

Before the  
Federal Communications Commission  
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION  
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In Re:

Jerry Szoka,  
Cleveland, Ohio

CIB Docket No. 98-48

Order to Show Cause Why a Cease  
and Desist Order Should Not Issue

To: The Commission

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Exceptions to Initial Decision

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## I. Introduction.

Jerry Szoka (Szoka) started Grid Radio (GR) in September, 1995. GR operates a microbroadcast station on 96.9 Mhz. in Cleveland and serves the public interest by providing information and entertainment to a niche audience previously unserved by the "full power" FM stations assigned to the market by the Commission. GR provides this vital service without support from commercial advertising and without interference to licensed stations or other services.

Szoka now stands accused of the "crime" of serving his audience without obtaining prior license from the Commission. On April 2, 1998, the Commission issued an order to show cause why a cease and desist order should not be issued against Szoka barring him from further unlicensed broadcasts, and proposing a forfeiture of \$11,000. On June 10, the CIB filed a Motion for Summary Decision. Szoka opposed summary decision and sought the addition of several factual and legal issues. Without holding a hearing on any of the requested factual or legal issues, Chief ALJ Chachkin released his summary decision on Sept. 4. Szoka hereby appeals the adverse initial decision to the Commission pursuant to § 1.265 of the Rules.

## II. Questions Presented for Review.

1. Whether the present licensing scheme violates the Congressional mandate set forth in the Communications Act to efficiently use the radio spectrum in the public interest.
2. Whether the present licensing scheme violates the First Amendment rights of Szoka and his audience by either imposing a prior restraint or an unjustified content-based regulation.
3. Whether the \$11,000 forfeiture is unconstitutional as excessive under the Eighth Amendment and Szoka's ability to pay, or, as at least quasi-criminal, imposed in violation of the rights guaranteed by the Fifth, Sixth, and Seventh Amendments, and the Small Business Regulatory Enforcement Fairness Act of 1996.
4. Whether the ALJ should have held a fact-finding hearing on the requested issues.

### III. Factual Background.

Jerry Szoka (Szoka) founded Grid Radio (GR) in September, 1995 because the existing stations serving the Cleveland market were not adequately serving the entertainment and information needs of his niche audience of gay men and women. GR's unique radio format has served the public interest and dramatically improved the lives of his listeners. Szoka Declaration at ¶ 29 & Ex. B (collecting listener comments regarding the need for and value to the community of GR).<sup>1</sup> He chose an empty frequency, 96.9 Mhz., and a power output, 48.8 watts ERP, and antenna height, 80 feet HAAT, that would not cause harmful interference, while at the same time were sufficient to serve his audience with a quality signal. *Id.* at ¶ 21 & Ex. A. Szoka carefully considered applying for an FCC license, but did not do so because the regulatory regime imposed by the FCC, including the channel allocations, minimum power requirements, and financial qualifications, imposed an impenetrable economic barrier. Szoka sought both to serve his audience, ignored by the existing licensees, and demonstrate to the FCC the necessity, utility, and efficiency of microbroadcasting. *Id.* at ¶¶ 19-20, 22

GR now broadcasts seven days a week, from 4 pm. to 3 am. Monday through Friday, with broadcasts beginning at 1 pm. on weekends. *Id.* at ¶ 3. None of the 16 FM stations heard in the Cleveland market serves the distinct programming needs of GR's audience. *Id.* at ¶ 4. GR's format is entirely non-commercial. The station is supported through donations and a volunteer staff. *Id.* at 10. News and information are provided primarily through a 3-hour weekly program called "The Beat Boys." This program provides news and interviews pertinent to the gay community, and routinely deals with issues such as gay marriage, hate crimes, local artistic and entertainment events, fundraising events, and interviews. *Id.* at ¶ 5. GR also has a community bulletin board and makes routine public service announcements (e.g. AIDS awareness and testing, safe sex, and housing issues) and provides information on counseling services (critically important to teens who have questions and concerns about their emergent sexuality and may be considering suicide). *Id.* at ¶¶ 7, 8.

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<sup>1</sup> References are to attachments to Szoka's July 28, 1988 opposition to motion for summary decision.

GR entertains its audience with a format of club-oriented dance music, which is also unavailable elsewhere in the market. *Id.* at ¶¶ 9, 11-14. Perhaps GR's most important public interest benefit is intangible, and can never be measured by counting hours of operation, ASCAP revenues, the percentage of time devoted to news and public affairs, ratings, or a comparison of formats—the sense of community, participation, and empowerment it helps to create for its audience. *Id.* at ¶ 6.

The CIB has not alleged that GR is causing any harmful interference with other licensees or services. Nor has the CIB alleged that GR has or is posing any threat to public health and safety. GR's \$4,000 worth of equipment was designed, selected, and installed to meet or exceed the technical standards of equivalent "type approved" equipment. There is no allegation of any failure by GR to adhere to technical standards. *Id.* at ¶¶ 15-18. GR has broadcast in a way that is not a nuisance to other stations. As a licensed electrician and former technical adviser at a college radio station, Szoka is not an irresponsible "pirate" or worse. *Id.* at ¶¶ 15, 17. Rather, he has confined his signal within the limits recognized by other broadcasters, making every effort to avoid interference with other broadcasters and services. Because GR's signal is comparatively weak, and the FCC has allocated all frequencies in the Cleveland area on the basis of Class B stations, 47 CFR § 73.202, it has not been difficult for GR's small station to fit on an unused portion of the spectrum.

