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October 18, 2012

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Dear FCC Commissioners and Commission Staff:

THE AMHERST ALLIANCE is a Net-based, nationwide citizens' advocacy group for Low Power FM (LPFM) and other media reforms. Since we were founded on September 17, 1998, in Amherst, Massachusetts, we have submitted hundreds of filings to the FCC.

I am submitting a *corrected* copy of the October 12 AMHERST ALLIANCE Reply Comments to the Ex Parte Written Comments of the PROMETHEUS RADIO PROJECT.

All of the corrections were made on pages 6 and 7 of the Reply Comments, where Amherst lays out the legal vulnerabilities of the FCC's proposed policy of "LP100s only" for highly urban areas. I wrote this section of the Reply Comments between 3:00 a.m. and 4:00 a.m. and made a few typos, for which I apologize. The following errors have been corrected:

Page 6, paragraph 3, sentence 4: "Yeats later" *now reads* "years later"

Page 6, paragraph 6, sentence 6: "higly urban" *now reads* "highly urban"

Page 7, paragraph 2 : "proposed 'LP100s only'" *now reads* "proposed 'LP100s only' policy"

Sincerely,

Don Schellhardt, Esquire
President, THE AMHERST ALLIANCE

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Creation Of A)
Low Power Radio Service)

Docket No. 99-25

REPLY COMMENTS OF THE AMHERST ALLIANCE
TO THE EX PARTE WRITTEN COMMENTS
OF PROMETHEUS RADIO PROJECT

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UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

Creation Of A)
Low Power Radio Service)

Docket No. 99-25

REPLY COMMENTS OF THE AMHERST ALLIANCE
TO THE EX PARTE WRITTEN COMMENTS
OF PROMETHEUS RADIO PROJECT

THE AMHERST ALLIANCE, currently based in Connecticut, is a Net-based, nationwide citizens' advocacy group for Low Power FM (LPFM) Radio -- and other reforms which will open the mass media to new voices. We were founded on September 17, 1998, at a meeting in Amherst, Massachusetts. In the 14 years since that date, we have testified before Congress and submitted hundreds of filings to the Federal Communications Commission (FCC).

THE AMHERST ALLIANCE hereby submits Reply Comments to the recent Ex Parte Written Comments of PROMETHEUS RADIO PROJECT of Pennsylvania. The Ex Parte Written Comments, which convey the substance of a presentation to FCC Commissioner Mignon Clyburn and members of his staff, are dated September 27, 2012 and were posted in FCC Docket 99-25 on September 28, 2012 (12 days ago).

BASIC REPLY COMMENTS

Amherst strongly agrees with Prometheus that the LPFM community now faces two major problems: (1) extremely limited ability to find frequencies for LPFM stations in highly urban areas, due to severe spectrum scarcity; and (2) the presence of many LPFM stations which may purport to originate local programming but are operating in fact as disguised translators for evangelical broadcasting chains or other national networks.

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However, Amherst's proposed *solutions* to these problems are somewhat different from the proposed solutions which Prometheus has highlighted.

Increasing The Number Of Frequencies Available For Urban LPFM Stations

To ease urban spectrum scarcity, Prometheus advocates second adjacent channel spacing waivers. Amherst also supports such waivers. However, we believe it is *even more important* for the FCC to change its proposed policy of allowing only LP100 stations (51 to 100 watts) in the center city portions of the Top 100 Arbitron Markets. In addition to, *or instead of*, licensing of LP100 stations in such areas, the Commission should license the LP50 stations (1 to 50 watts) that have been proposed by REC NETWORKS of Maryland -- and/or LP10 stations (1 to 10 watts). Licensing of LPFM stations at or below 50 watts, in these center city areas, could quadruple the frequencies available for LPFM in some large cities. LP50s, according to REC NETWORKS, are the *only* way for New York City and Detroit to have even *one* LPFM station.

Amherst adds that the policy we have proposed would affect less than 1% of the land area of the Lower 48 States. That is: The Commission could still limit 99% of the Lower 48 States to LP100 stations and/or LP250 stations (101 to 250 watts).

Requiring *All* New LPFM Stations To Offer Locally Originated Programming

With respect to stations which are functionally translators but have been able to "masquerade" as LPFM stations, we fervently support the Prometheus concept of replacing the current "bonus point" for local programming with a uniform *requirement* that *all* new LPFM applicants must commit to the origination of local programming. Indeed, we have proposed the same approach ourselves in various Written Comments in this Docket. We further agree with Prometheus that there are no legal impediments to such an approach.

