

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
Creation of a Low Power Radio Service) MB Docket No. 99-25
_____)
_____)

To: Office of the Secretary
The Commission

COMMENTS

GREAT SCOTT BROADCASTING

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Dated: April 7, 2008

SUMMARY

Ace Radio Corporation, Auburn Network, Inc., Great South Wireless, LLC, Matinee Radio, LLC, Radio K-T, Inc., Scott Communications, Inc., and Great Scott Broadcasting (collectively, the “Parties”), submit their *Comments* to the Commission’s proposed modifications to the low power FM (“LPFM”) service as set forth in the *Second Further Notice of Proposed Rule Making*, released on December 11, 2007 (the “*Second FNPRM*”), in this proceeding. The proposed codification of the Commission’s new LPFM displacement policy and its proposal to eliminate the second-adjacent spacing rule would lead to the substantial erosion of the protections afforded to full-service stations. Moreover, these policies frustrate the Commission’s mandate under Section 307(b) of the Communications Act where a new community may be denied a first local service.

The Parties urge the Commission not to adopt the proposals in the *Second FNPRM*, which, in the context of a community of license change, can place secondary LPFM stations on a higher regulatory footing than primary full-service FM stations. The Parties have no objection generally in providing assistance to affected LPFM stations in identifying alternate channels and filing the necessary applications. However when the Commission actually proposes to deny a first local service to a new community of license, the Parties believe that the Commission is heading in the wrong direction. As a result, the Parties urge that the Commission consider a longer range solution to the increasing tension being created between the full power and low power FM service as it takes the next step and opens up a new filing window.

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COMMENTS OF ACE RADIO CORPORATION, ET AL.

1. Ace Radio Corporation, Auburn Network, Inc., Great South Wireless, LLC, Matinee Radio, LLC, Radio K-T, Inc., Scott Communications, Inc., and Great Scott Broadcasting (collectively, the “Parties”), submit their *Comments* to the Commission’s proposed modifications to the low power FM (“LPFM”) service as set forth in the *Second Further Notice of Proposed Rule Making*, released on December 11, 2007 (the “*Second FNPRM*”),¹ in the above captioned proceeding. In the *Second FNPRM*, the Commission sought comments on a variety of issues related to LPFM. The Parties will comment on four of the issues: (a) the formalization of a policy for addressing displacement of LPFM stations by full-service FM stations; (b) the codification of a second-adjacent channel waiver standard; (c) the imposition of additional licensee obligations on full-service FM stations; and (d) the use of a contour protection-based licensing standard for LPFM stations.

2. While the Parties appreciate the Commission’s desire to provide regulatory relief to low power LPFM licensees, its proposed solutions, when implemented in connection with the

¹ FCC 07-204, 74 Fed. Reg. 12061 (March 6, 2008).

revision of certain LPFM service rules in the *Third Report and Order* (“*Third R&O*”),² mark a dramatic change in Commission policy. If adopted as proposed, the regulatory solutions outlined in the *Second FNPRM* would frustrate the Commission’s mandate in Section 307(b) of the Communications Act of 1934 (the “Act”) to provide a fair distribution of service.³

I. BACKGROUND

3. The Commission has always considered LPFM stations as secondary to full-service FM stations. In its *Second Order on Reconsideration*,⁴ the Commission emphasized the secondary status of LPFM stations and stated (i) that “[f]ull-service FM stations, including subsequently authorized new stations, facility modifications, and upgrades” are not required to protect LPFM stations; and (ii) that LPFM stations must protect all full-service FM stations’ 70 dB μ contours.⁵ Thus, LPFM stations retained the two quintessential characteristics of a secondary license class: they must protect primary licensees but are not themselves protected from primary licensees. In this regard, the Commission specifically rejected a proposal from Media Access Project to deny “a full service FM station’s modification application if ‘grant of the application will deny a local community content by reducing the coverage area available to LPFM stations.’”⁶ The Commission repeated that it did “not believe that an LPFM station should be given an interference protection right that would prevent a full-service station from seeking to modify its transmission facilities or upgrade to a higher service class.”⁷

4. In the *Further Notice of Proposed Rule Making* (“*FNPRM*”) released in connection with the *Second Order*, the Commission solicited comments on a proposal to excise from Section 73.809 some of the limited protection afforded to full-service FM stations located on second

² FCC 07-204, 74 Fed. Reg. 3202 (Jan. 17, 2008).

