

Appendix A:

**A First Amendment Analysis of a Local Origination  
Requirement for New LPFM Radio Stations**

# **A First Amendment Analysis of a Local Origination Requirement for New LPFM Radio Stations<sup>1</sup>**

by Institute for Public Representation on Behalf of Prometheus Radio Project

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In the most recent Report and Order on low-power FM (“LPFM”), the Commission sought comments on whether it should impose a local origination requirement instead of award applicants with a preference point for pledging to locally originate programming.<sup>2</sup> The Commission also asked commenters whether such a requirement would be constitutional. Prometheus Radio Project has proposed that the Commission adopt a local origination requirement of 20 hours per week for new LPFM radio stations. This analysis examines how this local origination requirement would fare under a First Amendment analysis.

## **Standard of Review**

Broadcast regulations have always been subject to a lower level of scrutiny than other speech restrictions due to the special nature of broadcast media.<sup>3</sup> The Supreme Court has found that there is no constitutional right to broadcast, because the inherent scarcity of broadcast spectrum means that more voices must be excluded from the airwaves than included.<sup>4</sup> Thus courts apply only rational basis scrutiny to content-neutral broadcast regulations.

In *American Family Association, Inc. v. FCC*, the D.C. Circuit upheld an FCC system for evaluating full-power non-commercial educational licenses under the First Amendment remarkably similar to the point system used to evaluate LPFM applications. Under that system, the FCC awarded NCE license applicants two points for “local diversity of ownership,” one to two points for the “best technical proposal,” three points for “established local entities,” and two points for status as a “state-wide educational network.” The court explained,

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<sup>1</sup> Prepared to accompany an *ex parte* letter filed on October 11, 2012, in MM Dkt. No. 99-25.

<sup>2</sup> *Creation of a Low Power Radio Serv.*, Fifth Report & Order, Fourth FNPRM and Fourth Order on Recon, 22 FCC Rcd 3315, 3340 (rel. Mar. 19 2012), at ¶63.

<sup>3</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969).

<sup>4</sup> *Red Lion*, 395 U.S. at 388.

It is well established that “structural” regulation of the radio and television broadcast spectrum, that is, that involving the ‘where’ and ‘when’ of broadcasting, is generally subject only to rational basis scrutiny. The justification for this deferential standard, according to the Supreme Court, lies in the unique physical characteristics of the broadcast medium. Regulation of some form is an irreducible feature of any broadcast spectrum worth having, since a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.

This deferential standard is applicable here. The point system governs the structure of all of NCE broadcasting by allocating its scarce spectrum among applicants. It is the quintessential example of a structural regulation involving the “where” and “when” of broadcasting.<sup>5</sup>

Thus, if a party were to challenge the local origination requirement, a structural regulation involving only the “where” of broadcasting, a court would most likely apply only rational basis scrutiny.<sup>6</sup>

At most, a court might apply intermediate scrutiny as applied in *League of Women Voters*.<sup>7</sup> In that case, the Court stated that broadcasting “restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest.”<sup>8</sup> Unlike the local origination requirement, the contested government regulation at issue in *League of Women Voters* was restrictive, and

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<sup>5</sup> *Am. Family Ass’n, Inc. v. FCC*, 365 F.3d 1156, 1168-9 (D.C. Cir. 2004) (internal quotations omitted) (citing *Ruggiero v. FCC*, 317 F.3d 239, 243 (D.C. Cir. 2003) (en banc); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 802 (1978); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 167-68 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045-46 (D.C. Cir. 2002); *Red Lion*, 395 U.S. at 375-77), *reh’g denied*, *Am. Family Ass’n v. FCC*, 2004 U.S. App. LEXIS 15098 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1004 (2004)).

<sup>6</sup> No commenter in this proceeding has challenged the constitutionality of a local origination requirement.

<sup>7</sup> *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>8</sup> *Id.* at 380.

was content-based rather than content-neutral<sup>9</sup>; however, for purposes of argument, we examine the application of intermediate scrutiny to the local origination requirement below, because if the requirement can pass intermediate scrutiny, a court would also find it to be rational.

### **The Local Origination Requirement Serves Substantial Governmental Interests**

According to the Commission, “two primary goals in establishing the LPFM service were to create opportunities for new voices on the airwaves and to allow local groups, including schools, churches, and other community-based organizations, to provide programming responsive to local community needs and interests.”<sup>10</sup> These interests were reiterated and reinforced by Congress with passage of the Local Community Radio Act.<sup>11</sup> In an age when full-power media are dominated by national networks and opportunities to distribute national or international content via satellite or internet are plentiful, there can be no question that the government has a substantial interest in reserving extremely limited available airwaves for new, diverse voices that serve local interests.

