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THE AMHERST ALLIANCE
Don Schellhardt, Esquire, President
3250 East Main Street, #48
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February 22, 2011

Marlene H. Dortsch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street
Washington, DC 20554

Dear Ms. Dortsch:

Enclosed you will find an original hard copy, plus 14 additional hard copies, of a Petition For Rulemaking by THE AMHERST ALLIANCE: a Net-based, nationwide media reform advocacy group. A copy of this Petition is also being submitted electronically, as an Attachment to Supplemental Written Comments by THE AMHERST ALLIANCE, in FCC Docket 99-25.

The enclosed Petition notes that Section 5 of the newly enacted Local Community Radio Act (LCRA) mandates that: (A) *new* Low Power FM stations, *new* translators and *new* boosters must "remain secondary to" -- that is, subject to potential displacement by -- (B) "*existing or modified*" full power FM stations (presumably, licensed before enactment of the LCRA on January 5, 2011). The LCRA is silent on stations which fall outside this basic mandate.

The enclosed Petition asks the Federal Communications Commission to establish targeted protection from displacement for LPFMs, translators, boosters and Class D educational stations *in those cases* where the LCRA does not explicitly preclude such protection. We propose that such targeted displacement protection should be granted only when a full power station fails to demonstrate to the FCC that it can serve "needs of the local community" better than the station which is threatened with displacement.

Please contact me, at djlaw@gmail.com or (203) 982-5584, if you have any questions.

Sincerely,



Don Schellhardt, Esquire, President
THE AMHERST ALLIANCE

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UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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Targeted)
Displacement Protection) FCC Docket No. _____
For Certain Radio Stations)

A PETITION FOR RULEMAKING
BY THE AMHERST ALLIANCE

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For Certain Radio Stations)

A PETITION FOR RULEMAKING
BY THE AMHERST ALLIANCE

Founded in Amherst, Massachusetts, THE AMHERST ALLIANCE is a Net-based, nationwide citizens' advocacy group for Low Power FM (LPFM) and other media reforms. Since our founding date of September 17, 1998, Amherst has submitted 204 filings to the Federal Communications Commission. We have been advocates for the current Low Power Radio Service on the FM Band, as well as a proposed new Low Power Radio Service on the AM Band. We have supported "Net Neutrality" -- and we have opposed both the elimination of, and any increase in, current limits on how much of the mass media a single entity can own. We have also questioned the Commission's rushed implementation of the In Band On Channel (IBOC) version of Digital Radio.

EXECUTIVE SUMMARY

- Using its own discretionary authority, rather than responding to a statute, the Commission has been allowing full power stations, which it accords Primary Service Status, to displace Secondary Service stations, such as LPFMs and translators. Section 5 of the newly enacted Local Community Radio Act (LCRA) transfers some of this system -- but only some of it -- from discretionary regulations to statutory law that the FCC cannot change. *New* (presumably, post-enactment) LPFMs, translators and boosters must “remain secondary to” -- that is, subject to possible displacement by -- “*existing or modified*” (presumably, pre-enactment) full power stations. The same *new* LPFMs, translators and boosters must “remain equal in status” to each other, unable to displace one another.
- This *selective* codification of the Commission’s Primary and Secondary Service system leaves a number of questions hanging. Although new LPFMs, translators and boosters must remain subject to displacement by “existing or modified” full power stations, must existing LPFMs, translators and boosters

also remain subject to displacement? Section 5 doesn't say. Although "existing or modified" full power stations may displace new LPFMs, translators and boosters, do new full power stations have the authority to displace new translators, boosters and LPFMs? Section 5 doesn't say. Presumably, the answers to these questions have been left to the FCC's discretion. We see the Congressional decision to codify *part* of the current Primary and Secondary Service system, but not all of it, as an invitation to the Commission to take a second look at the remainder of its Primary and Secondary Service Status system. In light of a spectrum that has grown increasingly crowded, not only in the largest metropolitan areas but in some of the smaller ones as well, a review of possible displacement protection for selected Secondary Service stations would be timely indeed.

- We urge the Federal Communications Commission, acting under its remaining discretionary authority, to establish the option of case-by-case protection from possible station displacement in those cases where Section 5 of the Local Community Radio Act (LCRA) does not preclude such protection.

- Subject to the limitations set by Section 5 of the LCRA, we propose the following general rule: When and if a low power FM station, FM translator, FM booster or Class D educational station becomes subject to displacement by a full power FM station, the full power station must first demonstrate to the FCC, on a case-by-case basis, that it can better serve the needs of the local community than the station which would be displaced.

