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Office of the Secretary  
Federal Communications Commission  
1919 M Street N.W.  
Washington, DC 20554

Re: RM-9208 Reply Comments

Dear Commissioners and Commission Staff:

Enclosed in this envelope are nine copies, and an original, of the RM-9208 Petitioners' Reply Comments in RM-9208.

You may have noticed that the Reply Comments are dated May 7, 1998. They were actually mailed to you on that date. However, through a convergence of human errors: (a) the copies were never delivered; and (b) we were not apprised of the non-delivery until a few days ago.

With this re-mailing, we hope to correct the situation.

Given that the deadline for RM-9208 Reply Comments has been extended until July 24, we are getting these Reply Comments to you with time to spare. **However**, since the substance of the Reply Comments has been discussed by phone and computer since March, you may find that other parties have already referenced this filing in their own filings. Also, you may notice that we have submitted a filing entitled "Additional Reply Comments" -- even though, unknown to us, the initial Reply Comments had not been received.

We apologize for any confusion caused by this situation -- and we promise never to send you anything by regular mail unless we arrange for "Return Receipt Requested"!

Respectfully yours,



Don Schellhardt  
(Writing for All Three RM-9208 Petitioners)

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**TABLE OF CONTENTS:**

REPLY COMMENTS OF THE RM-9208 PETITIONERS: NICKOLAUS E.  
LEGGETT, JUDITH FIELDER LEGGETT AND ATTORNEY DONALD J.  
SCHELLHARDT

RE: FCC DOCKET NO. RM-9208

	<u>PAGE</u>
<b>INTRODUCTORY PARAGRAPH</b>	1
<b>PRELIMINARY COMMENTS:</b>	1
Thank You, Commissioners and Commission Staff	1
Thank You, Chairman Kennard	2
"Keeping Our Powder Dry"	3
More About Our Motivations	3
Update On <u>La Nueva Radio</u> <u>Musical</u>	6
<b>COMMENTS ON SPECIFIC ISSUES:</b>	7
Points of Apparent Consensus and Disagreement Within the Microbroadcasting Community	8
(a) Power Ceilings Sought By Current Microbroadcasters VS. Ceilings Needed For Newcomers	8
(b) Ban On Micromarket Entry By Large Institutions	9
(c) Internal Debate Over Possible Ban On Commercials	11
<b>OTHER SPECIFIC ISSUES:</b>	14
(d) Constitutional Issues	14
(e) Spectrum Abundance OR Spectrum Scarcity?	21
(f) Finding Frequencies For Microradio	30

**TABLE OF CONTENTS****RM-9208 PETITIONERS' REPLY COMMENTS**

	<u>PAGE</u>
<b>CHART I: THE BUILT-IN TRADEOFF OF STATION SIZE VS. NUMBER OF MICROSTATIONS</b>	44
<b>CHART II: HYPOTHETICAL DISTRIBUTION OF FM MICROSTATIONS IN METROPOLITAN DENVER</b>	48
(g) Setting Priorities	51
<b>CHART III: THE FIFTY STATES (AND THE DISTRICT OF COLUMBIA) IN RISING ORDER OF (HUMAN) POPULATION DENSITY</b>	55-56
(h) Administrative Issues	59
(i) Size Restrictions	62
(j) Control Restrictions	63
(k) Stations Per Owner(s)	65
(l) Local Ownership Restrictions	65
(m) Race, Gender and Income	67
(n) Non-Profit, Non-Commercial Radio	68
(o) Educational Institution Radio	70
(p) Use of Auctions for Licensing	70
(q) Program Content Restrictions	71
(r) Type Acceptance of Equipment	72
<b>TEXT OF THE RECOMMENDED TWO TIERED SYSTEM</b>	75
<b>POLICY RECOMMENDATION: A TWO TIERED SYSTEM</b>	76
<b>CONCLUSION</b>	77

UNITED STATES OF AMERICA

RECEIVED

BEFORE THE

JUN 22 1998

FEDERAL COMMUNICATIONS COMMISSION

FCC MAIL ROOM

Petition For A)

Microbroadcasting)

Docket No. RM-9208

Service)

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REPLY COMMENTS OF THE RM-9208 PETITIONERS: NICKOLAUS E. LEGGETT,  
JUDITH FIELDER LEGGETT AND ATTORNEY DONALD J. SCHELLHARDT

The undersigned individuals -- whose Petition to the Commission was the catalyst for Docket No. RM-9208 -- hereby submit Reply Comments in Docket No. RM-9208.

