

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Creation of a Low)	MM Docket No. 99-25
Power Radio Service)	
)	RM-9208
)	RM-9242
)	
)	

**REPLY COMMENTS OF THE
CORPORATION FOR PUBLIC BROADCASTING**

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I. INTRODUCTION AND SUMMARY.

The Corporation for Public Broadcasting (“CPB”) offers these reply comments in response to the Commission’s Notice of Proposed Rule Making in the above-captioned proceeding released February 3, 1999 (the “Notice”), proposing to authorize the operation of low power FM (“LPFM”) radio stations.

The more than one thousand sets of comments that have been filed in this proceeding reflect two facts that are, at this point, indisputable. First, there is a pent-up demand for radio frequencies that the Commission is right to take seriously and to seek to accommodate. Second, satisfying this demand for frequencies is not the same thing as satisfying the public’s need for a robust and well-administered local radio service. The LPFM proposal as it currently

stands is an unjustified departure from established spectrum management principles that will not achieve the Commission's stated objectives.¹

Without exception, every reliable technical study submitted in this proceeding suggests that abandoning second and third adjacent channel protection criteria in order to make room for LPFM stations would destroy existing radio service for millions of listeners. Those few studies that claim there would be minimal impact fail to use a reasonable baseline of acceptable reception. Thus, their definition of "minimal impact" does not correspond to the real world experience of listeners, particularly listeners of lightly processed public radio stations who would experience crackling, hissing, or complete signal failure upon the introduction of LPFM stations. It was these types of defects that drove listeners from AM to FM radio. These listeners may have no alternatives at all if the FM band were similarly overstressed.

Even if the Commission were to ignore the technical evidence and proceed with its LPFM proposal, the record suggests that it will be difficult to create the sort of decentralized, but viable and rational, service that the Commission imagines. The commenters have presented two distinct visions of an LPFM service. Some aspire to a truly "microradio," noncommercial service that would be impractical to administer and difficult to sustain. Others desire an entrepreneurial commercial service that could exist only in less densely populated areas, would be constrained by existing rules and licensing requirements, and would likely replicate the concentration and barriers to entry that the Commission seeks to change. Conceivably, the Commission could attempt to foster both visions by adopting different rules for LPFM stations of

¹ These goals include providing a low-cost means of serving urban communities and populations in smaller rural towns, increasing the amount of community-oriented broadcasting, encouraging new radio broadcast ownership, and promoting diversity in radio voices. *See* Notice at ¶ 1.

different power levels, but CPB questions whether the FCC has the legal authority or the capability to administer such a complex scheme. Most fundamentally, CPB questions whether the Commission can justify taking this step at the expense of the public's existing radio service, particularly its noncommercial service.

As the D.C. Circuit reiterated recently in the context of the political broadcasting rules, the Commission bears the burden of explaining why any new proposal will serve the public interest.² When the Commission has concluded that a low power broadcast service squeezed into existing spectrum is not in the public interest—as it has done in the Class D proceeding³ and in subsequent decisions⁴—it cannot abruptly change course without a persuasive explanation. The Commission must show how the technical realities of radio in general, and the service characteristics of noncommercial radio in particular, have so changed in the last few years that LPFM would now be in the public interest. The Commission has not and cannot meet this burden on this record.

² See *Radio-Television News Directors Association v. FCC*, 1999 WL 561975, *7 (D.C. Cir. 1999); see also *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (“changes of [the Commission’s] policy require a rational explanation”).

³ See *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, Second Report and Order*, 69 FCC 2d 240 (1978) (“*Class D Second Report and Order*”).