#### IV. The FCC Banned But is Now Reconsidering Whether to License Microbroadcasters Such as Szoka.

The federal government has chosen the speakers allowed to broadcast their messages in the radio spectrum. The number of these speakers granted licenses has been carefully limited through a complex system of laws and regulations. These limitations have been and continue to be entirely imposed by governmental choice rather than any intrinsic limitations dictated by the technology or the spectrum resource itself.

By regulation, the Commission has banned and refused to license microbroadcasters such as Szoka. *See, e.g.*, 47 C.F.R. § 73.512(c) (except in the state of Alaska, the FCC will not accept new applications for licenses from Class D Stations, defined to include stations operating with less than 100

watts); 47 C.F.R. § 73.211(a) (FM stations must operate with a minimum effective radiated power of 100 watts); 47 C.F.R. § 73.511(a) (no new noncommercial Educational station will be authorized with less than the minimum power requirement for Class A Stations [100 watts]); *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 FCC 2d 240 (1978), *recon. den.*, 70 FCC 2d 972 (1979); *Amendment of Part 74 of the Rules Concerning Translator Stations*, 7 FCC Rcd 7212 (1990), *recon. den.*, 8 FCC Rcd. 5093 (1993) (no original programming on translators). The Commission presently interprets these rules and policies as a blanket ban on microbroadcasters such as Szoka. *See, e.g.* Unlicensed FM Station, Orlando, Fl. Request for STA (denied April 7, 1998).

The FM spectrum, generally and in Cleveland, is not fully utilized. Szoka has found a "hole" and is serving the public interest by providing his small audience with unique and diverse programming not available elsewhere. Accordingly, the ban on microbroadcasters has been criticized as both irrational and not achieving even its intended goals. *See, e.g.* Note, "Educational FM Radio -- The Failure of Reform," 34 Fed. Com. L.J. 432, 450-53 (1982) ("Educational FM Radio"); *see id.* at 465 ("The rule change not only failed to achieve its goals, but it dealt them setbacks, making them more difficult to achieve in the future."). For example, it aggravated spectrum scarcity in the commercial spectrum. *Id.* at 434 ("The rule change has increased the crowding of the spectrum and has done so without achieving any improvement in service to the public"). *See also, e.g.* Hassle," Radio World (Aug. 20 1997) ("The legal limits of unlicensed operation are set too low. The radio band can accommodate more low-power operations than it does."); Charles Fairchild, "The FCC and Community Radio," Z Magazine (Jul. 1997), *available in*, <<http://www.radio4all.org/fp/FCC.html>> ("the NPR/NFCB alliance pushed for what they called the 'professionalization' of public and community radio").

The FCC is presently undertaking a public inquiry into the need for, technical feasibility of, and implementing rules for a new FM microbroadcasting service. RM 9208, 9242. A number of technical and policy considerations have fueled this inquiry. First and foremost, there is a considerable amount of spectrum resource within the FM broadcast service that has been deliberately left vacant that could be used by microbroadcasters in both urban and rural communities. Second, rapid consolidation of

ownership has taken place following the sweeping changes implemented by the Telecommunications Act of 1996.<sup>2</sup> That statute allowed up to eight stations to be owned by a single entity in a market and removed all restrictions on the total number of licenses that could be held by a single entity.<sup>3</sup> The increased concentration has reduced the number of independent voices, and tended to standardize formats and reduce the amount of truly locally oriented content. Third, the observed market demand by as many as several thousand "pirate" stations demonstrates that there is a growing unmet need for community-based radio. Fourth, improvements in transmitter and receiver technology during the past two decades can facilitate the more efficient use of the spectrum. Even the Commission has recognized that there is now less of a need for separation on second and third adjacent channels as a protection against harmful interference.<sup>4</sup>

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<sup>2</sup> Even Chairman Kennard has recognized the threat that the resulting reduced number of voices poses to the values protected by the First Amendment and the FCC's affirmative duties under the Communications Act. In the April 6, 1998 issue of *Broadcasting & Cable*, "\_\_\_", Kennard was quoted as saying that he is "concerned about ensuring that there are opportunities for people to participate in the broadcast community...It troubles me that there are fewer opportunities to do that today, but we know that there are many, many people, who still want to speak to their communities over the airwaves. And these are not just minority-owned businesses. These are community groups, churches, small businesses and people who want to have use of the public airwaves." Kennard also stated, "I really fear the day when we have a world in which people in any community get all of their news and information, local news and information, from only one or two sources over the air. I think that's a threat to the democratic process."

<sup>3</sup> Section 202(a) "National Radio Station Ownership Rule Changes Required: The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally."

<sup>4</sup> Szoka commissioned a study by Doug Vernier that found the closest station to be in the distant Akron market. The closest was 2 channels away --WKDD at 96.5 -- for which interference could be predicted using FCC criteria in a radius of 1.5 km. The second was two co-channels away -- WONEFM at 97.5 -- and the only interference which could be predicted for it was in a 500 meter radius, which contained no permanent residents. Vernier Study, Szoka Decl. at Ex. A. These numbers should be put into perspective. Recent rulings on "grandfathered" stations that exceed ordinary spacing requirements have found that these theoretical predictions of interference are probably too high when the capabilities of modern receivers and transmitters are considered. See Report and Order, MM Docket No. 96-120, RM - 7651 (Aug. 4, 1997) (short-spaced stations seldom affected by second and third adjacent channel interference; small risk "is far outweighed by the improvement in flexibility and improved service).

