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February 19, 2000

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

Re: Petition for Reconsideration ^{OFFICE OF THE SECRETARY}
Report & Order FCC 00-19

In The Matter of The Creation
of a Low Power Radio Service
MM Docket 99-25/
RM-9242
RM-9208

Dear Madam Secretary:

Enclosed is a Petition for Reconsideration, being timely filed in the above captioned proceeding, with the text of the instant Report & Order having appeared Feb 17, 2000 in the Federal Register.

Enclosed is an original and nineteen copies of said Petition for Reconsideration, to allow for the widest possible distribution at the Commission.

Should there be any questions, I can be reached at the numbers and address above.

Respectfully submitted,

J. RODGER SKINNER, JR.
RM-9242 Petitioner

JRS:gl
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	MM Docket No. 99-25
Creation of a Low)	RM-9242
Power Radio Service)	RM-9208
)	
)	REPORT AND ORDER
To: The Commission)	FCC 00-19
)	Adopted January 20, 2000
)	Released January 27, 2000

Petition For Reconsideration
of Report and Order FCC 00-19

By: **J. Rodger Skinner, Jr.**

Introduction

J. Rodger Skinner, Jr. (Skinner) was the petitioner in RM-9242 in this proceeding calling for the creation of a nationwide Low Power FM radio broadcasting service. A large number of comments were filed in response to a public notice accepting comments on RM-9242 and the majority of these comments favored the plan put forth in RM-9242. The Commission subsequently issued its Notice of Proposed Rulemaking (Notice) on Low Power FM radio and it contained many of the provisions originally put forth in RM-9242. On January 20, 2000, the Commission issued its Report and Order in this proceeding. This Report and Order differed substantially from the plan put forth in RM-9242 and the complete plan put forth in the Commission's own Notice of Proposed Rulemaking. Therefore, Skinner has grounds for this timely filed Petition for Reconsideration of the Report and Order in FCC 00-19. The premise behind this Petition for Reconsideration is that the Commission gave short shrift to several important issues in this proceeding and may have succumbed to intense political pressure

being applied by the National Association of Broadcasters (NAB), who have demonstrated that they are vehemently opposed to the creation of any type of LPFM service whatsoever. The Commission, in its Report and Order, failed to make a case for prohibiting something as crucial to the success of a LPFM radio station as the ability to support itself through the sale of commercial advertising. For those feeling a need to give some protection to existing small business commercial broadcasters (full-power stations) in regards to competition for advertising revenues, please see comments on this matter below under "Conclusions". Having spoken with many individuals who have worked their entire adult life in the broadcasting industry, including many minorities, I have found that they see LPFM as their one and only hope of ever being able to own their own radio station. Unlike many "pirate operators" who commented in this proceeding and would be happy with 10-watts since they want to only "play radio" when the mood strikes them, the dedicated broadcast professionals that I refer to supported the ideas put forth in RM-9242, 1000-watt and 100-watt stations, commercial or non-commercial operation and use of both 2nd and 3rd adjacent channels for LPFM. These experienced professionals, of which I speak, although outnumbered in comments in this proceeding by the "pirate operator" types, should receive more attention since they are much more capable of producing a viable LPFM radio service which would provide more and better service to the community.

1. Basis for Reconsideration

This Petition for Reconsideration sites as one basis The Regulatory Flexibility Act (RFA) adopted in 1980 (5 USC 601).

The Regulatory Flexibility Act in 1980 (5 USC 601).

Agencies proposing rules that would have a "significant" economic impact on small business, small not-for-profit organizations, or small governmental entities must prepare a Regulatory Flexibility Analysis (RFA) and try to **find simpler, less burdensome ways** [emphasis added] for such small organizations to comply with federal requirements. The Act applies to

independent regulatory agencies and executive agencies. The Small Business Administration (SBA) oversees the Act's enforcement. The Act does not require an agency to abandon a proposed regulation because it might have a "significant" impact on small entities, only to consider less burdensome alternatives and to explain why it has rejected those alternatives.

Initial consultation with the staff of the Office of Advocacy of the Small Business Administration, indicated an interest to participate in righting some of the wrongs apparent in the Report and Order on LPFM, but realized that under the current definition of a "small business" that most existing radio stations, as well as newly proposed LPFM stations, both met this definition (annual sales under \$5 million for a radio station). Those problems have been addressed below under "Conclusions".

2. Issue Analysis

With the decision of the Commission in its Report and Order in FCC 00-19 to establish the new Low Power FM radio service as an educational non-commercial service (NCE) only and totally rejecting commercial service, out of hand, it violated that provision of the RFA that calls for considering less burdensome alternatives and to explain why it has rejected those alternatives. The Commission failed to adequately explain why it rejected the proposal that would have allowed the applicant to specify either commercial or non-commercial operation, failing to give ample consideration of commercial support for LPFM stations, a method of support used by the majority of the nations radio stations for over seventy-five years.