- Pursuant to Section 5 of the LCRA, case-by-case displacement protection would not be available when and if --
 - (1) A Low Power FM station, FM translator or FM booster that was licensed after January 5, 2011 (the date of enactment of the Local Community Radio Act) becomes subject to displacement by

 - (2) A full power FM station that was licensed on or before January 5, 2011 (the date of the enactment of the Local Community Radio Act), including any full-power FM station that was licensed on or before January 5, 2011 but modified after that date. We note that the LCRA provides automatic displacement authority for existing stations which are “modified”, but does not mention existing stations which *relocate*.

- Although we propose that the burden of proof would fall upon the full power station in a potential displacement situation, this burden of proof would be lighter in some cases than in others. If the proposed displacement involves involuntary cessation of broadcasting or involuntary relocation from the local community by the potentially displaced station, the full power station would first have to demonstrate that it can better serve needs of the local community by the *substantial* weight of the evidence. If the proposed displacement involves only involuntary relocation to another frequency, within the local community that is already being served, by the potentially displaced station, the full power station need only demonstrate that it can better serve needs of the local community by a *simple* preponderance of the evidence.

IDENTIFICATION OF THE PETITIONER

THE AMHERST ALLIANCE was founded over dinner at a Friendly's Restaurant in Amherst, Massachusetts. The founders then wrote THE AMHERST DECLARATION and required all new Members to accept the Declaration's "basic principles".

These key principles include support for:

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- (1) Reducing the domination of the airwaves by media megacorporations;
- (2) Allowing both commercial and non-commercial stations to compete for licenses in an envisioned Low Power Radio Service (which was then pending as a proposal before the FCC);

And

- (3) Lack of encouragement for "pirate radio" (that is, illegal unlicensed radio broadcasting, as opposed to legal unlicensed Part 15 broadcasting on the AM Band).

The high points of Amherst history include the following:

A. Active participation in the rulemakings that led to the establishment of a Low Power FM (LPFM) Radio Service in January of 2000. We did not achieve the goal of including some commercial-airing stations within the LPFM Radio Service, but we did succeed in persuading the Commission to adopt other public policy recommendations that we offered.

B. Active lobbying during the ensuing Congressional deliberations on whether to restrict the nascent LPFM Radio Service, including February 17, 2000 testimony during Hearings before the Subcommittee on Telecommunications of the House Energy and Commerce Committee. Amherst was unable to stop the enactment of adjacent channel spacing restrictions, adopted in December of 2000 and finally repealed by the Local Community Radio Act in January of 2011, but was instrumental in stopping the original bill that would have abolished LPFM completely.

C. Leadership of a 19-party Freedom Of Information Act Request, in 2004, that led the FCC to release the then-secret MITRE Corporation Report. The Report, by an independent party, confirmed that LPFMs do not cause interference problems for full power FM stations.

The released Report went on to become the primary intellectual foundation for the eventual repeal of adjacent channel spacing restrictions.

D. Active involvement in a successful campaign to persuade the Commission not to raise the applicable ceiling on how much of the radio broadcasting industry a single entity may legally own. In this regard, we were pleased to see that a reviewing court ultimately upheld Amherst's interpretation of Section 206 (h) of the Telecommunications Act over a competing Interpretation advocated by major broadcasting companies.

Amherst did not achieve any of its victories singlehandedly, but we were one of the key players in the various debates -- and our absence from the struggles could have made a difference for the worse on any of several occasions.

THE AMHERST ALLIANCE was basically inactive from 2008 until late 2010. With action on the Local Community Radio Act by Congress in December of 2010, and the prospect of implementation of the LCRA in 2011, Amherst has recently revived itself in order to provide input to the Commission on LCRA implementation.

THE AMHERST ALLIANCE prides itself on being unusually committed to pluralism, both in terms of our own Membership (gay rights activists to "evangelical" Christians, and Greens to Republicans) and in terms of the wide range of small, locally owned and operated stations that we support putting on the radio dial. Some media reform advocacy groups may see such stations as politicized "tools for social justice", while other media reform advocacy groups may see such stations as opportunities for Christian "evangelism", but we see such stations as ends in themselves. We want to see a diverse range of programming on the airwaves, certainly

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including locally focused stations with a political and/or religious agenda -- but also including stations that bring light jazz to the Shenandoah Valley or “doo wop” music to Delaware.