⁴ See *Stephen Paul Dunifer*, 11 FCC Rcd 718, 724 (1995) (“low power FM radio broadcasting . . . is an inefficient use of the spectrum . . . [and] cannot adequately serve communities and mobile audiences”); *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, Memorandum Opinion and Order*, 8 FCC Rcd 5093, 5094 (1993) (“[E]nhancements to the FM service are most efficiently provided by full-service broadcast stations.”); *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, Report and Order*, 5 FCC Rcd 7212, 7219 (1990) (“[O]ur efforts to improve local service must be balanced against the technical degradation to the overall broadcasting system that could result from a proliferation of [low power] stations”); *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, Notice of Inquiry*, 3 FCC Rcd. 3664, 3668 (1988) (“Our experience with low-power stations like translators indicates that substantial spectrum inefficiencies may result from their operation on a primary basis.”).

II. The LPFM Proposal Is Unworkable And Unwise.

A. LPFM Will Harm The Public's Existing Radio Service.

1. The receiver tests show that LPFM will create harmful interference.

The overwhelming technical evidence submitted in this docket shows that there is no justification for removing the second and third adjacent channel protections, as the Commission must do to introduce an LPFM service of any magnitude. The majority of technical engineering experts – even equipment manufacturers with an interest in seeing demand for new and more sensitive radios that might result from the degradation of existing FM service – conclude that the elimination of the adjacency protections would result in destructive interference, would riddle the current radio service with static and would stymie the transition to digital broadcasting.⁵

Of the four technical studies submitted to the Commission, two suggest that LPFM might not cause objectionable interference to existing FM stations.⁶ Both of these studies, however, are fatally flawed because they fail to set a baseline of acceptable reception from which to determine how much interference is too much. One such study is the Commission's Office of Engineering Technology Second and Third Adjacent Channel Interference Study of FM

⁵ See, e.g., Association of Federal Communications Consulting Engineers Comments at 3, 12 (calling the proposed LPFM 1000 stations "ill advised" and microradio "a very bad idea"; also concluding that the hypothesis that areas of potential interference would be very small is unsupported by technical facts); National Public Radio ("NPR") Comments at 3 ("the Commission's blanket proposal to eliminate second and third adjacency protections in licensing LPFM stations is untenable"); Consumer Electronics Manufacturers Association Comments at ii (2nd and 3rd adjacency protections must be preserved); Lucent Technologies Comments at i ("it will be difficult for additional low power analog and new digital IBOC signals to co-exist and serve their intended service areas"); National Association of Broadcasters ("NAB") Comments at 28, 37 (NAB tests show that second and third adjacent channel interference protection is necessary; LPFM will result in substantial interference).

⁶ See FCC's OET Report; National Lawyers Guild Comments at Exhibit B ("Broadcast Lab Study").

Broadcast Receivers (“OET Report”), released on August 3, 1999.⁷ The OET Report should have been completed before the Commission even considered issuing the Notice, rather than as a last-minute entry into the docket.⁸ Because of the time pressures under which it was produced, the OET Report is admittedly “limited in scope.”⁹ OET also states that follow-up studies must be conducted with an expanded study sample, and that these studies have not yet been completed “[b]ecause of the need to get some objective data into the record as quickly as possible.”¹⁰ Finally, the OET Report warns that the Commission must exercise caution “in extending sweeping conclusions from the data to the general population of receivers due to the small sample size.”¹¹ Beyond the frailties it admits, the OET Report is of limited value because it fails to establish an objective threshold of minimum quality reception. Instead, the test implies that only the complete failure of a receiver would signify that there was unacceptable interference.¹² Similarly, the Broadcast Lab Study, on which LPFM proponents rely, evades the question of

⁷ Project TRB-99-3.

⁸ The hastiness with which the OET Report was prepared and the inability of commenters to use the OET data in their own technical studies is particularly troubling. Notwithstanding the extensions of time for comments and reply comments that the Commission has granted and its openness to receiving comments on a rolling basis, CPB is concerned that this proceeding has been timed in a way that is contrary to the public interest. The LPFM proposal would produce seismic and historic changes in the way the FM band is managed. Particularly in light of the uncertainties involved with the transition to digital, the Commission should strive to validate its conclusions within the larger technical community. Given the magnitude of the implications of an LPFM service, the Commission (and the public) should be confident that the methodology underlying any decision is sound. The OET Report does not satisfy the Commission’s duty of diligence in studying the technical ramifications of this proposal. If the Commission is not persuaded by the overwhelming technical evidence of the receiver studies that the elimination of second and third adjacent channel protections would significantly undermine the integrity of the FM radio service, it should consider organizing a second round of testing using methodology that has consensus support.