³ 47 U.S.C. § 307(b).

⁴ 20 FCC Rcd 6763, FCC 05-75 (rel. March 17, 2005) (the “*Second Order*”).

⁵ *Second Order*, ¶ 37.

⁶ *Id.* ¶ 38.

⁷ *Id.*

adjacent channels to LPFM stations.⁸ The Commission noted that the proposed modification to the LPFM station's obligations to protect subsequent full-service authorizations was based on real-world conditions, such as the theoretically minimal interference between LPFM and full-service stations operating on second-adjacent channels. In this regard, the Commission stated that approximately forty LPFM broadcasters face interference or displacement by full-service stations. As for the absence of second-adjacent channel interference, no studies were cited.

II. DISCUSSION

5. The Parties and other full-service broadcasters acknowledge the contributions made by LPFM stations and respect their place in the radio industry. Moreover, full-service broadcasters have traditionally provided both technical and financial assistance to the LPFM stations that they propose to displace.⁹ The Parties, however, fear that the proposals in the *Second FNPRM* are yet another step along the path towards the Commission's recognition of LPFM as a fully protected license class. As long as LPFM stations are required to protect the service currently provided by full-service stations, and as long as full-service stations are allowed to modify their facilities without regard to LPFM stations, it makes sense for full power broadcasters to assist LPFM stations on a voluntary basis. Indeed, there is an acute need to provide LPFM broadcasters with this technical and legal assistance.

6. Certain of the Parties have already had experience in assisting five of the forty LPFM stations referred to by the Commission. This experience has caused the Parties to express their concerns with the Commission's ambitious desire to protect LPFM stations at the expense of full-service broadcasters. It has become clear to the Parties that some LPFM stations licensees are unsophisticated in their knowledge of and adherence to technical and legal requirements.

⁸ *Second Order*, ¶ 39.

⁹ *Third R&O*, ¶ 62.

LPFM station licensees are not, for the most part, professional broadcasters, and they typically do not hire professional consultants for technical and legal advice and assistance. The Commission appears to be aware of this problem since it noted that, in the first LPFM filing window, one-third of all LPFM applications were dismissed for technical and legal deficiencies.¹⁰ As a result, the Parties have discovered that several of the LPFM stations that the Parties have assisted are operating with facilities that do not comply with their authorizations. For example, in one instance an LPFM station was operating almost 20 kilometers from its authorized site. Such violations lead the Parties to believe that the Commission is underestimating how much second-adjacent interference may exist by overpowered LPFM stations.

7. The Parties have no desire to single out any individual stations for violations. The purpose of these comments is to have the Commission consider the fact that many LPFM stations are not well versed with technical and legal requirements and too often cannot afford to hire professionals for assistance. Unfortunately, the temptation for LPFM stations to broadcast with excessive power can be overwhelming when such stations find out that their coverage area is very limited or when they experience interference from full-service broadcasters. In proposing to eliminate second-adjacent spacing for displaced LPFM stations, the Commission is depending on every LPFM station to operate within the limits of their authorized facilities. But it would be prudent for the Commission to realize that the interference studies on which it relies may not take into account excessive power or other noncompliant LPFM station technical operations.

8. While the Parties continue to be willing to cooperate with LPFM stations, they are troubled by the Commission's incremental erosion of the Parties' interference protection rights in

¹⁰ *Second Order*, ¶ 35 (noting that this figure excludes those LPFM applications that failed to protect third-adjacent channels).

favor of existing LPFM service. The Commission has already eliminated its Section 73.809 interference complaint procedures for second-adjacent channels. In isolation, this change to the LPFM service rules was not overly objectionable – broadcasters could still rely on the minimum spacing requirements of Section 73.807. With full spacing protection, few LPFM stations are located within the protected contour of full-service stations. However, the Commission has now implemented a broad “interim” waiver policy for second-adjacent spacings. In light of the Commission’s waiver policy, the Parties are concerned that the Commission intends eventually to eliminate the LPFM second-adjacent spacing requirement in its entirety. The Parties’ extensive experience in working with LPFM broadcasters leads them to believe that such a move will result in an increasingly chaotic and balkanized FM band. Accordingly, the Parties strongly urge the Commission not to implement the proposed revisions to the LPFM service rules.