## V. Szoka Has Standing to Raise the Statutory Violations and Unconstitutionality of the Microradio Ban as a Defense in this Proceeding

The Chief ALJ improperly ruled in Conclusion 10 that Szoka has no standing to raise the FCC's statutory and constitutional violations as defenses in this proceeding. The statutory ban is directly applicable to Szoka, and as noted above, it is the present policy of the Commission unequivocally not to license operations such as GR. The 1978 Second Report and Order reveals that the factfinding -- primarily petitions -- used to eliminate Class D's from the FM service was insufficiently cognizant of the Commission's various statutory obligations, *inter alia*, to maximize use of the spectrum, encourage the airing of diverse opinions, and promote the public interest. It can and should be revisited because the moribund factfinding upon which it was based undermines the Commission's statutory duty to maximize use of the spectrum in the public interest.

Because the FCC had, at a minimum, the duty to provide Jerry Szoka with some fair opportunity to obtain a waiver, the regulations which effectively barred his ability to obtain a license shield him from liability for failure to do so. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157-1158 (D.C. Cir. 1979) (a waiver based on First Amendment considerations must be given more than "routine treatment"). "[W]hile a broadcasting station, as defined in the Act, which affects interstate communications clearly must be licensed, the Commission must make a provision for the issuance of an appropriate license." *C.J. Community Services v. FCC*, 246 F.2d 660, 663 (D.C. Cir. 1957).

Szoka has standing under Article III of the Constitution to challenge the forfeiture and cease and desist order sought by the CIB. He is aggrieved by the CIB's enforcement proceedings and has suffered from the trampling of his First Amendment rights. These injuries are traceable to the CIB's conduct, and the courts -- like this tribunal -- have authority to redress the grievances raised by the Szoka. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The courts have repeatedly recognized that being subject to forfeiture proceedings by the FCC gives one standing to challenge not just the statute pursuant to which a forfeiture was imposed, but also regulations of the Commission whose existence is indirectly linked to the proceedings against the defendant. *See Lutheran Church Missouri Synod v. FCC*,

141 F.3d 344 (D.C. Cir. 1998). For example, a religious broadcaster had standing to challenge the FCC's affirmative action regulations after it was sanctioned for allegedly not being candid in its reporting about its hiring practices, since the aspect of its reporting that was deemed lacking in candor was related in subject matter to the affirmative action regulations. *Id.* at 349-50. Not only could the broadcaster assert its own rights to challenge the regulations, it could assert the rights of third parties -- its employees -- to whom the regulations had never been directly applied. *See id.* The D.C. Circuit found that the "black mark" on its record resulting from the forfeiture itself was sufficient injury to give the broadcaster standing to challenge the regulations whose existence indirectly led to the forfeiture. *Id.* *But see United States v. Dunifer*, 997 F.Supp. 1385, 1389 (N.D. Cal. 1998) (station which has not applied for a license can only challenge the FCC's regulations on overbreadth grounds, not as applied to him, because merely being injured by the regulations is not enough).

The fact that the constitutionality of the Commission's licensing scheme has been previously upheld by the courts, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), does not mean that the FCC's regulations adopted under color of those statutes (here the ban on microbroadcasting) are constitutional, and thus Szoka's failure to obtain a license as required by statute does not prevent him from challenging the Class D regulations which make it impossible for him to obtain a license. The courts have repeatedly struck down regulations adopted by the Commission pursuant to its rule-making authority where those restrictions contravened constitutional guarantees. *See, e.g.*, *Lutheran Church v. F.C.C.*, 141 F.3d 344 (D.C. Cir. 1998) (voiding the Commission's affirmative action policy for licensees, 47 C.F.R. § 73.2080(b)&(c), as in violation of the Fifth Amendment's ban on race discrimination, even though the rule was adopted pursuant to the Commission's authority under 47 U.S.C. § 303, previously upheld by the courts, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)(upholding the "public interest" standard of 47 U.S.C. §303); *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974)(upholding FCC's power to regulate hiring practices of broadcasters pursuant to 47 U.S.C. § 303's public interest standard), to regulate the hiring practices of licensees). Given that Congress is owed "a standard [of constitutional review] more deferential than we accord to judgments of an administrative agency," *Turner Broadcasting*

v. *F.C.C.*, 117 S. Ct. 1174, 1189 (1997), it would be anomalous to simply rubberstamp agency regulations simply because they purport to implement the will of Congress.

Contrary to the suggestion in *In re Ptak*, CIB Docket No. 98-44 (July 6, 1998) (following the decision in *United States v. Dunifer*, 997 F.Supp. 1235 (N.D. Cal. 1998)), it is well-established that although a statute governing an agency may be constitutional, the agency's interpretation of that statute may be unconstitutional, and may violate the very statute it purports to implement. *E.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 574-75 (1988) (rejecting the National Labor Relations Board's interpretation of National Labor Relations Act provisions which were previously upheld by the Supreme Court, because the NLRB's interpretation of them might violate the First Amendment); *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (rejecting the Justice Department's interpretation of the Voting Rights Act, which it administers, because "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress authority under § 2 of the Fifteenth Amendment [in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)] into tension with the Fourteenth Amendment"); *Hopwood v. State of Texas*, 78 F.3d 932, 954 n. 47 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996) (rejecting the interpretation of Title VI of the Civil Rights Act adhered to by the agency which issues regulations under it, the Office for Civil Rights ("OCR"), as violating the Constitution and Title VI itself: "To the extent that OCR has required actions that conflict with the Constitution, the directives cannot stand."), *citing Miller v. Johnson*, 515 U.S. 900, 921 (1995) ("compliance with federal antidiscrimination laws [those upheld in *Katzenbach, supra*] cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws"). Thus, Szoka's ability to challenge the Class D regulations is not foreclosed by prior rulings upholding the Commission's general power to license broadcasters.

