

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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1998 Biennial Regulatory Review -- )  
Streamlining of Radio Technical Rules in )  
Parts 73 and 74 of the Commission's Rules )  
)

MM Docket No. 98-93

REPLY COMMENTS OF BIG CITY RADIO, INC.

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## SUMMARY

Because the Commission's responsibility is to facilitate the use of broadcast spectrum that best benefits the public, Big City Radio, Inc., hereby supports the Commission's proposals to allow FM broadcast licensees to negotiate and implement certain types of interference agreements and to accept point-to-point contour prediction methodology as an alternate approach. New Commission rules that enables licensees to negotiate interference agreements among themselves and to use more advanced measures of projected interference offer additional opportunities for licensees to expand or modify their services to better serve the public. Such new rules are consistent with the realities of today's broadcasting environment and the ability of broadcasters and regulators alike to better understand the technical benefits and defects of any particular proposal. In light of today's technology, a Commission rule that increases the freedom of licensees to expand or improve their services through negotiated agreements that are subject to certain specific requirements and Commission review will not endanger the integrity of the spectrum. And a Commission rule, as the one proposed, that enables applicants to make use of a specific alternative predictive measure when such would better reflect the realities of a proposal is likely to encourage more efficient use of the spectrum, rather than holding broadcasters hostage to the technical limitations of the past. Accordingly, the Commission should adopt its proposals as soon as practicable.

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To the Commission:

**REPLY COMMENTS OF BIG CITY RADIO, INC.**

Big City Radio, Inc. ("Big City"), pursuant to Section 1.415 of the Commission's Rules, hereby submits these Reply Comments in response to comments filed in the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding. <sup>1/</sup> In the *Notice*, the Commission proposed rules that would enable FM radio broadcast stations to cause or accept interference to other FM stations in a manner consistent with the public interest. A broad consensus of commenters support this proposal. *See, e.g.*, Comments of Mullaney Engineering, Inc. at 5-6. However, a few commenters, such as the National Association of Broadcasters ("NAB"), have claimed that the Commission would be abandoning its responsibility to protect the integrity of the FM band were it to adopt this proposal. *See* NAB Comments at 13-20.

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<sup>1/</sup> *Notice of Proposed Rule Making, In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, MM Docket No. 98-93 (released June 15, 1998) ("*Notice*").

Big City disagrees. The Commission's responsibility is to facilitate the use of broadcast spectrum that best benefits the public. At one time, this responsibility may have required rules that erred well on the side of caution, as any attempt to review new or modified facilities required interference studies painstakingly developed by hand with slide rules. Now, the tools to project unacceptable interference have advanced, and limits on the use of broadcast spectrum likewise must be updated if the Commission is to fulfill its responsibility to facilitate the efficient distribution of radio services.

New Commission rules that enable licensees to negotiate interference agreements among themselves and to use more advanced measures of projected interference offer additional opportunities for licensees to expand or modify their services to better serve the public. Such new rules are consistent with the realities of today's broadcasting environment and the ability of broadcasters and regulators alike to better understand the technical benefits and defects of any particular proposal. In light of today's technology, a Commission rule that increases the freedom of licensees to expand or improve their services through negotiated agreements that are subject to certain specific requirements and Commission review will not endanger the integrity of the spectrum. And a Commission rule, as the one proposed, that enables applicants to make use of a specific alternative predictive measure when such would better reflect the realities of a proposal is likely to encourage more efficient use of the spectrum, rather than holding broadcasters hostage to the technical limitations of the past. Accordingly, the

Commission should adopt its proposals to allow licensees to file negotiated interference agreements and to use, as appropriate, the point-to-point (“PTP”) contour prediction model to determine the extent of protected FM coverage contours as soon as reasonably possible.

**I. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO ACCEPT CERTAIN TYPES OF FREELY NEGOTIATED INTERFERENCE AGREEMENTS.**

**A. Negotiated Interference Agreements Are Consistent with the Commission’s Role As the Facilitator of Better Broadcast Service.**

The Commission’s primary responsibility is not, as NAB suggests, to select a single set of “interference standards” to apply uniformly to every radio station in the United States. *See* NAB Comments at 9-10. Rather, the Commission is charged to advance the public interest through regulation of the broadcast spectrum. *See, e.g., Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840 (1997). In certain instances, the public interest is best served by inflexible national standards. In most cases, however, the public interest would be better served by provisions that enable local broadcasters to assess their individual circumstances and to propose expanded uses of the broadcast spectrum in a manner that would best serve their local audiences. Such a regulatory focus on determining what works best in any particular case reflects the nature of radio itself: a fundamentally local service that demands attention to the peculiar circumstances of the area it serves in order to prosper.