We differ with Prometheus, however, regarding *what* the minimum level of locally originated programming should be.

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Prometheus proposes to begin, and end, with 20 hours of locally originated programming per week (or roughly 3 hours per day). Amherst has proposed to *start* with 2 hours per day and then “*ramp up*”, over 2 years, to 8 hours per day.

Amherst will not quibble with Prometheus over whether the *initial* mandate for locally originated programming should be 2 hours per day or 3 hours per day. However, the *eventual* mandate, following a 2-year “ramp up”, should be 8 hours per day.

Aspiring LPFM broadcasters within THE AMHERST ALLIANCE generally plan to serve rural areas and small cities, where it is typically more difficult to generate locally originated programming. Still, they report they can meet the 8-hours-per-day “target” *if* they have a 2-year “ramp up” period for bolstering their local reputation and making local contacts.

While a minimum requirement for 3 hours of locally originated programming per day, as proposed by Prometheus, would be a vast improvement over the status quo, we believe that a higher minimum requirement for 8 hours per day would be significantly more effective in discouraging those national networks which seek to use LPFM stations as a “front”.

Amherst’s Proposed New Policy For *Existing* Translators and *Existing* LPFM Stations

We add that THE AMHERST ALLIANCE has also proposed, in Written Comments in Docket 99-25, a policy to increase locally originated programming on *existing* radio stations.

First, we have supported allowing translators, both commercial and non-commercial, to air locally originated programming -- *if* they agree to pursue the 2-year “ramp up” to at least 8 hours of locally originated programming per day.

Second, we have proposed that existing translators *and* existing LPFM licensees, while retaining their Secondary Service Status (and therefore remaining unable to displace Primary Service Status stations), should be able to displace *other* translators and LPFM stations in some cases. A higher displacement priority, *within* the Secondary Service Status class of stations,

should be made available *if* the displacing stations have agreed to the referenced 2-year “ramp up” and the displaced stations have not.

Regarding the second policy recommendation, the Local Community Radio Act (LCRA) limits the Commission’s ability to upgrade translators and LPFM stations to Primary Service Status. The Act also limits the Commission’s ability to favor LPFM stations over translators, or *vice versa*, when setting displacement priorities. However, nothing in the Act appears to prevent the Commission from establishing new displacement priorities *within* the Secondary Service Status class of stations -- *provided* that the displacement priorities are not based on whether a station is a translator or an LPFM station. In this case, any translator *or* any LPFM station could gain a higher displacement priority, relative to *other* translators and LPFM stations, on the independent basis that it has made a substantial and binding commitment to the origination of local programming.

Speeding Progress Toward A New LPFM “Filing Window”

At the very close of its September 28 Ex Parte Written Comments, Prometheus states that it "hopes" the full Commission will vote to approve a final rule on LPFM "in the fall" (presumably, October through mid-December).

Prometheus adds that it still advocates an extended delay, specified in other Prometheus filings as 6 to 9 months, between issuance of the final LPFM rule and opening of an LPFM filing window. Prometheus considers this necessary in order to allow their own favored applicants, with "limited resources", time to catch up with the other potential applicants.

As for the first point, Amherst generally agrees with Prometheus -- but is much more emphatic. We don't just "hope" the FCC will issue the final rule on LPFM this fall. We *urge* the FCC to issue the final rule this fall -- and the sooner this fall, the better.

Amherst notes that 5 months have already passed since the comment period was closed in Docket 99-25.

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We know that the FCC has had to deal with the conflict between pending translator applicants and new LPFM applicants. However, it has generally managed this conflict artfully.

Indeed, the Commission now appears positioned to win in court if any or all of the pending Petitions For Reconsideration should lead to an injunction request. That is: The potential litigants are unlikely to be able to demonstrate to the court "a probability of prevailing on the merits" if an injunction is granted.

Meanwhile, the fact remains that December 20, 2012 marks the *second* Anniversary of passage of the Local Community Radio Act by Congress. If we were Congressional sponsors of that Act, we would not be pleased to see the LCRA enters its third year of life without action by the FCC to issue a final rule and announce the dates for an LPFM filing window.

As for the second point, Amherst's aspiring LPFM licensees have "limited resources", too -- quite possibly less than the resources available to the average potential applicant in Prometheus. If our own potential LPFM applicants were wealthier, we would probably have a Washington office like Prometheus!