PRELIMINARY COMMENTS

We begin with some initial remarks and information.

Thank You, Commissioners and Commission Staff

In our April 25, 1998 Special Comments, Requesting A Suspension of Microbroadcasting Prosecutions, we thanked the Commission for: (a) extending the original comment deadline, in this Docket, by an additional 45 days; and (b) accepting 4 of our 5 requests for improvements in the Notice and public information procedures in this Docket. Where applicable, we hope that these improvements will become standard features of the Commission's notice and public information process.

In any case, we repeat that "Thank You" now. We also expand it to include our "Thank You" for the Commission's relatively rapid response to our summer 1997 Petition.

RM-9208 Petitioners  
Reply Comments  
PAGE TWO

We are particularly pleased that the Commission is considering legalization (or, rather, re-legalization) of microbroadcasting now -- before adoption of any comprehensive regulatory policy for the allocation of digital radio frequencies. Given the current concentration of ownership of conventional radio frequencies -- with its harmful effects on diversity, innovation, upward mobility and perhaps even freedom of speech -- we are heartened that the Commission has not compounded present problems through premature allocation of digital radio frequencies. Instead, the Commission is wisely offering the prospect that newly re-legalized microstations will have a legitimate voice in the coming deliberations on use of emerging radio technologies. In turn, the prospective participation of microstations may empower and embolden other under-represented parties to join the digitalization debate -- with gusto.

Thank You, Chairman Kennard

We believe that Chairman Kennard deserves a special "Thank You" for his visible, and sometimes lonely, efforts to promote broadcasting diversity -- including at least the possibility of re-legalized microbroadcasting. We strongly suspect that Chairman Kennard has played a pivotal role in bringing current microbroadcasting policy to the point of serious reconsideration.

RM-9208 Petitioners  
Reply Comments  
PAGE THREE

We are aware that some in the microbroadcasting community have criticized Chairman Kennard for not moving far enough, fast enough. We wish to make it clear that we do not share this view. We are aware of at least some of the statutory, political, cultural and logistical constraints which apply to the present situation -- and we are satisfied, for now, that events are moving in a good direction.

Time will tell whether we are correct.

#### "Keeping Our Powder Dry"

We urge the Commission not to misconstrue our acknowledgement of the good which has been done so far.

We are explicitly preserving all of our legal and political rights -- including the rights to criticize the Commission, or even sue the Commission, if future Commission decisions do not justify our current level of cautious optimism.

To draw upon Teddy Roosevelt's imagery, we continue to carry the very biggest stick we can find. Nevertheless, for now we are speaking in the softest voice we can muster.

#### More About Our Motivations

In our March 4, 1998 Written Comments, we mentioned that none of us are currently microbroadcasters or investors in

RM-9208 Petitioners  
Reply Comments  
PAGE FOUR

microbroadcasting. We added that none of us have any current plans to change this status.

We are, we said, simply responsible private citizens who are concerned about the state of our country in general, the state of our representative democracy in particular and the fate of coming generations of Americans. If we have had any financial motivation at all for filing our Petition and participating in subsequent deliberations, it is simply the hope that our enhanced visibility may lead to offers for more challenging employment and/or other career advancement. Apart from this hope, we are motivated by patriotism: nothing more -- and nothing less.

In light of some remarks by some parties, on both "sides" of the microbroadcasting debate, we feel compelled to add that we are neither socialists nor radicals. One of us was raised as a Republican, one of us was raised as a Democrat and the third among us was raised as an Independent. All of us, now, are basically "between the political parties" -- and between the ideological extremes of conventional Left and conventional Right. We are, basically, moderates -- of the "find a third way" variety rather than the "split the difference" variety. Among the politically prominent Americans of the last few decades, the political leader who best represents our thinking is probably Paul Tsongas.

