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In The Matter Of

Creation Of A
Low Power Radio Service

FCC Order No. 00-19

Dockets MM 99-25,
RM-9208, RM-9242

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JUN - 5 2000
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FOR A DECISION
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UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

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OF THE AMHERST ALLIANCE

THE AMHERST ALLIANCE is a nationwide citizens' advocacy group, organized and mobilized primarily over The Internet. The Amherst organization advocates media reform in general and Low Power Radio in particular.

On February 24, 2000, THE AMHERST ALLIANCE filed with the Commission a friendly Motion For Reconsideration of the rule which established a Low Power Radio Service. So far as the undersigned parties can determine, the Commission has never acted upon this Motion For Reconsideration.

This week, the FCC opened the First Filing Window for those who seek Low Power FM licenses. As the FCC receives this Motion For A Decision, it is simultaneously receiving LPFM license applications from parties in 11 different states. It will continue to accept these LPFM applications until June 5, 2000.

THE AMHERST ALLIANCE formally requests the Commission to act on Amherst's February 24, 2000 Motion For Reconsideration -- accepting it, rejecting it or accepting it in part -- *before* Low Power Radio licenses are actually awarded to any of the First Filing Window applicants.

Amherst's Motion For Reconsideration proposes policies -- such as the restoration of license eligibility for parties who are individuals, rather than groups -- that would materially affect the nature of the license allocation process. Therefore, it is prudent and equitable -- and, arguably, a legal necessity as well -- for the Commission to respond to Amherst's Motion For Reconsideration *before* any Low Power Radio licenses have been awarded.

We note that THE AMHERST ALLIANCE had not planned, at the time of its February filing, to file a Motion For A Decision if the Motion For Reconsideration did not generate a response from the Commission. However, Amherst has now decided to press the matter -- because it has become very clear, very recently, that the narrow provisions of Order 00-19 are being narrowed still further by the *interpretations* of certain Commission staffers who oversee implementation.

It is these recent staff *interpretations,* greatly compounding the undue restrictiveness of Order 00-19 itself, which have moved us to take action now.

These staff interpretations are discussed below, in the section entitled "The Catalyst For This Motion".

ADMINISTRATIVE CONSIDERATIONS

Favorable action on this Motion, if taken before any Low Power Radio licenses are awarded, will not *necessarily* require re-doing the First Filing Window. Applications which have already been received can still be considered, while a Supplemental Filing Window can be opened to permit submission of new or amended applications.

PARTIES JOINING IN THIS MOTION FOR A DECISION

THE AMHERST ALLIANCE is joined in this Motion For A Decision by eight additional parties:

1. PROVIDENCE COMMUNITY RADIO of Providence, Rhode Island. This group holds the distinction of being the first non-profit group in American history to be incorporated solely for the purpose of starting up and managing a Low Power Radio station. The founder of Providence Community Radio is Wesle AnneMarie Dymoke, who has just been elected to succeed Don Schellhardt as National Coordinator of THE AMHERST ALLIANCE.

2. ROGUE COMMUNICATION of Santa Cruz, California. As a communication consulting firm, it maintains Internet-accessible databases and has long been active in the battle to legalize, and legitimize, Low Power Radio.

ROGUE COMMUNICATION was founded by Ted and Stephanie Coopman. Mr. Coopman, who has published academic articles on the Low Power Radio movement, played the single most important role in preparing the movement-wide Joint Statement On Microradio, which was submitted to the Commission during the summer of 1999. Ms. Coopman is a professor of Mass Communication at San Jose State University.

ROGUE COMMUNICATION notes that it does not join in the call, made in the referenced Motion For Reconsideration, for Commission review -- in 2002 -- of whether it should continue to exclude all commercial-airing stations from the Low Power Radio Service.

Unlike the eight other signatories of this Motion For A Decision On The Motion For Reconsideration Of THE AMHERST ALLIANCE, ROGUE COMMUNICATION favors keeping the Low Power Radio Service strictly commercial-free, totally and permanently.

In all other respects, ROGUE COMMUNICATION agrees with the policy recommendations in Amherst's February 24, 2000 Motion For Reconsideration.

3. DON SCHELLHARDT of Bridgewater, Virginia. Mr. Schellhardt is Co-Founder, and National Coordinator EMERITUS, of THE AMHERST ALLIANCE. He also served as Amherst's first National Coordinator, but has declined to seek another term so that he can promote media reform -- *and* political reform -- on a *much* larger scale. Currently a trial lawyer in Harrisonburg, Virginia, he co-authored the July 1997 Petition For Rulemaking that triggered the FCC's first Low Power Radio deliberations, in Docket RM-9208.