⁹ *Id.* at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 25.

¹² Clearly, this cannot be the only measure of acceptability. As cogently explained by one commenter, “[c]ommon sense says that if the signal degrades into annoying half music-half static, listeners will turn it off.” Colorado West Broadcasting Comments at 1.

what level of interference other than complete receiver failure is unacceptable. It merely states that such a measure is “difficult to establish.”¹³

What the more rigorous technical studies make clear is that the interference resulting from the introduction of LPFM stations would have far-reaching consequences, particularly for noncommercial services. Interference, in the sense it is used here, means more than just the reception of annoying noise; it means degradation of the signal to such an extent that most listeners either could not or would not listen to the signal.

- ◆ Appendix A of the NAB Comments show that LPFM interference to existing radio station listeners would be dramatic. In the top sixty markets, at least five million listeners would experience interference from 1000-watt stations and six million listeners would experience interference from 100-watt stations.¹⁴
- ◆ Noncommercial listeners would be more heavily hit than others.¹⁵ Even the Broadcast Lab Study suggests that the lightly processed programming favored by noncommercial radio broadcasters will be damaged more dramatically by interference than would a more heavily processed signal, such as rock music.¹⁶
- ◆ LPFM licensees, as NPR and other commenters point out, are likely to displace translators, many of which have been constructed with government money because they provide important public service benefits.¹⁷ Because public radio stations tend to rely heavily on translators to reach remote audience members, this threat is of particular concern to them.¹⁸ Millions of radio listeners receive their only noncommercial service, and sometimes their

¹³ Broadcast Lab Study Executive Summary at 1.

¹⁴ See NAB Comments, Vol. 3 at 20.

¹⁵ See, e.g., Public Radio Regional Organizations Comments at 5; Station Resource Group Comments at 14; United States Radio Listeners Association Comments at 2-3; Colorado West Broadcasting Comments at 1; Oregon Comments at 9; University of Northern Iowa Comments at 2.

¹⁶ See Broadcast Lab Study at Tab 2, pages 7 and 15.

¹⁷ See NPR Comments at 24.

¹⁸ See Public Radio Regional Organization Comments at 5-8.

only service, through translators.¹⁹ As some commenters have noted, the 24-hour service offered by many translators could be shut down by an LPFM service, even though the LPFM service has more limited hours.²⁰ An LPFM station by definition cannot provide coverage of vast areas, but could disrupt service by interfering with an essential link in a chain of translator stations covering a thinly populated, rural area.²¹

- ◆ As numerous commenters have pointed out, fragile signals, such as reading services for the blind on the FM subcarrier, would be destroyed by new LPFM interference.²²
- ◆ This interference would also destroy service beyond the protected 60 dBu contour.²³ The issue is not whether current licensees have a right to continue to broadcast beyond their protected contours. The issue is whether the public has a right to expect continued reception where it currently enjoys service. A proposal that results in less service to listeners because of interference both to and from LPFM stations is not in the public interest.²⁴
- ◆ The administrative burden of coping with actual or potential interference would be an additional tax on existing service. As a number of commenters have noted, the introduction of an LPFM service would divert station programming and professional resources to monitoring LPFM station applications and objecting to interference. Several broadcasters have pointed out that the Commission's proposal to eliminate or relax technical filing requirements would require incumbent broadcasters to study each application

¹⁹ See, e.g., Creative Educational Media Corporation, Inc. Comments; Western North Carolina Public Radio, Inc. Comments; University of Northern Iowa Comments; Mercer County Community College Comments; Sen. Robert G. Torricelli Comments; State of Oregon Comments.

²⁰ See Western North Carolina Public Radio, Inc. Comments at 1.