A. The Commission’s Proposed LPFM Displacement Policy Undermines Section 307(b) of the Communications Act.

9. In the *Third R&O*, the Commission implemented an interim policy regarding the rights of displaced LPFM stations when no alternative channel is available. The Commission established a presumption that would place certain displaced LPFM stations on a higher footing with subsequent proposals for new or modified full-service facilities.¹¹ Under this proposal, retaining an incumbent LPFM station that regularly broadcasts at least eight hours of locally originated programming each day would be preferred to permitting a full-service station to provide a community with its first local service. The Commission seeks comment on whether this policy should become a licensing presumption.

10. The Parties strongly believe that such a presumption would violate the Commission’s mandate under Section 307(b) of the Act to distribute frequencies to communities with no local

¹¹ *Third R&O*, ¶ 68.

service on a fair and equitable basis. To the Parties, an implicit component of the Commission's displacement policy is the assumption that full-service broadcasters are not providing adequate local programming or are somehow failing to serve the public's interest. This is not so. The comments of the National Association of Broadcasters and others have emphasized the extraordinary programming and emergency information provided on a daily basis by the great majority of broadcasters to their local communities.¹² Local programming is the lifeblood of the broadcaster and it is not in a licensee's interest to ignore the needs of its community and its service area. The Parties will reserve any further comment on this issue for the Localism proceeding. However, it does appear that the Commission may be in part influenced in making this proposal by an unjustified sense that full-service broadcasters are not satisfactorily serving their communities, which appears to lead to a conclusion that the provision of a first local service to a community is not to be credited. The Parties strongly believe that this assumption is not correct, and they urge the Commission not to take any actions in this regard without a full record demonstrating that local programming by full-service broadcasters is completely absent. The Parties are extremely confident that such a conclusion is not the case. Accordingly, the Parties submit that the Commission should not to amend its rules to create a licensing presumption to protect LPFM stations against subsequently proposed full-service allotments, authorizations or modifications.

11. By their nature, LPFM stations are authorized to provide service to a relatively modest service area. Consequently, their reach often fails to cover any portion of the community to which they are licensed. Under these circumstances, the Commission's abrupt change of course from its stated LPFM policies puzzles the Parties. In the *Second Order*, the Commission expressly found that "an LPFM should [not] be given an interference protection right that would

¹² See, e.g., Comments of the National Association of Broadcasters (filed Nov. 1, 2004) MM Docket No. 04-233.

prevent a full-service station from seeking to modify its transmission facilities or upgrade to a higher service class.”¹³ Yet in implementing its “interim” displacement policy, the Commission opted to create a presumption *against* allowing a full-service station to provide a community with its first local service if the move would force off the air an LPFM station providing a certain level of locally originated programming.¹⁴

12. The LPFM displacement policy violates the Commission’s statutory mandate under Section 307(b) of the Act “to provide a fair, efficient, and equitable distribution of radio service” throughout the nation.¹⁵ This may be the Commission’s most basic and significant obligation. That the Commission appears willing to stray so far from its mandate in favor of the secondary LPFM service in the absence of a solid factual record is of great concern. There is certainly no record that LPFM stations provide local programming better than, or even to any degree comparable to, that provided by full-service stations.

13. In light of this clear statutory mandate, the Commission has traditionally been extremely wary of granting individual waivers of its spacing requirements in the full-service context. For example, in reviewing an application for review of the Media Bureau’s denial of Greater Media’s short-spacing waiver request for WPLY(FM), the Commission noted that “[e]very waiver of the spacing rules incrementally undermines the effectiveness of the FM assignment plan.”¹⁶ The Commission went on to state that the grant of a *single* waiver would “severely impair the staff’s ability to enforce the spacing rules” thereby leading to their “substantial erosion.”¹⁷ Yet, while it eschews individual waivers of its *full-service* spacing rules,

¹³ *Second Order*, ¶ 38.

¹⁴ *Third R&O*, ¶ 68.

¹⁵ 47 U.S.C. § 307(b).