RM-9208 Petitioners  
Reply Comments  
PAGE FIVE

Based on adult experience and observation that cumulatively totals more than half a century, we have arrived at three basic conclusions about modern socialism and modern capitalism:

1. Modern socialism is lousy at creating wealth and opportunity.

2. Modern capitalism is lousy at distributing wealth and opportunity.

3. Therefore, the best system for the most people is the proverbial "mixed economy" or "enlightened capitalism". That is, we favor capitalism tempered by rigorous public and governmental oversight, including carefully circumscribed governmental mandates which force capitalism to "factor in" values that: (a) are important to the larger society; but (b) capitalism has no "built in", natural incentive to pursue. Examples of such values include environmental quality, upward mobility and even national security (as in the Loral case).

Where culture and/or religion alone cannot successfully "implant" such vital values within companies, government must.

Again, we are not attempting to end capitalism -- or even Time Warner. Large corporations have a legitimate place -- even an indispensable place! -- in our economy and culture. (Could we have won World War II without them?) We just do not want their place to be so huge that it displaces everyone else, and/or so small in spirit that it excludes vital American values.

RM-9208 Petitioners  
Reply Comments  
PAGE SIX

And/or generates an eventual backlash so severe that the larger society does move toward socialism.

We are, in a sense, cultural conservatives: defenders of capitalism, if a long term perspective is taken. We stand, in essence, with Edmund Burke: the eighteenth century conservative philosopher, and Member of Parliament in Great Britain, who supported the American Revolution.

Edmund Burke said this (and we strongly agree with him):

"The conservative statesman is one who preserves institutions by improving them."

#### Update On LA NUEVA RADIO MUSICAL

Speaking of backlashes, we have an update:

In our April 25, 1998 Special Comments, Requesting A Suspension of Microbroadcasting Prosecutions, we mentioned that the FCC had recently shut down La Nueva Radio Musical in New Haven. This unlicensed microstation had filled the gap left in the Hispanic community when a licensed station was acquired and subjected to a format change. It was the only Spanish station in a city where 1 out of 5 people are Hispanic.

We added that more than 5,000 residents of New Haven County (mostly, but not totally, Hispanics) had signed Petitions urging the Commission to put La Nueva Radio Musical back on the air.

2,000 signatures have been added in the 2 weeks since then.

RM-9208 Petitioners  
Reply Comments  
PAGE SEVEN

COMMENTS ON SPECIFIC ISSUES

We had originally intended to present these views as Additional Written Comments, to be filed on or before April 27, 1998. Upon reflection, however, we became aware that the views in question had developed largely in response to the criticisms, commendations and/or counterproposals of other parties who are commenting in Docket No. RM-9208.

We therefore concluded that these views would be more appropriately placed before the Commission in the context of Reply Comments.

We add that these views have been circulated to members of the microbroadcasting community through extensive Internet postings and replies, lengthy and numerous exchanges (by phone and E-Mail) and both formal presentations and informal discussion at various conferences. These processes have resulted in refinements, revisions and clarification of underlying issues where agreement could not be reached. In short, we have "done our homework" as "lobbyists" within the microbroadcasting community. We can therefore assure you that the views set forth below are widely known, across the nation, within the microbroadcasting community -- and we can further assure the Commission that every major segment of this community has had ample opportunity for feedback on what we are saying now. Our comments are our own, but they are informed comments.

Points of Apparent Consensus and Disagreement  
Within the Microbroadcasting Community

With respect to current microbroadcasters, we believe that there is a consensus (or something close to a consensus) on at least two issues:

(a) Current microbroadcasters generally seek power between 50 watts (the CDC urban ceiling) and 250 watts (the CRC Petition). In practice, we believe that the vast majority of currently unlicensed broadcasters -- over 90% -- could be induced to file for licenses, and to stay within the law once licensed, with power ceilings set in the range of 50 to 100 watts. In this respect, the lower and upper ends of the CDC proposal -- that is, 50 watts urban and 100 watts rural -- probably reflect, more accurately than any other proposals, the minimum power levels needed to entice virtually all current microbroadcasters "into the fold" of regulated stations.