To “codify” its commitment to internal pluralism, in our Membership and our leadership, the Members of THE AMHERST ALLIANCE have unanimously voted to adopt the following statement, which is binding on all Members in their interactions with each other:

“THE AMHERST ALLIANCE does not practice or tolerate discrimination on the basis of race, religion, political creed, gender or sexual orientation.”

TEXT OF SECTION 5 OF THE LOCAL COMMUNITY RADIO ACT (LCRA)

For easy reference, we have reproduced below the text of Section 5 of the recently enacted Local Community Radio Act (Public Law 111-371):

SEC. 5. ENSURING AVAILABILITY OF SPECTRUM FOR LOW-POWER FM STATIONS.

The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that--

- (1) licenses are available to FM translator stations, FM booster stations, and low-power FM stations;
- (2) such decisions are made based on the needs of the local community; and
- (3) FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations.

THE LCRA'S MANDATES ON DISPLACEMENT PROTECTION

LCRA Section 5 (3) changes the FCC's system for assigning Primary Service Status to some stations and Secondary Service Status to others.

Using its own discretionary authority, rather than responding to a statute, the Commission has been allowing full power stations, which it accords Primary Service Status, to displace Secondary Service stations, such as LPFMs and translators. The LCRA transfers some of this system -- but only some of it -- from discretionary regulations to statutory law that the Commission cannot change.

Now, "when licensing new FM translators, FM boosters and low-power FM stations", the FCC "shall ensure that" these stations will "remain secondary to existing or modified full-power stations". Further, the FCC "shall ensure that" stations in this group will "remain equal in status" to each other: all of them "secondary to" (subject to possible displacement by) the indicated full power stations, none of them able to displace other stations in the same group and none of them subject to displacement by other stations in the same group.

The adjectives are crucial, however. *New* (presumably, post-enactment) LPFMs, translators and boosters must "remain secondary to" -- that is, subject to possible displacement by -- "*existing or modified*" (presumably, pre-enactment) full power stations. The same *new* LPFMs, translators and boosters must "remain equal in status" to each other, unable to displace one another.

This *selective* codification of the Commission's Primary and Secondary Service system leaves a number of questions hanging.

THE LCRA'S SILENCE ON DISPLACEMENT PROTECTION

Although new LPFMs, translators and boosters must remain subject to displacement by "existing or modified" full power stations, must existing LPFMs, translators and boosters also remain subject to displacement? Section 5 doesn't say.

Although "existing or modified" full power stations may displace new LPFMs, translators and boosters, do new full power stations also have the automatic authority to displace new translators, boosters and LPFMs? Section 5 doesn't say.

Presumably, the answers to these questions have been left to the FCC's discretion. We see the Congressional decision to codify part of the current Primary and Secondary Service system, but not all of it, as an invitation to the Commission to take a second look at the remainder of its Primary and Secondary Service Status system.

Determining the exact Congressional intent on this point is a bit like reading tea leaves. That is: Congress has been very clear about what the Commission *must* do, and almost as clear about what the Commission *may* do, but has given little direct guidance about what the Commission *should* do. Where the LCRA is silent, the Commission apparently has discretion -- but the areas of silence in the statute provide at least a few hints of unaddressed concerns that Congress may want the Commission to ponder.

For one thing, Congress explicitly preserved, as a matter of statutory law, the opportunity for “*existing or modified*” (pre-enactment) full power stations to displace at least *some* Secondary Service stations -- but did not vest *new* (post-enactment) full power stations with this statutory prerogative . For another thing, Congress preserved this displacement option, as a matter of statutory law, for existing full power stations which are “*modified*”, while declining to include full power stations which *relocate* to another community after they have been licensed.

We are speculating here, but we can posit one common thread that might tie all of these scattered decisions together: a Congressional intent to honor the reasonable *expectations* of full power FM stations which were licensed on or before the date of LCRA enactment. The affected stations would have filed for their licenses, under the Commission rules of the time, with the reasonable expectation of being able to displace Secondary Service stations in the event of a signal upgrade or similar modification. The LCRA honors that expectation.

However, the same expectation is *not* honored for a full power station which “changes its own game plan” by attempting to relocate away from the community it is serving. Nor is it honored for a full power station which is licensed *after* the LCRA’s enactment date.

Thus, the Congressional policies make logical sense if we posit that Congress chose to protect, by statute, the reasonable original *expectations* of full power FM licensees who are now On Air -- while leaving the FCC totally free to set *new* rules for *new* full power FM stations.

