

DON SCHELLHARDT, ESQUIRE

Attorney For LET THE CITIES IN!!

3250 East Main Street, #48

Waterbury, CT 06705

djslaw@gmail.com

(203) 982-5584

August 23, 2013

Jocelyn Samuels

Acting Assistant Attorney General

Civil Rights Division

The Justice Department

950 Pennsylvania Avenue N.W.

Washington, DC 20530-0001

RE: Action In Court To Expand Expansion Of Low Power FM (LPFM) Radio Service

Dear Assistant Attorney General Samuels:

This letter requests action by the Justice Department to undo the racially disparate impact of a planned expansion of the Low Power FM (LPFM) Radio Service, under which many new community radio stations will file for licenses in October. Regulations developed by the Federal Communications Commission (FCC) restrict radio station eligibility criteria so strictly that *no* LPFM stations *at all* will be eligible for licensing in any of 27 different cities -- including New York City, Detroit, San Jose, San Bernardino and Pittsburgh.

The letter you are reading is being sent to you by E-Mail, along with two Attachments, but you will soon receive hard copies of these three documents by USPS Express Mail. Attorney General Eric Holder will also receive copies by E-Mail and USPS Express Mail.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Two

The two Attachments to this letter are as follows:

- (a) This is a Petition For Reconsideration that was filed, in FCC Docket 99-25, by LET THE CITIES IN!! (LTCI): a newly formed citizens' advocacy group. It seeks a *full* expansion of the LPFM Radio Service into urban areas, and I serve as attorney (*pro bono*) for the group. The Petition asserts that the FCC has violated the Equal Protection Clause of the United States Constitution by eliminating from the LPFM Radio Service a class of *previously authorized* LP10 stations (1 to 10 watts). In a number of cities, where most of the radio spectrum is already claimed by existing broadcasters, *only* LPFM stations below 50 watts -- and in some cases, such as most of New York City and all of Detroit, only LPFM stations below 10 watts -- will be small enough to "fit" into the minimal amount of radio spectrum that remains. Yet the Commission chose to borrow its previously approved licensing eligibility criteria by eliminating the LP10 class and limiting *all* LPFM stations, even in areas with extreme spectrum scarcity, to a minimum power level of 50 watts. This policy has the effect of protecting established broadcasters from new competitors by reducing -- and, in some cases, precluding -- otherwise available licensing opportunities for those who now stand on the outside, looking in.

The Petition urges the FCC to expand the scheduled LPFM filing window (set to open on October 15) in order to allow applications for LP10 stations -- and, if possible, by other LPFM stations below 50 watts -- in targeted urban areas. LTCI estimated that less than 1% of the total land area of the United States would be affected by the changes we proposed at that time. Unfortunately, as of today, less than two months remain before the scheduled filing window opens on October 15 -- and the Commission has still neither granted nor denied LTCI's Petition For Reconsideration (or, for that matter, any of the several Petitions For Reconsideration filed by other parties). As we explicitly apprised the Commission, in an Ex Parte Notice of June 26, 2013, a continued delay in the decision means that -- even if LTCI's Petition is ultimately granted -- potential LP10 applicants will not have enough time to prepare for the filing window. PROMETHEUS RADIO PROJECT of Pennsylvania made a similar point -- concerning its own Petition For Reconsideration, not ours -- in Ex Parte Notices of July 25, 2013 and July 29, 2013.

The FCC itself has already declared, when issuing its final regulations for the LPFM Radio Service expansion, that LP100 applicants require nine months to prepare for a filing window. The October filing window was scheduled with this conclusion in mind. Most LTCI Members believe that three months would suffice for LP10 applicants, but not the two months (or less) that remain right now.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Three

At this point, therefore, LTCI no longer considers it practical to expand the October filing window. Instead, we ask the Justice Department to petition the appropriate court for a *second* filing window, scheduled *after* completion of the October filing window, in which LP10 applications would be considered.

To review any and all of the documents in the 99-25 Docket File, as posted on the FCC's Electronic Comment Filing Service (ECFS), go to the FCC's Web Site at www.fcc.gov and click on the link to Public Comment (ECFS). Then, enter 99-25 in the appropriate box -- not "99-25", nor Docket 99-25, but just 99-25 -- and you should be taken to the LPFM Docket File. Note: There is a special mechanism you must use if you wish to see filings that were received more than a year ago.

- (b) The other Attachment to this letter is my resume. This will tell you a little more about the man who has approached you to ask for your help.

