefits of [radio-television station combinations] *when bedrock diversity interest[s] are not threatened*," and further stated that in reviewing this rule the FCC should take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace."

1999 Local Broadcast Ownership Order at ¶20 (emphasis in original), citing Pub. L. No. 104-104, 110 Stat. 56, 110 (1996), and S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996). The Commission also noted that Congress' interest in promoting diversity appears in other contexts as well, including Section 257 of the 1996 Act. *Id.* at ¶21 citing 47 U.S.C. § 257(b) (directing the Commission "to promote the policies and purposes of this Act favoring diversity of media voices").³³

Based on these Congressional directives to promote diversity, the Commission has discretion to develop a new service. Moreover, because the Commission has found that the promotion of diversity is "most pressing at the local level," *Local Broadcast Ownership Order* at ¶19, adopting a low power FM service is a well-reasoned approach to fulfilling its Congressional mandate.

D. The Commission May Place Stricter Ownership Limits on Low Power FM Stations than on Full Power Stations.

Despite broadcasters' claims to the contrary, nothing in the 1996 Act or the 1997 Budget Act

³³ See also 47 U.S.C. § 309(j)(3)(B) (directing the Commission to use competitive bidding to distribute licenses among "a wide variety of applicants" including small businesses and businesses owned by women and minorities.)

prevents the Commission from adopting strict ownership limits for commercial low power FM stations. Indeed, several commenters, including NLG-CDC, Civil Rights Organizations, and the National Federation of Community Broadcasters (“NFCB”) agree with UCC *et al.* that such restrictions are necessary if the low power FM service is to achieve its intended goal of providing opportunities to make diverse alternative radio voices available to the public.³⁴ Thus, the Commission should prohibit current broadcast licensees from holding low power licenses, require local residency of licensees and locally-originated programming, and limit low power licensees to a single license.

NAB claims that: 1) commercial low power FM stations are subject to the same ownership rules as commercial full-power stations, *see* NAB comments at 71; and 2) adding voices to each market will lead to increased consolidation because the existence of new stations will raise the allowable limits for other stations, *see* NAB comments at 72-73. NAB is incorrect. UCC *et al.* address each argument in turn.

As the Commission explains, *NPRM* at ¶59, it can impose ownership restrictions on low power licensees because low power FM is a new service not covered by the existing ownership rules.³⁵ When Congress relaxed some of the broadcast ownership rules through the 1996 Act, it very specifically limited its actions to the Commission’s existing rules. Section 202(a) of the 1996 Act

³⁴ *See* NLG-CDC comments at sections XIII, XIV; Civil Rights Organizations comments at 20; NFCB comments at 9; UCC *et al.* comments at 11-12. Moreover, if the Commission decides to adopt a purely noncommercial service, many of the broadcasters’ arguments would be rendered moot because noncommercial stations are not subject to the same ownership limits as commercial ones.

³⁵ “We also tentatively believe that Congress’s intent, to enhance commercial efficiencies in the radio broadcast industry, does not sufficiently apply to the new classes of services we are contemplating.” *Id.*

directed the Commission to “modify section 73.3555 of its regulations” in order to remove nationwide ownership limitations. Section 202(b)(1) further directed the Commission to “revise section 73.3555(a) of its regulations” in order to raise caps on the number of full power stations an operator may own within a single market.

In these sections, Congress clearly evinced a desire to increase economic efficiencies of full power stations and enable unfettered economic exchange and growth among *existing* stations.³⁶ Thus, the 1996 Act, aimed at the Commission’s then-current regulations, targeted only radio services covered by those regulations.

NAB has also claimed that voices added to the market through the introduction of LPFM must be counted under FCC rules to determine the size of the market. Consequently, under this reading, any grant of new licenses in major markets could increase the number of stations that already present broadcasters can own. *See* NAB comments at 72-73.

The Commission has already concluded that certain services are excluded from its cross-ownership rules. In the *1999 Local Broadcast Ownership Order*, the Commission explicitly determined that it would not include low power TV stations, translators or class D stations when counting the number of voices in a market. *See 1999 Local Broadcast Ownership Order* at ¶111 n.169. *UCC et al.* see no reason why this determination would be different for LPFM stations, especially in light of the Commission’s emphasis on full power stations’ ability to reach entire metro areas and beyond. The Commission decided to count only stations “presumed to be available to all residents of the radio market.” *Id.* at ¶112. Many LPFM stations would not be available to their entire markets, and so would not have the kind of range which the Commission considers necessary

³⁶ *See NPRM* at ¶ 59.

for a voice to be counted.