Amherst can see the same pattern, *in reverse*, for Congressional policies toward LPFMs, translators and boosters. For these stations, it is new licensees who find the rules fixed by statute. Under the LCRA, they will file for licenses within the knowledge that they *must* be

subject to displacement by “existing or modified” full power stations -- just as new full power stations will file for licenses with the knowledge that they are not guaranteed displacement authority by statutory law.

Similarly, new LPFMs, translators and boosters will file for licenses with the knowledge that they *may not* displace other new LPFMs, translators and boosters. At the same time, the LCRA does *not* specify that existing LPFMs, translators and boosters must also be “equal in status” to each other and therefore unable to displace each other.

In short, Congress is inviting, or at least permitting, future Commission reconsideration of its own rules in the case of both *new* full power FM stations and *existing* LPFMs, translators and boosters (as well as any and all Class D educational stations).

Does the Commission want to “grandfather” some or all existing LPFMs, translators and boosters, protecting them from displacement case-by-case or even across-the-board? The LCRA allows it to do this, provided only that the Commission does not protect new stations from displacement by existing or modified full power stations. The LCRA also allows the FCC to protect any and all Class D stations from displacement by any and all full power stations, either case-by-case or across-the-board.

Does the Commission want to deny new full power stations the kind of automatic displacement authority that existing or modified full power FM stations enjoy? The LCRA allows it to do this, provided only that the “grandfathering” of existing or modified full power stations is not eroded.

Does the Commission, in retrospect, regret the massive proliferation of “satellators” in recent decades? Would the Commission like to give existing fill-in translators and LPFMs priority, within the Secondary Service class, over existing “satellators”? The LCRA allows it to do this, provided only that *new* LPFMs, translators and boosters are “equal in status” to each other. Thus, the Commission retains the legal authority to “thin the herd” of existing satellators -- by allowing other Secondary Service stations to displace them and/or by declining to renew their licenses over time.

Does the Commission wish to ban new “satellators” and limit future translators to “fill in” stations only? The LCRA allows the Commission to do even this. *If* the Commission licenses new (post-enactment) satellators, Section 5 of the LCRA mandates that those satellators must be “equal in status” to LPFMs, fill-in translators and boosters. However, Section 5 of the LCRA does not require the FCC to license new satellators in the first place. Instead, Section 5 mandates that the Commission must “ensure the availability of spectrum” for new *translators*, without denying the Commission authority to limit new translators to fill-in translators only.

THE AMHERST ALLIANCE reserves the right to propose, in the future, a lower priority, within the Secondary Service class, for existing satellators -- and/or a prospective ban on the licensing of new satellators.

For purposes of the current Petition For Rulemaking, however, THE AMHERST ALLIANCE is focusing on its proposal to establish targeted displacement protection for certain radio stations. In light of a spectrum that has grown increasingly crowded, not only in the largest urban areas but in some of the smaller ones as well, such action would be timely indeed.

A PROPOSED NEW FCC POLICY ON DISPLACEMENT PROTECTION

The Commission is well aware of two stark realities.

First, as population and economic activity grow, a progressively greater portion of the nation's available radio frequencies are being claimed. Some metropolitan areas are already "full", with no room at all for a new LPFM station or any other kind of new radio station, while other geographical areas -- including even some small cities and small towns -- are clearly headed in the same direction.

Under these circumstances -- *unless* the Commission changes some of its station displacement policies, in those respects where the LCRA leaves it free to do so -- the stations with *Primary* Service Status will functionally become, in a rising number of geographical areas, stations with *Exclusive* Service Status. Indeed, we are already aware of displacement of a small city LPFM in South Carolina, as well as displacement of Class D educational stations in suburban Seattle and suburban Philadelphia. Like the proverbial row of falling dominoes, Secondary Service Stations will be displaced, over the decades ahead, from more and more of the American radioscope -- to survive only in small towns and rural areas, if at all -- *unless* the FCC makes displacement of existing Secondary Service stations by new full power stations far less automatic.

Second, even as licensees are claiming a rising share of the total radio frequencies available, the total amount of spectrum available for radio may shrink in the future. With

wireless firms and others finding more and more proposed uses for the same electromagnetic spectrum that radio and TV must also use, it does not require ESP to foresee increasing pressures on Congress and the FCC to reduce the share of spectrum that is available for more traditional uses. Such pressures are already being generated, as the Commission must be keenly aware.