Academically, I earned a B.A. in Government (aka Political Science) from Wesleyan University, Middletown, CT in 1971. These studies included a year spent as an Exchange Student at Mount Holyoke College, South Hadley, MA. Then I received a law degree from George Washington University, Washington, DC in 1975. This was followed by admission to the Bar of Virginia the same year (and, eventually, admission to the Bar of Connecticut in 1994). More recently, I went back to graduate school to earn an M.A. in Liberal Studies (Cross-Cultural Politics) from Hollins University, Roanoke, VA in 2008. The M.A. coursework included courses in East Asian Studies at the University of San Francisco, San Francisco, CA.

For almost 20 years, I was a Government Relations attorney in Washington, with employers who included a Congressional Committee, a Member of Congress, the American Gas Association (for 12 years) and the U.S. Environmental Protection Agency. After that, I transitioned to a "grassroots lobbyist", living in various locations *outside* of Metro Washington and advocating reform-oriented causes (the most notable cause being LPFM community radio). This work does not pay nearly as well as my work in Washington (to put it mildly), but it has its satisfactions.

LET THE CITIES IN!!, which I now represent, was not founded until December of 2012. However, my total involvement with LPFM goes back to 1997, when I joined Nickolaus Leggett of Virginia (leggett3@gmail.com) to become one of the first two people ever to propose an LPFM Radio Service (in a Petition For Rulemaking which became FCC Docket RM-9208). Later, I co-founded THE AMHERST ALLIANCE, a citizens' advocacy group for LPFM, and have led it for most of the past 15 years.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Four

WHY WE ASK THE JUSTICE DEPARTMENT TO INTERVENE

The short explanation is this:

We're broke. We cannot afford, on our own, to carry this ball any farther than we have.

As a group, LET THE CITIES IN!! has *very* limited financial resources. Our 20 Members are aspiring community radio broadcasters, typically drawn to LPFM stations because they cannot *afford* a higher wattage station, and everyday radio listeners who want more variety -- and/or more coverage of local news and events -- on their radio dials. These are not people who can finance a Constitutional challenge to the FCC in a Federal appellate court.

Discussion within our group has confirmed this reality clearly.

As for myself, as an individual, I can't afford to finance such a court challenge, either. Yes, I am an attorney, but I am a semi-retired attorney. My current income is derived mainly from pension checks plus Social Security.

Even if I were willing to donate my own legal labor to LET THE CITIES IN!! -- which I have done so far, and would be willing to continue to do -- I cannot cover the probable total of other litigation costs. These non-labor costs could include court fees, photocopying, possible discovery and repeated long distance travel from Connecticut to various courthouse proceedings.

Plus, there's another problem. I am not very experienced as a litigation attorney, let alone as an appellate litigation attorney. Most of my legal work has involved action as a Government Relations attorney, focused on regulations and/or legislation. Although I have spent some time in courtrooms, my primary focus there has been on child custody cases (notably including service as a Guardian Ad Litem for children, in cases where abuse was suspected). Nothing in my legal experience to date has prepared me to argue the present case in a Federal appellate court (although I might make a good "second chair").

So, on behalf of myself and LET THE CITIES IN!!, I ask the Justice Department to intervene. Unless the Department takes action to assure a second filing window for LPFM applicants in the LP10 range, and/or unless some well-heeled party learns of this case and provides effective appellate representation *pro bono*, literally tens of millions of Americans, disproportionately drawn from racial and ethnic minorities, will be unable to listen to any local LPFM stations at all. Meanwhile, America as a whole is likely to have at least 3,000 stations.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Five

For a literally graphic illustration of this point, go to the first page of the FCC's Web Site at www.fcc.gov. Find the section entitled "Low Power FM Opportunities" and focus on the map of the United States, with white spaces which indicate locations where no frequencies for LPFMs are available (with the exception of possible LPFM stations below 50 watts, which the FCC has now prohibited). If you click on the map to enlarge it, you will notice that most of the United States is in fair to excellent shape for LPFM availability. White space, however, covers much of the Northeast, much of the Great Lakes and much of California.

Most of this white space -- if not all of it -- exists today because the Commission chose, in 2012, to eliminate the LP10 stations it had authorized in 2000.

**THE FCC'S VIOLATION OF THE EQUAL PROTECTION CLAUSE
OF THE UNITED STATES CONSTITUTION**

As I've said, I am a Government Relations attorney, not an appellate litigation attorney. I'm sure you know the applicable Equal Protection precedents much better than I do.