¹⁶ *Greater Media Radio Company, Inc.*, FCC 99-226, ¶ 16 (1999) (“*Greater Media*”); see *ECI License Company, Inc.*, 11 FCC Rcd 1797 (rel. Feb. 13, 1996) (noting that “[o]ver time, [Section 73.215(e)] waivers would effectively eliminate §§ 73.207 and 73.215(e) as a tool for achieving a fair distribution of services”).

¹⁷ *Greater Media*, ¶ 6.

the Commission now proposes to codify a presumption favoring waivers of the LPFM spacing rules.

14. Due to the size of their coverage area, LPFM stations are seldom able to provide an adequate signal to a substantial portion of their licensed community. As a result, many LPFM stations provide specialized or niche programming to the small areas they serve. Even if there were a demonstrated absence of locally responsive programming, the Commission's "interim" policy is not keyed to locally responsive programming but rather to locally *originated* programming that may or may not be of a local interest to the local community and may not be responsive to local concerns at all. Thus, it is not uniformly the case that the displaced LPFM station would already be providing local service to the community that the full-service station may be impacting.

15. The Commission's LPFM displacement policy eviscerates the philosophical underpinnings of the existing FM allotment priorities and creates a disincentive for full-power FM broadcasters to extend first local service to unserved communities. Codification of the Commission's LPFM displacement policy could ultimately thwart the gold standard under the Commission's FM priorities: proposals to provide regions with their first aural service.¹⁸ There is a better and more permanent long-term solution to protecting existing LPFM stations and promoting an expansive development of the service. Following the conclusion of the DTV Transition there will be almost no stations remaining in the TV channel 6 portion of the television band. This space (82-88 MHz) is immediately adjacent to the existing noncommercial educational reserved portion of the FM band (88.1-91.9 MHz). By exploring the use of the abandoned space in the TV channel 6 spectrum in this proceeding or a separate proceeding, the Commission could alleviate if not eliminate the increasing tension being created by the shared

¹⁸ See, Revision of FM Assignment Policies and Procedures, *Second Report & Order*, 90 FCC 2d 88 (1982).

use of the commercial FM service and the trend toward providing more protection to LPFM stations. This tension will only become more intense when the Commission opens the next LPFM window filing opportunity.¹⁹

B. The Commission Should Not Codify Its Interim Section 73.807 Second-Adjacent Channel Waiver and Processing Policies.

16. In its *Second FNPRM*, the Commission asks whether it should codify its “interim” policy of waiving the second-adjacent channel minimum separation requirement for LPFM stations displaced by a new or modified full-service FM station.²⁰ The Parties believe that codification of the interim waiver policy as a part of Section 73.807 of the Commission’s Rules would be imprudent in several respects.

17. Under the Commission’s proposed new rules and interim policy, an LPFM station displaced by a subsequently authorized full-service FM station can change channels regardless of the second-adjacent channel spacings.²¹ There may not be a problem when only one LPFM station operates within a full-service station’s 70 dB μ contour or community of license. However, as multiple second-adjacent LPFM stations encroaching within the full-service station’s 70 dB μ contour are authorized, the harm posed by such interference can become a significant problem.²²

18. As discussed above, the Commission has observed, and the Parties have experienced, that LPFM licensees have difficulties in understanding the Commission’s technical rules. While

¹⁹ The Parties intend to provide a more complete and detailed proposal for use of the TV Channel 6 portion of the television band for LPFM stations in the context of comments to be filed in the Diversity proceeding (MB Docket No. 07-294, *et al.*). *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-217, ¶ 100 (rel. March 5, 2008).

²⁰ 47 C.F.R. § 73.807.

²¹ See *Third R&O*, ¶ 64.

²² In fact, the Commission recently denied a noncommercial educational station its waiver request of a third adjacent overlap for just this reason. See, e.g., *Letter to Centenary College from Rodolfo F. Bonacci, Audio Division, Media Bureau* (November 27, 2007) (“This has been called the ‘swiss cheese’ effect, where a station’s protected service contour is punctured by ‘holes’ of interference from multiple second- and third-adjacent channel FM stations.”).

the Parties acknowledge that many LPFM broadcasters are both responsible and technically competent, the Parties are concerned with the situations facing some LPFM licensees who do not have the means to hire consultants or may have the temptation to operate in excess of their authorized parameters. True, the Commission has the authority to issue Notices of Apparent Liability to LPFM broadcasters for failure to abide by the basic service rules. But such enforcement efforts take time and many LPFM stations do not have the means to pay fines. Thus, reliance on enforcement measures may not be as effective as they are with full-service broadcasters.