As the target of an enforcement proceeding seeking both an injunction and a forfeiture, Szoka does not need to show standing to raise a First Amendment defense -- since the requirement of standing does not apply to defendants. *Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979), provided the plaintiff

has already brought an action which it had standing to bring. In any event, Szoka clearly has standing, since he satisfies the three-part test most recently articulated in *Lujan*: (1) the injunction sought by the CIB is a "concrete and particularized" and "actual or imminent" threat to his First Amendment interest in continuing to broadcast; (2) the proceeding against Szoka, and the injunction sought against him, are "fairly traceable" to the Class D Regulations Szoka seeks to challenge, which prevent him from obtaining a license; and (3) the harm Szoka seeks to avoid "will be redressed by a favorable decision" rejecting the CIB's request based on the invalidity of the Class D regulations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Even if the very real injury of being sued for an injunction against his speech were not enough injury to establish standing to challenge the regulations as applied to him -- as the *Dunifer* decision contends -- Szoka would still have standing, since a license application would have been futile, and even outside the First Amendment context, a plaintiff need not submit to the policy being challenged as applied to him if it is clear that application would have been futile. See *Lodge 1858, American Federation of Government Employees v. Paine*, 436 F.2d 882, 896 (D.C. Cir. 1970) ("the exhaustion requirement does not obtain when it is plain that any effort to meet it would come to no more than an exercise in futility"); *Atlantic Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984) ("exhaustion is not required where it is 'highly unlikely' that the [agency] would change its position if the case were remanded to it"); *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997); *Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998). The well-established rule of law is that resort to further administrative remedies is not required where the issues have been fairly presented to the agency, where administrative remedies available are inadequate, or where further appeal for agency action would be futile. *Greene v. United States*, 376 U.S. 149 (1964); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Sanders v. McCrady*, 537 F.2d 1199, 1201 (4th Cir. 1976); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974). "Courts should be flexible in determining whether exhaustion should be excused." *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997).

Szoka did not need to apply for a license to challenge, here as a defense, the microradio ban as overbroad. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), Thornhill was convicted of violating a statute

prohibiting a person without just cause or legal excuse to picket business premises. Thornhill defended himself on the ground that the statute was unconstitutional on its face. 310 U.S. at 91. The Court explained that Thornhill need not have applied for a license to challenge the statute because “the character of the evil inherent in the licensing system . . . is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression.” *Id.* See also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988); cf. Reed Hundt, May 28, 1996 speech at University of Pittsburgh School of Law, available in <<http://www.fcc.gov/Speeches/Hundt/spreh528.txt> (“FCC’s own history certainly demonstrates that vague rules create real possibilities for mischief”).

Any application for waiver would clearly have been futile. The decisional authority makes clear that the “futility” exception is properly applied where resort to the agency would be useless because the agency has articulated a clear position on the issue which demonstrates that it would be unwilling to reconsider. *Clouser v. Espy*, 42 F.3d 1522, 1532 (9th Cir. 1990); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990); *El Rescate Legal Service v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1991). The FCC demonstrated beyond all doubt that it would be unwilling to license microbroadcasters in Memorandum Opinion and Order In the Matter of Application for Review of Stephen Paul Dunifer, 11 F.C.C. Rcd 718 (Aug. 1, 1995) at ¶ 10 (“Mr. Dunifer’s argument that the Commission’s rules limiting licenses for low power FM services violate the First Amendment is unavailing”).

In fact, it would have been futile for Szoka to seek a license for GR from the Commission. The FCC has never granted a waiver of the Class D regulations, except to two isolated instances that involved waivers for original programming for retransmitting facilities owned by Native Americans which were in such isolated areas that they received no other programming. *Turro v. FCC*, 859 F.2d 1498, 1500 n.1 (D.C. Cir. 1988). In *Turro*, moreover, the Court upheld the FCC’s decision not to grant waivers of the its rule banning original programming on low-power translators. The Court accepted the Commission’s rationale for the blanket ban, administrative convenience, on the basis of the “floodgate” argument. *Id.* at

1499. The Commission would interpose this “floodgate” justification for rejecting waivers to microbroadcasters such as Szoka. The Commission itself eliminated any doubt that it has an open mind on waiver requests (sufficient to mandate “useless” exhaustion as a necessary element of standing to raise affirmative defenses to this enforcement action) in its August 2, 1995 Memorandum and Order denying Dunifer’s Application for Review of his Notice of Apparent Liability, 11 F.C.C. Rcd 718 (1995). *Cf. U.S. Telephone Ass’n v. F.C.C.*, 28 F.3d 1232, 1235-36 (D.C. Cir. 1994) (in striking down forfeiture “guidelines” as an unlawful rule promulgated without prior notice and comment, court found that FCC’s characterization of guideline as a “policy statement” exempt from rulemaking procedures was an improper effort to evade review of its substance since FCC mechanically applied the “guideline” in all but 8 of 300 cases).

Refusing to allow Szoka to challenge the regulations as applied to him on the grounds that he did not apply for a license would be senseless, since any tribunal would still have to address his overbreadth challenge, and it is a basic principle of judicial restraint to decide as-applied challenges first in order to avoid having to reach the issue of overbreadth. *Colorado Republican Campaign Committee v. F.E.C.*, 116 S. Ct. 2309, 2320 (1996) (facial challenge should generally not be decided before as-applied challenge is decided).