²¹ See, e.g., State of Oregon Comments at 15-16 (discussion of how Western states use translators to bring public radio to sparsely populated areas).

²² See, e.g., The National Association of Radio Reading Services Comments; Minnesota Public Radio Comments; Sun Sounds Radio Reading Service Comments; Detroit Radio Information Service Comments. This would be a real tragedy, as this service is essential to a minority population and cannot be replaced by common substitutes for radio service, such as Internet access or television.

²³ See, e.g., Brill Media Company Comments at 2; University of Northern Iowa Comments at 2; Creative Educational Media Corporation, Inc. Comments at 6; see also *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Notice of Proposed Rule Making, FCC 99-327 (1999)* (“DAB Notice”) at ¶ 33 (recognizing that “stations generally provide useful service beyond their service contours in the absence of interference”).

²⁴ See NAB Comments at 41-43; North Carolina Association of Broadcasters and Virginia Association of Broadcasters Comments at 25.

for potential interference.²⁵ This would be a misallocation of funds and staff time, particularly for noncommercial licensees, that could be better used to serve the listening public.

2. LPFM would reduce the flexibility existing stations need to transition to digital and respond to DTV tower dislocations.

On September 17, 1999, the Commission extended the reply comment period in this proceeding to permit commenters to relate their technical studies of potential digital radio design options to the LPFM proposal.²⁶ CPB agrees with the dozens of commenters opining that the implementation of an LPFM service at this time is not consistent with the nascent plans to introduce digital radio.²⁷ It would be unfair not only to existing broadcasters, but also to new LPFM licensees, to establish a new FM service without fully understanding what the impact of digital service rules, build-out requirements and propagation characteristics would be on *all* FM licensees.

The Notice of Proposed Rule Making concerning digital audio broadcasting (“DAB Notice”)²⁸ tentatively concludes that an “in-band, on-channel” (“IBOC”) system is the best means of implementing DAB.²⁹ IBOC systems allow stations to simultaneously broadcast both digital and analog signals without disrupting analog service.³⁰ Under the IBOC proposal, in the early stages of the transition a station would transmit both its analog signal and two digital

²⁵ See, e.g., Sun Sounds Radio Reading Service Comments at 3; KIKV-FM Comments at 3; Omni Broadcasting Company Comments at 3.

²⁶ See FCC 99-254.

²⁷ See, e.g., Public Radio Regional Organizations Comments at 12; Station Resource Group Comments at 15; NAB Comments at 43-48.

²⁸ See *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Notice of Proposed Rule Making*, FCC 99-327 (1999).

²⁹ See *id.* at ¶ 37.

³⁰ See *id.* at ¶ 2.

signals of lesser amplitude on either side of the existing FM signal. During this “hybrid” period, an IBOC system would add new energy around the host analog signal, effectively widening the signal. The presence of digital sidebands would reduce the separation between the analog signal and the 2nd and 3rd adjacent channel digital signals.³¹ As the DAB Notice acknowledges, these wider IBOC signals increase the likelihood that an LPFM station would cause and receive destructive interference, particularly if 2nd adjacent channel protections were eliminated.³² Because IBOC is the digital transmission scheme most likely to be adopted, the Commission must consider the findings of the technical studies submitted in this docket showing that the LPFM proposal will harm the existing broadcasting service in the light of the additional stresses IBOC could cause.

The Commission has outlined several public policy objectives that will guide it during the transition to digital, including ensuring that DAB does not “weaken the vitality of our free, over-the-air radio broadcast service, which provides service to virtually all Americans through a strong, independent system of privately owned and operated stations.”³³ The Commission has indicated that it favors an IBOC system because, among other things, it guarantees that “[l]isteners would enjoy uninterrupted service with their analog receivers.”³⁴ LPFM is inconsistent with this crucial commitment to preserving the integrity of universal radio service.

³¹ *See id.* at ¶ 7.

³² *See id.* at ¶ 25.

³³ *See id.* at ¶¶ 15-19.