I *have* learned that, under standing court decisions, a violation of the Equal Protection Clause has occurred if each of three findings are made:

- (a) An action by government has a racially disparate impact
- (b) The racially disparate impact adversely affects "fundamental rights", which may include employment and economic opportunity

And

- (c) The government cannot demonstrate a "compelling state interest" which is "compelling" enough to justify the discriminatory effect(s)

We stress that the harmful and discriminatory effects do not have to be intentional. Whether these effects spring from hostility, or lack of knowledge, or indifference, the simple existence of harmful and discriminatory effects is what counts.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Six

Once the effects have been demonstrated, the government's action must be modified, or reversed, *unless* the government can affirmatively prove to the reviewing court that its action is necessary to serve a "compelling state interest".

:LTCI asserts that *all three* of the indicated criteria are met by the FCC's decision to bar previously authorized 1-10 watt LPFM stations from the airwaves -- even in areas where higher wattage LPFM stations will not "fit" in the local radio spectrum.

The FCC's Low Power FM Rule Would Have A Racially Disparate Impact

The United States has 285 incorporated communities with over 100,000 people. Of these 285 cities:

- 0 The average city, under the FCC's current rule, has enough LP100 frequencies for 6 LPFM stations
- 0 However, 46 of the 285 cities have only enough LP100 frequencies for 1 or 2 stations

And

- 0 27 of the 285 cities -- including New York City, Detroit and San Jose -- do not have enough LP100 frequencies (50-100 watts) for *any* LPFM stations *at all*

In 12 of these 27 totally excluded cities, non-whites account for 45% or more of the population: that is, a level at least 50% above the national average of 29%. This correlation weakens for the smallest cities in the sample, but is quite strong (10 of 15) for totally excluded communities drawn from the nation's 170 largest cities.

In the Chart set forth below, we have listed in **bold** font those totally excluded communities in which the non-white share of the population equals or exceeds 45%.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Seven

27 CITIES IN WHICH *NO* LPFM STATIONS *AT ALL* CAN BE LICENSED

1. New York City, 0	55%
10. San Jose, 0	53%
18. Detroit, 0	88%
59. Riverside, CA, 0	41%
61. Pittsburgh, 0	32%
67. Toledo, 0	30%
68. Newark, NJ, 0	73%
72. Buffalo, 0	46%
75. Jersey City, NJ, 0	68%
97. San Bernardino, CA, 0	55%
114. Moreno Valley, CA, 0	53%
115. Yonkers, NY	40%
139. Santa Rosa, CA	32%
166. Paterson, NJ, 0	69%
169. Bridgeport, CT, 0	55%
171. Lakewood, CO	13%

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Eight

186.	Warren, MI	9%
199.	Elizabeth, NJ, 0	41%
216.	Allentown, PA, 0	27%
223.	Denton, TX, 0	24%
227.	Provo, UT	11%
226.	Vallejo, CA, 0	64%
229.	Ann Arbor, MI	25%
233.	Berkeley, CA, 0	41%
257.	Fairfield, CA, 0	44%
258.	Cambridge, MA, 0	32%
283.	Rialto, CA, 0	61%

For much more information (including more qualitative analysis) on cities affected by the FCC's elimination of LP10 stations, please proceed to the 99-25 Docket File, as preserved in the FCC's Electronic Comment Filing Service, and review the following filings: November 23, 2012 Don Schellhardt, Esquire Reply Comments to REV -- PEOPLE'S PRODUCTION HOUSE and COLLEGE RADIO DAY (see especially the Appendix, with the study on "Dealing With Spectrum Scarcity") ... February 17, 2013 LET THE CITIES IN!! Addendum to Petition For Reconsideration ... and February 21, 2013 LET THE CITIES IN!! Ex Parte Notice.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Nine

The Racially Disparate Impact Would Impede
Fundamental Rights To Pursue Employment and Economic Opportunity

In an area which has one or more local LPFM stations, individuals can work at those station(s) -- and gain experience which may improve their marketability in fields such as journalism, computers and/or communications technology. While most or all LPFM station staff will be unpaid volunteers, their experience with LPFM stations can improve their prospects for gainful employment in the years ahead.

Such experience is much harder to come by when most of a worker's "local" stations are in fact being run, perhaps with total automation, from a central facility that is hundreds or thousands of miles away

Also: LPFM stations can contribute to the economic development of *communities as a whole*, along with the upward mobility of individual residents.

For one thing, LPFM stations can increase a community's economic activity *and* social activity by covering community events that typically "fly below the radar" of a full power station: high school basketball games, for example, and neighborhood block parties.

