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PETITION FOR NOTICE OF INQUIRY

REGARDING ESTABLISHMENT OF A NEW BROADCAST BAND

SUBMITTED BY:

THE CITIZENS BROADCAST BAND DISCUSSION GROUP,
JOHN ANDERSON,
NICKOLAUS E. LEGGETT **AND** DON SCHELLHARDT, ESQUIRE

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John Anderson of Wisconsin is a broadcast journalist and editor of an internationally prominent Web Site on Low Power Radio. **Nick Leggett** of Virginia is an inventor, technical writer and political scientist, as well as Co-Petitioner on the Petition For Rulemaking that triggered Docket RM-9208: the FCC's first deliberations on establishing a Low Power Radio Service. **Don Schellhardt, Esquire** of Connecticut is a Government Relations and Family Law attorney, extensively experienced in working for, and also lobbying, a wide range of government institutions -- from the Jefferson County (Colorado) Zoning Board and the Superior Court of New Haven to U.S. EPA, the FERC, the FCC and Congress. In addition, he joined Nickolaus and Judith Leggett on the Petition For Rulemaking that led to FCC Docket RM-9208.

This document proposes initiation of a Notice Of Inquiry (NOI) to consider the need for, feasibility of and possible parameters of a new broadcast band, reserved exclusively for non-commercial use by private individuals and small community groups. The broadcast band we contemplate will create a new source of local information and content for radio listeners, but we also hope it will end some serious problems with the current broadcast bands.

Culture And Freedom Of Speech In The United States

While the FCC has many services in its realm, the most influential of them are the ones that directly reach the public. Radio and Television have been staples of American culture for many years, and are an important element in most people's lives. A vast majority of Americans own a television, even more own a radio, and eventually, the Internet will be joining their ranks as a mass media source that is available to everyone.

Unfortunately, of these services, only the Internet is a "controlled content" medium. Much like a library, the individual user dictates the flow of information. But unlike the Internet and the library, broadcast sources provide content that is sent directly to the user, who has little or no control over what content is provided. This results in a type of cultural consolidation.

The signs of cultural consolidation are already well fused into our society. "Pop Culture" is a perfect example of just how much influence mass media can have in the information age. Instead of playing local bands, radio stations tend to focus on national "Top 10" playlists, creating national celebrities almost overnight. Without nationwide radio playback and mass media intervention, it is doubtful that many of the popular musicians of the last 70 years would have been nearly as popular as they were.

Cultural consolidation has its downsides, but darker examples can be made illustrating the power of mass media. The use of mass media as a tool for political influence is a very real threat to our stability as a free society. Authoritarian governments are very aware of the controlling effects that mass media can have over people; they use it to misinform and manipulate public opinion to serve their own interests. Many people are concerned about the recent consolidation of radio stations in America, ourselves included, for somewhat similar reasons. With no public access to the airwaves, and only a few groups (corporate, government or otherwise) controlling all of the mass media in the United States, it would be very easy to exert political and cultural ideals over a large audience, permanently damaging a key element of our society.

But these problems aren't created exclusively from the nature of broadcasting. The main reason there is little public control over broadcast media, is because there is almost non-existent public access to the media. Even the so-called "National Public Radio" is little more than a nationalized company with permanent staff, the only difference being that NPR gets its funding from contributions and taxes instead of advertising. In terms of public access, NPR does not provide any more than its commercial counterparts do.

Direct public access to broadcasting is extremely important in a society where mass media dominates our culture. In an age where television and radio can be more influential than the pen, it is important that we keep these areas open for public

access, in order to maintain some sort of public representation in the evolution of our culture and politics.

As it currently stands, Americans have only marginal access to radio broadcasting. The process of auctioning off radio licenses for commercial stations restricts most of the citizenry from becoming involved in station ownership and operation, and instead places operation in the hands of groups that can afford the expensive auction fees. The Telecommunications Act of 1996 liberalized caps on media ownership, which has only served to drive up license costs even higher, shutting off small businesses from the broadcast bands as well.

You don't have to wait to see the consequences of this system, as they have been happening for years now, even before the Telecommunications Act of 1996 made them worse. The general regulatory environment and the FCC's poor handling of broadcast issues has led many people to take the civil disobedience path towards getting on the air, with disastrous results.

