UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

Creation Of A	)	
Low Power Radio Service	)	Docket 99-25

REPLY COMMENTS OF DON SCHELLHARDT, ESQUIRE KI4PMG

I am one of the co-authors of the 1997 Petition For Rulemaking, in Docket RM-9208, which triggered the FCC's first deliberations on establishment of a Low Power FM (LPFM) Radio Service. I am also the Co-Founder and current President of THE AMHERST ALLIANCE, although I speak only for myself in these Written Comments.

I hereby submit Reply Comments to those Docket 99-25 Written Comments -- filed by the NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL TRANSLATORS ASSOCIATION and others -- which attempt to shift the Commission's basically balanced "market-by-market" proposal (aka Option #3) into distinct favoritism toward translators.

Option #3 can certainly benefit from more tightly focused geographical analysis and a firm commitment to the licensing of LP10 stations in selected areas. Its basic approach, however, is fair to both "sides". It should *not* be made less evenhanded.

<u>The False Case For A "Tilt" Toward Translators</u>

A common argument for a translator "tilt" seems to run like this:

Section 5 (3) of the Local Community Radio Act (LCRA) directs that *new* [presumably, post-enactment] translators and *new* LPFM stations "shall remain equal in status" [to each other]. Since new translators and new LPFMs are "equal in status" by law, new LPFM applicants have no legally superior status that can justify overriding the privileged position of pending translator applications under the "First Come, First Served" principle.

This argument, however, focuses too narrowly on only certain parts of the total picture.

1. "First Come, First Served" is not sacred. It is not one of the Ten Commandments. It is not part of the U.S. Constitution. It is not even part of an applicable Federal statute. It is a regulatory *custom:* one which is *usually* honored by the Commission, *at the Commission's discretion,* when the FCC is implementing the broader statutory mandate for "equitable and efficient" allocation of licenses.

2. Pending license applications are not the same as actual licenses. If the FCC were to yank away a station's license -- without a rule violation, without the arrival of a competing station that has a higher Priority Service Status and without waiting for the license to come up for renewal -- the Commission would be improperly overriding a vested interest. An application which is merely pending is not a comparably vested interest.

3. Individual entitlements are not group entitlements. The Commission's Option #3 does, in fact, apply the "First Come, First Served" principle to individual pending translators -- right up to the point at which individual pending translators run into Section 5 (1) of the LCRA. That subsection sets *collective* goals: that is, ensuring the availability of spectrum for

new LPFMs *as a group* and new translators *as a group.* The FCC is directed to pursue specified *end results* for specified *groups* of stations: it is not directed to establish specified processes for the consideration of individual applicants.

The same collective end results are implicit in Section 5 (2), which directs the FCC to ensure that licenses for new translators and new LPFMs are awarded "based on the needs of the local community". The envisioned consideration of "community needs" suggests an assumption that the Commission will have meaningful alternatives to choose between, thereby echoing the Section 5 (1) expectation that *both* new translators *and* new LPFMs will be robustly represented in the nation's service areas.

The FCC has responded to the largely collective goals of the LCRA by developing a largely collective approach of its own. Option #3, in effect, "carves up markets" between pending translators *as a group* and new LPFMs *as a group.* New LPFMs get "the first crack" at areas with low spectrum availability, while pending translators get "the first crack" at the remaining areas.

From the standpoint of the two groups *overall*, a fairly evenhanded balance is struck. Indeed, if any group is shortchanged numerically, it is LPFMs as a group -- not translators as a group. I say this because translators would go into the proposed rounds of licensing with a 20-1 numerical advantage over LPFMs, and would still come out of the licensing rounds with a huge numerical edge over LPFMs. Option #3 would keep the "numbers gap" from growing any larger, and might even shrink the gap a bit, but LPFMs would still be a long, long way from "catching up" with translators.

In any event, Option #3 is evenhanded, or perhaps even a little pro-translator, if you judge by its impact on the two groups involved.

As for individual applicants, treated by the LCRA as secondary to the affected groups, a pending translator in suburban Philadelphia may well lose, permanently, a licensing opportunity that would otherwise have been assured by the "First Come, First Served" principle. On The Other Hand, an aspiring LPFM broadcaster in Western Kansas will have to wait to see what frequencies -- if any -- are left after local translator applicants have been processed.

Thus, even at the level of individual applicants, the pain will be spread over pending translators and aspiring LPFM broadcasters alike.

As former House Energy and Commerce Committee Chairman John Dingell (D-MI) once said of a bill: "This is a perfect compromise, inasmuch as everyone is equally unhappy."

The Sustainability of the Commission's Approach

The Commission's decisions on these matters should be sustainable, so long as the Commission proceeds with Option #3, or some reasonable variant -- or adopts an alternative approach that is comparably *balanced* between the two *groups*, while prioritizing an expanded LPFM presence in areas where LPFMs are currently under-represented or absent.

The Commission may be sued regardless of what it does. However, there are lawsuits and there are lawsuits. There are lawsuits, perhaps launched to "make a point" or to score a point with constituencies, which are quickly dismissed on a summary judgement. Then there are lawsuits, often filed by very angry parties and rooted in strong legal arguments, which can go on for years and years.

If the Commission "stays in the middle" with something like Option #3, the second kind of lawsuit is unlikely to materialize. For one thing, a court will grant the FCC a [rebuttable]

"presumption of reasonableness" when its decisions are reviewed. For another thing, a court will almost certainly grasp that the Commission was burdened with a complex situation and a somewhat murky statute, making it difficult or impossible for the FCC to fashion a flawless solution. Finally, because years of further delay will not benefit either pending translators or aspiring LPFM broadcasters, parties may be reluctant to file serious lawsuits so long as the final regulations leave them with some kind of benefit.

However, if the FCC "tilts" too far in either direction -- for example, seriously shortchanging LPFMs in urban areas by failing to license LP10 stations, or moving back toward the blanket dismissal of *all* pending translator applications -- then "all bets are off". Such a "tilt" could trigger a serious lawsuit, or action in Congress, or both.

Aware of this practical reality, THE AMHERST ALLIANCE and other LPFM advocates have consciously resisted the temptation to endorse the unduly pro-LPFM policies in Options #1 and #2. I urge translator advocates to show similar self-restraint in their own recommendations.

Respectfully submitted,

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