³⁴ *See id.* at ¶ 36.

Beyond these observations, it is difficult to offer more specific commentary about the relationship between LPFM and DAB. At this point in time, we do not know with certainty which DAB system will be selected. Assuming that IBOC is the chosen technology, we do not know which IBOC proposal will be utilized or what the technical specifications will be. We do not know the impact of the selected IBOC proposal on analog adjacent channels. We do not know when, if ever, the Commission would impose an analog sunset date. Although the DAB Notice recognizes that the development DAB and LPFM services could be inter-dependent,³⁵ the timing of the comment cycle and the IBOC testing will not yield a meaningful consideration of that interaction. It is dangerous to implement an LPFM system prior to the resolution of the questions raised by the DAB Notice. Indeed, in light of the harm LPFM will cause to the public interest in a robust analog (and digital) FM service, it is highly risky to implement LPFM at all.

Finally, the Commission should also consider the flexibility that FM licensees require to respond to the digital *television* transition. Many television stations converting to digital currently, or soon will, need to terminate FM licensee tower space leases to accommodate their new DTV antennas. These FM licensees will have to find new tower space and may well need to change their operating parameters. A station operating near one or more LPFM stations may find that it cannot relocate its transmitter to a place from which it can continue to serve its audience because it will be blocked by interference from the LPFM stations.³⁶ A second digital television issue that will have untold implications for noncommercial stations is interference

³⁵ *See id.* at ¶ 23.

³⁶ *See, e.g.*, Heartland Broadcasting Corporation Comments at 5; Positive Alternative Radio, Inc. Comments at 10; Nassau Broadcasting Partners Comments at 6.

from new DTV Channel 6 stations.³⁷ As NPR notes, “adding LPFM stations to the reserved band is likely to increase the interference potential among FM stations, and between analog TV/DTV and noncommercial FM stations.”³⁸

B. LPFM Will Not Confer Benefits Commensurate With The Harm It Causes.

1. The decentralized microradio vision will not achieve FCC goals.

In addition to its crucial technical shortcomings, the LPFM service envisioned by the commenters fails to achieve the Commission’s policy objectives. In broadest terms, advocates of an LPFM service aspire to two starkly different sets of service characteristics. One group of commenters advocates a “microradio model” of LPFM: noncommercial stations operating at 10- or 100-watts, local programming requirements, local residency requirements, a limit of one station per owner, and freedom from the programming and operational requirements that apply to FM licensees.³⁹ The “microradio model” proponents generally seek primary status even for 10- and 100-watt stations.⁴⁰ This model focuses on diversifying radio station ownership and on increasing local programming. Under the “microradio model” theory, limiting station ownership and requiring that these stations be noncommercial will encourage owners to cater to the public rather than to advertisers. Local programming and residency requirements will result in more local programming. Aside from the local programming requirements, most of these

³⁷ See DAB Notice at ¶¶ 40-49 (proposing that channel 6 be used for LPFM or digital radio).

³⁸ NPR Comments at 20-21.

³⁹ See, e.g., National Lawyers Guild Comments; Microradio Empowerment Coalition Comments; Media Island International Comments; Prof. Robert McChesney Comments; Prometheus Radio Project Comments; American Civil Liberties Union of Massachusetts, Radio Free Allston, and the Citizens’ Media Corps Comments.

⁴⁰ See, e.g., Media Island International Comments at 1; Prof. Robert McChesney Comments at 3; National Lawyers Guild Comments at 12-13 (seeking a “modified primary” status for these stations, under which LPFM stations would be permitted to receive greater interference than primary stations, but could not be bumped off the air by a full-power stations seeking to increase its power or relocate its transmitter).

commenters advocate a hands-off regulatory regime, with little to no regulation of these operators and the material that they broadcast, and “amnesty” for unlicensed broadcasters.⁴¹