Yet, despite their own limited resources, our potential LPFM applicants tell us they could be ready to file their applications within 2 to 8 weeks after issuance of a final rule. Why should the Prometheus applicants be given a "handicap" of several more months when no one else seems to need the extra time?

Consequently, we urge the Commission to commit itself to the following goals:

- (1) Issuance of a final rule on LPFM on or before December 20, 2012 (the second Anniversary of passage of the LCRA by Congress)
And
- (2) Initiation of an LPFM filing window no more than 3 months thereafter

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**LEGAL VULNERABILITIES OF THE FCC'S PROPOSED
"LP100s ONLY" POLICY FOR CENTER CITY PORTIONS
OF THE TOP 100 ARBITRON MARKETS**

THE AMHERST ALLIANCE reminds the Commission of previously noted legal vulnerabilities in its currently proposed policy of "LP100s only" for highly urban areas.

First, *the proposed "LP100s" policy would violate the Administrative Procedure Act (APA)* because the Commission never presented to the public its rationale for the proposed policy. By failing to offer any kind of explanation for its intention to bar smaller LPFM stations from urban areas, the FCC denied commenters the opportunity to address the rationale *and* reduced the knowledge available to commenters for drafting a viable counterproposal.

The Commission has missed two opportunities to explain itself. Initially, in 2000, it announced that licenses would be awarded for LP10 stations as well as LP100 stations. After the Commission went on to award licenses for LP100s, but not for LP10s, THE AMHERST ALLIANCE and other parties remind the Commission of its unkept promise and respectfully requested an explanation. Absolute silence was the only response. Years later, when the Commission sought public comments on expansion of the LPFM Radio Service under the LCRA, it stated that it did not plan to issue any LP10 licenses because it had never issued any LP10 licenses in the past. Amherst told the FCC that this *non sequitur* offered no insight into *why* the FCC opposed the issuance of LP10 licenses -- but the FCC has so far failed to provide any additional explanation for its proposed "LP100s only" policy in highly urban areas.

Second, *the proposed "LP100s only" policy would violate the "Equal Protection of the Laws" Clause of the Fourteenth Amendment to the United States Constitution.* It would do so by imposing a disproportionately negative impact on racial and ethnic minorities without the justification of an overriding "public interest".

We are referencing, after all, a policy which would, according to an analysis of REC NETWORKS data, reduce LPFM stations from 1 to 0 in both the City of New York and the City of Detroit -- while simultaneously eliminating 4 out of every 5 LPFM stations in the City of Los Angeles and the City of San Francisco.

Meanwhile, due to less severe spectrum scarcity, frequency availability for LPFM stations would be much more robust in most of America's suburbs, small cities and rural areas.

Given the different demographics of these different locations, how can the Commission's proposed "LP100s only" policy *not* be considered to pose a disproportionately negative impact on racial and ethnic minorities?

On average, due to their disproportionate concentration in highly urban areas, American blacks and American Hispanics -- and perhaps American Asians as well -- would have a substantially lower chance to start an LPFM station *if*, as currently proposed by the Commission, LPFM stations of 50 watts or less are banned in the center city portions of the Top 100 Arbitron Markets. By the same token, *listeners* belonging to these racial and ethnic groups would have a substantially lower than average chance of finding an LPFM station on their radio dial.

U.S. Supreme Court precedents indicate that *it does not matter to the courts* whether a disproportionately negative impact on racial and/or ethnic minorities is intended. If a government action is producing (or is about to produce) such a racially disproportionate negative impact, then that action is "suspect" under the Equal Protection Act of the Laws Clause of the United States Constitution.

U.S. Supreme Court precedents *also* indicate that even a Constitutionally "suspect" government action might be upheld *if* it can be demonstrated to that an overriding public interest, "compelling" enough to outweigh the racially discriminatory effects, is being served. However, in the case of the proposed "LP100s only" policy for highly urban areas, the Commission has not provided any hint of an overriding public interest that the proposed policy would serve. In fact, as we have noted above, the Commission has not even offered any explanation of *why* the proposed policy has been proposed at all.

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ATTACHMENTS

For further discussion of the pace of LPFM implementation, we have ATTACHED the May 20, 2012 Reply Commission of THE AMHERST ALLIANCE to May 8, 2012 Written Comments of PROMETHEUS RADIO PROJECT.