Unlicensed Broadcasters and The FCC: The Never-Ending Battle

Unlicensed broadcasting, or “radio piracy”, is a never-ending battle for the FCC, and it’s always a losing one. In the last five years alone, the FCC conducted more than 250 enforcement actions against unlicensed broadcasters, almost all of them on the FM band.

More than 100 of those actions involved direct interaction with FCC agents, and 83 of them included, astonishingly, *actual raids by law enforcement officials*. At least 6 of those incidents *led to the actual arrest of the unlicensed broadcaster*. In about one-thud of all enforcement actions, property was seized, including some property that was not related to radio broadcasting at all. *

The Constitutional and civil questions that arise from the crackdown on what is almost always a victimless crime are disturbing, and don’t get discussed even remotely as much as they should be. The precedent that is being set from these actions poses a serious hazard to the FCC, which is in essence using brute force to silence speech. Court challenges to the FCC’s enforcement tactics have resulted, some of which the agency has temporarily lost, allowing unlicensed stations periods of temporary legitimacy.

*These statistics were collected from the FCC Action Enforcement Database, located at <http://www.diymedia.net/fccwatch/ead.htm>. These Statistics are far from perfect, but they are much more detailed than what the FCC offers in the way of enforcement news.

To date, *all* of the FCC's victories in court have been won on *procedural* grounds, such as a Defendant's failure to **file** for an exemption from the restrictions on Low Power Radio broadcasting (the Free Radio Berkeley case) or a Plaintiffs failure to file in the correct Federal Circuit Court (the BeatRadio case). CBBDG does not agree with these judicial decisions or with the rationales that courts have presented to explain them.

Even if the judicial rationales are accepted, however, it is nonetheless important to note that these rationales are completely procedural, and therefore completely silent on the substance of the issues involved. So far, **no** court has ruled in favor of the FCC's authority, under the Constitution, to do what it has been doing. All of the court decisions have used procedural rationales (or excuses) to avoid having to make a decision on the Constitutional *merits* of the FCC's case.

Many things can also be said about the amount of labor put into enforcement. Local FCC offices and Federal Marshals spend more time and resources being "radio cops", and spend less time resolving actual issues relating to serious crimes and technical problems.

While this might be good starting point for the discussion of FCC enforcement reform, it is not the focus of this Petition. Reform could improve the constitutionality of the FCC's enforcement, but it would not resolve the never-ending battle between the FCC and unlicensed broadcasters.

Who exactly is at fault here? It is hard to label unlicensed broadcasters as crooks and menaces when the FCC refuses to give out any licenses, thus making civil disobedience the only way to get on the air. Still, in that same respect, it is hard to blame the FCC for refusing to **give** out licenses when there are, in essence, no licenses available to give out.

“Lack of Real Estate”: The Real Problem With The Radio Bands

In June of 1997, a Petition For Rulemaking was submitted to the FCC by 3 individual concerned citizens, **two** of whom (Nickolaus Leggett and Don Schellhardt) have agreed co-sign this Petition For Notice Of Inquiry by the CBBDG. The Leggett/Schellhardt Petition in June of 1997 became FCC Docket RM-9208 in February of 1998, which in January of 1999 became the centerpiece of a proposed rule, in FCC Docket 99-25, to establish a nationwide Low Power FM service (hereafter referred to as LPFM). The proposed rule became a final rule in January of 2000.

The new Low Power FM Service was designed to create radio stations that would reinvigorate localism and assure direct public access in radio programming. Apart from those large broadcasting institutions that were (and remain) fearful of competition, few questioned the legitimacy of the ideals behind this service. In fact, FCC Docket 99-25 set a record for the highest public participation in the FCC's 65-year history -- with most of the more than 3,400 filings coming from individual citizens who support LPFM.

The actual implementation of the Service, however, became very controversial.

Concerns of interference with more established broadcasters was a major issue, and both sides plunged into what essentially became a conflict between would-be LPFM broadcasters and the existing commercial broadcasters.

