UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

IN FCC DOCKET 99-25:

ADDITIONAL REPLY COMMENTS

OF DON SCHELLHARDT, ESQUIRE KI4PMG

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

ADDITIONAL 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.

In these Reply Comments, I want to elaborate on two Petitions For Rulemaking that were recently filed with the FCC, and also placed in this Docket, by my own organization: THE AMHERST ALLIANCE. Both of these Petitions deal with the allocation of radio frequencies during a time when, in many geographical areas, there aren't enough frequencies to go around.

I want to address these Petitions in the context of the resource scarcity that is surfacing -- or on the verge of surfacing -- in much of America's economy and society. Because my career has led me to deal with the scarcity of natural gas, oil and water, as well as the scarcity of radio spectrum, I want to highlight a few of the common threads I have noticed.

Technically, then, I am addressing Written Comments by THE AMHERST ALLIANCE that conveyed or referenced two Petitions For Rulemaking by THE AMHERSTALLIANCE. Really, however, as my final filing in this round of public comments in FCC Docket 99-25, I am submitting a "think piece".

I invite readers at the Commission, and elsewhere, to take a brief break from the frenetic battles in this particular round of 99-25 rulemaking. Lean back. Kick off your shoes. Relax -- and spend a few minutes taking "the long view".

I have set forth, immediately below, some specific information about Amherst's specific Petitions For Rulemaking. After that, I move on to The Big Picture.

4/21/11 AMHERST ALLIANCE Petition

To Substantially Increase Locally Originated Programming

As noted in the heading above, this Petition For Rulemaking was submitted to the Federal Communications Commission on April 21, 2011. A copy of this Petition was placed in Docket 99-25 through Written Comments filed by THE AMHERST ALLIANCE on the same date.

The Petition is also referenced in Written Comments filed by Amherst, in Docket 99-25, on July 5, 2011 and August 29, 2011.

The Petition presents three basic proposals:

1. The Petition proposes to allow locally originated programming on translators (as also proposed in pending FCC Docket RM-11331).

2. The Petition proposes that existing satellators, and also existing satellite-fed LPFMs, should be placed into a new, lower priority sub-category, which we call "Auxiliary" Secondary

Service -- except when such stations have agreed to "ramp up", over 2 years, to 8 hours per day of locally originated programming.

3. The Petition asks the FCC to bar licensing of any new satellators, or new satellite-fed LPFMs, except when applicants agree to "ramp up", over 2 years, to 8 hours per day of locally originated programming.

2/22/11 AMHERST ALLIANCE Petition

To Establish Targeted Displacement Protection For Certain Radio Stations

As noted in the heading above, this Petition For Rulemaking was submitted to the Federal Communications Commission on February 22, 2011. A copy of this Petition was placed in Docket 99-25 through Written Comments filed by THE AMHERST ALLIANCE on the same date.

The Petition is also referenced in Written Comments filed by Amherst, in Docket 99-25, on August 29, 2011.

The Petition notes that Section 5 of the 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 Petition asks the Federal Communications Commission to protect certain LPFMs, translators, boosters and Class D educational stations from displacement in certain cases where the LCRA does not explicitly preclude such protection. We further 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.

My Life As A Scarcity Fighter

It seems to be part of my Karma, in this lifetime, to deal with the management and/or alleviation of resource scarcity.

This trend became noticeable in my first job after graduating from law school at George Washington University. I took on work as a contract writer for the Overseas Private Investment Corporation (OPIC). which insures selected private investments in developing countries by U.S. corporations. I was hired to write the bulk of OPIC's Annual Report.

As I wrote about specific investments in developing countries, I learned how important infrastructure can be to a country.

In Ghana, people were starving in the country's interior while record catches of fish rotted on the beaches. The reason? There was no refrigeration technology for keeping the fish fresh on the journey inland. OPIC helped to solve the problem by insuring an ice factory. If the people of Ghana didn't have refrigerated rail cars, they could still use blocks of ice.

In Botswana, there was a similar problem. People were raising cattle on one side of a mountain range. Other people were starving on the other side of the mountain range. The reason? The mountains were impassable. OPIC helped to solve the problem by insuring a contractor who built a dirt road over the mountains. A paved road would have been nicer, but a dirt road was good enough to get beef to people who needed it desperately.

Infrastructure is important. That lesson was illustrated for me vividly.

I learned the same lesson in my next job. I was hired as Legislative Counsel to U.S. Representative Matthew J. Rinaldo (now deceased), a Republican from New Jersey. (This was back in the days when moderate Republicans were still allowed in the Party.)