However, we believe that this is only true for current microbroadcasters. Many of these current microbroadcasters began with wattage in the single digits -- sometimes as low as the much-criticized 1 watt! -- and we believe that wattage in the single digits would be sufficient to draw many prospective new entrants into the microstation market.

For this reason, and others, we are proposing a Two-Tiered system of power ceilings. Details are discussed later.

RM-9208 Petitioners  
Reply Comments  
PAGE NINE

(b) Supporters of the CDC proposal -- those we have nicknamed "The Dunifer Brigade" -- favor limiting market entry to "non-profit, non-commercial" broadcasters only. The CRC Petition and the Skinner Petition (RM-9242) allow profit-making, commercial-airing stations -- but propose local ownership restrictions as a way to keep large, out-of-town corporations out of the microstation market. (Unfortunately, these do nothing to keep large, local corporations out of the market!)

For our part, we have proposed that eligibility for microstation licenses -- and for acquisition of microstations that are already licensed -- should be strictly limited to "individuals, groups of individuals, non-profits and the very smallest of small businesses". We stand, basically, in the middle: against market entry by all but the smallest corporations, whether locally based or not, but for robust market entry by entrepreneurs.

There are, obviously, clear differences in these various approaches. There is, however, one point of consensus: From RM-9242 to the CDC proposal, all of the current proposals favor FCC action to keep large, out-of-town corporations from entering this market. Some of us would go farther than others, but all of us would go at least that far.

We urge the Commission to bear this point in mind. If the Commission wants to turn unregulated rebels into regulated

RM-9208 Petitioners  
Reply Comments  
PAGE TEN

and responsible members of the broadcasting community, it had better make certain that the new microbroadcasting licenses truly give such microbroadcasters a stake in The System.

If the Commission instead gives them the appearance of a stake in The System, while in reality corporate "fronts" and/or corporate acquisitions transform the micromarket into yet another colony of the megacorporations, then current microbroadcasters will not be fooled for long -- if at all. Sooner or later (and it will likely be sooner!), the "pirates" will be back in force. This time, however, following what they will surely call "phony legalization", the "pirates" will likely be "madder and meaner", with anger and self-righteousness fueled by a profound sense of betrayal.

In such a situation, it will be harder than ever to persuade these "outsiders" that reforming The System is a viable alternative to overthrowing The System.

In short, in the eyes of many microbroadcasters, and many of their listeners and/or followers, the credibility of the United States Government now rests in the hands of the Federal Communications Commission. Whether or not the Commission wants this responsibility, the Commission has it.

We urge the Commission -- as strongly as we know how -- to take this responsibility seriously.

RM-9208 Petitioners  
Reply Comments  
PAGE ELEVEN

(c) As for areas where microbroadcasters have not reached a consensus, the issue that overshadows all others is whether or not microstation licenses should be strictly limited to stations which are: (1) non-profit; and (2) non-commercial.

We note for the record that it is entirely possible to have a non-profit radio station which airs commercials to cover its expenses. For "The Dunifer Brigade", however, even this option is too much of a compromise with capitalism. Apparently, it is not enough for microbroadcasters to be altruistic and idealistic: they must be impoverished, altruistic and idealistic.

We, the RM-9208 Petitioners, are altruistic and idealistic, too. We are doing all these lengthy filings for nothing and we have no prospect of financial gain if microstations are re-legalized. However, we do not believe that poverty is a virtue: we do not believe the monks who say that it is and we do not believe the Left Wing Puritans who imply that it is.

One among us has had firsthand experience with poverty -- and he knows that there is nothing ennobling or romantic about it. Poverty is a terrible, terrible thing. It racks the mind with pain and fear; it racks the body with unmet needs and hungers; it forces people into neighborhoods unfit for even the rats who live there. Poverty twists the body, mind and soul. It is a horrible, horrible thing.

RM-9208 Petitioners  
Reply Comments  
PAGE TWELVE

We are firmly, passionately, unalterably opposed to mandating poverty for microbroadcasters -- which is exactly what a ban on commercials would accomplish. The only major exception will be when sufficient subsidies can be obtained from non-profit groups. Such groups, however, are often as driven by ideological "special interests" as corporations are driven by financial "special interests". They do not generally speak for, or to, everyday Americans.

