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99-251

Secretary
Federal Communications Commission
The Portals
445 12th Street S.W.
Washington, DC 20554

**RE: Report & Order No. 00-19
(Low Power Radio Service)**

Dear Commissioners and Staff,

Acting SOLELY as an individual concerned citizen, without the knowledge or consent of THE AMHERST ALLIANCE, I hereby submit a personal Motion For Reconsideration of the Low Power Radio rule in Report & Order No. 00-19.

Enclosed are 15 copies of the Motion, plus an original.

Please regard this as a FRIENDLY Motion For Reconsideration. I strongly support the new rule and commend the Commission for its work. I have filed this Motion SOLELY because, to the best of my knowledge, it is the ONLY legally permissible way to suggest an improvement of the rule at this point.

The enclosed Motion For Reconsideration focuses exclusively on the thorny question of license eligibility for those who engaged in unlicensed broadcasting AFTER having "constructive notice" of the proposed rule (on February 26, 1999).

In this regard, the Motion makes two recommendations:

- 1. Otherwise ineligible individuals should be allowed to compete for LPFM licenses where: (a) they challenged the legality and/or Constitutionality of an FCC Order to cease operations AND/OR affirmatively sought an injunction to bar the FCC from enforcing such an Order; AND (b) the court in question allowed unlicensed broadcasting to continue during the course of legal deliberations.**

DON SCHELLHARDT
Motion For Reconsideration Cover Letter
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- 2. For ineligible individuals who do not fall within this “court challenge defense”, PROBATIONARY licenses should be made available. To obtain such a license, an applicant would have to meet the following conditions: (a) certification, under penalty of perjury, that he or she has not engaged in unlicensed broadcasting for at least 1 year (that is, has undergone a 1-YEAR WAITING PERIOD as a demonstration of commitment); (b) agreement to submit to close and constant FCC monitoring (including frequent, unannounced on-site inspections at random intervals) throughout a 1-YEAR PROBATION PERIOD; and (c) restriction to an LP10 classification throughout the Probation Period. Following the TOTAL 2-YEAR TRANSITION, the Probationary licensee would be fully accepted into the LPFM licensee community and awarded the usual rights and responsibilities of an LPFM broadcaster.**

I believe that these Recommendations are modest, moderate and reasonable -- and, in the case of the first Recommendation, perhaps even legally compelling.

I urge the Commission to consider these Recommendations carefully -- and to revise Report & Order No. 00-19 to the extent necessary for their adoption.

Respectfully,



Don Schellhardt
Co-Petitioner, Docket RM-9208

**MOTION FOR RECONSIDERATION
BY
DON SCHELLHARDT**

FCC Report & Order No. 00-19

In The Matter Of:
Creation Of A Low Power Radio Service

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UNITED STATES OF AMERICA
Before THE
FEDERAL COMMUNICATIONS COMMISSION
THE PORTALS
445 12TH STREET S.W.
WASHINGTON, DC 20554

In The Matter Of:) FCC Report & Order No. 00-19
Creation Of A) RM-9208; RM-9242
Low Power Radio Service) FCC Docket No. MM 99-25

MOTION FOR RECONSIDERATION
BY
DON SCHELLHARDT

I am Don Schellhardt, known more formally as Attorney Don Schellhardt or Donald Joseph Schellhardt, Esquire. I am a writer, a Member of the Bar in Virginia and Connecticut (currently practicing only in Virginia) and a concerned citizen who supports media reform in general and Low Power Radio in particular.

I have no personal plans or desires to apply for a Low Power Radio license under the Commission's new rule in FCC Order No. 00-19. I have been actively involved in the battle for Low Power Radio primarily because I believe that the current concentrations of institutional ownership in the mass media constitute a clear and present danger to the survival of representative democracy.

Acting as such a concerned citizen, I hereby file this Motion For Reconsideration.

Let me stress, at the outset, that I am filing this Motion as an INDIVIDUAL -- speaking for no one but myself. Hopefully, my words will carry some added weight due to my status as one of the three Co-Petitioners in Docket RM-9208. HOWEVER, no weight should be added because of my status as Co-Founder, and current National Coordinator, of THE AMHERST ALLIANCE.

The leaders and the Members of THE AMHERST ALLIANCE have NOT authorized me to file this Motion For Reconsideration. In fact, they have not even been consulted. I considered it best, for all concerned, to make this Motion a "solo flight".

Let me also stress, at the outset, that this is a FRIENDLY Motion For Reconsideration. While there is room for improvement in Report & Order No. 00-19, it is nevertheless a vast improvement over the status quo which preceded it -- and I commend the Commission for its vision and courage in forging ahead. This Motion For Reconsideration is simply an attempt to persuade the Commission to be slightly more flexible, in a highly sensitive area, BEFORE the final rule in Report & Order No. 00-19 has solidified.

To the best of my knowledge, this Motion For Reconsideration is the ONLY legally permissible way to bring my proposal to the Commission's attention at this point. I would have offered this proposal at an earlier point if I had thought of it.