For further discussion of the case for allowing LP50 stations (1 to 49 watts) in the center city portions of the Top 100 Arbitron Markets, we have ATTACHED the May 16, 2012 *Joint Reply Comments* of THE AMHERST ALLIANCE, REC NETWORKS, CHRISTIAN COMMUNITY BROADCASTERS, NEXUS LPFM ADVOCACY, NEXUS BROADCAST, RIVERTON RADIO PROJECT, MUSIC RADIO 95, NICKOLAUS LEGGETT N3NL, SCOTT TODD, JOHN RICHMOND and LEROY F. SCHELLHARDT to MANEESH PANGASA. Although these Joint Reply Comments, which call for the licensing of LP50 stations in the center city portions of the Top 100 Arbitron Markets, were not signed by PROMETHEUS RADIO PROJECT, the list of signatories nevertheless included a clear majority of the LPFM advocacy groups in America.

NOTICE OF THESE REPLY COMMENTS

We are sending a copy of these Reply Comments, via Electronic Mail, to Brandy Doyle of PROMETHEUS RADIO PROJECT. We are also E-Mailing a copy to FCC Commissioner Mignon Clyburn and selected Members of the Commission staff.

CONCLUSION

For the reasons set forth herein, THE AMHERST ALLIANCE urges the Federal Communications Commission to take the following actions:

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- A. To increase the availability of frequencies for LPFM stations in highly urban areas, abandon the policy of “LP100s only” in the center city portions of the Top 100 Arbitron Markets, instead allowing the licensing of LP50 stations (1 to 49 watts) and/or LP10 stations (1 to 10 watts)
- B. As a *lower* priority response to the scarcity of frequencies for LPFM stations in highly urban areas, allow waivers for second adjacent channel spacing
- C. To prevent the further spread of translators disguised as LPFM stations, require *all* new LPFM stations to air a minimum level of locally originated programming -- ideally, adopting THE AMHERST ALLIANCE proposal for an initial requirement of 2 hours per day, rising to 8 hours per day after a 2-year “ramp up” period
- D. To further promote broadcast localism, allow translators, whether commercial or non-commercial, to air locally originated programming -- *if* they agree to the 2-year “ramp up” to 8 hours per day
- E. Allow translators and LPFM stations which agree to the 2-year “ramp up” to displace *other* translators and LPFM stations which do not agree to such a minimum level of locally originated programming
- F. Issue a final rule on LPFM on or before December 20, 2012 (the *second* Anniversary of passage of the Local Community Radio Act by Congress)
- G. Open a new LPFM filing window within 3 months thereafter

Respectfully submitted,

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Dated: October 12, 2012

APPENDIX

THE AMHERST ALLIANCE

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Time Lags To Allow For LPFM Application Should Be "Adequate" --
Not Excessive

"Give applicants at least six months, and preferably nine months, between the final rules for the next application window and the start of the first [filing] window." (Page 7)

If no unforeseen developments intervene, THE AMHERST ALLIANCE will be joining PROMETHEUS RADIO PROJECT -- and certain other LPFM advocates -- in a joint filing in this Docket. Among other things, this multi-party statement will call for "adequate time", between the issuance of the final LPFM rule and the opening of a filing window, to allow LPFM applicants to prepare and file their applications.

Amherst stands behind this call for "adequate time". It appears, however, that Amherst defines "adequate time" very differently than Prometheus. For Prometheus, "adequate time" is apparently six to nine months. For Amherst, "adequate time" is two months or three.

Amherst presents the following schedule as an example of a "timetable" we consider reasonable:

Closing of Docket 99-25 comment period	Late May 2012
+ 2 months = Issuance of final rule in Docket 99-25	Late July 2012
+ 2 months for application preparation = Opening of filing window	Late Sept. 2012

Those AMHERST ALLIANCE Members who are planning to seek LPFM licenses tell us that they are ready, willing and able to file their applications within a time frame of this nature.

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Some of our Members even report that they have been planning ahead for this filing window for several years -- and are now ready to file their applications within two weeks of reading the text of a final rule. These Members understand that other LPFM applicants might reasonably require four weeks, or six weeks, or eight weeks. However, it is difficult for them to believe that the LPFM applicants mentioned by Prometheus -- who have had no less knowledge of coming events than anyone else -- truly require a preparation period of 24 weeks or 32 weeks or 36 weeks.

Amherst acknowledges having heard totally unofficial reports, from credible sources, that the Commission may need additional time to produce a final rule if: (a) the proposed policy of "LP100s only" in highly urban areas is eliminated; and (b) this "LP100s only" policy is wisely replaced, in such areas, by a policy of licensing LP50 stations with a range of 1 to 49 watts.