In the FCC 00-19 Report and Order, Appendix C, Final Regulatory Flexibility Act Analysis, the Commission states, "The LP100 and LP10 services are likely [to] create significant opportunities for new small business." The Commission then makes no attempt to describe these "significant opportunities for new small business." In reality, the opposite is true. By the decision to allow for non-commercial service only and prohibiting the traditional form of commercial support for radio stations, the Commission's action will result in two extremely negative effects on small businesses.

First, the number of LPFM stations that could have been created, meeting all technical

requirements without causing interference, will be severely limited unless the Commission allows for both commercial and non-commercial operation on reconsideration. Surely, no one will argue that both commercial operation and non-commercial operation taken together offer more flexibility and opportunities for financial solvency than non-commercial operation alone. This is especially important considering that the Commission chose to limit stations to a maximum of 100 watts (3.5 miles coverage) and rejecting, again without sufficient specifics, that portion of the Notice that called for 1000 watt stations (9 miles coverage), more capable of obtaining sufficient financial support to remain operational. Those opposed to commercially supported operation should be reminded that it costs money to build and operate a radio station, even a LPFM station. By imposing a double constraint of non-commercial service only and severely limited power (coverage) on the new LPFM service is to unnecessarily limit the potential and staying power of this new service and threaten its economic ability to survive. Indeed, in separate comments issued by Commissioner Powell in this proceeding, speaking of the radio industry, he states -

We regularly consider the economic impacts of our actions on licensees. Just one example is the degree to which we have attempted to balance the need for consolidation to achieve economic efficiency against our goal to foster myriad diverse voices. Indeed, the Commission itself has recognized that the industry's ability to function in the public interest, convenience and necessity is fundamentally "premiered on the industry's economic viability".

LPFM as originally proposed in RM-9242 and amplified in the Notice allowing for 1000 watts and 100 watts, commercial or non-commercial operation and use of both 2nd and 3rd adjacent channels would have created a LPFM service that could make a significant positive contribution to broadcasting in America, in markets large and small, spread efficiently amongst the several states and communities. To limit the service, as done in the Report and Order, is in direct violation of section 307(b) of the Communications Act of 1934 (Act), as amended, that calls for fair, efficient and equitable distribution of licenses for radio service among the several states and communities.

SEC. 307. ALLOCATION OF FACILITIES; TERMS OF LICENSES.

(a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of

operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

The Commission has instead enacted rules that are **unduly restrictive** and therefore in violation of Section 307(b) of the Act. The Commission acted without regard of its own data (receiver study) that showed that 2nd and 3rd adjacent channels could be used for LPFM without causing undue interference to existing stations, analog or digital. This case is made in the comments of Bruce A. Franca on February 17, 2000 in the following hearing:

Testimony of Bruce A. Franca
Deputy Chief, Office of Engineering and Technology
Federal Communications Commission
For Hearing on "A Review of the FCC's Spectrum Management Responsibilities in Addition to H.R. 3439, the 'Radio Broadcasting Preservation Act'" before the Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection United States House of Representatives

Third Adjacent Channel Protection Is Not Necessary

Of course, I am aware of the differences of opinion that exist, particularly on the part of full service FM stations and their representatives, over whether LPFM stations will cause interference to existing FM service. The principal issue here is over whether we should have imposed 3rd adjacent channel restrictions on LPFM stations. The main determinative factor is the ability of FM receivers to operate satisfactorily when signals from LPFM stations are present on 3rd adjacent channels. I believe that the record provides strong support that 3rd adjacent channel restrictions are not needed for LPFM and that any areas experiencing interference would be very small and would be outweighed by the benefits of the new service.

Initially, I would point out that during the period from 1964 to 1987, pre-1964, "grandfathered," short-spaced full power FM stations were permitted to modify their facilities without regard to either 2nd or 3rd adjacent channel spacings. No interference complaints were received as a result of such modifications, and this policy was re-instituted in 1997, again without subsequent interference complaints. Similarly, in 1991, the Commission decided to accept small amounts of potential 2nd and 3rd adjacent channel interference in the noncommercial FM service where such interference is counter-balanced by substantial service gains.

-NAB/CEA Criteria Are Inappropriate for Today's FM Service

Both CEA and NAB, for example, generally find the performance of today's FM radios unacceptable because they do not meet their presupposed desired levels of performance. For example, 17 of the 28 radios tested by the NAB failed to meet its standard of 50 dB audio signal-to-noise ratio (S/N) performance with no interference present and with the "strongest"

desired signal level tested.² Similarly, CEA reports that none of its sample receivers “came near meeting” its 45 dB S/N performance target at the current FCC protection standards for full power co-channel stations. While such performance levels may indicate more interference from prospective LPFM stations, we fail to see how such levels can be appropriate measures when most radios do not perform to these levels, even in the absence of any interference, as was the case in NAB’s tests. Moreover, we have seen no indication from consumers that they find that the vast majority of FM receivers do not provide satisfactory service. Therefore, as stated in our Report and Order, we do not find the S/N levels suggested by CEA or NAB to be appropriate interference criteria for today’s FM radio service. We also note that a previous study by the NAB indicated that the current FCC co-channel protection requirement for FM stereo yields an audio S/N of about 30 dB, not the 50 dB suggested by NAB in its technical study.