Contrary to the oversimplified arguments of some broadcasters, *see, e.g.*, New Mexico Broadcasters Assn. comments at 22, the Commission's tentative conclusion that it must use competitive bidding for mutually exclusive LPFM applications does not contradict its conclusion that the ownership rules are inapplicable to LPFM stations. Careful examination of the relevant statutory language reveals that applying the competitive bidding rules to LPFM is not inconsistent with the conclusion that the ownership laws should not apply. The language and purpose of the two sections are easily distinguishable.

The 1997 Budget Act expressed Congress's intent that competitive bidding apply broadly to radio services, making specific mention of the narrow class of services to be exempted. *See* 1997 Budget Act, § 3002(a)(1). In the *NPRM*, the Commission correctly suggested that Congress's choice to mention specifically exempted services, without any other qualifications, indicated Congress's intent that competitive bidding apply to *all* mutually exclusive applications for commercial stations. *See NPRM* at ¶104. Consequently, Congress chose general language in directing the Commission to grant licenses and permits through a system of competitive bidding "[i]f . . . mutually exclusive applications are accepted *for any initial license . . .*" 1997 Budget Act, § 3002(a)(1) (emphasis added). *See also NPRM* at ¶104.

This language, unqualified except for narrow exemptions, is in stark contrast to that found in the 1996 Act which charged the Commission with modifying specific portions of its rules. The 1997 Budget Act, rather than amending a particular Commission rule as did the 1996 Act, adds new sections to Title 47 of the U.S. Code, with new responsibilities for the Commission. The 1997 Budget Act modified no specific rules because it made a wholesale change by inserting entirely new

and broad provisions into federal communications law. These new sections apply equally well to new services and to those that existed in 1997. Thus, it is consistent to find that the Commission may impose strict ownership restrictions on LPFM, but that it must also resolve mutually exclusive commercial applications through auctions.

Broadcasters argue that the Commission's obligation to comply with the auction provisions of the 1997 Balanced Budget Act would foreclose low power service from achieving the Commission's diversity goals. *See, e.g.*, Bonneville International Corp. ("BIC") comments at 11-12; *see also* NPR comments at 28. NAB and NPR maintain that because licenses for mutually exclusive commercial stations must be auctioned, the Commission cannot ensure that licenses will go to entities without other broadcast interests. *See* NAB comments at 79; *see also* NPR comments at 28; BIC comments at 12.

Contrary to NAB's assertions, the auction rules work no damage to the Commission's goal of increasing diversity and community-oriented programming on the airwaves. *See* NAB comments at 78-79. As UCC *et al.* stated in their comments, the Commission may use bidding credits to target the recipients of commercial licenses. In addition, if the Commission follows its proposal to prohibit current licensees from obtaining LPFM licenses, current broadcasters would be excluded from the bidding process.³⁷

NAB further claims that authorizing low power radio will not achieve the Commission's goals because few stations are available in urban markets, and unused stations are already available in rural markets. *See* NAB comments at 80; *see also, e.g.*, BIC comments at 12; Athens

³⁷ The 1996 Act states expressly that the Commission retains discretion in implementing competitive bidding procedures. *See* 47 U.S.C. § 309(j)(6)(E).

Broadcasting comments at 5-6. First, NAB's figures apply mainly to LP1000 stations, and as noted above, UCC *et al.* believe that low power FM may be best implemented through the licensing of smaller stations. Second, the streamlined application process and lessened obligations of LPFM stations will make licenses available to organizations with resources insufficient to obtain and operate a full power station. This will utilize unused spectrum, and thus increase spectrum efficiency.

NAB's argument essentially asks the Commission to surrender its objectives if it cannot achieve every one of them in every market in the country. Although not many frequencies may be available in urban markets, whatever stations are available should be distributed to entities without broadcast licenses to provide fresh viewpoints in the consolidated radio market.

NAB argues that owners from non-local markets should be allowed to apply for low power licenses. However, as noted above, the Commission can promote diverse viewpoints only by requiring that new, distinct owners and licensees run new, low power stations. The Commission does not need to create new opportunities for existing broadcasters to expand their reach to new markets. Instead, this service is intended to provide opportunities for new local voices to reach the public.

IV. Past Commission Precedent is Consistent with Creation of the LPFM Service.

A. Cases Cited by the NAB and Others Are Not To The Contrary.

Several commenters argue that Commission precedent prohibits the Commission from establishing the proposed low power service. As demonstrated below, those opposing the LPFM service have misconstrued Commission precedent. Furthermore, commenters citing Commission precedent have failed to explain how these precedents apply today, given the dramatic changes in

radio technology and the changes in the character of the FM service since the cited cases were decided.