Speaking for ourselves, we want to end poverty -- or at least erode its hold on so many individuals and communities.

History makes it clear that socialism will not do the job: it only reduces the incentives for wealth creation and pursues "equality" by impoverishing everyone (except political leaders).

Capitalism can reduce poverty: (a) if it is joined by supportive government initiatives (such as investments in infrastructure, education and efforts to reverse overpopulation through birth control); (b) if its tendencies toward excess (such as the sale of missile guidance technology to Communist China!!) are restrained by culture, religion and/or government; and (c) if its paths of opportunity are kept open and affordable for all segments of society. Where capitalism incorporates a society's vital values (such as self-preservation in the face of Communist Chinese expansionism), where capitalism invests enough on its own to assure a society's economic growth in

RM-9208 Petitioners  
Reply Comments  
PAGE THIRTEEN

the future, and where capitalism is open enough on its own to assure upward mobility in the present, light government regulation can be justified. Where, as in radio today, crucial community needs are effectively excluded from corporate consideration, small companies within the industry cannot grow, and small companies outside the industry cannot enter the market, capitalism has destroyed the justification for its own existence.

Unless it offers opportunity to everyday people, improves the quality of life for everyday people and is accountable to the society from which it draws its profits, there is no compelling reason why the larger society should tolerate capitalism. Some may believe that the rich have a God-given right to get richer, if they can figure out how, but we see capitalism as a human creation -- which must "earn its keep", like every other human institution, by demonstrating how it benefits the society which authorizes it. We cling to the classic, if unspoken, American compromise with capitalism: that is, the rich can get richer if they benefit the rest of us in the process and allow newcomers to get rich, too.

Not for this land the class stratification of Europe!  
Here, when capitalism turns toward royalism, a Social Contract is ruptured -- and "all bets are off".

In short:

Capitalism without opportunity is simply exploitation.

RM-9208 Petitioners  
Reply Comments  
PAGE FOURTEEN

And capitalism without accountability is a runaway train -- racing down the track toward a spectacular collision with The Will Of The People.

In such a case, decisive action by government is needed.

Action is needed to correct the situation, as an end in itself. However, action is also needed to restore the credibility of capitalism among the people -- and to remind the corporations that their existence ultimately depends on adding more to a society where they operate than they take away from it.

As Gwynn Dyer, a British columnist and economist, puts it: "The market is a stupid beast." (Witness the high private sector expenditures on imported, depleting oil versus the low private sector investments in domestically available, perpetually renewable solar energy.)

If this "stupid beast" is not overseen -- and sometimes disciplined -- by effective cultural pressures and/or a responsible and far-sighted government, the "stupid beast" will eat its young.

#### OTHER SPECIFIC ISSUES

(d) Constitutional issues have long been a rationale for unlicensed microbroadcasting. The charges of unconstitutional regulation have often, however, been more implicit than explicit.

RM-9208 Petitioners  
Reply Comments  
PAGE FIFTEEN

This has surely not been the case with the Dunifer-defending Committee for Democratic Communications of the National Lawyers' Guild. As the Commission is well aware, the CDC has made the assertion -- in filings with both the Commission and the Federal Ninth Circuit Court -- that the current ban on microbroadcasting violates the First Amendment to the U.S. Constitution. A Ninth Circuit Court judge has considered this argument solid enough to justify keeping Free Radio Berkeley on the air until a trial can determine the merits of this Constitutional claim.

As the Commission is also aware, we have challenged the Constitutionality of the microbroadcasting ban as well. We did so in our April 25, 1998 Special Comments, Requesting A Suspension of Microbroadcasting Prosecutions.

In that document, we asserted that the ban on microradio violates the Fourteenth Amendment to the U.S. Constitution: "equal protection of the laws".

We ask the Commission to note two implications:

1. There are now two independent grounds for challenging the Constitutionality of the ban on microbroadcasting. While we neither endorse nor reject the CDC's First Amendment claim at this time, we note that it does not preclude our own claim: a court could accept either or both. Thus, if FCC action or inaction invites a lawsuit, it might be a "two front war".

