

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Creation Of A)
Low Power Radio Service) FCC Docket No. 99-25

REPLY COMMENTS OF
DON SCHELLHARDT, ESQUIRE KI4PMG AND NICKOLAUS E. LEGGETT N3NL
TO THE EX PARTE WRITTEN COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS (NAB)
AND NATIONAL PUBLIC RADIO (NPR)

We are Don Schellhardt and Nick Leggett. Today, we are responding to recent Ex Parte Written Comments filed, respectively, by the National Association of Broadcasters (NAB) and National Public Radio (NPR).

In 1997, we jointly filed the first Petition For Rulemaking to request establishment of a Low Power FM (LPFM) Radio Service. This Petition led to the opening of FCC Docket RM-9208 ... which led, in turn, to the opening of FCC Docket 99-25 ... which led, in turn, to creation of the LPFM Radio Service in early 2000.

Along the way, on September 17, 1998, Don Schellhardt co-founded THE AMHERST ALLIANCE. The organization is a Net-based, nationwide citizens' advocacy group for the promotion of locally focused LPFM stations and other media reforms. For most of the ensuing 14 years, Don has served as Amherst's President.

Both of us have also been active in FCC Dockets unrelated to LPFM. Notably, our 1986 Petition For A Notice Of Inquiry led to the opening of FCC Docket RM-5528, while our 2001 Petition For Rulemaking led to the opening of FCC Docket RM-10330. Both Dockets concern the proposed shielding of vital civilian electronics equipment against a man-made or solar-generated Electromagnetic Pulse (EMP).

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LP50 Stations, LP250 Stations and
“Routine” Spacing Waivers Won’t Violate Any Statutes

NPR says the FCC cannot legally license any LP250 stations -- or, by implication, any LP50 stations, either -- because Congress did not explicitly authorize any variance from the currently applied LP100 standard.

Both NPR and the NAB say that the FCC cannot start routinely granting second adjacent channel spacing waivers to LPFM stations, in the same way that it currently grants such waivers to translators, because Congress did not explicitly authorize the Commission to do this.

C'mon, folks!

What is this? The "Mother, May I?" school of statutory interpretation?

In general, the Western world of legal thinking follows the maxim of Thomas Hobbes: "Where the law is silent, man is free."

That which is not prohibited is permitted.

Individuals and Commissions may choose the colors they wish if they color within the lines.

Here we are talking about two policies -- second adjacent channel spacing waivers and LP100 LPFM stations -- which were created by the Commission, not by Congress. Now the Commission isn't supposed to adjust its own creations in any way unless it first asks Congress for explicit permission?

The silence of Congress is permission.

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Congress didn't restrain the FCC when it started to grant, routinely, second adjacent channel spacing waivers for translators. Why is prior Congressional permission suddenly required when LPFM stations join translators as beneficiaries?

Nor did Congress restrain the FCC when the Commission announced it would start issuing LP10 licenses along with LP100 licenses. Granted, for reasons the FCC has still not disclosed, the Commission never actually issued any of the promised LP10 licenses. That's not the point. The point is that the Commission told the broadcasting community, Congress and the rest of the world that it was going to start issuing LP10 licenses. Then Congress took no visible action at all to stop the FCC from doing this.

The silence of Congress was its consent to the FCC's variance from its own LP100 model for LPFM stations. That silence of Congress remained throughout the Congressional deliberations on the Local Community Radio Act (LCRA).

If Congress has never once objected to the LP10 option, during the 11 years that LP10s have "officially" remained in the Commission's regulations, why would Congress expect the Commission to ask permission before it acts to issue LP10 licenses now? And/or LP50 licenses? And/or LP250 licenses?

We apologize for being flippant on these issues. Truly, however, the legal arguments being made by NPR -- and, to a lesser extent, by the NAB -- are unworthy of the brainpower these institutions have at their disposal.

We cannot believe NPR and the NAB seriously expect the FCC to set a precedent for having to seek explicit Congressional approval -- in advance -- every time it wants to change one detail of a regulation that was established under the FCC's discretionary authority in the first place. Would NPR and the NAB, themselves, *really* want to live under such an unwieldy version of the FCC?

Of course they wouldn't. They just want *LPFM applicants and stations* to live under such an unwieldy version of the FCC.

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Conclusion

We advise *NPR and the NAB* to "call it a day" on these issues and march off to fight more winnable battles. We urge *the Commission* to start licensing LP50 stations (1 to 50 watts) in the urban cores of the Top 100 Arbitron Markets ... start licensing LP250 stations elsewhere ... and start giving second adjacent channel spacing waivers to LPFM stations under the same standards that are applied to translators.

Notifications

A copy of this document is being sent, electronically, to Lawrence Walke of the NATIONAL ASSOCIATION OF BROADCASTERS in Washington, D.C. (lwalke@nab.org) . A copy is being sent, by U.S. Postal Service First Class Mail, to Rishi Hingoraney of NATIONAL PUBLIC RADIO, 635 Massachusetts Avenue N.W., Washington, D.C. 20001-3753.

Respectfully submitted,

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Dated: November 19, 2012