As a result of this, a Congressional restriction was placed on LPFM, which led to the decimation of what was once a promising step toward greater public access to the airwaves. Most mid-sized to large metropolitan areas, where LPFM would have served the most people, and been the most sustainable financially, will see few if **any** new radio stations with the current interference limits tied to the Service.

The fundamental problem with LPFM wasn't buried within the idea itself. The problem lies in what is wrong with the FM broadcast band: It's too crowded. Even with the interference extensions initially given to the Service before the intervention of Congress, there was still only enough "real estate" to harbor a few LPFM stations per metropolitan area. This is hardly enough to appease the thousands of groups that were interested in the Service. In some areas, there were dozens of groups competing for just a few broadcast licenses, showing just how in-demand the service was, and how inadequate it was for serving all of the aspiring broadcasters.

Resources are always a problem when they are in short supply. Radio is no exception.

“Spectrum scarcity” on the radio bands is the cause of the price **hikes** on license auctions, the conflicts over LPFM, and the unlicensed broadcasting. Most importantly, it is the reason that public access to the airwaves is very low. The radio bands are too crowded, and problems have formed and grown as a result.

The most effective way to appease any resource problem is to produce more resources.

This is precisely what the FCC should do with the radio problem.

A New Radio Broadcast Band

A new broadcast band, located in a currently under-utilized portion of the radio spectrum, is the best solution -- even if those who listen to the new band must purchase new equipment to do so. Without in any way discouraging the expansion of the current Low Power FM Service, or the establishment of a new Low Power AM Service, CBBDG nevertheless maintains that establishing a new broadcast band in an under-utilized portion of the spectrum would be significantly more effective than proposals to add more licenses to the existing broadcast bands.

For one thing, it would presumably be considerably less controversial, **as** it wouldn't create any interference concerns with incumbent interests. In addition, the **amount** of bandwidth consumed by a new broadcast band would be minimal, compared to the level

of public service it could provide. Keep in mind that the traditional FM broadcast band only consumes about 20MHz of bandwidth, which is relatively insignificant in terms of radio spectrum. (3.3 television stations on the largely unused UHF band would easily enclose the same amount of space.)

Because the goal is to make a new broadcast band usable by many groups, it should be designed to handle a lot of radio stations. There would have to be at least 10MHz bandwidth assigned to such a service (though CBB suggests increasing that further). The new broadcast band should be set on a frequency range that is fit for broadcasting (such as frequencies that have little atmospheric skip and reduced interference potential).

This much is known, but major questions remain. At an absolute minimum, the proposed Notice Of Inquiry should solicit public input on *at least* 3 particular questions:

1. How great is the need for a new broadcast band, reserved exclusively for non-commercial use by private citizens and small community groups? Obviously, the existing levels of “pirate” radio broadcasting, and the huge backlog of unapproved Low Power FM applications, demonstrate massive **unmet** demand for such a broadcast band. Still, it would be useful to attempt to *quantify* the “market” with more precision. A good *starting* point might be adding together all of the parties against whom warning notices and/or other enforcement actions were initiated over the last 20 years, *plus* all of the inquiries that the FCC received about setting up a Low Power Radio stations over the

last 20 years,*plus* all of the ungranted LPFM applications that the FCC has received since establishment of the LPFM Service in 2000. The next step could be surveys and/or other efforts to determine how many LPFM applications *would have been submitted* if relaxed channel spacing standards, as originally proposed in 99-25, had become law.

The process of defining the market for new licenses could continue from there.

However, the same question should also address the potential *listenership* for stations with such licenses. Commenters, including rank-and-file radio listeners, should be encouraged to offer evidence on the size of the potential *audience* for alternative and/or locally focused news coverage, features coverage, music and/or other entertainment, to be provided by private citizens and small community groups.

2. *Where on the radio spectrum should such a new broadcast band be located?*

As a *starting* point for discussion, possibilities include the following:

A. Unused portions of the “L” Band, now that it is no longer reserved for use by the military, *unless* the Commission decides that all unused portions of the “L Band” are needed for Eureka-147 Digital Radio.

B. Millimeter waves.

C. Infrared broadcasting, as proposed by Nickolaus Leggett of Reston,

Virginia: a signatory of this Petition.