This model may rest on a coherent and valid philosophy, but it sacrifices service for the public to access for broadcasters. It also poses insurmountable administrative burdens for both the FCC and licensees. The threshold question that the Commission must decide is whether the “microradio model” can be implemented lawfully (*i.e.*, in compliance with the Communications Act and in a way that is susceptible to FCC enforcement), and in a technically benign and realistic manner. One of the original proponents of LPFM now seems to think that at least a 10-watt service is simply not viable.⁴² Beyond the technical concerns discussed above (which are of course magnified if all LPFM stations are considered primary), CPB questions whether the Commission can achieve its goals through the noncommercial “microradio model.” As a number of the would-be licensees remark, single-station ownership limits would prevent experienced and motivated operators from participating in the LPFM service.⁴³ These stations would be less attractive to the minority and female entrepreneurs the Commission hopes to attract because of the loss of efficiencies of common ownership, the difficulty in recouping investments from noncommercial stations, and the expense of programming a station without the benefits of network feeds.

The proponents of the “microradio model” envision a system of local or regional voluntary mediation groups to which technical problems could be referred, in lieu of or as a

⁴¹ See, e.g., Cato Institute Comments at 2-4; Microradio Empowerment Coalition Comments at 1-2.

⁴² See Skinner Comments at 1.

⁴³ See, e.g., Metro Detroit Broadcasting Corp. Comments at 5; see also Clean Mountain Air Broadcasting Corp. Comments at 2; NAB Comments at 69-71.

prerequisite for seeking FCC assistance.⁴⁴ These groups would help LPFM operators to work out time-sharing arrangements among themselves.⁴⁵ Even if this utopian model could be implemented without abuse or unfairness,⁴⁶ the influx of numerous low power stations into the FM band would still result in an unmanageable administrative burden for the FCC. The Commission currently has difficulty ascertaining the credentials of “noncommercial” stations; this difficulty and the danger of illegal operation of LPFM stations would increase by orders of magnitude if hundreds of new LPFM stations were to begin operation.⁴⁷ The Commission also has difficulty in distributing existing FM noncommercial licenses;⁴⁸ no workable proposals were submitted to cope with the distribution of hundreds of 100-watt and 10-watt licenses in every market. Finally, it is unclear how the Commission, with its existing staff, could enforce new rules like local residency and programming requirements in addition to its existing regulations (such as the indecency rules⁴⁹) on LPFM stations.⁵⁰

⁴⁴ See, e.g., Microradio Empowerment Coalition Comments at 2; Media Island International Comments at 1; Prof. Robert McChesney Comments at 3; Prometheus Radio Project Comments at 5.

⁴⁵ See, e.g., National Lawyers Guild Comments at 15.

⁴⁶ This assumption is questionable. The Commission would have to invest time and resources to ensure that these arbitrating bodies are overseen by impartial, responsible decision-makers. The FCC cannot abdicate its statutory responsibility under 47 U.S.C. §§ 303 and 307 to manage the broadcast spectrum to a private body. At the same time, Commission involvement in the body’s structure and decision-making could render the group a federal advisory committee subject to the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-15.

⁴⁷ See, e.g., Clean Mountain Air Broadcasting Company Comments at 2; State of Oregon Comments at 9; National Association of Broadcasters Comments at 64-69.

⁴⁸ See NPR Comments at 28 (noting the pending *Reexamination of the Policy Statement on Comparative Broadcast Hearings, Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21167 (1998)).

⁴⁹ As one commenter pointed out, “[t]he voices heard over low-power radio will not always be those of polite churches, elementary schools, and traffic reporters.” See Cato Institute Comments at 3.

⁵⁰ The Notice intimates that the Commission is free to selectively enforce its rules on LPFM stations. See Notice at ¶¶ 59, 60, 70, 72. CPB does not take a position on whether or not the Commission may, under the law, forebear from enforcing its regulations on certain licensees. However, particularly with respect to those rules that are the products of explicit legislative mandates, the Commission bears a heavy burden of explaining why it is acting within

2. The commercial LPFM model will result in a noisier FM band with voices that are not more independent, but carry shorter distances.