**Limitations Of The Rule's Current Policies
Regarding Unlicensed Broadcasting**

As presently written, Report & Order No. 00-19 requires all applicants for an LPFM license to certify, under penalty of perjury, that:

- (1) They have not engaged in unlicensed broadcasting after February 26, 1999 (the date of presumed "constructive notice" that an FCC rule to legalize Low Power Radio was being proposed);
OR
- (2) They engaged in unlicensed broadcasting after February 26, 2000, but ceased immediately when ordered to do so by the Commission.

These are generally reasonable requirements -- and THE AMHERST ALLIANCE, as an organization, accepts and supports them. As an individual, however, I believe they are unreasonable in one narrow but crucial respect.

**Unlicensed Broadcasting
While Engaged In A Court Challenge
To The Legality Of The Low Power Radio Ban**

The current requirements allow no room for the unlicensed broadcaster(s) who engaged in unlicensed broadcasting WHILE ASSERTING HIS/HER/THEIR LEGAL RIGHTS IN COURT. In other words, the requirements do not address situations where:

- (a) An unlicensed broadcaster challenged the legality and/or Constitutionality of an FCC Order to cease operations AND/OR affirmatively sought an injunction to bar the FCC from enforcing such an Order;
AND
- (b) The court in question allowed unlicensed broadcasting to continue during the course of legal deliberations.

A classic example of such a station is PRAYZE-FM: an evangelical station in metropolitan Hartford, with an orientation toward black listeners. Since February 26, 1999, PRAYZE-FM has been On The Air and Off The Air, depending on its fortunes in the courts at any given time. To the best of my knowledge, however, PRAYZE-FM has not engaged in any unlicensed broadcasting, during this period, in the face of A COURT'S directive to cease transmissions.

It is not reasonable to punish LPFM applicants, by rendering them ineligible for LPFM licenses, simply because they asserted legal and/or Constitutional rights which A COURT regarded as credible enough to consider in a formal proceeding. It is not reasonable to penalize unlicensed broadcasters for seeking their "day in court" -- and it may not be legal to do so, either.

IF any unlicensed broadcaster is ruled ineligible for an LPFM license SOLELY because he or she went to court, thereby exercising procedural rights to which he or she is entitled BY LAW, then such an aspiring LPFM licensee would have credible grounds for challenging this status of ineligibility in court.

If a number of such broadcasters are ruled ineligible, SOLELY because they obtained A COURT'S effective permission to engage in unlicensed broadcasting (at least temporarily), then the FCC may have to deal with a number of lawsuits.

Apart from the legal considerations, however, the exclusion of these LPFM applicants from eligibility is not logically related to the Commission's concern with "character". The Commission has stated, in Report & Order No. 00-19, that its eligibility exclusions are preventive -- not punitive -- in motivation. That is, the Commission has stated that its goal is simply to assure that LPFM licenses are reserved for those who can be trusted to "play by the rules".

As a licensed lawyer for 25 years, roughly 4 of which have been spent in courtrooms, I submit that going to court is "playing by the rules". Broadcasting without a license, but WITH the consent of a court, is "playing by the rules".

Where unlicensed broadcasting continued (or resumed) AFTER a court order was issued against it, the situation is different. THAT situation is discussed in the section below. However, the mere act of defending your asserted rights in court, AND persuading a court to keep your station on the air (at least temporarily), is not a mark of "bad character". Some might call it a sign of courage or confidence. To revive a Good Old American Word, some might call it "spunk".

**PROBATIONARY Licenses
For Certain LPFM Applicants**

As noted above, there ARE instances where potential LPFM applicants have NOT “played by the rules”. Perhaps, when faced with an FCC Order (dated after February 26, 1999) to cease transmissions, they have continued to broadcast while in hiding, foregoing their right to challenge the Order in court. And/or perhaps, like Free Radio Berkeley, they have continued to broadcast after (rightly or wrongly) losing their case in court.

I will not argue that such actions are justified. I DO argue, however, that such actions are forgivable -- IF the potential LPFM licensees can PROVE a willingness to act differently in the future.

Let me return to the Commission's stated rationale for its eligibility exclusions. The FCC has stated that its motivations are preventive -- NOT punitive. The FCC has explained that its intent is simply to insure that LPFM licenses are awarded ONLY to those who can be trusted to “play by the rules”.

I agree with the Commission -- heartily. I add only that those who have not “played by the rules” in the past should be given a **CONDITIONAL AND CLOSELY MONITORED OPPORTUNITY** to PROVE that they are now willing to assume the responsibilities of operating a licensed, regulated radio station.

This situation is, in short, "tailor-made" for the concept of PROBATION.

The concept of PROBATION may spring to my mind because of my experience as a judicial aide in the courts of Connecticut.

During 1997 -- in fact, while I was co-authoring the Petition For Rulemaking that triggered FCC Docket RM-9208 -- I was an aide to Judge Clarence Jones, who was then serving in the Juvenile Court of New Haven.

Later that year, and into 1998, I was an aide to Judge Jorge Simon, who was heading up an experimental Drug Rehabilitation Court. This court, which was also based in New Haven, was one of the first such courts in the nation -- and it has since become a model for a number of other Drug Rehabilitation Courts throughout the United States.