Because Representative Rinaldo was a senior Republican on the House Energy and Commerce Committee, and because I was assigned to help him on that Committee, I found myself in the epicenter of activity when an historically unprecedented natural gas shortage hit the nation. Factories were closing, and in some cases even public schools were closing. Natural gas utilities were struggling to find enough natural gas to heat homes and apartments.

Congress, with help from Representative Rinaldo and many others, was able to take *some* action that eased the situation. For the most part, however, we just had to wait for the weather to get warmer. Having "reaped the whirlwind" of unwise regulatory policies toward natural gas in the past, as well as shoddy emergency planning by *some* (but not all) natural gas utilities, we found there was little we could do *in the near term* to alleviate a catastrophic resource shortage.

I will never forget the personal frustration I felt, as a "deputy legislator", over my relative powerlessness to end the crisis. So I learned my second life lesson in resource scarcity: *If you wait until the crisis strikes, it may be too late to turn the situation around quickly. Better you should plan ahead* before *a possible crisis hits.*

After my work with Representative Rinaldo, I spent 12 years with the American [Natural] Gas Association. There I held several different positions, including Director of Legislative and Regulatory Affairs. When this is added to my two energy-oriented jobs on Capitol Hill, and my stint as a Policy Advisor on global warming at the U.S. EPA, I spent almost two decades dealing with legislation and regulations affecting natural gas -- and, to a lesser extent, government policies affecting oil, coal and electric power generation.

Of course, this energy and environmental experience has now been followed by 13 years with THE AMHERST ALLIANCE. In my work for Amherst, the scarcity of radio spectrum has been a constant backdrop.

Finally, while I have never been involved with water management *professionally,* preparation for future water shortages has been an interest of mine for decades.

"On my own time", I have kept loosely aware of water management debates. In addition, in 2005 I took a course in Water Law at the University of Denver School of Law.

Common Threads

Whether the resource involved is natural gas, or oil, or water, or the radio spectrum, "scarcity fighters" face two basic questions:

(1) Over the medium term to the long term, how can we ease shortages -- or, ideally, prevent them from happening in the first place -- by "baking a bigger pie"?

And

(2) For now, and the immediate future, how can we honor justice and maintain a "safety net" for all -- and thereby "preserve domestic tranquility" -- by "slicing the current pie more fairly"?

With respect to the second question, there are three basic alternatives (which are not necessarily mutually exclusive):

(A) Allocate resources based on the perceived "social value" of particular uses: for example, prioritizing service to residential users over industrial users when natural gas is in short

supply, or prioritizing allocation of water to farmers

(B) Apply a policy of "First Come, First Served": for example, allowing 1886 water rights by a small copper miner to "trump" water rights sought by a modern real estate developer, or allowing existing satellators to retain use of frequencies that could otherwise be used by locally oriented newcomers

And/or

(C) Allow "market forces" to decide allocation: for example, auctioning off water rights or commercial radio licenses to the highest bidders

"Baking A Bigger Pie"

In 3 of the 4 resource-constrained industries that I know, no one seems to be trying very hard to "bake a bigger pie".

In the case of *water*, "baking a bigger pie" might mean projects for desalination of seawater and/or inland brine -- none of which seems to be happening. Ditto for projects to reclaim polluted fresh water, build more reservoirs and/or refurbish aging aqueducts.

In the case of *natural gas*, price-induced conservation has stretched supplies and natural gas from shale has boosted domestic production significantly. However, there have been many environmental complaints about the new hydrofracturing technologies, which suggests that shale production might be restrained by new environmental regulations in the future. Also: The industry continues to pursue approval of unpopular Liquefied Natural Gas (LNG) facilities that would rely on *imported* natural gas and pose public safety concerns. Better choices would be pursuit of "clean" coal gasification and/or gasification of America's abundant organic garbage.

In the case of *oil*, the industry passed its U.S. production peak in the 1970's and seems likely to reach its global production peak momentarily. So there is probably no way to "bake a bigger pie" when it comes to oil. However, some large oil companies are trying to bake one anyway -- by producing liquid synthetic fuels from tar sands and/or oil shale. Unfortunately, production of these liquid synthetic fuels generates hugely negative environmental impacts, while also gulping down precious water supplies (often in arid areas). So the world's governments should be trying hard to get consumers off oil completely, and on to other energy sources -- but, for the most part, this isn't happening on anything close to the right scale.

