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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12 St. SW
Washington, DC 20554

Re: Notice of *Ex Parte* presentation, MM Docket No. 99-25 – Creation of a Low Power Radio Service; MB Docket No. 09-182 – 2010 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; MB Docket No. 07-294, Promoting Diversification of Ownership in the Broadcasting Services

Dear Ms. Dortch:

On Tuesday, September 25, Brandy Doyle of Prometheus Radio Project and Angela Campbell, Laura Moy, and law student Amanda Burkett of the Institute for Public Representation, Counsel for Prometheus Radio Project (collectively “Prometheus representatives”), met with Commissioner Mignon Clyburn, Dave Grimaldi, and Louis DiLorenzo of the FCC regarding matters in the above-captioned dockets.

Prometheus representatives explained that the LPFM service is well-situated to provide additional ownership opportunities for minorities and women, as well as alternative sources of relevant media content for communities that are underserved by commercial full-power media. However, providing

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additional low-power FM radio ownership opportunities to minorities and women will not address the lack of ownership opportunities in full-power commercial broadcasting, which – despite a federal appeals court mandate, consistent encouragement from the public, and numerous representations to the contrary – the Commission has failed to address or even analyze.¹

Prometheus representatives explained that barriers to LPFM entry exist for minorities and women, and have prevented many groups from obtaining LPFM licenses in the last application window. We described two major barriers for minorities and women who wish to get into LPFM broadcasting: 1) lack of available LPFM spectrum in urban areas where large underserved minority communities reside and 2) competing applications from “local” organizations that plan to exclusively broadcast nationally syndicated content. We urged Commissioner Clyburn to support rules that will target these problems, thereby improving ownership opportunities for minorities and women in the upcoming LPFM application window.

Second-Adjacent Waivers Will Allow LPFM to Serve Urban Areas

Prometheus representatives argued in support of a second-adjacent frequency waiver standard modeled after the FM translator rules. Ms. Doyle explained that current second-adjacent frequency restrictions keep LPFM stations out of urban areas because of lack of frequency space. Ms. Doyle also explained that there was no technical reason not to grant these waivers, as FM translators operating at higher power levels than LPFM stations already use second adjacent frequencies without incident. The same frequency rules that are already in place for these stations should be implemented for LPFM: if a station on a second-adjacent frequency will not interfere with an existing station, then the FCC should grant an LPFM license to a broadcaster for that frequency.

¹ See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 472 (3d Cir. 2011) (ordering the Commission to improve its data collection and analysis of minority and woman ownership “within the course of the Commission’s 2010 Quadrennial Review”); Comments of UCC, et al., MB Dkt No. 09-182 (filed Mar. 5, 2012), at 23-38; Reply Comments of UCC, et al., MB Dkt. No. 09-182 (filed Apr. 17, 2012), at 19-35; Letter of The Leadership Conference on Civil and Human Rights, MB Dkt. No. 09-182 (filed July 26, 2012); *Ex Parte* Notice of Free Press, MB Dkt. No. 09-182 (filed Aug. 9, 2012).

A Local Origination Requirement Will Better Ensure that LPFM stations Serve Local Community Needs

LPFM was established to serve uniquely local needs. There has only been one round of LPFM applications in the past, and the next round will likely be the last opportunity to establish LPFM stations due to spectrum scarcity. The rules governing the first round of applications included a preference point for applicants who pledged to provide eight hours of locally originated broadcasting per day.

The recent literature review on the critical information needs of the American public found that although “low power FM stations frequently are started with the explicit intention of addressing the critical information needs of specific community groups that other media outlets systematically neglect,” recent research suggested that “the original vision” of LPFM “is to some extent being subverted by national organizations that are creating de facto programming networks that are undermining the extent to which LPFM stations are providing locally-produced news and information.”²

In the Fourth Further Notice of Proposed Rulemaking in this proceeding, the Commission requested comment on whether to require that all applicants locally originate programming.³ Prometheus filed comments urging the FCC to require each licensee to locally originate at least 20 hours per week. This requirement would not be unduly burdensome, since it is less than the eight hours per day currently required to obtain a local origination preference point. At the same time, such a requirement would better ensure that whichever applicant is selected will fulfill the original intent of meeting local community needs.

² Lewis Friedland, Philip Napoli, Katherine Ognyanova, Carola Weil, & Ernest J. Wilson III, *Review of the Literature Regarding Critical Information Needs of the American Public* 50-51 (2012), available at http://transition.fcc.gov/bureaus/ocbo/Final_Literature_Review.pdf.

³ LPFM Fifth Report & Order, Fourth FNPRM and Fourth Order on Recon, MB Dkt No. 99-25 (filed Mar. 19 2012), at ¶63 (asking, “should we impose a specific requirement that all new LPFM licensees provide locally-originated programming?”).

The Local Origination Requirement Does Not Violate the First Amendment

Prometheus noted that no commenter in this proceeding has argued that a local origination requirement would violate the First Amendment, thus making it unlikely that anyone could or would bring a constitutional challenge. But in any event, requiring some amount of local origination would not violate the First Amendment.

As the Supreme Court made clear in *Red Lion*, First Amendment standards as applied to broadcasting must account for spectrum scarcity. Because not everyone who wants a broadcast license can have one, the government may constitutionally impose reasonable requirements to serve the public interest on those that are granted licenses. Because the LPFM service was created to ensure an outlet for local voices and service to small, underserved communities, requiring some amount of local origination is a reasonable means to ensure that the spectrum allocated to low power service is used as intended.

The Supreme Court has rejected the opportunity to revisit *Red Lion* on four separate occasions over the last several years – in both *Fox I* and *Fox II* and in denying *certiorari* in appeals of the 2002 Biennial and 2006 Quadrennial Broadcast Ownership reviews – indicating that the Court continues to view *Red Lion* as good law. Moreover, spectrum scarcity remains a real and growing problem. The fact that the Commission is expecting many more applicants for LPFM stations than can be granted is one indication. Another is the FCC's recent efforts to encourage broadcast stations to share or voluntarily give up spectrum to allow the spectrum to be used for wireless telecommunications services.

Requiring LPFM licensees to originate 20 hours of programming per week is not a content-based regulation. Each licensee will remain free to determine what to broadcast. The rule would not require licensees to broadcast any point of view or even any particular type of programming. At bottom, it is no different than requiring (as the FCC rules do) that some licensees have a main studio located in or near their community of license. If the requirement were to have any effect on program discretion, it would be far less than other existing requirements such as requiring stations operating on reserved spectrum to provide noncommercial educational programming, requiring stations to provide

political candidates with equal access, requiring stations to offer reasonable access for federal candidates, and requiring television station to broadcast educational programming for children.

Thus, if challenged, the regulation would clearly be upheld under rational basis scrutiny. At most, intermediate review would apply. The FCC would be able to meet this standard by showing that the regulation furthers the substantial governmental interests of ensuring the integrity of its spectrum allocation process and in licensing broadcasting to serve the public interest goals of diversity and localism. Moreover, the requirement is narrowly tailored; it does not infringe on the licensee's editorial discretion any more than necessary and the alternative of awarding a preference for locally originated programming has proven insufficient to ensure that local program needs are being met.

Timing

Finally, Prometheus representatives expressed our hope that the item would be voted on this fall and that the rules would provide sufficient time for community groups with limited resources to prepare their applications.

Respectfully submitted,

/s/

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