In both the Juvenile Court AND the Drug Rehabilitation Court, the judges wrestled with the same question that challenges the Commission today:

How do you take the unruly energy of intense, but alienated, people and CONVERT that energy into something which is creative and constructive -- for themselves and others? How do you teach them to make their own energy work FOR them instead of against them -- and FOR the good of their society as well?

This is neither a simple question nor an easy task. Yet, if the larger society simply builds a wall around such people and “throws away the key”, their energy and their pain and their anger will NOT disappear. In the best case (from the standpoint of the larger society, not necessarily the individual), the angry, unruly energy will simmer away corrosively, often ending in one form of self-destruction or another. In the worst case (again from the standpoint of the larger society, not necessarily the individual), the pressure will build within -- until it explodes.

I am sure that many unlicensed broadcasters will fume at the thought of being compared to juvenile delinquents and substance abusers -- and the comparison, if taken LITERALLY, is indeed unfair. Yet, if you ignore the differences in DEGREE and look to the similarities in KIND, you can see the common threads of unruly (and often angry) energy, bristling within people who see themselves as -- and are seen by many others as -- Outsiders. If their energy has no place else to go, and if the larger society offers them no potential stake in the status quo, then their energy may be turned AGAINST the larger society. AND/OR it may be turned against themselves -- resulting in an incalculable loss of potential talent and vision.

So the question looms:

Are the long term interests of the larger society REALLY served by simply walling off these Outsiders and “throwing away the key”?

OR should they be given a chance, under SUPERVISED conditions, to find a more productive outlet for their energy and a more satisfying place in society?

If such an individual were a non-violent drug user, coming before the Drug Rehabilitation Court of New Haven, the judge would take the following steps:

(1) Having screened out the drug DEALERS and the VIOLENT drug users, he or she would sentence the drug user to 1 to 2 years in prison.

(2) The judge would then SUSPEND this sentence, keeping the drug user out of prison FOR SO LONG AS he or she: (a) entered, stayed in and successfully completed a substance abuse Rehabilitation Program; and (b) remained "clean and sober" for a period of at least 1 year (up to a maximum of 18 months, if the judge is suspicious and/or the drug user is struggling). VOCATIONAL counseling and training would also be offered during this period.

(3) During this period of at least 1 year, the (hopefully former) drug user would be tested for possible drug use at least once a week.

(4) Throughout the period of the judge's involvement, the drug user would be motivated by the combination of a "carrot" and a "stick". The "stick" would be the threat of an immediate trip to jail in the event of an unacceptable drug test. The "carrot" would be vocational opportunities AND the promise of total expungement of the court records, including the prison sentence, IF a successful rehabilitation is achieved.

The same basic approach can be applied to unlicensed broadcasters: a FREEZE on current behavior ... followed by “carrot” and “stick” incentives for adopting new behavior ... with careful and constant monitoring to assure that the new behavior is authentic.

Specifically, I urge the Commission to adopt the following policies for individuals who cannot sign the required license eligibility statement AND also cannot claim a “court challenge defense”:

(A) As a demonstration of commitment, such an individual must refrain from unlicensed broadcasting for a period of AT LEAST ONE YEAR before he or she is eligible to apply for an LPFM license. He or she must certify this, under penalty of perjury, at the time of the license application.

(B) When and if such an applicant is awarded an LPFM license, he or she must agree to cooperate, for a period of ONE YEAR, with a program of close and constant monitoring by Commission enforcement officials. This monitoring may include (but need not be limited to) frequent, unannounced on-site inspections at random intervals. The license itself would have to be renewed after 1 year, BUT could be awarded for the normal duration if the Probation has been successful.

(C) During the 1-year Probation Period, the license of such a broadcaster could be suspended at any time in the event of violations. In the case of MATERIAL violations, the license could be revoked. However, in the

event of SUCCESSFUL completion of the Probation Period, the broadcaster would "graduate" to the rights of a full-fledged LPFM licensee.

(D) During the 1-year Probation Period, the broadcaster would be limited to an LP10 classification: that is, a maximum power level of 10 watts. However, upon successful completion of the Probation Period, he or she could apply for an upgrade to LP100 if the spectrum is locally available. If sufficient spectrum is NOT locally available, he or she could express to the Commission a willingness to relocate and then apply for a conventional LP100 license in an area where the necessary spectrum can be found. In the event of mutually exclusive applications in the new area, his or her (or their) station would be credited with 1 year of experience for purposes of applying the public interest "points formula".

Incidentally, this proposal for Probationary Licensing has been consciously structured to permit affected individuals -- IF they are speedy and diligent -- to attain "rehabilitated" status in time for the Commission's scheduled expansion of the Low Power Radio Service in 2002.

CONCLUSION

For the reasons set forth, the Undersigned, Don Schellhardt, urges the Commission to reconsider the referenced portion of Report & Order No. 00-19 -- and to revise it to the extent necessary for incorporation of the Recommendations in this Motion.

Respectfully submitted,



Don Schellhardt
Co-Petitioner, Docket RM-9208

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Dated: February 25, 2000
February 25, 2000