Further, although LPFM stations (like National Public Radio stations) are barred by law from selling Air Time for advertisements, they are nevertheless permitted (like NPR stations) to broadcast "donor acknowledgements". These On Air announcements recognize organizations and/or individuals for donations to the station. This is in fact advertising, NPR-pioneered and FCC-approved, under another name. Because of their small size, and very low operating costs, LPFM stations can typically offer small, local businesses "donor acknowledgements" at rates much lower than a local NPR affiliate would charge -- and at least one order of magnitude less than a large commercial radio station would charge.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Ten

In short: LPFM stations can be an absolute blessing for a community's small businesses -- by offering them the functional equivalent of locally focused, On Air advertising, all of it unaffordable on any other kind of radio station.

By eliminating its previously authorized LP10 stations, the FCC has effectively denied this blessing to every single neighborhood in New York City, Detroit, San Jose and 24 other cities. Meanwhile, the Commission has effectively decreed that the residents of Houston may have up to 13 LPFM stations within their city limits -- all because Houston happens to have the spectrum to accommodate that many LP100 stations, while New York City, Detroit, San Jose and 24 other cities are not allowed to have stations small enough to "fit" in their own spectrum.

So ... for individuals seeking upward mobility in a radio-related field, and communities seeking more economic stimulation and greater social vitality, conventional, "full power" radio is *not* a satisfactory alternative to Low Power FM. If it were, the FCC would not have had cause, in 2000, to establish LPFM as a separate option for aspiring broadcasters. Nor would Congress have had cause, in 2010, to enact the Local Community Radio Act, which removes certain legal obstacles to LPFM licensing -- and explicitly directs the Commission to assure that LPFM stations, as well as translator stations, are widely available to American communities.

In comparing LPFM stations to conventional, full power radio stations, LET THE CITIES IN!! stresses two key points:

(a) **Low Power FM stations are uniquely local.**

- 0 The power levels of LPFM stations limit them to local listeners only, creating a strong incentive to serve "niche markets" through locally focused and/or substantively distinctive programming ... The FCC calculates that a typical LP100 station has a transmission radius of "3.5 miles", while a typical LP10 station has a transmission radius of "1 to 2 miles"
- 0 The FCC awards a bonus point, in licensing competition, to LPFM applicants which commit themselves to airing a minimum level of "locally originated" programming ... Most LPFM advocacy groups strongly favor going even farther, by turning the bonus point into an absolute requirement for all LPFM licensees ... For now, the bonus point is still decisive in many urban areas

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Eleven

- 0 LPFM licenses are awarded “one to a customer”, which prevents the possibility of LPFM station “chains”
 - 0 A majority of each LPFM station’s Board Members must live locally
 - 0 LPFM stations may *not* be owned by any established media entity
- (b) **Racial and ethnic minorities, as well as women, are greatly under-represented in conventional, “full power” radio broadcasting.**

Citing the May 7, 2012 Written Comments, in Docket 99-25, of Maneesh 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 the 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 17,7% of all radio stations.

“Currently, people of color make up only 6% of the nation’s radio newsroom workforce.”

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twelve

**The FCC Has *Not* Presented A “Compelling State Interest”
That Would Justify Its Elimination Of Previously Authorized LP10 Stations**

(a) **Procedurally, it can be argued that the FCC has not presented any kind of “state interest” at all -- “compelling” or otherwise.**

To the best of LTCI’s knowledge, the FCC *never once*, at any point during the public comment period on LPFM expansion, explained *why* it wished to eliminate the LP10 stations it had authorized in 2000. The FCC’s ultimate explanation, alleging that LP10 stations might cause interference with larger stations and would not reach enough listeners to make the stations economically viable, was presented when the FCC’s final rule was issued on November 30, 2013. By then, the opportunity for public comments had closed -- effectively denying parties any chance to debate or discuss the Commission’s official rationale.

LTCI addressed the FCC’s stated rationale in our Petition For Reconsideration, but this was not equivalent to public participation by *all* potentially interested parties through timely Written Comments.

We contend that this procedural outrage alone justifies action to void the Commission’s elimination of LP10 stations.

Because the FCC never presented to the public, *during a time when the public comment period was open*, its reasons for wanting to eliminate LP10 stations, Members of THE AMHERST ALLIANCE, THE MEDIA ALLIANCE, COMMON FREQUENCY and other LPFM advocacy groups were effectively denied their legal rights to: (i) debate and/or discuss the reasoning behind the Commission’s proposal; and/or (ii) develop one or more counterproposals that might effectively address the Commission’s concerns.

