Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission (electronically filed)

COMMENTS OF BROWN STUDENT RADIO

1. Brown Student Radio ("BSR") hereby submits these Comments in response to the Commission's *Fourth Further Notice of Proposed Rulemaking* in the above-captioned proceeding, FCC 12-28 (rel. March 19, 2012.[1] BSR is an applicant for a new Low Power FM ("LPFM") radio station at Providence, Rhode Island,[2] and has an Application for Review currently pending[3] with respect to the dismissal of its application after a point system award to a time-sharing group of mutually exclusive applicants.[4]

2. BSR urges the Commission to eliminate the provision of Section 73.872(c) of the Rules that aggregates the points of mutually exclusive applicants who enter into a time-sharing agreement that does not involve a universal settlement. The reason is that the existing rule is far too easily abused. In at least two cases, abuses have succeeded; so the pathway is now known, and it is likely that abuses will be more prevalent in any future application window. Indeed, any applicant that does not plan for point aggregation through an agreement among at least three

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[1] 77 FR 20756 (April 6, 2012).

[2] File No. BPL-20000605AGJ.

[3] Application for Review filed July 27, 2011.

[4] *Casa de Oracion Getsemani et al.*, 23 FCC Rcd. 4118 (2008), *recon. den.* 26 FCC Rcd. 9190 (MB 2011).

applicants will be foolhardy to apply, given the expected large numbers of mutually exclusive applications resulting from the well-known pent-up demand for LPFM licenses, and the low probability of success of a singleton application if the aggregation rule is retained.

3. The abuse occurs when there is a partial settlement among applicants, each of which has three points standing alone, but not all have the intent or resources to construct. The settling applicants enter into a time-sharing agreement, allowing aggregation of their points to a total of six or nine, as the case may be; but not all of the applicants are equally *bona fide*. A dominant applicant takes virtually all of the shared air time and leaves only the required minimum of 10 hours a week to the other applicants, which hours can be in the middle of the night, when listenership is minimal. The two non-dominant applicants need never construct. They can walk away, leaving the dominant applicant with complete control of a frequency that it could never have obtained as a stand-alone. In this way, a three-point applicant can defeat other equally qualified three-point applicants who are not fortunate enough to find "friends" who will merge and then disappear. The surviving applicant can then apply to remove the share-time condition on its license and end up with a free and clear license for 100% of the air time.

4. This situation has occurred in at least two cases, one of which involves BSR. In June of 2000, twelve mutually exclusive applications were filed for Channel 243 in and near Providence, Rhode Island. Five applicants were each tentatively selected for grant, with the maximum of three points awarded to each.[5] Three of the five then entered into a time-sharing agreement, aggregating their total to nine points. Over BSR's objections, the three time-sharers

[5] *See Broadcast Actions*, Report No. 25930, Feb. 28, 2005.

were each awarded construction permits,[6] and the remaining two applications were dismissed. One grantee, Facility ID 123967, was an educational institution which closed its local campus, established a new campus outside of its proposed station's service area, and submitted its unbuilt construction permit for cancellation. The second grantee, Facility ID 124196, never constructed or asked for an extension of time to construct and allowed its permit to expire. The third grantee was the dominant party, reserving to itself 148 hours a week in the initial settlement agreement. It now operates WIGV-LP, Facility ID 121214, and has applied for removal of the share-time condition,[7] so that it will be the sole licensee with 100% of the air time hours.[8]

5. The second example involves WLCQ-LP, Facility ID 133854, Feeding Hills, Massachusetts. The initial WLCQ-LP construction permit was issued after two applicants entered into a share-time arrangement and defeated several other applicants that individually each had an equal number of points. WLCQ-LP took 22 hours a day and left the other party, Facility ID 133976, with only two hours from 2:00 to 4:00 a.m., when there is no significant audience.[9] The two-hour-a-day facility was never constructed. The permittee abandoned its construction permit, leaving WLCQ-LP with 100% control of a channel that it could not have obtained without the help of a non-participating partner.

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[6] *See* Note 3, *supra*.

[7] File No. BPL-20120402AAH. BSR filed an Objection to this application, which remains pending.

[8] Both the initial construction permit grant for WIGV-LP and WIGV-LP's application are the subject of BSR's pending Application for Review.

[9] *See Citilight Ministry Center Facility*, 20 FCC Rcd. 10179 (2005).

6. BSR does not know how often share-time agreements have prevailed but have never been implemented as proposed. It is worth noting, however, that two of the three time-sharing Rhode Island applicants and both Massachusetts time-sharing applicants had the same consultant listed as the contact person in their application.[10] The cat is out of the bag, so to say. If one consultant can produce a full-time victory for a single licensee, why cannot other consultants and attorneys do the same; indeed, can they afford not do the same? If they allow their clients to remain as stand-alone applicants, their probability of getting a construction permit will be materially reduced, no matter how meritorious the applications may be.

7. Any benefits from the aggregation opportunity are exceeded by the detrimental potential for abuse. The only benefit of point aggregation is that it may simplify selection of a winner among mutually exclusive applicants and avoid the discomfort of a division of the license term or perhaps forced time-sharing.[11] This administrative convenience is small compared to the disadvantage suffered by applicants who do not know enough, or are unable, to game the system. The whole point of the Commission's encouragement of LPFM is to provide an opportunity for new community groups to have access to the airwaves. LPFM applicants must not have any other broadcast interests, so they are most often unsophisticated and inexperienced with the Commission's application process. It is unfair and harsh to throw them into a system where they are likely to be doomed unless they spend money to hire an experienced consultant or attorney.