From the Commission’s own receiver study and the findings of no interference reported during the many years when short-spaced grandfathered full-power stations were allowed to relocate without regard to 2nd or 3rd adjacent restrictions, as mentioned above, it is obvious, even to the casual observer, that since full-power stations could operate on **both** 2nd and 3rd adjacent channels without causing interference to existing stations, then certainly LPFM stations could also. The other receiver studies that were submitted in this proceeding tried to cast doubt on that conclusion but the FCC explained this nicely in this manner, included in the comments (above) of Mr. Franca at the hearing referenced above that was held on February 17, 2000.

3. Conclusions

It would be best to let the marketplace rule and let the public choose which radio stations will enjoy their attention and listenership. However, in the alternative, if the Commission wishes to protect existing small business full-power stations from competition for listeners and advertising revenues, then I would suggest a system could easily be implemented whereby there would be a defined limit on the number of new LPFM stations that could be added to a metropolitan statistical area (MSA or market). This number would be dependent on the number of stations now licensed in that MSA or market. For example in a small market with two radio stations, it might be unfair to add ten new LPFM stations to the mix. This would be of more importance in very small markets where a great number of channels might be available for use by LPFM stations. It would be of lesser importance in larger markets where the scarcity of

channels is greater.

Therefore, I suggest that it might be *fair* to consider limiting the addition of a number of new LPFM stations equal to up to one-third the number of existing stations in the market, in markets (MSA) ranked below the top fifty markets. For example, if market (MSA) size #63 has nine full-power stations currently licensed, then there could be up to three new LPFM stations added in that market, contingent on that number of non-interfering channels being available there. I believe this type of approach is much more balanced and in line with the requirements of the RFA and Section 307(b) of the Act.

The current Report and Order on LPFM has an immense negative impact on small business in that - - -

- a) **PROBLEM:** Not allowing use of 2nd adjacent channels-
It precludes the establishment of hundreds of new LPFM stations (2nd adjacent channel restriction) mostly in major markets where they are needed most. Smaller markets, in general, have many more channels available for new applicants.

SOLUTION:

Allow use of both 2nd and 3rd adjacent channels for LPFM. Proven not to cause interference back then or now.

- b) **PROBLEM:** Not allowing commercial ads for support-
It reduces the economic viability of a new LPFM station to be able to stay on the air and pay its bills by restricting the service to non-commercial only. It also has a negative impact on all small businesses in the market by not allowing them to advertise on LPFM stations where the rates would be affordable.

SOLUTION:

Allow for choice of either commercial or non-commercial operation, with certain limits on the number of new stations per market, if necessary to protect existing stations from excessive competition.

- c) **PROBLEM:** Not allowing 1000 watt stations-
It unduly restricts the coverage area (only 100 watts or 10 watts) and economic viability of a new LPFM station to sustain itself and remain on the air by limiting such coverage to only 1 to 3.5 miles when most small businesses have a trading area of approximately ten miles. This ten mile trading area could be matched

by a 1000 watt station, making LPFM advertising both affordable and effective.

SOLUTION:

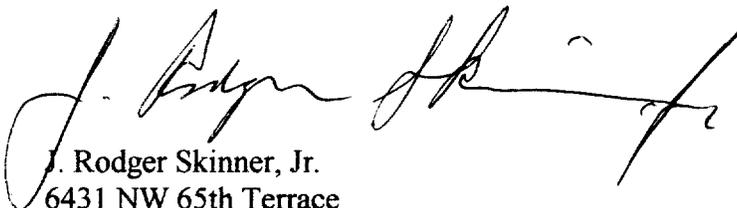
Allow for 1000 watt stations in addition to 100 watt LPFM stations, where the channel in question can use that power level without causing interference, using the prohibited contour overlap method to predict it.

Upon consideration, for the reasons stated above, the Commission must reconsider its positions taken in its Report and Order FCC 00-19 for Low Power FM and allow for:

- a) Commercial and non-commercial operation of LPFM stations
- b) 1000 watt, 100 watt and 10 watt LPFM stations
- c) Use of both 2nd and 3rd adjacent channels for LPFM operation where there would be no prohibited overlap of interfering contours with existing stations, as originally detailed in RM-9242 and currently used by the Commission for Sec. 73.215 stations.

February 19, 2000

Respectfully submitted by,



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