V. The Commission's Refusal to License Microbroadcasters Such as Szoka Violates the Communications Act of 1934.

Congress passed the Communications Act of 1934 to secure the benefits of newly developing technologies. Several provisions of the Act impose an affirmative duty on the Commission to facilitate speech and maximize the number of speakers in pursuit of the public interest mandate. See 47 U.S.C. § 303(g)(FCC required to “study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest”); 47 U.S.C. § 303(y) (authority to allocate spectrum “to provide flexibility of use” consistent with treaties, in the public interest, and without “harmful interference among users”); 47 U.S.C. § 157(a)(“It shall be the policy of the United States to encourage the provision of new technologies and services to the public”); 47 U.S.C. § 307(b)(“the Commission shall make such distribution of licenses, frequencies, hours or 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.”)(emphasis added); 47 U.S.C. § 151 (FCC shall regulate “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”); 47 U.S.C. § 326 (Commission has no “power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication”); see also § 257(b), Telecommunications Act of 1996 (“National Policy: In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”). Generally this obligation requires maximizing the number of users on the electromagnetic spectrum and reducing gaps in coverage. It is axiomatic that the “public interest” standard cannot repeal or curtail the First Amendment rights of either the public or broadcasters, and that any regulation of broadcasting must recognize that the interest of the listening public is paramount. In *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94 (1973), for example,

the Court upheld the FCC's decision not to force broadcasters to accept paid editorial advertising. Noting that the "public interest" standard must be construed with due regard to the First Amendment interests of the public, the Court recognized that such a requirement would relegate the airways to the wealthy:

The Commission was justified in concluding that the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth.

*Id.* at 123. Regulations that are contrary to the Act, here the regulatory ban on microbroadcasting, cannot be enforced and must be set aside. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (access obligation that treated CATV systems as common carriers held unlawful under Act).

Congress granted the Commission the power to issue licenses (and imposed the ban on unlicensed broadcasting) to benefit the public by ensuring interference-free access to the public. The licensing power has never been construed to authorize the denial of license to new speakers -- here microbroadcasters such as Szoka who can speak without causing harmful interference -- primarily on the basis of protecting the economic interests of existing licensees. The power to license, thus carefully circumscribed to conform to the mandate of Congress and the First Amendment, was described by the Court in the first case construing the Act a mandate on behalf of the public to make full use of the spectrum without any obligation to protect the economic interests of existing speakers. *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-77 (1940) (footnotes omitted; emphasis added). The D.C. Circuit articulated the Commission's affirmative statutory obligation to license a new non-interfering service, in that case a "booster" to serve an area blanketed by adjacent mountains, in *C.J. Community Services v. FCC*, 246 F.2d 660, 662-665 (D.C. Cir. 1957) (reversing FCC's cease and desist order against unlicensed TV booster). *See also, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (upholding ban on broadcast-newspaper cross-ownership because diversification of media voices was object of both Act and First Amendment).

Unlike other agencies whose purpose is simply to eliminate certain harms in a reasonable manner, e.g., the EPA, the FCC has an affirmative mandate to maximize use of the spectrum resource, that is, to eliminate gaps and waste in the usage of the electromagnetic spectrum while eliminating or avoiding unacceptable interference and guaranteeing diverse programming. See, e.g., *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 274 (D.C. Cir. 1973) (statutory maximum use requirement is related to First Amendment goal of a "diversity of ideas").

Furthermore, the FCC must be flexible and responsive in applying its rules, so that the public interest in a particular case is not undermined by a rigid adherence to preestablished rules and regulations. See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (general rule may not be in "public interest" if extended to every case); *C.J. Community Services v. FCC*, 246 F.2d 660, 662-664 (D.C. Cir. 1957) (the Commission has discretion to withhold issuance of cease and desist order when in the public interest).

The FCC has assigned portions of the electromagnetic spectrum, specifically the bandwidth from 88 to 108 mhz., to the exclusive use of FM radio stations 47 C.F.R. § 73.201. But instead of maximizing the use of this precious resource, it has allowed gaps to remain in the spectrum, leaving various frequencies unused in many geographic areas during most or all of the day. See, e.g., Dunifer Decl. [Ex. A] at ¶¶ 6, 15; Radio World, August 10, 1994, p. 9. "Radio Translators Fill in Coverage Gaps": 47 C.F.R. § 74.1201 *et seq.* (permitting low power transmitters to operate with less than 100 watts if they are transmitting a signal originating from a full-power radio station, but prohibiting local broadcasters from using a transmitter with identical wattage to broadcast any program originating in the listener's community); *cf.* 43 Fed. Reg. 39706 ("even if permitting many 10-watt operations was inefficient [because of interference with potential high-power stations], this did not necessarily mean that a given 10-watt operation was inefficient"); 43 Fed. Reg. 39708 ("there will be space in the commercial FM band to accommodate many of the 10-watt stations that will be required to change channels"); 43 Fed. Reg. 39707 ("there was something approaching general agreement that Class D's could be useful in small towns").

Judge Chachkin did not address Szoka's statutory claim in his conclusions 8-10.