4. NICKOLAUS E. LEGGETT was another co-author of the 1997 Petition For Rulemaking that led to Docket RM-9208 in 1998. A licensed "ham" operator for over three decades, and the holder of several patents, Nick is both a technical writer and inventor. He resides in Reston, Virginia, with his wife, Judith Fielder Leggett: the third of the three co-authors of the 1997 Petition For Rulemaking.

5. WESLE ANNEMARIE DYMOKE of Providence, Rhode Island. As noted earlier, Ms. Dymoke is the founder of PROVIDENCE COMMUNITY RADIO as well as the newly elected National Coordinator of THE AMHERST ALLIANCE. Her term of office as the leader of Amherst begins today: June 1, 2000.

6. WILLIAM C. DOERNER of Corpus Christi, Texas. Mr. Doerner is the founder and executive of PALMSRADIO: an Internet broadcasting company which emphasizes coverage of community events and issues in the Corpus Christi area.

7. MATTHEW HAYES of Berkeley, California. Mr. Hayes is a professional, with a background in science and computers, who is weighing the option of starting and/or joining a licensed LPFM station in the Bay Area.

8. MATTHEW ABEL, an attorney with law offices in Livonia, Michigan. Like Don Schellhardt, Nickolaus Leggett and Judith Fielder Leggett -- the three individuals whose Petition For Rulemaking triggered Docket RM-9208 -- Matthew Abel has no personal plans to seek an LPFM license. He is, however, deeply concerned about the current state of representative democracy in America -- and has been actively involved in efforts to launch and promote a third party alternative to the Republican Party and the Democratic Party.

THE MOTIVATIONS FOR THIS MOTION

We are filing this Motion at this time in order to pursue two objectives:

1. If possible, we hope to persuade the Commission to expand the scope of the Low Power Radio Service -- and, in particular, the *diversity* of potential licensees -- *before* any Low Power Radio licenses have actually been awarded.

2. If the first objective is not achieved, then we intend to preserve our legal standing to challenge in court the Commission's allocation of Low Power Radio licenses.

We take this step -- that is, positioning ourselves for possible litigation -- because we have seen a string of viable Constitutional challenges to the FCC's ban on Low Power Radio tossed out of court on purely procedural grounds. We have seen more than one judge avoid deciding the clear Constitutional merits of a Low Power Radio case by asserting that Low Power Broadcasters had failed to "exhaust their administrative remedies". Instead, we have been told, the aspiring LPFM broadcasters should have filed a waiver request.

Of course, both the aspiring broadcaster and the FCC knew that a waiver request would never have been granted. Still, the failure to ask for one has been regarded, in more than one court, as a fatal procedural weakness.

We do not intend to make this mistake ourselves. We are filing this Motion For A Decision *now,* before any Low Power Radio licenses have been awarded, in a sincere effort to pursue all of our administrative remedies. If there is any additional administrative remedy we should be pursuing, simultaneously or sequentially, we ask the Commission to apprise us of this option *now*.

Otherwise, we must assume that the Commission's rejection of this Motion, and/or a lack of response to it, will leave litigation as our only remaining option for pursuing a more diversified Low Power Radio Service. None of the signatories of this Motion is committed to litigation, but all of the signatories are committed to *considering* litigation if other remedies fail. We are acting now to preserve our options later.

Our future review of those options will be shaped in large part by what the Commission decides to do, between now and the day when the first LPFM licenses are awarded, to increase opportunities for participation in the Low Power Radio Service.

THE CATALYST FOR THIS MOTION

As we noted earlier, none of us had ever planned to initiate litigation on the basis of the Commission's LPFM rule itself.

We had originally intended to "hold our fire" because we considered the new rule to be overly narrow, and indefensibly exclusive, but we also regarded the new rule as a beachhead -- which could be expanded in the future.

In addition, we were well aware of the political pressures which had been brought to bear against the Commission. We realized it was an act of courage for the Commission to go even as far as it did.

While believing the new rule to be less than the Constitution requires, we nevertheless decided to give the licensing process a chance -- while we worked with the Commission to expand the license eligibility criteria, and reduce the adjacent channel spacing restrictions, over time.

Then, very recently, we began to learn of extremely restrictive *staff interpretations* of the Commission's basic regulations. Suddenly, it became apparent to us that overly narrow Commission regulations were about to become subject to overly narrow interpretations by the Commission's staff.

The Commissioners may not be aware of the level of anger, and even outrage, which these staff interpretations have triggered among aspiring LPFM applicants. Suffice it to say that the undersigned parties, who are basically *moderates* in the Low Power Radio movement, and *friends* of the Commission, view these staff interpretations as so damaging that we must now consider litigation if this is left as the only way to overturn those interpretations.