A local origination requirement would serve opportunities for new and diverse voices in radio broadcasting by preventing organizations that plan to rely solely upon national networks for programming already made available elsewhere from applying for LPFM licenses. Such a requirement would ensure that LPFM licenses are awarded to organizations that will promote new community voices not already in possession of a broadcast outlet for their programming.

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<sup>9</sup> *Id.* at 381 (“The restriction imposed . . . is specifically directed at a form of speech . . . and is defined solely on the basis of the content of the suppressed speech.”).

<sup>10</sup> *Creation of a Low Power Radio Serv.*, Third Report & Order, 22 FCC Rcd 21912, 21922 (rel. Dec. 11, 2007), at ¶23 [hereinafter 3d R&O] (explaining that “two primary goals in establishing the LPFM service were to create opportunities for new voices on the airwaves and to allow local groups, including schools, churches, and other community-based organizations, to provide programming responsive to local community needs and interests.”).

<sup>11</sup> 156 Cong. Rec. H8619-01 (daily ed. Dec. 17, 2010) (statement of Rep. Doyle) (Representative Doyle, lead co-sponsor of the Local Community Radio Act, stated, “[W]hen [the FCC] created the Low Power FM radio service, they sought to create opportunities for new voices on the airwaves and to allow local schools, churches, and other community-based organizations to provide programming that is responsive to local community needs.”).

The local origination requirement serves localism by ensuring LPFM licenses are not awarded to organizations that have no interest in serving local needs and, if awarded a license, would air only national programming. Although programming does not have to be locally originated to serve local needs, a minimal amount of local programming is nevertheless a useful indicator that a licensee does in fact serve local needs. As the Commission has recognized, “intent to provide locally-originated programming is a reasonable gauge of whether the LPFM station will function as an outlet for community self-expression.”<sup>12</sup> Local origination fosters a dialogue between community members and broadcasters, and “the centerpiece of localism is the communication between broadcasters and the members of the public that they are licensed to serve.”<sup>13</sup>

By ensuring that each and every LPFM licensee will fulfill the original intent of meeting local community needs, a local origination requirement will also serve spectrum efficiency. It is not an efficient use of the spectrum to use stations that are purposely designed to reach small audiences and provide an outlet for underserved local communities to distribute nationally syndicated programming that could be distributed by satellite radio or the internet.

Finally, a local origination requirement will serve administrative efficiency by limiting the number of applications the FCC receives for LPFM licenses to those organizations truly committed to serving their local communities.

*The Local Origination Requirement Is Narrowly Tailored to Serve These Interests*

The local origination requirement is narrowly tailored to serve these governmental interests because it is a minimally burdensome means to substantially serve those interests. As Prometheus explained in comments filed in May,

A local programming requirement of 20 daytime hours per week is reasonable. According to one site analyzing the first LPFM licensing windows, 81% of applicants pledged to originate local programming. This indicates that the majority of LPFM licensees view eight hours a day of local

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<sup>12</sup> *Creation of Low Power Radio Serv.*, First Report & Order, 15 FCC Rcd 2205, 2262 (rel. Jan. 27, 2000), at ¶144 [hereinafter 1st R&O].

<sup>13</sup> *Broad. Localism*, 23 FCC Rcd. 1324, 1326 (rel. Jan. 24, 2008).

programming as a manageable commitment. A weekly requirement of twenty hours is a lower standard than the existing pledge of eight hours per day (or 56 hours weekly); however, a somewhat lower standard is reasonable, given the move from an optional pledge to a requirement of eligibility. A weekly rather than daily standard also gives licensees the flexibility to broadcast local programming at times that are most convenient. For example, a student-run station might have more local programming on weekday afternoons and evenings, while a church station might primarily originate programming on Saturdays and Sundays.<sup>14</sup>

The local origination requirement is also minimally invasive, because it does not treat speech differently on the basis of content and has no impact on editorial discretion.<sup>15</sup> It favors no particular type of content and does not prohibit LPFM licensees from broadcasting non-locally originated programming for the remaining 88% of hours available in the week.

