

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

In re)
)
ELIMINATION OF MAIN STUDIO RULE) MB Docket No. 17-106
)

TO: Honorable Marlene H. Dortch
Secretary of the Commission

ATTN: The Commission

**COMMENTS IN SUPPORT OF
ELIMINATION OF BROADCAST MAIN STUDIO RULE**

The Presence Radio Network, Inc. (TPRN), licensee of non-commercial educational radio stations in the State of Maine¹, and Saint Joseph Missions, d/b/a We Are One Body® Catholic Radio (WAOB), licensee of non-commercial educational radio stations in western Pennsylvania², by their attorney, and pursuant to the Notice of Proposed Rulemaking in the above-entitled matter, FCC 17-59, released May 18, 2017, hereby respectfully submits their joint Comments in support of eliminating the so-called "main studio rule", 47 CFR §73.1125. In so doing, the following is shown:

¹WXTF(FM), North Windham, Maine; WTBP(FM), Bath, Maine; WWTP(FM), Augusta, Maine; WXPB(FM), Corinth, Maine; and WEGP(AM), Presque Isle, Maine.

²WAOB(AM), Millvale, Pennsylvania; WAOB-FM, Beaver Falls, Pennsylvania; and WPGR(AM), Monroeville, Pennsylvania.

1. While it has been on the books for many years, the main studio rule is unenforceable from the standpoint of the Administrative Procedure Act, 5 U.S.C. §551 et seq., in that Section 73.1125 as written and published in the Code of Federal Regulations does not set out: (a) the very definition of the term "main studio"; (b) what minimum amount of equipment is required to be maintained there; (c) what hours the studio is required to be open; (d) whether or not paid employees are required to be present; or (e) whether volunteers can staff the main studio. The usually selective enforcement of this rule was decided by unelected FCC staff members who made up the standards as they went, without going through the required notice and comment rulemaking proceeding, and without actually publishing the requirements in the Federal Register and codifying them in the Code of Federal Regulations. That the Commission hid clues concerning compliance with this rule in cases such as ***Jones Eastern of the Outer Banks, Inc.***, 7 FCC Rcd 7309 (1992), was in our opinion not enough to comply with the Administrative Procedure Act's requirement that a notice and comment rulemaking be held on each aspect of a proposed rule or proposed rule enforcement, particularly where the FCC intended to levy civil forfeitures for non-compliance.

2. Thus, the FCC's enforcement of Section 73.1125 was ultra vires and in violation of the controlling appellate precedent, ***Paralyzed Veterans of America v. D.C. Arena L.P.***, 117

F.3d 579 (D. C. Cir. 1997), which holds that where an agency engages in a new interpretation of an agency rule in conflict with prior definitive interpretation, a notice and comment rulemaking is required. Furthermore, FCC attempts to impose civil forfeitures against broadcasters who were found to be in violation of Section 73.1125 of the Rules were contrary to established norms of administrative due process requiring an agency to give a regulate adequate notice. The applicable case law that binds federal agencies such as the FCC is stated in **First American Bank of Virginia v. Dole**, 763 F.2d 644, 651-52 n. 6 (4th Cir., 1985). There, the appellate court cited with approval a district court opinion which rejected an FCC attempt to levy a forfeiture against a broadcast licensee:

Civil penalties may be considered "quasi-criminal" in nature. **Pollgreen v. Morris**, 579 F. Supp. 711, 717-18 (S. D. Fla. 1984); **United States v. Sanchez**, 520 F. Supp. 1038, 1040 (S. D. Fla. 1981), *aff'd mem.*, 703 F.2d 580 (11th Cir. 1983). Where civil penalties may be imposed, therefore, "individuals and organizations [must] be specifically put on notice of [possible] government sanctions before they are levied." **United States v. Rust Communications Group, Inc.**, 425 F. Supp. 1029, 1033 (E. D. Va. 1976). The requirement of notice is principally designed to give fair warning to persons or organizations subject to administrative sanctions. Regarding the requirement of adequate notice, the Fifth Circuit has explained that "statutes and regulations which allow monetary penalties against those who violate them, ... must give ... fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." **Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n**, 528 F.2d 645, 649 (5th Cir., 1976) (citation omitted); *accord* **Montgomery Ward & Co., v FTC**, 691 F.2d 1322 (9th Cir. 1982); *In re*

Metro-East Mfg. Co., 655 F.2d 805, 810 (7th Cir. 1981). Because civil penalties could be imposed, the need for clarity in the CAB's charter regulations was greater than in the usual case where no such sanction is available. First American was entitled to clear notice of any duty it supposedly had under the charter regulations to monitor Davis' deposits. That notice was never provided.

3. Above and beyond the appellate precedents which govern the FCC, further imposition of the main studio rule is unfair to radio broadcasters, who compete daily against media in non-broadcast environments, such as internet radio stations or podcasts, which are not hamstrung by administrative rules which have a history of inconsistent and unfair enforcement. What matters to the media consumer is not where the program originates, but rather the content of the programming. Every time the FCC repeals a rule which otherwise forces its broadcast licensees to spend money, it liberates such licensees to use its scarce resources to better serve the public interest, convenience and necessity. This is particularly true in the cases of The Presence and WAOB, which are non-commercial, listener supported broadcasters.

4. Therefore, there are strong and sound reasons, legal and common sense alike, to repeal the main studio location rule. The public interest, convenience and necessity demands it.

Respectfully submitted,

THE PRESENCE RADIO NETWORK, INC.

**SAINT JOSEPH MISSIONS, d/b/a
WE ARE ONE BODY® CATHOLIC RADIO**

A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

By _____
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Their Attorney

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