The second model presented to the Commission is the “commercial LPFM model.” According to this model, which focuses on 100-watt (as a secondary service) and 1000-watt (as a primary service) stations, owners would be permitted to operate multiple stations, no residency or local programming requirements would be imposed, and stations could be commercial.⁵¹ Proponents of this model argue that many minority-operated stations have been “virtually locked out of the market for lucrative national advertising revenue,”⁵² and that unless the LPFM service is commercial, the cost of the enterprise would make the venture too risky for the average minority entrepreneur.⁵³ They also state that strict ownership restrictions would prohibit minority owners with experience from entering the LPFM market, and point to the benefits of joint ownership of two or more LPFM stations in the same market in helping broadcasters to reach scattered populations.⁵⁴

The drawbacks to this commercial LPFM model are plain. The proposed commercial nature, higher power, and looser ownership limits of the LPFM service would make

its authority to craft different rules for different classes of FM licensee. For example, the Notice proposes that ownership of LPFM stations be limited to one per person per community. *See* Notice at ¶ 57. This rule would violate Section 202(b) of the Telecommunications Act of 1996, which by its plain meaning permits multiple ownership of commercial AM or FM radio stations, regardless of the power at which the station operates. Similarly, Section 202(a) of the Act orders the Commission to eliminate “any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.” The Act does not appear to afford the Commission latitude to promulgate the national ownership rule suggested the Notice, ¶ 60.

⁵¹ *See, e.g.*, Metro Detroit Broadcasting Corporation Comments; Morris Broadcasting Comments; *see also* Jim Rouse Communications Group Comments (advocating commercial ownership to encourage growth of minority broadcasters); Blazzin Broadcasting Comments (same).

⁵² *See* Metro Detroit Comments at 3.

⁵³ *See id.* at 9.

⁵⁴ *See* Morris Broadcasting Comments at 6; Metro Detroit Comments at 5-6.

these stations susceptible to the same type of concentration the Commission seeks to combat.⁵⁵ Moreover, there appears to be no mechanism to ensure that the LPFM stations will be owned by, or operated for the benefit of, the underrepresented segments of the population that the Commission hopes to serve.

Several proponents of the “commercial LPFM model” express the hope that the Commission will give preference to minority applicants or applicants that serve minority communities.⁵⁶ The Balanced Budget Act of 1997 prohibits such a preference in most cases by mandating the use of auctions where there are mutually exclusive applications for all broadcasting stations except for “noncommercial educational broadcasting facilities” and “public broadcast stations.”⁵⁷ Although the Commission may provide small business bidding credits, an auction usually results in the distribution of licenses to those with the most resources which, as many commenters have noted, historically are not minority bidders.⁵⁸ A first-to-file regime, even if legally permissible, is a false resolution to the mutual exclusivity problem.⁵⁹ In any case,

⁵⁵ See National Lawyers Guild Comments at 4.

⁵⁶ See, e.g., Morris Broadcasting Comments at 7; Metro Detroit Comments at 10-12; see also Minority Media and Telecommunications Council Comments at 34-79 (proposing that the first filing window for LPFM applicants be reserved for minority broadcast training services).

⁵⁷ Public broadcast stations are not, as some commenters suggest, simply stations committed to public service, but are defined as stations licensed as noncommercial educational stations and owned and operated by a public agency or nonprofit group, or owned and operated by a municipality for the transmission of noncommercial programs for education purposes. See 47 U.S.C. §§309(i-j), 397(6). Thus, unless a station meets the statutory definition of “noncommercial educational broadcasting facility” or “public broadcasting station,” the Balanced Budget Act’s provisions will apply.

⁵⁸ See Morris Broadcasting Comments at 11; Michigan Association of Broadcasters Comments at 2; National Lawyers Guild Comments at 9-11.