The Notice Of Inquiry should encourage commenters to raise other possibilities, in addition to those which are enumerated here.

In addition, the NOI should solicit public comment on what can be done to encourage and reward Research, Development and Demonstration on broadcast technology for utilizing uncongested areas of the radio spectrum. *Special attention* should be paid to ways in which the risks and/or costs of such R,D&D can be reduced for individuals and small businesses, which have historically been more innovative than large institutions *but* which are also usually much more limited in their resources.

3. *What should be the parameters for such a new broadcast band?* In this regard, choosing the most suitable power level(s) is a vitally important consideration.

One of the main reasons that current broadcast bands are so crowded is because many stations broadcast with large amounts of power (up to 100,000 watts on the FM band), covering a large amount of geographical space per frequency (upwards of 80 miles, not including interference potential). In setting parameters for a new broadcast band, the power level(s) should not be set so low as to create listening problems and/or make financial sustainability excessively difficult, but should also not be set so **high** as to crowd the band.

A good *starting* point for discussion would be the two-tiered power levels which have already been established for Low Power FM stations: that is, LPFM-10 (1 watt to 10 watts of Effective Radiated Power, or ERP) and LPFM-100 (11 to 100 watts of ERP).

From this starting point, the NOI should ask commenters whether upward or downward adjustment is advisable.

For example, radically *downward* adjustment might yield power levels low enough to justify unlicensed broadcasting on the band in question, effectively creating unimpeded “market entry” (and, if necessary, exit) for the non-commercial broadcasters involved. With so many Part 15 broadcasters already investing time and energy in broadcasts at one half of a watt, even power levels as low as **5** watts in urban areas, and 20 watts in rural areas, might produce a significant growth in the number of voices on the airwaves.

Conversely, a case can be made for *increasing* the power levels above the LPFM Tiers. We are contemplating, after all, broadcasts on a currently *under-utilized* portion of the radio spectrum. Financial risks could be significantly greater for broadcasters due to the initial lack of listeners. In light of the heightened risks, and the greater availability of spectrum, the LPFM power levels may be too low to serve as a workable “model”.

We note that, even in the case of the LPFM Tiers, THE AMHERST ALLIANCE had recommended, in Written Comments filed in FCC Docket 99-25, the creation of *three* LPFM Tiers instead of two -- with the last proposed Tier set *above* 100 watts.

While the LPFM-IO and LPFM-100 Tiers that eventually emerged “tracked” Amherst’s recommendations *exactly*, Amherst had also proposed establishment of an LPFM-250 Tier -- to be limited to rural areas, small towns and some small cities. Amherst had suggested that the FCC should select either of two thresholds for allowing LPFM-250 applications: (a) a proposed service area with an average population density of 1,500 people per square mile or less; *or* (b) a location outside of the top 100 media markets (as listed on the date of the license application).

CBBDDG further notes that 250 watts is the power level which the FCC has already selected for FM satellators and other “long distance translators”. That power level **was** set by the FCC on the assumption that most of these translators would be serving the same kind of rural areas, small towns and small cities that the proposed LPFM-250 stations would be serving.

In any case, regardless of the specific power level involved, CBBDDG does endorse the LPFM-based *concept* that the FCC have two or three power level Tiers, explicitly or implicitly based on population density. This would allow rural and small town stations to have more signal range, in keeping with their placement in areas where spectrum is

generally more available *and* where lower population density makes financial sustainability dependent on a longer geographical reach. The same concept has been discussed briefly in the FCC's own Spectrum Policy Task Force Report.

Apart from determining the most suitable power level(s) for stations transmitting on the new broadcast band, other operating parameters must be addressed in the NOI.

As a *starting* point for discussion in the NOI, CBBDG recommends a few potential guidelines for consideration:

A. Unlike the LPFM Service, stations on the new broadcast band could be opened to ownership by *individual citizens*, as well as small community groups.

B. Unlike the new LPFM Service, established community groups should *not* be given an arbitrary "bonus point" over newly established non-profit groups, or individuals, in the competition for station licenses. If power levels are set high enough to warrant a licensing requirement, the competition over licenses should be based on the quality, diversity and originality of the programming that will be offered. There should *not* be an automatic disadvantage for newcomers on a broadcast band that is specifically intended, at least in part, to turn "outsiders" into pillars of the community.