As for *radio*, neither the FCC nor the large broadcasters seem to be pressing for new equipment, and/or any other new technologies, that could permit use of currently un-utilized parts of the radio spectrum. Yet, as my friend and colleague Nickolaus Leggett likes to say: "The higher you go up in frequency, the more abundant the spectrum becomes."

Nick seems to be carrying on a lonely love affair with millimeter wave broadcasting and infrared broadcasting. I would love to see him get some company.

I commend to all readers of these Reply Comments the text of Nick's June 30, 2011 article in RADIO WORLD: "It's Time For A Lighthouse Protocol".

The article appears in the hard copy of RADIO WORLD's June 30, 2011 edition. However, it can also be found by following the following link:

http://www.rwonline.com/its-time-for-a-lighthouse-protocol/23828

I also recommend Nick Leggett's February 28, 2008 Written Comments in MB Docket 04-233 (which concerns Broadcast Localism) and his February 10, 2010 Written Comments in GN Docket 09-191 and WC Docket 07-52.

“Slicing The Current Pie More Fairly”

The “track records” on this front are varied.

In the case of *natural gas*, the resource is generally allocated by “market forces” -- until and unless a shortage develops. At that point, the Federal Energy Regulatory Commission (FERC) steps in, activating “curtailments” which shift the entire system over to a “social value” footing until the crisis has passed. State Public Utility Commissions (PUCs) also become involved, activating their own State level curtailments that are designed to work with the Federal curtailments system.

In general, the curtailment regulations put residences (including apartments) at the head of the line, along with public schools. After that come agricultural uses and various industries, with the highest industrial priority assigned to the use of natural gas for “feedstock” (that is, use of natural gas to make fertilizer and/or chemicals). The priorities roll down from there.

The case for the natural gas industry’s “on-and-off free market” was summed up for me succinctly by a natural gas engineer whose utility serves Aspen, Colorado:

“Here in Aspen, we have people who literally heat their outdoor swimming pools with natural gas. 24/7. All winter long. Just so a warm swimming pool is *always* ready for them. In any kind of weather. At a moment’s notice. It runs ‘em about $800 a month, but they can afford it. [This was $800 a month in 1985.]

“Thing is: It’s good we have those curtailment regulations kicking in on the really cold days. If we just allowed dollars to decide everything, we’d be closing down public schools and freezing senior citizens in their apartments, but the folks with the outdoor swimming pools would be getting all the natural gas they want.”

The natural gas industry curtailment system isn't flawless. Some of the databases are seriously out-of-date. Further, not all of the newer natural gas uses, such as gaseous fuel for Natural Gas Vehicles, have been integrated into the standby planning for shortages.

Still, the state of affairs for natural gas "beats by a country mile" the state of affairs for oil.

Oil is "winging it". Tightly (and perhaps excessively) regulated by President Carter, it \was deregulated in spades by President Reagan. The latter President was so intoxicated by "the magic of the marketplace" that he removed all of President Carter's limits on new oil imports -- and even persuaded Congress to repeal Washington's *standby* authority to allocate oil and oil products *during a supply emergency.*

To the best of my knowledge, none of President Reagan's successors have ever restored any of the statutes or regulations or Executive Orders that President Reagan ripped to shreds.

If the oil status quo remains in place:

The next oil supply disruption, should it occur, will plunge America into a state of "everyone for themselves". If people in Aspen want to heat their outdoor swimming pools with *oil,* they'll be able to bid it away from the commuter who needs gasoline to get to work.

In the case of *water,* State governments differ radically in their approaches to supply allocation. California has pioneered the "social value" approach. Colorado proudly follows the "First Come, First Served" approach. Other States "mix and match".

If there is any trend I can discern, it is the relative unpopularity of water auctions *among the general public.* Elected and appointed officials may see the matter differently, but many everyday citizens in the Western States tend to erupt when they see farmers bribed to go out of business so that their water rights can be acquired for an ethanol plant or a subdivision.

These citizen eruptions haven't ended the appeal that water auctions seem to have for some political leaders, but they may have dulled that appeal a bit. In The Meantime, at least one proposed ethanol plant in Colorado has been blocked because the water auctions for it became too much of a political "hot potato".

At present, sporadic citizen revolts against water auctions seem to be only the storm clouds over the nation's water allocation systems. Otherwise, the country's water allocation systems seem to be functioning without much controversy.

Still, in *most* places during *most* seasons, the country hasn't really exceeded the limits of its water supplies. When and if *that* happens, it will be important to see whether "First Come, First Served" water allocation or market allocation prove to be more popular with the voters than "social value" water allocation. I doubt it.