Here is some history of past Commission deliberations on the LP10 issue:

Don Schellhardt, Esquire

:Letter to the Justice Department

August 23, 2013

Page Thirteen

In 2000, under the leadership of FCC Chairman William Kennard, the FCC established *two* classes of LPFM stations: the LP100 class (50-100 watts) and the LP10 class (1-10 watts). The Commission announced that there would be *two* filing windows, with LP100 applicants coming first and LP10 applicants being considered thereafter.

Thereafter, Chairman Kennard left the Commission and the LP100 filing window was held. However, by 2011, when Congressional enactment of the Local Community Radio prompted the FCC to take another look at LPFM, the long-promised LP10 filing window had still not to been opened.

LTCI, THE AMHERST ALLIANCE have searched in vain for an explanation, On The Record, of *why* the FCC decided to place the LP10 filing window “on hold” indefinitely.

Later, when the Commission proposed to eliminate LP10 class of stations, it stated that LP10 stations should not be licensed because LP10 stations had never been licensed. Period. This supposed “explanation” was not an explanation at all -- because it failed to reveal *why* the FCC had never licensed an LP10 station.

A college professor might call the FCC’s statement “tautological”. It leads us around in a circle.

Adding to this story “the finishing touch” of the Commission’s decision not to provide an explanation until it was already too late for that explanation to be challenged in a public comment period, it is clear to us that the FCC did not wish to see its reasoning on LP10s brought into the light of day.

We can’t help but speculate that the FCC would not have feared public examination of its case unless it saw that case as a weak one.

Confident leaders don’t stonewall.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Fourteen

(b) There is evidence that FCC staffers may have misinformed the Commissioners regarding the LP10 controversy.

In March of 2012, Peter Doyle, Chief of the Audio Division of the FCC's Media Bureau, fielded a question from the audience at a Convention of the National Religious Broadcasters' Association. This was a public forum, with journalists in attendance and no reason for anyone to expect confidentiality.

According to a press report, when Mr. Doyle was asked whether the FCC might approve LP10s, he replied: "LPFM groups aren't satisfied with 100 watts, they want 250 watts, not 10."

The response from some Members of the LPFM community was almost instantaneous.

On March 7, 2012, THE AMHERST ALLIANCE -- one of the most vocal LPFM advocacy groups, which I was leading -- sent an Ex Parte Notice, in FCC Docket 99-25. I stated that "*Mr. Doyle's statement was absolutely, unequivocally untrue.*"

The letter stressed that Amherst has strongly advocated LP10s since 1999. This should have been long enough to make Amherst's position absolutely clear in Mr. Doyle's mind.

The letter added that THE AMHERST ALLIANCE *does* support LP250s (101-250 watts), *but*: (i) Amherst would limit LP250s to small towns and rural areas (where low population density justifies a longer transmission radius) *and* (ii) Amherst assigns rural LP250s a lower priority than urban LP10s.

One day later, on March 8, REC NETWORKS -- another long-established, well-respected LPFM advocacy group -- placed its own Letter in FCC Docket 99-25. REC raised, independently, the same basic points that Amherst had raised.

Then, on March 9, 2012; Todd Urick wrote a Letter to the FCC on behalf of COMMON FREQUENCY of California. His letter addressed other issues besides LP10s and did not mention Mr. Doyle's statement explicitly. However, he expressed strong support for licensing

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Fifteen

of LP10s, documenting how they can notably boost the number of choices on the dial in the San Francisco Bay Area.

Let me add that, in addition to the 3 groups whose filings I have just referenced, THE MEDIA ALLIANCE of California, CHRISTIAN COMMUNITY BROADCASTERS of Georgia and NEXUS BROADCASTING of Texas have all openly backed LP10s -- at least for *some* urban areas. This brings the total count of LP10 supporters to 6 of the nation's 7 major LPFM advocacy groups, compared to the *zero* LP10 supporters that Peter Doyle reported.

Meanwhile, to the best of our knowledge, Peter Doyle has never corrected his inaccurate statement On The Record, let alone apologized for it. We do not know whether any FCC Commissioners have been influenced by his false, and apparently uncorrected, report.

Later, at the Commission Meeting where the final rule on LPFM expansion was issued, statements by some of the Commissioners suggested they were unaware how much of urban America is still being excluded from LPFM coverage. This apparent lack of full awareness raises the possibility that some of the Commissioners may have been under-informed, or even misinformed, when they cast their votes for a final rule that included the elimination of LP10s,

For more details, please see "D. The Commission Was Under-Informed When It Mandated 'LP10s Only' For Highly Urban Areas", on Pages 6-8 of the ATTACHED Petition For Reconsideration.

- (c) Although LTCI believes the FCC's elimination of LP10s can be -- and should be -- voided on procedural grounds alone, LTCI also asserts that the FCC's late-arriving substantive rationale is fatally flawed.