C. As with the LPFM Service, the license holder(s) of the station should not be able to sell their license, and should be barred from having any ownership ties to existing mass media groups.

D. As with the LPFM Service, licenses should not be permitted to national institutions and “relaying” of other broadcast stations should be prohibited.

E. As with the LPFM Service, a required specific amount of live and local programming per day should be set so as to inhibit any use of automation and relaying. The LPFM requirement is 6 hours per day, but stations on the new broadcast band may be different enough to merit a somewhat different “threshold”. In any event, **this** requirement should take effect *only* a few years after a radio station has been established, in order to give the station time to establish an audience and acquire a staff.

This is not an exhaustive list of recommendations, and other guidelines need to be discussed as well. The Notice Of Inquiry should strive to encourage open-ended discussion of all matters related to operating parameters for the new broadcast band.

Spectrum Policy Reform: The Time Truly Is Now

The FCC is currently engaged in spectrum policy reforms that could radically change the way frequencies are assigned. In the final report of the Spectrum Policy Task Force (hereafter referred to as SPTF), published in November of 2002, several findings and recommendations were made. While the report did not touch extensively on radio broadcasting, several of its assertions coincide with observations made in this Petition.

The SPTF's Report focuses heavily on the argument that the traditional FCC method for establishing services is ineffective, and does not coincide very well with the FCC's own statutory authority.

The report notes that the Communications Act of **1934**, which established the FCC and laid down its framework, clearly states that it is the policy of the United States to encourage new services to the public, and that anyone who opposes a new service will have the burden of demonstrating that the proposal is inconsistent with the public interest.

Obviously, lack of space on the RF spectrum can force the FCC to constrict this somewhat liberal objective. But the SPTF Report concluded several times that it is not the physical lack of bandwidth that seems to be the biggest problem. In fact, the Task Force encouraged the FCC to fundamentally change the way it manages spectrum, with the specific goal of allowing more public services:

- *In many bands, spectrum access is a more significant problem than physical scarcity of spectrum. (SPTF report, 11)*
- *In light of the preliminary FCC measurements, the acknowledged variability of some types of licensed spectrum users, and the recent advances in technology, the Task Force concludes that there is evidence to suggest that the spectrum use can be increased significantly. (SPTF report, III. B)*
- *Preliminary measurements show that significant spectrum capacity remains untapped. Thus, if the commission were to permit greater access to the radio spectrum, the effects of the physical scarcity of the spectrum resource could be minimized. (SPTF report, IV. C)*

- *It is important that the commission continue to optimize and facilitate access to and use of the radio spectrum. (SPTF report, IV. C)*

In speaking directly about broadcasting, the SPTF report says **very** little, as its focus was on services not related to broadcasting. In the handful of paragraphs written about broadcasting, the Task Force commented on an opportunity for improvement of broadcast policy, and stated that more reform in that area should be considered as part of any future policy agenda. Also, despite the mostly market-driven orientation of the SPTF report, it acknowledged that more spectrum for non-commercial broadcasting is in order:

- *Broadcast spectrum should remain subject to the current regulatory model, which is based on statutory public interest objectives. Over the longer term, the Commission should periodically reevaluate its broadcast spectrum policies. (SPTF report, II. page 6)*
- *It is likely that there will be a continued need to set aside some spectrum for non-market based broadcast uses. such as non-commercial and educational broadcasting. (SPTF report, VII. C. 3, page 45)*

Conclusion

We can no longer hide from the problems with radio broadcasting. The more we ignore them, the worse they will get, and the bigger of an issue they will become.

CBBDG has presented what we believe to be the best response at this time: a Notice Of Inquiry on the need for, feasibility of and possible parameters of a new broadcast band, reserved for non-commercial use by individuals and small community groups. We urge the FCC to accept our Petition as a serious and discussable proposal -- if not to help foster a more democratic broadcast environment, then to save the FCC from the political disaster that will come if these problems with radio broadcasting are not resolved soon.

Respectfully submitted,



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