In short:

The full Commission needs to be aware that certain members of the Commission's staff are now on the verge of turning friends of the Commission into adversaries of the Commission.

Two specific staff interpretations are causing us particularly acute concern.

"Maturity" Criteria In The "Public Interest Points Formula"

The actual catalyst for this Motion For A Decision was a conversation between Wesle AnneMarie Dymoke -- founder of Providence Community Radio and incoming National Coordinator of THE AMHERST ALLIANCE -- and Peter Doyle of the Federal Communications Commission staff. Mr. Doyle is reportedly the primary staff person in charge of structuring the license allocation process and interpreting the Commission's basic regulations on this subject.

In a discussion with Ms. Dymoke about the "public interest points formula" for deciding between competing LPFM applications, Mr. Doyle of the FCC made a statement which all of the undersigned parties find highly disturbing. Mr. Doyle made it clear to Ms. Dymoke that the FCC staff does not plan to allow newly incorporated non-profits to meet the "maturity" criterion by recruiting Board members and/or station personnel with sufficiently established community ties.

Rather, the Commission staff will apparently insist that the group as a whole must be well-established in the community.

Further inquiries by Ms. Dymoke, directed to others at the Federal Communications Commission, confirmed that the Commission staff currently plans to follow the interpretation outlined by Mr. Doyle.

If allowed to stand, this staff interpretation will convey upon ESTABLISHED churches and ESTABLISHED community groups a virtually insurmountable competitive advantage over newcomers.

At least in those areas where the spectrum is crowded enough to create competition for licenses, newcomers could be swept off the playing field completely -- defeating in the process the primary purpose of, *and the primary Constitutional requirement for,* a Low Power Radio Service.

Mr. Doyle's statement was, for the parties undersigned here, the proverbial last straw.

"Guess The Frequency"

After we learned of Mr. Doyle's conversation with Ms. Dymoke, we learned of *another* grievously restrictive interpretation by those Commission staffers who are implementing Order No. 00-19.

Within the past week, aspiring LPFM broadcasters have been informed that they may not ask to be considered for all of the frequencies which may be available in their particular area. Rather, an aspiring LPFM broadcaster must select *one* particular frequency, *without* knowing who else may be bidding for it, and then gamble everything on a single roll of the dice.

This new staff interpretation, announced at the last minute, introduces an element of random chance into an area where reliance on random chance is neither necessary nor desirable. It is rational for the Commission to look at a community as a whole ... then look at all of the LPFM applicants in that community as a whole ... and then decide which of the applicants in the pool are the best choices for the frequencies which are available in that community. It is difficult to understand why the Commission would prefer to assess the LPFM applicants frequency by frequency rather than community by community.

This frequency-by-frequency approach to license allocation means that an excellent candidate may be kept off the airwaves because of a bad guess about which particular frequency will attract the lowest level of competition. At the same time, a less capable candidate, in the same community, may win a license because dumb luck or insider information led them to select a frequency where there was less competition for the license.

This is *not* the way to identify the best candidates for LPFM in a community.

We also note that established commercial broadcasters are routinely allowed to "hedge their bets" by filing multiple frequency applications -- and then withdrawing some of those applications after they obtain a frequency they actually want. We ask the Commission why LPFM applicants should be forced to play "Guess The Frequency" while other broadcasters are allowed to apply for licenses under very different, and much friendlier, rules.

Weighing The Risks

If the full Commission allows the current staff interpretations to stand, and/or *if* none of the policy recommendations in Amherst's Motion For Reconsideration are adopted by the Commission, and *if* the First Filing Window results show that newly incorporated non-profits have been swept off the playing field completely(or close to completely) in most or many areas, *then* one or more of the undersigned parties may decide that the risks of litigation are less than the risks of doing nothing.

When the Commission considers whether to modify or override certain staff interpretations, and whether to adopt some or all of the policy recommendations in the Motion For Reconsideration of THE AMHERST ALLIANCE, we hope the Commission will bear this possibility in mind:

If we go to court and *win,* we will have *a Constitutionally based decision* that neither Congress nor future Commissioners can modify or overturn. In that event, the nature of the new Low Power Service will be decided by the courts, not the Commission *or* the Congress.

The Commission should note that two of the signatories of this Motion For A Decision are trial lawyers.

OUR PRIMARY "LITMUS TEST": HOW MANY OF THE NEW LOW POWER RADIO LICENSES ARE AWARDED TO NEWLY INCORPORATED NON-PROFITS

As the single most important factor in deciding our course, we will look at the results of the license allocation process after the First Filing Window applications have been received, processed and granted or denied.