NAB, NPR, and Clear Channel make much of the Commission's statement in *Grandfathered Short-Spaced FM Stations* Order that "we have no intention of relaxing second-adjacent-channel and third-adjacent channel spacing requirements as allotment and application criteria." *In re Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840, 11848 (1997). This language is, in fact, a quote from the initial notice of proposed rulemaking in the same docket. *See In re Grandfathered Short-Spaced FM Stations*, 11 FCC Rcd 7245, 7254 (1996).

In both places, the Commission's statement referred *solely to the scope of the proceeding before it*. In neither place did the Commission intend for this language to have preclusive effect on the Commission's ability to introduce a new service which relaxed second-adjacent and third-adjacent channel protection.

B. The Authority Cited by the Commission in the NPRM Fully Supports the Proposed Service.

NAB attempts to characterize Commission precedent, including the *Grandfathered Stations Order*, as a consistent march toward second-adjacent and third-adjacent channel protection. It characterizes any deviations from strict protection as "experiments" which the Commission later came to regret. NAB comments at 11-15. This revisionist history ignores and/or misconstrues the line of authority cited by the Commission in the *NPRM*.

As the Commission noted in the *NPRM*, the Commission has long accepted the principle that second-adjacent and third-adjacent channel protection should yield under the proper circumstances. *NPRM* at ¶44. The Commission first announced this policy over eight years ago in *In re Educational Information Corporation ("EIC")*, 6 FCC Rcd 2207 (1991). It demonstrated the

policy's continued vitality in the *Grandfathered Stations Order*.³⁸

In *EIC*, the Commission closely examined its policy concerning waivers for second-adjacent and third-adjacent channel protection for non-commercial educational stations in the FM band. *See EIC* at 2208. The Commission noted the importance of the educational service and the need for broad deployment of a variety of offerings within the service. The Commission also observed that congestion within the service made it increasingly difficult to meet the increasing demand for new offerings. The Commission therefore decided that it would consider waiving second-adjacent channel and third-adjacent channel protection where: (1) the interference would be confined to a very small area, and (2) the interference on second-adjacent and third-adjacent channels would possibly result in a *replacement* of service, rather than a *denial* of service.

The Commission properly cited *EIC* and its progeny as authority and precedent consistent with the proposed LPFM service. *See NPRM* at ¶46. The factors listed by the Commission in *EIC* as justifying waiver of second-adjacent channel and third-adjacent channel protection fully apply here.

The Commission has itself noted the importance of enhancing the diversity of voices in the media and the need to serve local communities and interests. *See, e.g., NPRM* at ¶12; *see also UCC et al.* comments at 1-3. The Commission has also noted that the current congestion within the band prevents new entrants from offering these needed services without relaxing second-adjacent and third-adjacent channel protection. *NPRM* at ¶46.

As shown *supra*, Section I, interference from 100-watt and lower power stations will be

³⁸ Furthermore, as discussed below, NAB's characterization of the Commission's decision in the *Grandfathered Stations Order* is fundamentally flawed.

confined to a narrow area. The interference is likely to result in a substitution of service, not a denial of service. The proposed LPFM service therefore precisely matches the criteria the Commission first set forth in *EIC* over eight years ago.

The Commission applied the same principles in formulating its proposal in the *Grandfathered Stations Order*. In the *Grandfathered Stations NPRM*, the Commission relied on the principles enunciated in *EIC*. See 11 FCC Rcd at 7254. The Commission also noted that:

A limited number of grandfathered stations existed between 1964 and 1987 with complete flexibility on second-adjacent-channel and third-adjacent-channel short-spacings ***and we did not receive complaints of second-adjacent-channel or third-adjacent-channel interference during that time.***

Id. (emphasis added).

The Commission properly cited this authority and its past experience demonstrating ***no complaints*** of interference as a basis for relaxing second-adjacent and third-adjacent channel protections in the LPFM service. NAB attempts to reformulate the Commission's decision in the *Grandfathered Stations Order* and the Commission's prior experience with short-spaced stations as somehow holding that relaxing second-adjacent and third-adjacent channel protections is "a bad idea," NAB comments at 19, but this attempted recharacterization is absurd.

Although NAB attempts to portray Commission precedent as consistently preserving rigid adjacent channel protection, this is not the case. Rather, as the above analysis shows, the Commission has consistently weighed the utility of second-adjacent channel and third-adjacent channel protection, balancing the public interest of providing the proposed service with the potential for harmful interference.

NAB's other case cites are not to the contrary. See NAB comments at 11-15. The cases cited merely demonstrate that the Commission has carefully evaluated the necessary level of

protection at critical stages in radio history. As these cases show, the Commission has always considered the existing level of technology and the public interest in altering the rules.

In the case of LPFM, as UCC *et al.* have shown, the existing technology and the public interest strongly support permitting the service.