## VI. The Regulatory Ban on Microbroadcasters Such as Szoka Violates the First Amendment.

The regulatory ban on microbroadcasters such as Szoka is both overbroad and an unconstitutional prior restraint in violation of the First Amendment. “[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). A rule “requiring a permit and a fee before authorizing” First Amendment activity “is a prior restraint on speech.” *Id.* at 131, citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). “Prior restraints on speech are the most serious and the least tolerable of infringement on First Amendment rights.” *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and thus “there is a ‘heavy presumption’ against the validity of a prior restraint.” *Forsyth County v. Nationalist Movement*, 505 U.S. at 131, citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Statutes regulating the time, place, and manner of communications are facially overbroad when they delegate standardless discretionary power to administrators resulting in unreviewable prior restraints on First Amendment rights. *E.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990); *Forsyth County*, 505 U.S. at 131, citing *Freedman v. Maryland*, 380 U.S. 51 (1965). These principles apply with added force to Szoka's radio station, since “music and other forms of cultural expression are traditionally protected under the First Amendment.” *Citizens Committee to Save WEFM v. F.C.C.*, 506 F.2d 246, 251 (D.C. Cir. 1974).

The licensing scheme faced by Szoka is overly broad, leaving gaps and therefore waste in the electromagnetic spectrum, it is essentially standardless, making it an unconstitutional prior restraint, and it fails to leave open ample alternative channels for communication.

First, the FCC's complete ban on microbroadcasting is overbroad. Restrictions on broadcasting should be “narrowly-tailored to further a substantial governmental interest.” *F.C.C. v. League of Women*

*Voters*, 468 U.S. 364, 380 (1984); *In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043, ¶ 77 (1987) (“scarcity” is improper basis for applying diluted standard of constitutional protection to electronic media: “governmental restrictions on broadcasters' speech are permissible under the First Amendment only in situations in which those restrictions are ‘narrowly tailored to further a substantial government interest’”), citing *League of Women Voters, supra*. “[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Fane v. Edenfield*, 945 F.2d 1514, 1518 (11th Cir. 1991)(quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1981)), *aff'd, Edenfield v. Fane*, 507 U.S. 761 (1993).

Moreover, “when the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured’ . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and materials way.” *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 664 (1994), citing *Edenfield, supra*. This is especially true when a restriction effectively regulates the content of speech. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (such restrictions must (1) serve a compelling state interest and (2) employ the least restrictive means); see *In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043, ¶ 82 (1987) (“We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different”).

Current regulations do not meet the requirements of narrow tailoring. “Since the principle that a multitude of voices will produce a multitude of ideas is at bottom premised on free entry into the media of communication, that principle must be re-examined to insure that the process of limitation of entry does not itself deny the First Amendment rights of those who might otherwise speak through the scarce media.” *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 274 (D.C. Cir. 1974) (Bazelon, C.J., concurring). While it may be more convenient for the FCC to have a blanket policy on Class D stations,

the possibility of significantly greater tailoring creates a statutory duty to tailor regulations to afford greater opportunities for speakers such as Szoka to use the FM band. *Sable Communications of California, Inc. v. FCC*, 492 US at 130 (law must have more than conclusory assertions of effects: evidence must show “*how* effective or ineffective the FCC’s most recent regulations were or might prove to be”) (emphasis in original).

Canada’s experience with microbroadcasting provides an example of a more narrowly tailored regime that serves the goal of allowing a “multitude of voices.” Since 1978, Canada has licensed low power FM radio broadcasters in remote communities with a simple three-page application form. Broadcast Procedure BP-15 [Ex. B], Canada Department of Communications, p.1 (1978); see *United States v. Dunifer*, No. C 94-03542-CW (Jan. 30, 1995).

Buttressing the Canadian experience is the increasing interest in microradio in other nations across the globe. Microradio stations are being utilized in Colombia, where the government plans to license 1000 such stations, *Dunifer* Decl. [Ex. A] at ¶ 9, and in the Philippines, where UNESCO, the development arm of the United Nations, is planning to set up micro radio stations. *Id.* at ¶ 10. An international radio conference has endorsed the use of microradio stations *Id.*

Moreover, the FCC’s study of micro broadcasting, on which the FCC has relied in refusing to license microradio stations, was conducted in 1978, making it obsolete in light of changes in technology since then that increase precision and reduce interference in broadcasting. The technology has changed since then, and the feasibility of micro-power broadcasting has changed with it. Accord *United States v. Dunifer*, No. C 94-03542 CW, Memorandum and Order Denying Plaintiff’s Motion for Preliminary Injunction and Staying this Action (N.D. Cal., Jan. 30, 1995) (in light of changes in technology, “the government has failed to establish a probability of success on its contention that the current regulatory ban on micro broadcasting is constitutional”).<sup>5</sup>

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<sup>5</sup> The FCC has an obligation to revisit the viability of microradio in light of rapid technological changes since 1978. “The Commission, in its task of managing an ever-changing technological and economic marketplace, has the responsibility to consider new developments in reviewing existing, and in applying new rationales in that marketplace. . . It is appropriate for an administrative agency to modify or eliminate its policies if the conditions addressed by the regulation have changed. . . .As the Supreme Court has

Further evidence of the less restrictive means available to the Commission in this regard is available in the FCC's own history. Until relatively recently, Non-Commercial Education FM broadcast stations could be licensed by the F.C.C. to broadcast with up to 10 watts of power. The FCC's own regulations pertaining to FM translators provide an example of how the Commission could regulate micro radio. The FCC permits translators to re-broadcast, on frequencies within the normal commercial and noncommercial FM radio band, signals that originate from full-power radio stations located far from the community in which the translator is based. Finally, the pending microbroadcasting rulemaking proceedings demonstrate that stations such as GR can be easily licensed, even on a secondary basis, to fill the existing gaps in the spectrum, avoid objectionable interference, and better serve the public interest.