In the *Notice*, the Commission proposed a change in its Rules regulating predicted interference among broadcast stations. This change is not radical. The Commission already has established rules to enable other stations to upgrade despite predictions of increased interference. *See, e.g., Notice* at ¶¶ 6-10. As the Commission implies in the *Notice*, the proposed rule simply corrects the existing policy of providing less interference flexibility to fully-spaced stations than stations which already are short-spaced. *Id.* at ¶ 10.

Nor is the Commission abandoning its role as the selector of “interference standards.” The proposal in the *Notice* does not suggest that any station can agree to accept or to cause any type of projected interference. Instead, the proposal strictly defines the circumstances in which parties can negotiate interference agreements, limiting such agreements to cases in which the proposed interference meets four narrow criteria. <sup>2/</sup> These restrictions on acceptable negotiated agreements demonstrate that the Commission does not intend to abandon its role as the regulator of interference, but simply wishes to involve

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<sup>2/</sup> *See Notice* at ¶ 20. These criteria include: 1) limiting total predicted interference experienced by any station to one-twentieth of its protected service area and population; 2) requiring that total service must be five times as great as the increase in total predicted interference, in both area and population; 3) prohibiting predicted interference within the boundaries of any affected station’s community of license; and 4) requiring new interference areas to be served by at least five aural services.

broadcast licensees in determining what types of interference should be permissible in specific cases. <sup>3/</sup>

In sum, the Commission is entirely within its purview in proposing to allow certain negotiated interference agreements. Although the Commission may need to oversee negotiated arrangements involving broadcast licenses, this supervision does not require the *ex ante* prohibition of such arrangements that NAB advocates. As past proceedings have made clear, the role of the Commission is not to prohibit all creative or novel approaches to spectrum use. <sup>4/</sup> Rather, the Commission's role is to encourage private parties to use commercial broadcast spectrum in means advancing the public interest. It is altogether reasonable that the Commission should want to create means by which several private parties might negotiate to improve radio service to a particular locality.

**B. Attempts to Characterize Negotiated Interference Agreements As Fatal to the FM Service Have No Basis.**

The comments of the NAB make sense only if one accepts their underlying premise, which, roughly stated, is: the radio status quo, at least with

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<sup>3/</sup> These criteria, which necessarily limit application of the proposed rule, also should quell concerns that the change would spark a widespread transformation in the ways FM receivers are constructed, as NAB hypothesizes. NAB Comments at 15-17.

<sup>4/</sup> In fact, even NAB agrees that the Commission should be willing to adopt flexible approaches to interference, at least when it comes to NAB's preferred vision of digital audio broadcast ("DAB") radio. See NAB Comments at 30. But the Commission hardly should be more restrictive when regulating known technologies and existing licensees -- with an opportunity for immediate public benefit -- than when considering the uncertain future of an untested form of digital radio.

regard to technical matters, is as good as it can be, and digital radio is the only means by which licensees can hope to make it better. That premise is not just wrong, but dangerously short-sighted.

First, radio is not yet as technically efficient as it can be. Fixed rules that were developed when the Commission had to scrutinize applications with slide rules or hand-held calculators should not serve to limit use of the broadcast spectrum in the age of the computer. A one-size-fits-all spacing rule that might make sense in the dense populations and flat terrain of Florida may make no sense in the rural areas and rough terrain of the Dakotas. Likewise, the mere possibility of a small pocket of interference over a sparsely-settled area should not preclude a change in operations that would bring a new audio service to thousands of people. Negotiated agreements by the parties most familiar with a certain situation provide a means by which the Commission may encourage more efficient broadcast services in particular circumstances without abandoning its role as the protector of the spectrum.

Second, digital radio, whatever its possibilities, is not a legitimate basis for Commission action (or inaction) in this proceeding; any action with regard to current interference proposals should not be based on a prediction of what particular digital audio broadcast ("DAB") technologies may (or may not) require. DAB is not even a recognized service at this time, *see Public Notice*, Petition for Rule Making, RM-9395, DA-98-2246 (released November 6, 1998) ("DAB Petition"), and it is hardly certain whether and in what form any future DAB service may be

implemented. In fact, based on the recent DAB Petition, it is far from clear whether DAB service would even work -- which, of course, is a necessary predicate to determining whether it would be commercially or technically attractive -- as presently designed. For the Commission to deny existing licensees the immediate opportunity to implement better service today in order to protect the possibility of a particular type of an imagined digital service sometime in the future both unfairly and unreasonably prejudices the pending DAB Petition in favor of NAB's preferred form of DAB service and unconscionably harms current licensees and radio listeners.