Under this scenario, the eminently worthwhile shift from "LP100s only" to urban LP50s (based on the model proposed by REC NETWORKS) would require extensive quantitative re-calibration of the basic parameters of the final rule. Amherst understands that the FCC, in light of this quantitative re-calibration, would then need more time to prepare a final rule.

Amherst further understands that a reasonable delay would be amply justified by the benefit of avoiding the proposed "LP100s only" policy. After all, as Amherst has stated on other occasions, it appears that avoiding the proposed "LP100s policy" -- and allowing, instead, the licensing of 1-10 watt stations within the framework of an LP50 Tier -- could *quadruple* the number of potential LPFM stations in the center city areas of the Top 100 Arbitron Markets. [A list of those areas is set forth in the Appendix to Amherst's Written Comments of May 7, 2012.]

Obviously, with a possible *quadrupling* of the number of urban LPFM stations hanging in the balance, the avoidance of an "LP100s only" policy, and its replacement by a policy of licensing LP50 stations in the 1-49 watt range, would be "a pearl of great price".

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Clearly, the benefits of this policy change would be an abundantly worthwhile tradeoff for a reasonable delay in issuance of the Docket 99-25 final rule.

Still, in this context, as well as the context of LPFM application preparation, "adequate time" means different things to different parties. How much time does the Commission *really* need to re-calibrate, accurately and equitably, the necessary numbers? One month? Two months?

Perhaps we are missing something, but two months seems to us to be a "reasonable delay" for quantitative re-calibration to accommodate a shift from urban LP100s to urban LP50s.

If the Commission adopts a hugely beneficial policy shift from urban LP100s to urban LP50s, with a "budget" of two additional months for issuance of a final rule, we believe the following *revised* "timetable" would be reasonable:

Closing of Docket 99-25 comment period	Late May 2012
+ 2 months for basic processing	
+ 2 months for re-calibration related to shift to 1-49 watt urban LP50 stations =	
Issuance of a final rule in Docket 99-25	Late Sept. 2012
+ 2 months for LPFM application preparation = Opening of filing window	Late Nov. 2012

This reasonable revision of the Commission's current scheduling would still allow the LPFM filing window to be completed before the end of the year.

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Creation Of A Low Power Radio Service)

FCC Docket 99-25

JOINT REPLY COMMENTS OF THE AMHERST ALLIANCE, NEXUS LPFM ADVOCACY, NEXUS BROADCAST, REC NETWORKS, CHRISTIAN COMMUNITY BROADCASTERS, NICKOLAUS LEGGETT N3NL, RIVERTON RADIO PROJECT, MUSIC RADIO 95, SCOTT TODD, JOHN RICHMOND AND LEROY F. SCHELLHARDT TO MANEESH PANGASA

The undersigned advocates of Low Power FM (LPFM) Radio hereby respond to the May 7, 2012 Written Comments of Maneesh Pangasa of Yuma, Arizona. We are sending an electronic copy of this filing to Mr. Pangasa at maneeshpangasa@gmail.com

We wish to underscore for the Commission the following statement by Mr. Pangasa:

" LPFM stations provide opportunities for women and people of color to work in radio programming, run local radio stations, and address issues that are often neglected by commercial radio stations.

"Women are 51% of U.S. population, but own only 6% of all local AM and FM stations.

"Racial and ethnic minorities make up 33% of the population, but own just 7.7% of all radio stations.

"Currently, people of color make up only 6% of the nation's radio newsroom workforce."

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We agree with Mr. Pangasa that an expanded LPFM Radio Service will help to broaden participation in radio broadcasting by racial and ethnic minorities and women. We also note that LPFM stations, with their smaller size, will typically be more oriented toward serving individual neighborhoods than metropolitan areas. As one beneficial result, a greater number of minority neighborhoods will be able to enjoy programming which is oriented specifically toward them.

Unfortunately, much of LPFM's favorable impact on minorities will be swept away if the Commission insists on allowing only LP100 stations into urban areas. If smaller LPFM stations are struck from the urban landscape, the potential presence of LPFM in urban areas will be reduced dramatically.

While the undersigned LPFM advocates do not agree on every issue posed by the Federal Communications Commission in its proposed rule on LPFM, all of us agree on the following points:

(1) In the center city areas of the Top 100 Arbitron Markets, the FCC should not proceed with its proposal to allow only LP100 stations to be licensed in such areas

And

(3) The REC NETWORKS proposal for a new LP50 class of stations, with a range of 1 to 49 watts, will be a far superior alternative for the center city areas of the Top 100 Arbitron Markets.

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