My own bet is that most voters, when and if *they themselves* don't have enough, will like "social value" allocation much better than either entitlements based on vintaging *or* supplies accorded by "a democracy of dollars".

This leads us back to *radio.*

As I said, I suspect that "social value" allocation is more politically sustainable -- over the long term -- than the competing approaches to resource allocation. For one thing, it is the only approach to resource allocation that really tries to determine *what the majority of the people in a society* really need and want.

When things are calm and "normal", most voters may not care that much whether a resource allocation scheme ranks them behind those with more money and/or those who got to the resource first. However, when there's a 2-mile line at the gasoline station … or the

faucet is running dry … or the heat won't go on in sub-freezing weather … or Grandma doesn't hear about the toxic gas release from a truck accident because none of the town's absentee radio stations carry local news bulletins anymore … That's when voters may suddenly become *very* interested in the esoteric subject of how their resources are allocated.

The Federal Communications Commission, then, may have cause to be concerned about how far it has drifted from the relatively safe harbor of "social value" resource allocation.

Once Upon A Time, before mandatory auctions and other changes, the Commission held "comparative Hearings" that -- in effect -- carefully assessed the "social value" of every single radio station applicant. The FCC then awarded each radio station license to the applicant who was found to have the most to offer to the society as a whole.

Today:

(1) By law, commercial licenses *must* be "market allocated" through auctions. Congress concocted this monstrosity, not the Commission, but for now the Commission is stuck with the consequences. Personally, I hope to see enactment of auctions exemptions before I die.

(2) Non-commercial licenses are allocated by the patch quilt structure of a bare bones "points system" followed by settlement negotiations with random rationality. Gone are the days of "comparative Hearings". I know that Congress may well have contributed to this situation by failing to provide enough funding for the preservation of "comparative Hearings". Still, I haven't seen much evidence that the Commission fought very hard to get the funding it needed,

And

(3) Whoever manages to obtain a license, under either of these avenues, receives a strong presumption of tenure based on "First Come, First Served". License renewal is virtually guaranteed so long as no major rules are broken -- even if the station is the fourth satellator

for the same entity in a single service area, and is sitting on a frequency needed by a vibrant new station that would originate local programming. Similarly, the FCC's Priority Service Status regulations continue to treat all Secondary Service stations as equal, even though satellators which offer no locally originated programming clearly have a lower "social value" than fill-in translators which *do* offer such programming.

Apart from the FCC's use of a threadbare "points system" during the *pre-settlement* stage of mutually exclusive non-commercial license applications, there is hardly anything left of the "social value" thinking that once formed the very bedrock of the Commission's decision-making.

Now it is time -- *past* time -- for the FCC to inject more "social value" thinking back into its license allocation decisions.

A good place to *start* would be expeditious Docketing of the two AMHERST ALLIANCE Petitions For Rulemaking with which I began this discussion.

Overall Assessment of Scarcity Management Effectiveness

For whatever it may be worth to the Commission, and others, set forth on the next page are the grades I would personally assign to each of the resource-constrained industries I have mentioned above.

DON SCHELLHARDT'S GRADES

FOR RESPONSES TO RESOURCE SCARCITY

As of September 27, 2011

Industry	"Baking A Bigger Pie"	"Slicing The Current Pie More Fairly"	Average
Natural Gas	B	C	C+
Water	F	B	D+
4 Industry Average	*D*	*D+*	*D*
RADIO	*F*	*D*	*D-*
Oil	F	F	F

These grades do not focus upon the regulators of each industry alone. Instead, the grades apply to each industry *as a whole*, including its regulators but also including its private sector.

If my personal analysis is anywhere close to correct, the radio industry is far from alone in having much work to do in order to deal with scarcity "equitably and efficiently".

The United States as a nation has a lot of work to do.

Conclusion

I urge the Federal Communications Commission to undertake new initiatives to "slice the current pie more fairly" when it comes to radio spectrum. Prompt action on the referenced AMHERST ALLIANCE Petitions For Rulemaking is an excellent place to begin.

I further urge the Federal Communications Commission to begin "baking a bigger pie". It can start by vigorously encouraging new technologies which access currently un-utilized portions of the radio spectrum. One promising option for the Commission, as suggested by my friend and colleague Nickolaus E. Leggett N3NL, would be R&D grants and/or regulatory incentives which promote millimeter wave broadcasting and/or infrared broadcasting.

Respectfully submitted,

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Dated: _____

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