RM-9208 Petitioners  
Reply Comments  
PAGE SIXTEEN

2. Although some might say that an unconstitutional regulation is an unconstitutional regulation, there are very real differences in the remedies that the two different arguments would require.

The First Amendment claim, at least as presented by the CDC, would require the Commission to reduce regulation of the airwaves to the minimum level needed to prevent chaos. The Fourteenth Amendment claim would allow essentially any level of regulation, short of censorship or expropriation, so long as the Commission provides a reasonable range of broadcasting opportunities across America's socioeconomic spectrum.

In short, the First Amendment argument, at least as phrased by the CDC, points toward minimal regulation. Our own Fourteenth Amendment claim points toward optimal regulation: it is not an attack on the very power to regulate. The Commission may regulate as much as necessary, so long as it regulates fairly.

The body of U.S. Supreme Court decisions is supportive of the Fourteenth Amendment argument. We cite two examples.

First, the U.S. Supreme Court has declared unconstitutional the once-established practice of requiring defendants to go without legal representation if they could not afford a lawyer. The Court concluded that this practice violated "equal protection of the laws" by depriving many poor people, in a taxpayer-funded forum, of the legal resources available to other social classes.

RM-9208 Petitioners  
Reply Comments  
PAGE SEVENTEEN

This case is significant, of course, as an application of Fourteenth Amendment principles by the nation's highest court.

However, it may be even more significant for its conclusion that the Fourteenth Amendment prohibits discrimination, by any arm of government, on the basis of class or income. In order to be prohibited by the Fourteenth Amendment of the U.S. Constitution, discrimination by a government entity does not have to be based on race, creed or religion. Demonstrable and material class discrimination is enough to justify judicial intervention under the Fourteenth Amendment.

Despite the blessings of Congress and President Clinton, market-mandated allocation of radio station licenses is still unconstitutional on its face when it denies over 99% of the American population an opportunity to acquire a license.

Although we would not consider it a prudent or practical option, Congress could theoretically abolish the FCC and leave the airwaves completely unregulated. This might blunt our Fourteenth Amendment claim, and stop microbroadcasting prosecutions (although it would certainly pose other problems).

However, so long as the FCC exists, and does any regulating at all, it must regulate with an eye to providing "equal protection of the laws". Its regulations must not discriminate on the basis of race, creed, religion or class. If regulations allow money to decide everything, they are inherently unlawful.

RM-9208 Petitioners  
Reply Comments  
PAGE EIGHTEEN

The other precedent we would mention is the U.S. Supreme Court's decision to strike down some versions of the death penalty: specifically, those versions which left sentencing of a capital offender entirely up to the judge or jury. This lack of objective, impersonal criteria for imposing the death penalty was -- in the eyes of the Supreme Court -- a violation of the Fourteenth Amendment. It raised the real possibility that different defendants in identical situations might receive radically different sentences.

Opponents of the death penalty had attempted for years to ban executions through claims based on the Eighth Amendment: that is, the Constitution's prohibition of "cruel and unusual punishment". This direct approach did not sway the Court (perhaps because it is difficult to argue that a penalty supported by 3 out of 4 Americans is a violation of established social norms).

However, the Fourteenth Amendment argument got results -- and, by judicial standards of time, they were fairly quick results. Such is the power of a Fourteenth Amendment claim.

In the case of current Commission regulations, we believe that it would be easy to draw a comparison between: (1) the allocation of licenses by dollars, with no objective or impersonal standards to assess the value to society; and (2) the failure to set any standards for applying the death penalty.

RM-9208 Petitioners  
Reply Comments  
PAGE NINETEEN

We believe that a reasonable comparison can also be drawn between: (1) exclusion of access to the airwaves by all -- absolutely all! -- of the parties who cannot afford the equipment for transmissions above 100 watts and/or do not have the money to bid competitively in a licensing auction; and (2) denial of legal representation, even in criminal cases, to those who cannot afford to hire a lawyer.