Moreover, the FCC's prior efforts to achieve these goals have not been fully successful. In 2007, the Commission attempted to promote local origination by reinstating its earlier local eligibility requirements for LPFM: "Even outside the limited context of mutually exclusive applications, we view local origination as a central virtue of the LPFM service and therefore will reinstate the eligibility restriction contained in Section 73.853(b) of the Rules to encourage local origination."<sup>16</sup> Additionally, the Commission has awarded a preference point to applicants who pledged to originate programming locally.<sup>17</sup> But despite both the eligibility restriction and the preference point, a significant minority of LPFM stations are currently used to broadcast national programming with very little, if any, alteration designed to serve their local communities. A 2009 study conducted by scholars at Penn State University called A

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<sup>14</sup> Comments of Prometheus Radio Project, filed MM Dkt No. 99-25 (May 7, 2012) at 44 [hereinafter Prometheus May 2012 Comments].

<sup>15</sup> For further discussion on this point, see *infra* pp. 7-8.

<sup>16</sup> 3d R&O, *supra* note 10, at ¶24.

<sup>17</sup> 1st R&O, *supra* note 12, at ¶171.

*Slice of the Pie: Examining the State of the Low Power FM Radio Service in 2009* found that out of approximately 1,000 LPFM licensees examined between late 2008 and 2009,

234, nearly a quarter, were either by name or affiliation . . . identified with a national religious organization. In addition, some of the religious organizations self-describe themselves on their web pages as “networks” and list the LPFM stations as “members.”<sup>18</sup>

The Penn State scholars found stations that serve only as local distributors of otherwise non-local content to be

in every aspect we could divulge . . . different from LPFM operators who do not belong to networks . . . they maintain the station not in order to benefit the local community but in order to provide access to their organization’s mission; and they are committed to the advancement of their organization rather than to the goals of their geographical community.<sup>19</sup>

The study was cited by Prometheus in comments filed in May.<sup>20</sup> The Commission’s recent literature review on the critical information needs of the American public also cited the study, noting 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 suggests 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.”<sup>21</sup>

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<sup>18</sup> Colleen Connolly-Ahern, Amit Schejter, Jonathan Obar, & Nadia Martinez-Carrillo, *A Slice of the Pie: Examining the State of Low Power FM Radio Service in 2009* 17-18 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2000228](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000228)). For convenience, a full copy of the study is also filed as an appendix to the *ex parte* letter that this analysis accompanies.

<sup>19</sup> *Id.* at 26.

<sup>20</sup> Prometheus May 2012 Comments, *supra* note 14, at 41-42 (citing Connolly-Ahern, et al., *supra* note 17).

<sup>21</sup> 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](http://transition.fcc.gov/bureaus/ocbo/Final_Literature_Review.pdf), (citing Connolly-Ahern, et al., *supra* note 18).

The point system is even less likely to be as effective as intended in the next round of LPFM applications because the Commission is expecting an increase in applications due to LPFM's new availability in urban areas – areas that will likely have fewer available frequencies and more applicants. The local origination requirement is a better means of serving the Commission's interests because it puts an affirmative obligation on LPFM licensees to provide some content that originates from the local community in which it serves. This will limit the applicant pool to those who serve the Commission's goals of using the LPFM service to advance diversity and localism.

## **Response to Specific Concerns**

### *Content-Based vs. Content-Neutral Regulation*

Some may argue that the local origination requirement is a content-based regulation that would not survive constitutional scrutiny; however, the requirement does not fit the characteristics of a content-based regulation.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.<sup>22</sup>

The local origination requirement would be content-neutral because it would benefit programming produced in a particular place without reference to the ideas or views expressed in the programming.

Under a set of remarkably similar facts, in *Am. Family Ass'n, Inc. v. FCC*, the D.C. Circuit Court found FCC's decision to favor truly local stations over affiliates under the control of centralized organizations to advance diversity "did not necessarily value one speaker, or one type of speech over another; it merely expressed its intention that there continue to be multiple speakers."<sup>23</sup> Similarly, in *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court upheld a challenge to the newspaper-broadcast cross-

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<sup>22</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994).

<sup>23</sup> *Am. Family Ass'n, Inc.*, 365 F.3d at 1169 (quoting *Time Warner Entm't Co. v. U.S.*, 211 F.3d 1313, 1318 (D.C. Cir. 2000)).

ownership ban, distinguishing ownership regulations made to advance the public interest from content-based restrictions and noting that “the issue before us would be wholly different if the Commission were to choose among applicants upon the basis of their political, economic or social views.”<sup>24</sup> Ultimately upholding the rule at issue, the Court stated, “[h]ere the regulations are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it.”<sup>25</sup>

Even if the local origination requirement were determined to be content-based, it would still be upheld. In cases where the Supreme Court has found a content-based regulation unconstitutional, such as in *League of Women Voters*, the Court has looked specifically at what impact the regulation had on speech. In *League of Women Voters*, the regulation was content-based because it was “specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection.”<sup>26</sup> The regulation at issue in *League of Women Voters* forbade broadcasters from engaging the type of speech the First Amendment was designed to protect; in contrast, the local origination requirement would not prohibit licensees from saying anything, and would in fact promote rather than limit speech.