C. The Commission's 1978 Decision On "Class D" Stations is Not Inconsistent With the NPRM.

Several commenters invoke the Commission's decision in 1978 to degrade "Class D" licensees to secondary status, *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 FCC.2d 240 (1978), as authority to show that the Commission has already considered and rejected the arguments in favor of a low-power FM service. See Greater Media comments at 4; Radio One comments at 4-6; Clear Channel Communications comments at 6-8.

This misstates the precedent. The Commission itself recognized in its 1978 decision that the question of balancing worthwhile services and efficient use of the spectrum is always a mixed question of fact and policy. 69 FCC.2d at 243. As the Commission recognized, it must examine every proposal for new or modified existing services "anew," balancing competing interests to determine what best serves the public interest at that time. *Id.*

In 1978, after much deliberation, the Commission decided that the balance of equities *at that time* favored downgrading Class D stations to encourage broad deployment of larger educational stations. Contrary to Radio One's allegation, the Commission held that Class D stations provided valuable services. As the Commission explained:

The fact that we raised questions about the continuation of 10-watt operations has led some to misunderstand the Commission's view of 10-watt or other low-power operations. It is *not* our view then that these stations have

no value, nor do we believe that now. Likewise we have *never* operated on the belief that these stations do not respond to discrete local needs.

Id. at 248 (emphasis added).

The Commission reinforced its view that low power stations serve valuable purposes by declining to change the rules in Alaska, where 10-watt operations “seem well-designed to serve the small and often isolated settlements of that State.” *Id.* at 250.

Thus, Radio One’s statement that “the Commission has reasoned that the FM band cannot accommodate low power stations as providers of primary service,” Radio One comments at 4, is simply inaccurate. The Commission itself stressed the evolutionary nature of its spectrum management and its need to continually re-evaluate what services best serve the public interest.

In 1978, the Commission faced a very different world than that which now exists. At that time, the Commission wished to see broad deployment of educational broadcast stations. The Commission determined that legacy Class D stations were creating obstacles to deployment of larger non-commercial stations with broader footprints.

In the more than *20 years* since the Commission degraded Class D licenses, the deployment the Commission sought to encourage has long since taken place. The proposed low power service will no longer block deployment of stations with larger footprints. Instead, the proposed service will fill in the “holes” left by larger stations and allow a *more* efficient use of spectrum.

If nothing else, the Commission recognized the value of Class D license as a secondary service. The *Class D Order* therefore fully supports the proposed 100-watt and lower power stations, which the Commission has proposed as secondary services.

More important, the shape of the radio industry has changed so much that any conclusion drawn 20 years ago cannot be relied upon. The Commission itself has repeatedly described the

changes in the industry as revolutionary. In response to these changes, the Commission has changed the rules on ownership, on duopolies, and on negotiated interference. Additionally, as explained above, technical improvements in radio receivers invalidate conclusions drawn in the 1970s.

In addition, as the Commission noted in the *NPRM*, the 1996 Telecommunications Act has wrought profound change on the radio market. Concentration of ownership has increased enormously, driving out the smaller stations that serve local communities and that provide outlets for controversial or otherwise less profitable speakers. *See supra* Section III.

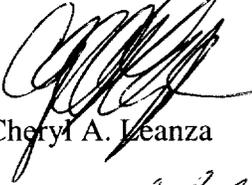
Twenty years ago, the Commission recognized in its own decision that it must evaluate the value of low power services in light of existing technology and in light of the state of the service as it existed at that time. The Commission made what it then acknowledged as a difficult choice between valuable services.

The Commission has, *after 20 years*, chosen to re-evaluate the need for low power stations. It again must make this decision in view of the changed circumstances in radio. The Commission has never supported the idea that a decision on spectrum management made 20 years ago is inviolate and cannot be revisited. As evidence, one need only look at the number of changes to other aspects of the FM service since the Class D decision. The Commission should therefore reject those comments which insist that the Commission determined the fate of low power stations twenty years ago and may not alter it now.

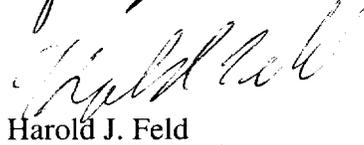
Conclusion

The Commission should create a low power radio service with safeguards to ensure it remains inherently local and community-based in character. UCC *et al.* believe the comments and suggestions contained herein would fulfill this goal, and urge the Commission to adopt a LPFM service.

Respectfully submitted,



Cheryl A. Leanza



Harold J. Feld



Andrew Jay Schwartzman

Of Counsel:
Randi M. Albert

G. William W. Carmany
Law Student Intern
UCLA Law School

MEDIA ACCESS PROJECT
1707 L St., NW
Suite 400
Washington, DC 20036

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