For more information on Fourteenth Amendment concepts, we recommend that the Commissioners and Commission staff read **GIDEON'S TRUMPET** by Anthony Lewis. This non-fiction book, authored by a writer for **THE NEW YORK TIMES**, traces the strategy and tactics which led to the Supreme Court's decision, in the **Gideon** case, that low-income defendants must be given access to court-appointed lawyers.

At George Washington University, where Don Schellhardt earned his law degree, **GIDEON'S TRUMPET** was required reading for first year students. We mention this to illustrate the importance placed upon the Fourteenth Amendment by a major law school. (**U.S. NEWS AND WORLD REPORT**, in its annual ranking of graduate and undergraduate institutions, has rated George Washington as a "top 20" law school.)

Of course, we acknowledge that the simple existence of differing impacts on different classes (or different

RM-9208 Petitioners  
Reply Comments  
PAGE TWENTY

racess or different religions) does not, in and of itself, automatically make a statute or regulation unconstitutional. It does, however, render such a statute or regulation "suspect" -- to use a word that is often popular among Supreme Court Justices.

Once a court decides that a statute or regulation is "suspect", due to differing impacts on social classes (and/or other societal sub-groups), then defenders of the status quo must demonstrate why the differing impacts advance the public good and are "reasonable" under the circumstances.

For example, a public housing project will discriminate against those who are not poor. This is clear discrimination -- a ban on subsidized rent for middle and upper class citizens -- but it is also "reasonable" discrimination, given the goals of public housing and its value to society.

Can the FCC come up with a reasonable reason for excluding over 99% of the American people from the airwaves??

We will answer the question this way. In the Gideon legal representation case, the losing side argued (among other things) that the status quo was saving taxpayers' hard-earned money. In the death penalty case, the losing side cited (among other things) the need to deter crime. These arguments went down to defeat -- but they are still stronger than the arguments for retaining royalist radio.

RM-9208 Petitioners  
Reply Comments  
PAGE TWENTY ONE

When and if the Commission issues a proposed rule to re-legalize microbroadcasting, we urge it to include a specific solicitation of public comments on the Constitutionality of: (1) the current ban on microradio stations; (2) the recent Congressional mandate for comprehensive use of auctions as the way to allocate radio station licenses; and/or (3) any other Commission policies or regulations which are relevant to the issue of microbroadcasting re-legalization.

Everyone can present their views and/or case law.

(e) The question of spectrum scarcity is directly related to both the Constitutional issues and the practical issues in the microbroadcasting debate.

1. With respect to the Constitutional issues, the assumption of spectrum scarcity is the cornerstone of virtually all current regulation of radio. (We know that this is not news to the Commission!)

In the Red Lion case, the Supreme Court held that the Constitution permits a uniquely high level of broadcasting regulation, compared to other forms of free expression, because spots on the spectrum are "uniquely scarce".

If you take away the assumption of spectrum scarcity: (A) the rationale for broadcasting regulation is seriously undercut; and/or (B) an alternative rationale is needed.

RM-9208 Petitioners  
Reply Comments  
PAGE TWENTY TWO

Not surprisingly, some parties who favor less regulation -- or, more commonly, less regulation of the ways they want to operate -- have argued that spectrum scarcity is a thing of the past, thanks to new technologies. Sometimes, other factors are mentioned as well -- and, occasionally, it is even asserted that spectrum scarcity has, from the start, been a fiction to justify governmental oversight of the airwaves.

We do not agree that spectrum scarcity is a thing of the past. We challenge this assertion for two reasons:

(A) We do not believe it is true. We do not even believe it is close to coming true.

The potential of digitalization, and perhaps other emerging technologies, is still largely -- potential. It is not yet clear how far these technologies can actually take us. Nor is it clear whether the Commission will: (i) require widespread access to these new technologies, subject to reasonable conditions; or (ii) allow these new technologies to stay in the hands of an (essentially unregulated) monopoly or oligopoly.

We, the RM-9208 Petitioners, think of ourselves as far-sighted, if not outright futuristic. We all view **STAR TREK** as science fiction -- not fantasy! -- and even see star travel as an achievable goal in the coming century.