8. It is important to note that the listening public does not benefit from point aggregation in partial settlements, because the result of the current rule does not assure that the grantees are

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[10] This consultant specializes in religious applicants and is highly experienced and very active in the LPFM application arena.

[11] *See* Section 73.872(c)(4) of the Rules.

any more qualified, or will provide any better programming service, than the dismissed applicants. The limited benefit of possibly bringing a station on the air sooner is not sufficient to offset the disqualification of applicants who may provide better service.[12]

9. If there is no way to aggregate points, then there are likely to be more situations where no settlement is reached, and more applicants will be forced into the discomfort of dividing the license term or sharing time. That discomfort may stimulate some arrangements among those applicants to share time, perhaps even combining resources to produce better programming or to make their operations more financially viable. Such arrangements should be entertained, because absent point aggregation, they do not penalize other equally qualified applicants who may chose not to join a consortium. And that is the point – all applicants with equal merit should get an equal chance to prove their abilities in the public's ears.[13]

10. Of course, a universal settlement among all applicants in a mutually exclusive group should still be permitted, because it will eliminate conflict and allow a station or stations to be

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[12] The construction period is no shorter for grantees after point aggregation than for other grantees. *See* Section 73.3598(a) of the Rules. Thus a share-time award does not itself ensure a more rapid commencement of service to the public than grant of any other application.

[13] In theory, it should be possible for the Commission to investigate partial settlements to ensure the *bona fides* of each applicant before approving the settlements. However, that approach would require substantial Commission resources to be devoted to individual cases. It is because such resources are not plentiful that the Commission does not entertain petitions to deny against applicants other than construction permit selectees or grantees. *See* Section 73.3584(a) of the Rules. The only way that non-*bona fide* settlements could be smoked out would be to permit petitions to deny all pending LPFM applications – a solution that would not only drain Commission resources but would also slow down the process of getting applications granted so that new stations can serve the public.

constructed promptly. But where a settlement is not universal, it should be permitted as a private transaction but not afford any advantage to the applicants.[14]

11. If the Commission does not eliminate point aggregation from partial settlements, then it must step in and police abuses when a permittee never constructs. BSR suggests that aggregating parties be required to stand or fall on their own proposal. If the proposal is not fully implemented in practice, with all participants remaining active, then the situation should revert to where it stood prior to the settlement. Any applicants in the same mutually exclusive group that were dismissed but still wish to prosecute their applications should be evaluated in the original group without point aggregation. Those who have points equal to the prior winner should be put into the same share-time arrangement or successive license term arrangement that would have been ordered absent the settlement.[15]

12. If the Commission concludes that re-opening the award would be unduly harsh on the original winner who constructed and counted on a certain number of hours of operation, then the share-time rules should be changed to increase the minimum number of hours that must be awarded to each party to a settlement.[16] For example, if no participant were permitted to have more than 150% of the total number of hours divided by the number of participants, no permittee

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[14] The Commission has encouraged settlements in the past, while requiring them to be universal so as to dispose of the mutual exclusivity permanently – even in the LPFM context. *See, e.g., Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 20 FCC Rcd. 11169 (par. 52) (2005); *Low Power Radio Service*, 15 FCC Rcd. 2205 (par. 150) (2000).

[15] This proposal is limited to the original applicants and treats them as they should and would have been treated absent the unfulfilled time-sharing agreement. It is different from the concept of allowing new applicants to seek "unused and unwanted time" without waiting for a new filing window, previously rejected by the Commission in *Creation of A Low Power Radio Service (Third Report and Order)*, 22 FCC Rcd. 21912 (par. 36) (2007).

[16] *See* Section 73.872(c)(1)(iii) of the Rules.

would have unreasonable expectations of controlling virtually all the air time, as happened in Rhode Island and Massachusetts. There would then be little or no hardship if the sharing arrangement were re-opened to admit other participants.[17]

13. There is time before the next application window for the Commission to clean up the point aggregation problem and to give every applicant, no matter now unsophisticated or inexperienced, an equal chance based on the merits of that applicant. Otherwise, some applicants will realize that the best way to win is to team with relatively uninterested applicants, who are likely not to follow through and build stations.[18] That result would not be in the public interest, as it does nothing for listeners and punishes applicants who apply in good faith but do not know how to game the system.

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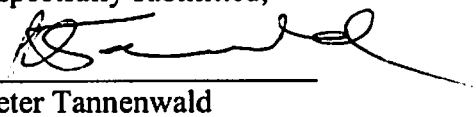
Respectfully submitted,



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[17] The alternative of opening a new application filing window to fill air time not occupied because a permittee did not construct or turned in its license would be less desirable, because it would fail to recognize the investment of time and resources by applicants that were rebuffed only because of an arrangement that was not *bona fide*.

[18] "Uninterested" applicants need not be outright fraudulent. If they are, the Commission has remedies available through rules against misrepresentation, although enforcing those rules again drains Commission resources. But a really serious applicant can always look for two other applicants who might be interested in having a radio station but do not really have the resources or know-how to proceed without help they may never get, thus increasing the probability that they will fall by the wayside.