As we noted earlier, most of the aspiring broadcasters we represent are Outsiders. They are not ESTABLISHED churches or ESTABLISHED community groups. They are Outsiders who are Playing By The Rules in a good faith effort to find a place in The System. Their signature profile is likely to be the NEWLY INCORPORATED non-profit group, hastily organized in the hope of bending enough to give the Commission what it wants in a Low Power Radio applicant.

Thus, we will be paying very close attention to whether newly incorporated non-profit groups are drastically under-represented in the ranks of those who are awarded Low Power Radio licenses after the First Filing Window has closed. If, as now seems possible, newly incorporated non-profits are missing from the list completely, at least in major metropolitan areas, we will be extremely alarmed.

In the event of litigation, it will be our core contention that:

(A) The new Low Power Radio Service, as actually implemented, has not been inclusive enough to assure *the minimum level of diversity in access to the airwaves* that is required by the Fourteenth Amendment to the Constitution ("equal protection of the laws") and the First Amendment to the Constitution ("freedom of speech");

And

(B) Every known option for administrative relief has been pursued without success, thereby compelling the Plaintiff(s) to turn to the courts for relief.

Although our case will be rooted primarily in *Constitutional* requirements, we will also remind the courts of language in the Communications Act of 1934. This Act, which has often been amended but is still the basic governing statute for the FCC, directs the Commission to allocate access to the airwaves in a manner which is "*equitable* and efficient" -- not just "efficient".

CONCLUSION

For the reasons we have set forth herein, we urge the Federal Communications Commission to overturn the specified staff interpretations of Order No. 00-19 and to issue a favorable decision regarding the February 24, 2000 Motion For Reconsideration that was filed by THE AMHERST ALLIANCE. In order to minimize the logistical complexities which could arise in the event of litigation, we further urge the Commission to make these decisions *before* the first Low Power Radio licenses have been awarded. In the case of the First Filing Window for LPFM applications, we also urge the Commission to open Supplemental Filing Window for the acceptance of new or amended applications.

Respectfully submitted,

Don Schellhardt

Co-Founder & National Coordinator EMERITUS,
THE AMHERST ALLIANCE

Member of the Bar, Virginia & Connecticut
B.A. Wesleyan; J.D. George Washington

For THE AMHERST ALLIANCE

102-B Weeping Willow Lane
Bridgewater, Virginia 22812

DonSunburst@aol.com
540/828-1727

Also: For Himself

Co-Petitioner,
FCC DOCKET RM-9208

Wesle A. Dymoke per djs

Wesle Annemarie Dymoke

Founder,
PROVIDENCE COMMUNITY RADIO

For PROVIDENCE COMMUNITY RADIO

P.O. Box 6785
Providence, Rhode Island 02940-6785

Procomrad@yahoo.com
401/941-0574

Also:

National Coordinator,
THE AMHERST ALLIANCE

For THE AMHERST ALLIANCE

Also: For Herself

Mailing Address:
P.O. Box 2330A East Side
Providence, Rhode Island 02906-2330A
Personal Residence:
173 Montgomery Avenue
Providence, Rhode Island 02905-4210

Wesdym@yahoo.com
401/941-0574

Ted Coopman per djs

Ted Coopman

Co-Founder & Partner,
ROGUE COMMUNICATION

For ROGUE COMMUNICATION

ROGUE COMMUNICATION
2501 Friesland Court
Santa Cruz, California 95062

Rogue@roguecom.com
831/477-7780

Nickolaus E. Leggett per djs

Nickolaus Engelhardt Leggett

Co-Petitioner,
FCC DOCKET RM-9208

1432 Northgate Square
#2A
Reston, Virginia

Nleggett@earthlink.net
703/709-0752

William C. Doerner per djs

William C. Doerner

3803 Waldron Road
Corpus Christi, Texas 78418

bdoerner@palmsradio.com
361/937-7226

Matthew Hayes per djs

Matthew Hayes

2508 Dana Street
Berkeley, California 94704

Matthewhades@hotmail.com
510/649-7520

Matthew Abel per djs

Matthew Abel

Member of the Bar in Michigan

15357 Farmington Road
Livonia, Michigan 48154

Attorneyabel@mediaone.net
248/866-0864 (Cellular)
248/661-1227 (Home)

CERTIFICATION OF SERVICE

The only party to send THE AMHERST ALLIANCE a copy of a filing with the FCC, submitted in response to Amherst's Motion For Reconsideration, was REC NETWORKS of Tempe, Arizona. A copy of this Motion For A Decision has today been sent, electronically and also by First Class Mail with pre-paid postage, to Michelle Eyre, founder and executive of REC NETWORKS.

Donald J. Schellhardt

Don Schellhardt

Dated: June 1, 2000

June 1, 2000