The FCC has stated that 1-10 watt LPFM stations should not be licensed because they might generate interference with larger stations *and/or* fail to reach enough listeners to make the stations financially viable.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Sixteen

However ...

The FCC did not explain why these concerns have not kept it from licensing FM Band translator stations which operate at 10 watts. Translators are stations which do not generate their own programming but instead relay programming that originates elsewhere, often in a studio thousands of miles away via satellite.

Nor did the FCC explain why these concerns have not kept it from licensing 10 watt Travelers' Information Service (TIS) stations on the AM Band -- which is even more crowded than the FM Band.

Nor did the FCC explain why these concerns, raised now in 2012, did not keep the Commission from authorizing LP10 stations a decade earlier. There was no reference to new information, and/or changed circumstances, that might justify the altered decision.

And

The FCC did not explain how its two expressed concerns are consistent with each other. How can a 10 watt LPFM signal be simultaneously (i) too weak to reach a financially viable number of listeners; and yet (ii) strong enough to cause interference to a 50,000 watt competing station?

For additional arguments on this matter, please see "F. 'Technical' Concerns Do Not Justify FCC Policy" on Pages 13-15 of the ATTACHED Petition For Reconsideration. The referenced material was developed by Nickolaus E. Leggett, Technology Advisor to LET THE CITIES IN!!

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Seventeen

JUDICIAL RELIEF SOUGHT

- (a) **Reverse the FCC’s elimination of the LP10 class of LPFM stations.** As we have indicated above, the Commission’s decision to eliminate LP10 stations (1-10 watts) was seriously flawed procedurally. As we also stated previously, the currently planned filing window for LPFM (set to open on October 15, 2013) is unconstitutional *unless* a second filing window is added for LP10 applicants. By limiting all applicants to LP100 status (50-100 watts), the Commission has effectively barred LPFM stations from the *many* communities where only LPFM stations below 50 watts will “fit” in the radio spectrum. This uneven exclusion of LPFM stations has a negative, racially disparate impact which is not justified by a “compelling state interest”: thus, it violates the Constitution’s Equal Protection Clause.
- (b) **Allow the October 2013 filing window for LP100 stations to proceed as planned, but require completion of a second filing window, for LP10 stations, shortly thereafter.**
1. **Schedule the second (LP10) filing window for dates 3 to 6 months after completion of the first (LP100) filing window.** As noted earlier, most LTCI Members believe 3 months are needed for aspiring LP10 broadcasters to prepare their applications. However, given the FCC’s many years of unexplained delay in the licensing of LP10 stations first authorized in 2000, we also believe it makes sense to give the FCC a firm “outside deadline” (6 months) for taking action.
 2. **Decide which geographical areas should have a second (LP10) filing window.**

In the FCC’s original (January 2000) final rule on establishment of the LPFM Radio Service, the Commission announced that an LP100 filing window would be followed by an LP10s. It was also announced that LP10 licenses, like LP100 licenses, could be sought in *all* geographic locations.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Eighteen

Of course, LET THE CITIES IN!! has focused solely on *urban* areas with *extreme* spectrum scarcity (such as New York City and Detroit). Cities have been our focus because urban locations generally have the lowest LPFM availability -- and their exclusion from the LPFM Radio Service poses the greatest Constitutional problems.

Nevertheless, we note in passing that a *public policy* case can be made for the FCC's original decision to allow LP10 licenses everywhere. For one thing, extreme spectrum scarcity isn't limited to just the largest cities. New York City (#1 in population rank) has no frequencies to accommodate LP100 stations, but neither does Rialto, California (#283 in population rank). For another thing, LP10s may make sense even in some small towns and/or other areas where LP100 frequencies are readily available. If, for example, a small town has a population density of 1,000 people per square mile but the density quickly drops to 2 people per square mile in the farmland just outside the town limits, setting up an inexpensive LP10 to cover the town might be much more cost-effective than trying to reach a handful of additional listeners with a more costly LP100.

Having noted that LTCI would happily endorse LP10s everywhere (just as 10 watt Class D educational stations were once licensed everywhere), LTCI's Petition For Reconsideration and Written Comments to the FCC have understandably focused on more practical *targeted* licensing opportunities for LP10s.

LTCI's Petition For Reconsideration proposed the licensing of LP10s (and also, *if possible*, LP50s) in locations within "urban core areas" of the Top 100 Arbitron Markets. The FCC itself has defined what it considers an "urban core area": (i) locations within 18 miles (30 kilometers) of the center of Arbitron Markets 1-20; (ii) locations within 12 miles (20 kilometers) of the center of Arbitron Market

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Nineteen

21-50; and (iii) locations with 6 miles (10 kilometers) of the center of Arbitron Markets 51-100.