Third, and perhaps most important, any claim that the integrity of FM broadcast service will be threatened by the Commission's negotiated interference proposals ignores the explicit limits on those proposals. The specific limits as to what types of negotiated interference agreements will be accepted ensure that the FM band as a whole will not be materially and adversely affected by the proposed rule change. As a general matter, the Commission's relatively stringent standards for acceptable interference agreements so limit the instances in which negotiated interference agreements will be possible as to preclude any real likelihood that sellers of FM receivers will feel compelled to downgrade the capabilities of their products. <sup>5/</sup> More fundamentally, however, the nature of the proposed change itself

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<sup>5/</sup> Accordingly, it is inappropriate for the Commission to reject its own proposal based on the slippery-slope logic of NAB, which implies that any capability to negotiate interference agreements by individual FM licensees is tantamount to the

limits any danger to FM broadcasting. The proposed rule does not require any action on the part of any FM broadcast licensee; rather, it simply enables FM broadcast licensees to better protect their own interests and to respond to their own markets. If a struggling station believes it is more likely to survive as a result of an interference agreement, it can negotiate such an agreement and secure its own survival (which, in turn, will help maintain the current level of diversity for a significant number of listeners in that market.) But if a station believes that a proposed interference agreement will cause it to lose listeners (and revenues) or slow its transition to new technologies, then the station will not spend the money necessary to arrange interference agreements and to complete the concomitant technical changes to the station. By extending to FM licensees another technical option, the Commission's proposal is, as outlined below, only likely to strengthen the appeal and diversity of FM broadcasts across the country. <sup>6/</sup>

**C. Negotiated Interference Agreements Would Advance the Commission's Primary Purpose: To Ensure That Use of the Broadcast Spectrum Serves the Public.**

The proposed change not only would pose little risk to the overall health of the FM band, but also would increase the ability of FM stations to protect

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elimination of most or all interference restrictions or the immediate "AM-ization" of the FM band. *See* NAB Comments at 10-11.

<sup>6/</sup> In this regard, it is useful to know that the NAB's trumpeted Ad Hoc Committee, *see* NAB Comments at 2, hardly was representative of the small radio owners that could most benefit from the Commission's proposals. For example, of the four commercial broadcast members, two were from huge broadcast networks (ABC and CBS) that have a significant interest in preserving the status quo.

or improve their service. *See Notice* at ¶ 27. As Cumulus notes in its comments, the proposed rule is well-timed: with the onset of digital television construction, radio stations are increasingly forced to locate new transmitter sites, which may result in occasions where interference agreements offer the best means to locate another feasible site. <sup>7/</sup>

More important, however, is that the proposed rule would enable stations for which the spacing requirements are overly restrictive to expand their services. <sup>8/</sup> In many cases, certain predictions of interference based on spacing or extrapolated coverage contours are not consistent with reality; rather, the interference predicted far exceeds that which actually would result if the relevant stations were operated at higher power or with less separation. *See, e.g.,* Comments of Mullaney Engineering, Inc. at 5. The proposed rule would enable parties whom may be unreasonably affected by general spacing requirements to attempt to improve their broadcast services. In the words of Greenup County Broadcasting,

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<sup>7/</sup> *See* Comments of Cumulus Media, Inc. (“Cumulus Comments”) at 4-5. Nor should the Commission worry that accumulated interference agreements would make it harder for parties to change sites in the future, as it would be in the negotiating stations’ interests to specify caveats to protect themselves against such unlikely future difficulties. Otherwise, it is doubtful that such interference agreements will be so widespread as to block other stations in the market from critically necessary technical changes.

<sup>8/</sup> *See, e.g.,* Cumulus Comments at 3-4; Greater Media Radio Co. Comments at 1-2. Big City, however, wants to emphasize that any consideration of GMRC’s proposal for B0 status should be only in addition to, and not in lieu of, the Commission’s far more flexible and useful negotiated interference proposal.

Inc., the proposal to involve broadcasters in determining the best uses of spectrum in their vicinity “applies common sense to real-world commercial broadcasting.”

In any case, the Commission’s proposed criteria ensure that such agreements undoubtedly would benefit the public. Under the Commission’s proposal, a negotiated interference agreement would have to bring new broadcast service to five times as many persons as would be predicted to experience interference as a result of facility modifications made possible by the agreement. Such interference neither can disrupt service to any station’s community of license nor affect more than five percent of the station’s service area or population. And any interference also must affect only a well-served area -- an area with five or more accessible aural services. All of these restrictions, which limit even predicted interference to areas that are well-served and that are a small part of a station’s service area, further guarantee that the public will not be disserved by any interference arrangement that conforms to the Commission’s proposal.