#### *Lack of a Clear Definition*

Another possible concern with the introduction of a local origination requirement is the lack of a clear definition of the term. Although the Commission has clarified its definition of local origination, there may be room to further tighten this term to prevent confusion among new licensees. Prometheus Radio Project recommends the following technical, content-neutral definition for local origination:

Local origination means original programming that is locally produced live or edited locally for primary use by the Station. Local production means in a main studio or at a location within 20 miles of the community of license, or delivered to the Station from a greater distance but created primarily for the Station and customized to its audience

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<sup>24</sup> *FCC v. NCCB*, 436 U.S. 775, 801 (1978) (quoting *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 226 (1943)).

<sup>25</sup> *Id.*

<sup>26</sup> *League of Women Voters*, 468 U.S. at 381.

(examples: an away game of a local sports team; coverage of local candidates at a non-local appearance).

Local origination may include non-local program elements contained in a local edit or mix. It does not include networked, syndicated or multi-station programming, whether broadcast live or recorded for later broadcast. It does not include mere assembly or automated production of otherwise unqualified program services or program elements. Programs delivered in whole or substantial part by space satellite or tape or disk transport do not qualify as local origination, unless the other qualifying elements of local origination are met.

### *No More Spectrum Scarcity*

Some may also argue that courts should cease to apply a lower First Amendment scrutiny standard to broadcast regulation because the underlying premise of spectrum scarcity, recognized in the seminal *Red Lion* case, is no longer true.<sup>27</sup> But in fact, broadcast spectrum is still exceptionally scarce, especially for LPFM. The fact that the Commission is expecting many more applicants for LPFM stations that can be granted is one indication, as was the case during the first LPFM application window.<sup>28</sup> Another indication is the Commission's recent efforts to encourage broadcast stations to share or voluntarily give up spectrum to allow the spectrum to be used for wireless

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<sup>27</sup> *Red Lion*, 395 U.S. at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." (internal citations omitted)).

<sup>28</sup> In 2000, the first and only time the FCC accepted applications for LPFM stations, demand increased spectrum availability by a wide margin. Over 3300 applications were accepted in 2000-2001, with fewer than a thousand stations eventually licensed and on air. See FCC Consolidated Database System (CDBS) Application Search, [http://licensing.fcc.gov/prod/cdbs/pubacc/prod/app\\_sear.htm](http://licensing.fcc.gov/prod/cdbs/pubacc/prod/app_sear.htm).

telecommunications services.<sup>29</sup> Because spectrum scarcity is still very much a current concern, there is no reason to believe that the Court would overturn *Red Lion* – the case that established the lower First Amendment standard for broadcast regulation – and eliminate the need for broadcast media license regulations. In fact, the Supreme Court has rejected the opportunity to revisit *Red Lion* on four separate occasions over the last several years – in both of its opinions in *Fox I* and *Fox II* as well as its rejection of *certiorari* in appeals of the 2002 Biennial and 2006 Quadrennial Broadcast Ownership reviews.<sup>30</sup>

## Conclusion

The Commission’s adoption of the proposed local origination requirement would be constitutional under the First Amendment under either rational basis or intermediate scrutiny. The requirement furthers a substantial government interest and does not unnecessarily intrude upon the editorial discretion of broadcasters.

Congress granted the Commission the power to enforce such a regulation in the Communications Act, and further bolstered that power in the LCRA when it recognized the importance of ensuring that local community voices were heard and that LPFM stations served local communities. Moreover, evidence shows that roughly ten years of LPFM stations without a local origination requirement has worked against the purpose of the Commission’s policy.<sup>31</sup> The proposed requirement that LPFM licensees locally originate at least 20 hours per week of programming furthers the Commission’s ultimate purpose of serving local communities without violating the First Amendment.

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<sup>29</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking (rel. Oct. 2, 2012), at ¶2 (“FCC has worked to free up spectrum for wireless broadband use through traditional approaches such as auctions, including clearing and reallocating government spectrum”).

<sup>30</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2309 (2012); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011), *cert. denied*, 80 U.S.L.W. 3716 (2012).

<sup>31</sup> See Connolly-Ahern, et al., *supra* note 18.