19. The Parties and LPFM proponents may argue over the theoretical scope of the interference caused by second-adjacent channel LPFM stations. In reality, however, some LPFM broadcasters operating outside of their authorizations cause interference to second-adjacent channels that extends well beyond the “ten to two hundred meters” that the Commission predicts.²³ In more densely populated regions, this level of interference could affect a substantial number of listeners. Yet, under the new rules adopted in the *Third R&O*, full-service broadcasters will have no recourse for *actual* second-adjacent channel interference caused by LPFM licensees.²⁴ Accordingly, the codification of the interim waiver policy, especially when coupled with the Commission’s recent revision of its interference complaint procedures, would essentially eliminate full-service stations’ remaining protection against interference from a second-adjacent channel LPFM station.

C. **The Commission Should Not Impose Additional Obligations on Full-Service Stations That Displace LPFM Stations.**

20. As the Commission notes in the *Second FNPRM*, full-service stations are not obligated to provide technical or financial assistance to LPFM stations displaced by a proposal

²³ *Third R&O*, ¶ 65.

²⁴ *Id.* at 63.

for construction of a new full-service station or modification of an existing full-service station.²⁵ The Commission then observes that the present arrangement is “inconsistent with the comity and respect” that LPFM stations deserve.²⁶ The Parties fundamentally disagree with this observation.

21. LPFM licenses have been granted on a secondary basis. As a result, LPFM stations do not enjoy – and, at the time their applications were filed and their licenses issued, had no legitimate basis to expect – the same rights and privileges as full-service stations. Moreover, LPFM stations are exempt from many of the obligations required of every full-service station. Mandating displacement assistance runs contrary to the balancing of rights and obligations attendant to these disparate services.

D. The Commission Should Not License LPFM Stations on the Basis of Contour Protection.

22. As the Commission has noted elsewhere, a significant number of applicants for new LPFM authorizations were unable to prepare applications that meet the Commission’s technical and legal requirements.²⁷ The situation would be exacerbated exponentially under a contour protection-based licensing system because, as the Commission notes in the *Second FNPRM*, LPFM applicants would need to seek the assistance of consulting engineers.²⁸ LPFM applicants often have limited resources, and the Parties believe that the need to retain a consulting engineer would impose an undue financial burden on applicants. Ultimately, the Parties predict that many LPFM applicants may elect to “go it alone” and file proposals that have not benefitted from review by an engineer. The influx of technically flawed contour-based applications would place additional and unnecessary strains on Commission staff, which would already be facing a significantly more complex LPFM application review process. While a contour protection-based

²⁵ *Second FNPRM*, ¶ 76.

²⁶ *Id.*

²⁷ *Second Order*, ¶ 35.

²⁸ *Second FNPRM*, ¶ 83.

licensing system might, in theory, allow for the expansion in the number of LPFM broadcasters, the Parties are concerned that it is sufficiently burdensome to turn the application process into chaos. The Parties propose that only in the instances where a displaced LPFM station is being assisted by a full-service broadcaster and has no other alternative channel, should a contour protection proposal prepared by a professional engineering consultant be entertained by the Commission. Accordingly, the Parties urge the Commission to retain the simpler, minimum separation licensing system.

III. CONCLUSION

23. For the reasons set forth above, the Parties urge the Commission not to adopt the proposals in the *Second FNPRM*, which, in the context of a community of license change, can place secondary LPFM stations on a higher regulatory footing than primary full-service FM stations. The Parties have no objection generally in providing assistance to affected LPFM stations in identifying alternate channels and filing the necessary applications. However, when the Commission actually proposes to deny a first local service to a new community of license, the Parties believe that the Commission is heading in the wrong direction. As a result, the Parties urge that the Commission consider a longer range solution to the increasing tension being created between the full power and low power FM service as it takes the next step and opens up a new filing window.

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