If the total amount of spectrum that is allocated for radio and TV is indeed permitted to shrink, the competition for access to the remaining radio spectrum will become even more severe. That is: With more aspiring radio station licensees showing up at the metaphorical dinner table, a food supply that is simultaneously shrinking will surely make matters worse. Under these circumstances, broadcast localism and nationwide diversity of programming will find it more difficult than ever to survive -- let alone flourish -- *unless* the Commission decides, very consciously and very clearly, that the promotion of broadcast localism and programming diversity will be built right into the concept of "Business As Usual" at the FCC.

Some Members of THE AMHERST ALLIANCE -- notably, Nickolaus E. Leggett N3NL of Virginia, who co-signed the Petition For Rulemaking that triggered the Commission's deliberations on creating Low Power FM Radio -- are investigating new technologies that could expand the total amount of spectrum that is available for radio.

While these new technologies may yield benefits in the long run, for the more immediate future the Commission must move toward some kind of targeted displacement protection for at least *some* LPFMs, translators, boosters and Class D educational stations -- or else accept the great risk that they could become "endangered species" in much of the United States. Our Petition is an effort to persuade the FCC to take reasonable, case-by-case steps in that direction.

In the hope of making life a little bit easier for the Commission, we hereby submit, as a possible starting point, the way we would write up the text of our targeted displacement protection proposal in “legalese”:

SECTION ____. (a) GENERAL RULE. (1) MANDATORY CASE-BY-CASE CONSIDERATION OF LOCAL COMMUNITY NEEDS BEFORE CERTAIN STATIONS MAY BE DISPLACED BY OTHER STATIONS. When and if a low power FM station, FM translator, FM booster or Class D educational station becomes subject to displacement by a full power FM station, the full power station must first demonstrate to the Federal Communications Commission that the full power station can better serve the needs of the local community than the station which would be displaced.

(2) RANGE OF DISPLACEMENTS THAT THE COMMISSION MAY AUTHORIZE FOLLOWING CASE-BY-CASE CONSIDERATION OF LOCAL COMMUNITY NEEDS. If the proposed displacement involves involuntary cessation of broadcasting or involuntary geographical relocation by the potentially displaced station, the full power station must first demonstrate that it can better serve needs of the local community by the substantial weight of the evidence. If the proposed displacement involves only involuntary relocation to another frequency, within the local community that is already being served, by the potentially displaced station, the full power station need only demonstrate that it can better serve needs of the local community by a simple preponderance of the evidence.

(b) SPECIAL RULE. Pursuant to Section 5 of the Local Community Radio Act, a case-by-case exemption from possible displacement shall not be available when and if --

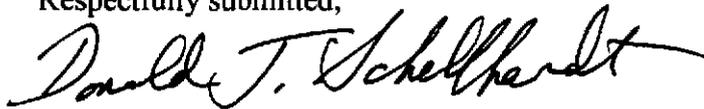
(1) a low power FM station, FM translator or FM booster that was licensed after January 5, 2011 (the date of enactment of the Local Community Radio Act) becomes subject to displacement by

(2) a full power FM station that was licensed on or before January 5, 2011 (the date of the enactment of the Local Community Radio Act), including any full power FM station that was licensed on or before January 5, 2011 but modified after that date, but not including any full power FM station which was licensed on or before January 5, 2011 but seeks to relocate to a different community after that date.

CONCLUSION

For the reasons set forth herein, we urge the Federal Communications Commission, acting under its remaining discretionary authority, to establish targeted protection from possible station displacement in those cases where Section 5 of the Local Community Radio Act does not preclude such protection.

Respectfully submitted,



Don Schellhardt, Esquire

Co-Founder and President

THE AMHERST ALLIANCE

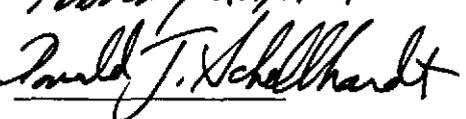
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February 22, 2011
Dated: 

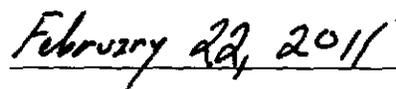
February 22, 2011

CERTIFICATION

I hereby certify that I have utilized U.S. Postal Service Express Mail to send a signed original copy of this Petition For Rulemaking, joined by 14 hard copies, to the following address: Marlene H. Dortsch, Secretary, Federal Communications Commission, Office of the Secretary, 445 12th Street S.W., Washington, DC 20554.

A handwritten signature in cursive script that reads "Donald J. Schellhardt". The signature is written in black ink and is positioned above a horizontal line.

Don Schellhardt, Esquire

A handwritten date in cursive script that reads "February 22, 2011". The date is written in black ink and is positioned above a horizontal line.

Dated: February 22, 2011