Opening these 100 urban core areas to LP10s would limit LP10 licensing to less than 1% of the land area of the Lower 48 States -- while still favorably affecting enough people to constitute a *vast* improvement over the FCC's current "LP100s only" policy.

Nevertheless, while we would certainly embrace a court's adoption of our original proposal, LTCI's subsequent research has persuaded us that our Petition's proposal can be improved.

Specifically, *if* a court wants to "target" LP10 licenses toward areas where they can do the most good, the court might prefer *more precise criteria* for determining where LP10s should be licensed.

Opening up the 100 largest urban core areas to LP10s, across-the-board, would bring more LPFM stations to large and totally excluded cities -- such as New York City, Detroit and San Jose -- but it would also bring more LPFM stations to Houston, which currently has 13 LP100 frequencies within its city limits, and Tampa, which has 15.

At the same time, action in the 100 largest urban core areas would not provide relief for cities that are relatively small but still face *extreme* spectrum scarcity. Examples are Allentown, Pennsylvania (#216 in population rank) and Provo, Utah (#227 in population rank), which are totally excluded from the LPFM Radio Service at the moment.

Therefore, while we would applaud a court's adoption of LTCI's original proposal, we prefer adoption of the following approach:

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty

- (a) **Direct the Federal Communications Commission to review the results of the October 2013 filing window for LPFM stations**
- (b) **Focus on the 285 incorporated communities that have at least 100,000 residents**
- (c) **Open a second filing window for LP10s, within 3 to 6 months, for every incorporated community that will come out of the first filing window with less than 3 LPFM stations**

As we have noted on Page 6 of this letter:

Current frequency availability projections, by REC NETWORKS of Maryland, indicate that 27 of America's 285 communities over 100,000 will have *no* LPFM stations *at all* under the FCC's "LP100s only" policy. Another 46 will have only one or two LPFM stations.

Thus, if REC NETWORKS' projections are accurate, and if LTCI's preferred recommendation is adopted, second filing windows for LP10s will be opened in 73 of the country's 285 largest cities. This would be roughly 1 city in 4.

To put the same points another way:

Without action to correct the situation, 1 city in 4 will be seriously underserved by LPFM, despite the *Congressionally mandated* expansion of LPFM into urban areas. 1 city in 10 will not be served by LPFM at all.

For administrative reasons, we have not proposed a second filing window for incorporated communities with fewer than 100,000 people. However, if the Justice Department and/or the court want to extend LP10 eligibility to incorporated communities with a lower population threshold -- or even to *all* incorporated communities, of *any* size, that have fewer than 3 LPFM stations under an "LP100s only" policy -- LTCI will certainly not object.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty One

LTCI's preferred approach, under Point #2, was inspired by observations made in the March 7, 2013 Reply To Petitions For Reconsideration, in FCC Docket 99-25, by THE MEDIA ALLIANCE.

3. **In geographical areas affected by the second filing window, order the Commission not to issue licenses to *any* new radio stations until the Commission's licensing of LP10s has been fully completed.**

The FCC has designated LPFM stations as "next in line" for whatever suitable frequencies are available and requested. 1-10 watt LPFM stations may have to "wait their turn" behind 50-100 watt LPFM stations, but they should at least be protected from being "jumped in line" by new stations which aren't even LPFMs.

4. **Direct that the Commission, in any given area, may not allow new stations to gain a license at lower wattage than the lowest wattage which is legal for LPFMs in the same area.**

Right now -- as we have noted -- the Commission has authorized itself to license urban translator stations at 10 watts, but has refused to license any LPFMs at power levels lower than 50 watts. This means, in practice, that the FCC, *for reasons it has never explained to the public*, will readily allow an evangelical broadcasting chain in Oklahoma to beam standardized programming at residents of Brooklyn -- while a neighborhood group in Brooklyn is *barred by law* from competing with the established out-of-towners for that 10 watt frequency.

In effect, the FCC has acted, *by force of law*, to declare that frequencies below 50 watts are "out of bounds" for local community groups -- while simultaneously acting, again *by force of law*, to effectively reserve the same frequencies for out-of-town interests.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty Two

This practice must come to an end. Clearly, it violates the Equal Protection Clause of the Constitution. It also violates the *Local Community Radio Act of 2010*, under which the current LPFM licensing process is now proceeding. That statute directs the FCC to assure that *both* LPFM stations *and* translator stations are “widely available” in communities across the nation.