The absolute ban on microradio is a creation of the Commission that can be easily eliminated without detrimentally impacting the government's interest in regulating the airwaves. Even in the most densely populated urban areas, there exists available spectrum space for a multitude of micro power stations in the gaps necessary to separate full power stations from one another. A regulatory framework could easily be implemented whereby any and all currently existing and future full power stations retain top priority, and microbroadcasters are relegated to whatever spectrum space remains available. By eliminating microradio stations that can easily fit within the existing gaps among radio stations, while allowing the licensing of large radio stations that will fill up much of what remains the electromagnetic

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stated, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *In re Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, ¶ 64 & n. 172 (1985) (emphasis added), quoting *F.C.C. v. WNCN Listeners' Guild*, 450 U.S. 582, 603 (1981). The courts have repeatedly overturned, or compelled the FCC to reconsider, policies which have outlived their usefulness. E.g., *Schurz Communications v. F.C.C.*, 982 F.2d 1043 (7th Cir. 1993)(invalidating FCC order except insofar as it repealed "the 1970 finsyn rules," *id.* at 1053-54, in light of internal FCC report indicating that "the rules had outlived their usefulness"); *Meredith Corp. v. F.C.C.*, 809 F.2d 863, 873-74 (D.C. Cir. 1987) (Fairness Doctrine); see also *Bechtel v. F.C.C.*, 10 F.3d 875, 880 (D.C. Cir. 1993) (overturning policy favoring integration of ownership); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984); *In re Syracuse Peace Council*, 2 F.C.C. Rcd 5043, ¶ 60; cf. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 399 (1969).

spectrum, the 1978 Second Report and Order has proven to be such an inconsistent and ineffectual means of preventing spectrum scarcity that it cannot be said to advance important state interests, as is required to provide a constitutional justification for the restrictions it places on free speech. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). It is as if a "Federal Newspaper Commission" said that, in order to conserve paper and ink, only newspapers with at least 1 million general circulation would be legal. All church newsletters, PTA bulletins, and community weeklies would be banned. Such a ban, akin to this one, violates the First Amendment and must be rescinded.

Moreover, the F.C.C.'s licensing requirements, even if they authorized microbroadcast licenses through the waiver process, would be unduly burdensome for microbroadcasters and would thus constitute prior restraints, rather than reasonable time, place, manner restrictions on speech, because they would require microbroadcasters, who use so little power that they pose little threat to the other licensees and services, to undergo the same rigors as larger broadcasters who use much more power and hog much more of the public's airwaves. Licensing requirements cannot impose burdens out of proportion to the scale of the activity the licensee seeks to engage in and the risks. *See Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943); *Follett v. McCormick*, 321 U.S. 573, 576 (1944); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 386 (1990); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983); *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (11th Cir. 1983); *cf. Cox v. State of New Hampshire*, 312 U.S. 569, 577 (1941); *Center for Auto Safety v. Athey*, 37 F.3d 139, 144 (4th Cir. 1996).

A prior restraint on speech is unconstitutionally vague and overbroad even when it contains an exemption or waiver from its prohibitions for speech that is constitutionally protected, since what speech is protected by the First Amendment is not self-evident to applicants, and accordingly must be spelled out *in advance* with clarity to avoid chilling their speech and to avoid the possibility of discriminatory enforcement by agency officials. *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *see also Dambrot v.*

*Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The *Nitzberg* Court rejected the *Dunifer* court's argument that First Amendment problems can be solved by creating a First Amendment exception to a regulations: "It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited." *Nitzberg*, 525 F.2d at 383, quoting *Jacobs v. Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975).

Waiver mechanisms without clear criteria do not suffice even when they contain explicit First Amendment exceptions. For example, in *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1183 (6th Cir. 1995), the University adopted a code banning hostile-environment racial harassment, and included with it a proviso that "the University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals' right to free speech." The Court found that this boilerplate provision did not provide adequate safeguards

The FCC's Class D regulations also lack the procedural safeguards required for a permitting system by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), because there is no specified and reasonable period of time in which a waiver must be issued, and there is no provision for prompt judicial review. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990); *Nitzberg*, 525 F.2d at 384. The FCC need not act on a waiver within any specified period of time. See 47 C.F.R. §73.3573 (providing procedures for processing FM broadcast station applications); 47 C.F.R. §1.3 (waiver provision). And while an applicant for a waiver could eventually appeal the agency's denial to the D.C. Circuit, 47 U.S.C. § 402(b)(1), this is insufficient, since the availability of even immediate appeal -- if not expedited -- was deemed insufficient in *FW/PBS*. See *FW/PBS*, 493 U.S. at 248 (Scalia, J., dissenting).

FCC's blanket regulatory ban on microbroadcasting does not further significant governmental interests in any direct and material way: Exclusion of low-power radio stations with beneath 100 watts,

but not over 100 watts, is inconsistent and belies the interest in spectrum scarcity that the FCC purports to be responding to in banning micro broadcasting. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), quoting *The Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). While the FCC is entitled to reasonable deference, this does not mean that its factual findings must be accepted as gospel.

The ban on microradio also cannot survive even as a time, place, manner restriction on speech because it leaves Szoka without ample alternative means of communicating with his audience: *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1991) (“An alternative [means of communication] is not ample if the speaker is not permitted to reach the ‘intended audience.’”) -- intended target audience can't be reached by Szoka without his micro radio station, and many niche markets are deprived of radio programming because of the FCC's refusal to license the only broadcasters who would find it profitable to reach them: micro broadcasters. Attached to Szoka's declaration as Exhibit B is a lengthy list of e-mails from Jerry's fans, attesting to irreplaceability of his station's programming and the services it provides to HIV sufferers, among others.