**D. To Ensure Maximum Public Benefit from the Possibility of Negotiated Agreements, Parties Should Be Able to Agree to Interference Accords of an Indefinite Term.**

In proposing to accept negotiated interference agreements, the Commission has acknowledged that, at least in many cases, private agreements may promote efficient spectrum use. If the Commission wishes to make such private agreements a realistic option for most parties, it must be willing to accept

such agreements with no set expiration date. 9/ Negotiated agreements that are required to terminate at the end of a license term (or at some other point not agreed to by the parties) would eliminate virtually any benefit of such agreements, as parties would be unwilling to risk the resources necessary to negotiate and implement such agreements if the agreement must be re-negotiated every few years or may end without their consent. Moreover, limiting the terms of such agreements would risk disruption of established broadcast service to certain audiences any time the agreements mandatorily expire or are required to be re-negotiated.

Instead, the terms of an approved agreement should be treated as additional conditions on the station's license for however long the parties establish in their agreement. 10/ The Commission may conclude that it explicitly should condition licenses of all stations involved in an interference agreement at the time it approves the agreement (or at the time any station involved in the agreement implements the first modification for which the agreement is necessary.) Such an approach should more than suffice to give any buyer exercising due diligence notice

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9/ Nor is there any real risk that indefinite terms would adversely affect individual stations or the FM broadcast service. First, as the Commission has recognized, individual stations are able to look out for their own interests. *See Notice* at ¶ 19. Second, the Commission's restrictions on the use of such agreements -- especially the constraints on the extent of potential interference and the absolute protection of service to a station's community of license -- so limit any potential interference through such agreements as to pose no material danger to the operations of even small stations.

10/ To the extent that a negotiated agreement leads to modification of existing facilities, it would be reasonable for certain of the terms of the negotiated agreement to become part of any new authorization.

of the interference circumstances of the particular station. In addition, such an approach should make it easier for the Commission, other stations or the public to verify the interference requirements of a particular station.

**II. THE COMMISSION ALSO SHOULD ALLOW LICENSEES TO TAKE ADVANTAGE OF NEW PREDICTIVE ALTERNATIVES IN ORDER TO ENABLE A MORE REALISTIC APPROACH TO USE OF THE BROADCAST SPECTRUM.**

Big City also agrees with the Commission, and a large number of commenters, that licensees should be able to use point-to-point contour prediction methodology ("PTP") as an alternative means for calculating a station's contours. <sup>11/</sup> Currently, the Commission bases its entire allocation and facility-approval process based on what it could hope to do with slide rules and hand-held calculators. The tools available to the industry and the Commission have progressed, and so should the Commission's rules.

PTP would be a welcome additional alternative to the method that the Commission currently accepts with regard to contour predictions. PTP would enable the Commission and licensees alike to rely on a method that takes into consideration terrain effects that exist farther than a few miles from a proposed transmitter site. That NAB can find instances in which the PTP method may be marginally less accurate than the existing method cannot be determinative. Otherwise, the mere fact that PTP is indisputably more accurate than the current

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<sup>11/</sup> See, e.g., Silverado Broadcasting Company Comments at 1-4; Redwood Empire Stereocasters Comments at 1-3.

method in other cases should compel the Commission to discard its current method in favor of PTP.

Fortunately, unlike the NAB suggests, *see* NAB Comments at 25-27, the Commission need not choose between the two approaches. It has proposed that the PTP method should serve as an alternative, not a replacement, for the current method. Accordingly, the Commission's PTP proposal should be promptly adopted as a useful alternative. 12/

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12/ Of course, the Commission should be willing to consider, as appropriate, other predictive methods that have been or may be shown to be more accurate than either PTP or the existing method with regard to particular circumstances.

### III. CONCLUSION

Broadcasters should be able to negotiate interference agreements between and among themselves, and they should be able to use more accurate means of predicting coverage and/or interference areas. To imprison the current potential of broadcasting because of past limitations or one party's imagined future is inconsistent with the Commission's responsibility to facilitate more efficient use of the broadcast spectrum. Accordingly, the Commission should adopt the proposals to:

1. enable FM broadcast licensees to negotiate interference agreements among themselves within certain Commission guidelines; and
2. enable broadcast licensees to make use of more modern predictive methodologies, such as PTP, in determining their predicted contours.

For the foregoing reasons, Big City applauds the Commission's proposal in the *Notice* to update its regulations in light of today's technology.

Respectfully submitted,

**BIG CITY RADIO, INC.**

By 

Michael Kakoyiannis

Its President

December 4, 1998

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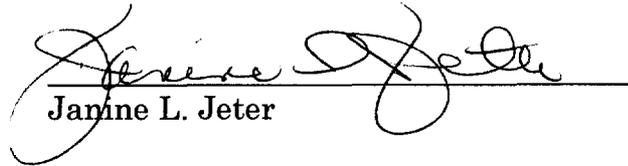
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