We stress that the FCC’s unequal entitlement for translator stations, regarding frequencies below 50 watts, is a truly powerful reason for licensing LP10s NOW. That is: When the FCC completes the upcoming licensing cycle for LPFM stations, a licensing cycle for translators will ensue. Unless the current licensing cycle for LPFM stations is extended to include a second filing window for LP10s, and/or any new translators are barred (in their next licensing cycles) from having lower wattage than the lowest wattage LPFM station, then translators -- with the FCC’s implicit blessing -- will be able to scoop up all of the precious urban frequencies below 50 watts. Access to these frequencies by LPFM stations will be gone forever (unless, of course, the FCC eventually allows new LPFM stations to displace certain existing stations).

In short: Some potential LPFM stations, especially in areas with extreme spectrum scarcity, will suffer IRREPARABLE HARM if translator stations remain legally empowered to seek lower wattage frequencies that LPFM stations are not allowed to access,

The policy advocated under Point #4 was first proposed in a March 19, 2013 Reply To Petition For Reconsideration, in FCC Docket 99-25, by PUBLIC MEDIA OF NEW ENGLAND d/b/a WHAV.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty Three

SOME TECHNICAL POINTS

- (a) The estimates of LPFM frequency availability, in various locations, were derived from the “My LPFM” Channel Search on www.recnet.com. The “Channel Search” was developed by Michelle Eyre of REC NETWORKS in Maryland.
- (b) Population rankings for referenced incorporated communities were drawn from Wikipedia.
- (c) Racial demographics for referenced incorporated communities were found in the “Area Current” report for each city.
- (d) LTCI supports making LP10 licenses (1-10 watts) available, at least in areas with extreme spectrum scarcity. We would also support licensing of LP50 stations (1-49 watts), as proposed by REC NETWORKS of Maryland, *if* a reviewing court sees LP50s as an acceptable option. Still, we prioritize LP10s over LP50s because we believe the legal case for LP10s is stronger. So is the practical case for LP10s.

CONCLUSION

The Department of Justice Web Site has apprised me to “Provide as much information as possible” in this letter. Within the limits of Reason, I have tried to do just that.

Nevertheless, if you want more information and you think I can provide it, do not hesitate to ask. I will do my very best to comply with any request.

Also: I will alert you whenever the FCC issues its decision on LTCI’s pending Petition For Reconsideration.

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty Four

It is my fervent hope that the Justice Department will decide to “take on the case” I have placed before you. Given LTCI’s highly constrained resources, this major injustice will stand unchallenged in court *unless* the Justice Department steps in.

Sincerely,

Don Schellhardt, Esquire

Attorney for LET THE CITIES IN!!

3250 East Main Street, #48

Waterbury, CT 06705

djlaw@gmail.com

(203) 982-5584

Attachments:

December 28, 2012 Petition For Reconsideration, in FCC Docket 99-25. by LET THE CITIES IN!!

Resume of Don Schellhardt, Esquire, Attorney for LET THE CITIES IN!!

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty Five

CC [Hard Copies]:

Attorney General Eric Holder, Justice Department

CC [Via E-Mail]:

Chairwoman Mignon Clyburn, FCC

Commissioner Ajit Pai, FCC

Commissioner Jessica Rosenworcel, FCC

General Counsel Sean Lev, FCC

Inspector General David Hunt, FCC

Representative Michael Doyle, D-PA, Sponsor, Local Community Radio Act

Representative Lee Terry, R-NB, Sponsor, Local Community Radio Act

Senator Maria Cantwell, D-WA, Sponsor, Local Community Radio Act

Senator John McCain, R-AZ, Sponsor, Local Community Radio Act

Leslie Stimson, Washington Bureau Chief, RADIO WORLD

Don Schellhardt, Esquire

Letter to the Justice Department

August 23, 2013

Page Twenty Six

All Members of LET THE CITIES IN!!, Nationwide

Nickolaus E. Leggett, Virginia, RM-9208 Co-Petitioner and Technology Advisor to LET THE CITIES IN!!

Tracy Rosenberg, California, THE MEDIA ALLIANCE

Todd Urick, California, COMMON FREQUENCY

Tim Coco, Massachusetts, PUBLIC MEDIA OF NEW ENGLAND d/b/a WHAV

Michelle Eyre, Maryland, REC NETWORKS

Brandy Doyle, Pennsylvania, PROMETHEUS RADIO PROJECT

Maneesh Pangasa, Arizona

Brooklyn College Professor John Anderson, New York, DIYMEDIA