⁵⁹ CPB takes no view on whether or not the Commission can legally avoid the problem of mutual exclusivity through a first-to-file approach.

a race to file is unlikely to produce increased minority or diverse ownership of stations.⁶⁰ The commercial LPFM stations are no more likely to produce “voices” of the sort the Commission seeks than were the stations added by its *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments* (the “80-90 Docket”).⁶¹ Even if minorities and first-time radio station owners were to become LPFM licensees, they would have difficulty reaching their intended audiences because, as the Commission is well aware, the FM radio spectrum serving the largest minority populations is saturated.⁶² The commercial LPFM model, particularly to the extent that it is limited to 100- and 1000-watt stations, would locate LPFM stations almost exclusively in small communities with small minority populations.⁶³

Conceivably, the Commission could try to fuse the two LPFM models by fashioning a 10-watt service according to the “microradio model” and following the “commercial LPFM model” for 100- and 1000-watt stations. As mentioned above, there are serious questions as to whether the Commission can legally exempt certain FM radio services from the Communications Act’s auction and ownership requirements as well as other rules. The Commission must also ascertain the feasibility of administering a multi-tiered FM service that is overly complex and overpopulated. But CPB’s most serious concern, regardless of how many levels of service the Commission establishes, is that the FM band cannot support the introduction of hundreds of new primary stations. FM licensees, particularly noncommercial licensees,

⁶⁰ See Heartland Comments at 9; Michigan Association of Broadcasters Comments at 2.

⁶¹ See *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 48 FR 29486 (1983); see also *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992).

⁶² See WAIN-FM Comments; Michigan Association of Broadcasters Comments; National Federation of Community Broadcasters Comments at 2; NAB Comments at 80; Station Resource Group Comments at 4.

⁶³ See Key Broadcasting, Inc. Comments.

simply cannot sustain current service if they are engaged in constant battle against potential interference, and if they succumb to actual interference or displacement.

III. CONCLUSION

In weighing the merits of the two LPFM models and in considering the impact of LPFM stations (whatever the regulatory structure of the service) on existing FM signals, the Commission should place the needs of listeners over the needs of would-be owners.⁶⁴ The LPFM proposal was developed without full consideration of what goals the service could realistically achieve and what toll it would take on existing FM service, particularly noncommercial radio. There is much to be said for increasing the number of voices in the FM band—both commercial and noncommercial. However, the state of the record, particularly the technical record, does not support elimination of second and third adjacent channel protections as the way to achieve the Commission’s diversity goals. The LPFM proposal, although lofty in its ambitions, suffers from administrative and legal problems, uncertain and conflicting purposes, and insufficient technical justification. Most importantly, the LPFM proposal as currently proposed would cause devastating technical harm without offering any correlative benefit.

As the D.C. Circuit has made clear, “[a]n agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules.”⁶⁵ The Commission cannot implement LPFM without a solid showing that this scheme will be in the public interest in a way that the Class D and other low power radio experiments were not. CPB does not believe that the Commission can support such a claim on this record. During his September 2, 1999 speech to

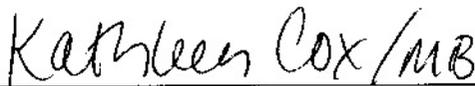
⁶⁴ See Colorado West Broadcasting Comments at 1; Low Power Radio Coalition at 2.

⁶⁵ *Pacific Gas & Elec. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

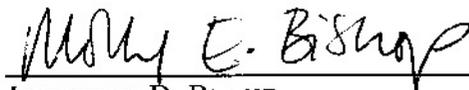
the National Association of Broadcasters, Chairman Kennard made two promises: "First, this FCC is committed to preserving the technical integrity of FM radio. And second, this FCC is committed to a digital future for radio. I want to personally assure you of my commitment to achieve both objectives." The technical record assembled in this proceeding shows that the LPFM proposal will damage the integrity of the FM band and thwart the transition to digital radio. Thus, with the record at hand, LPFM service appears to be at odds with the FCC's stated commitment to preserve technical integrity today and in radio's digital future.

For the foregoing reasons, CPB urges the Commission to reject the LPFM proposal.

Respectfully Submitted,



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