#### VII. The Proposed \$11,000 Forfeiture Violates the Prohibition in the Eighth Amendment Against Excessive Fines.

Judge Chachkin rejected in Conclusions 13-14 Szoka's forfeiture-related claims, albeit without any significant analysis. The Eighth Amendment<sup>6</sup> prohibits excessive fines. As a government-imposed punishment for the “offense” of broadcasting without a license, the proposed \$11,000 forfeiture is a “fine” within the meaning of this constitutional limitation. *See, e.g., Austin v. United States*, 509 U.S. 602, 609-610 (1993); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). The \$11,000 forfeiture proposed against GR is unlawful because it bears no relationship—and the FCC's hasn't even alleged any—to the gravity of the “offense” of broadcasting without a license. *See,*

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<sup>6</sup> “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const., Amdt. 8

*e.g.*, *Austin v. United States*, 509 U.S., at 622-623; *Alexander v. United States*, 509 U.S. 544, 559 (1993). In its most recent pronouncement, the Court emphasized that a forfeiture is unconstitutional if it is grossly disproportionate to the gravity of the offense charged. *United States v. Bajakajian*, No. 97-1487 (June 22, 1998). The FCC has not claimed that GR's unlicensed broadcasts have caused any harm. Indeed, the facts demonstrate that GR serves a vital public interest for its audience in Cleveland. The FCC has not sought to contest the beneficial aspects of GRID's activities. The FCC has not claimed that GR has violated any other law, such as facilitating the commission of crimes, obscenity, or unlawful lotteries. Nor has the FCC alleged that the forfeiture serves any other purpose, *e.g.*, remedial or compensatory, other than pure punishment. And, unlike traditional *in rem* civil forfeitures brought against "bad" property, the equipment used by GR may be part and parcel of some offense, but the money sought by the FCC from GR can hardly be said to have committed some crime. *Cf.*, *e.g.*, *Origet v. United States*, 125 U.S. 240, 246 (1888); *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931); *The Palmyra*, 12 Wheat. 1, 13-15 (1827). Just as was the case for the exported currency in *Bajakajian*, it is entirely lawful for GR to broadcast to his audience. All that was needed to export the currency was the filing of a report. Here, all that is needed for GR to broadcast, and to continue broadcasting, is for the FCC to issue a license, which it undeniably has the power—if not the obligation—to do. Accordingly, the proposed \$11,000 forfeiture "fine" must be viewed as unconstitutionally excessive because it bears no relationship to the gravity of the offense charged by the CIB.

#### VIII. Imposition of the Proposed \$11,000 Forfeiture Violates the Small Business Regulatory Enforcement Fairness Act.

In recent legislation, Congress has specifically directed agencies to be lenient in enforcement of regulatory compliance against small businesses such as GR. Congress recently enacted the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121. Congress found, among other problems, that "small businesses bear a disproportionate share of regulatory costs and burdens" and that "fundamental changes that are needed in the regulatory and enforcement of Federal agencies to make

agencies more responsive to small business can be made without compromising the statutory mission of the agencies.” §§202(2), (3). The relevant purposes of SBREFA included creating “a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented” and making “Federal regulatory agencies more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities.” §§ 203(6), (7). Congress required the FCC (subject to certain exclusions not relevant here, for example, “violations that pose serious health, safety, or environmental threats”) to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity.” § 223(a). The Commission has not issued rules implementing SBREFA, nor has CIB asked for the necessary factual inquiry to determine whether a reduction or waiver of the proposed forfeiture is appropriate in this case.

Judge Chachkin rejected the SBREFA claim in Conclusion 14, finding the violation was willful. However, such a determination should only be made after a full fact-finding hearing. Szoka has explained that his “violation” of the Act, if any, is not willful. He believes that he is acting lawfully, and that it is FCC, not GR, that is violating both its statutory mandate and the First Amendment by attempting to shut down GR and impose an unreasonable and unwarranted forfeiture. Szoka Decl. at ¶¶ 22, 27.

#### IX. The Proposed \$11,000 Forfeiture is So Punitive That It Cannot Be Imposed Without Affording Szoka Constitutional Safeguards.

The CIB proposed to punish Szoka as a criminal solely on account of his unlicensed speech. He must therefore be afforded the Constitutional safeguards normally accorded accused criminals. The statutory and regulatory penalties in general, and the \$11,000 forfeiture proposed by CIB in particular, are so punitive in purpose and effect that they are either criminal (triggering the full protection of the Fifth through Eighth Amendments and the Federal Rules of Criminal Procedure) or quasi-criminal (triggering at least the application of the Fifth Amendment’s ban on self-incrimination to the reporting requirements). *See, e.g., Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693

(1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *Lees v. United States*, 150 U.S. 476 (1893); *Boyd v. United States*, 116 U.S. 616 (1886).

X. Judge Chachkin Should Have Held a Fact-Finding Hearing.

Judge Chachkin improperly granted summary decision to CIB. He failed to explain why a full fact-finding hearing should not be held on the issues proposed by Szoka. Such fact-finding is especially important where First Amendment rights are at stake. Also, the summary decision format gave no consideration to, inter alia, Szoka's ability to pay, and to the balance of equities justifying his continued operation while means can be explored, including the microbroadcasting rulemakings, to authorize his lawful operation.