

EX PARTE NOTICE OF  
SEPTEMBER 27, 2013  
E-MAIL MESSAGE TO  
FCC CHAIRPERSON MIGNON CLYBURN

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\*\*\*\* SPECIAL NOTE TO THE U.S. DEPARTMENT OF JUSTICE: One copy is for Jocelyn Samuels, Acting Assistant Attorney General for the Civil Rights Division. The other copy is for Eric Holder, the Attorney General. \*\*\*\*

Dear FCC Chairperson Clyburn,

As you know, I am the attorney for LET THE CITIES IN!! (LTCI): a citizens' group which advocates licensing of additional Low Power FM (LPFM) radio stations in urban areas. LTCI has submitted a Petition For Reconsideration in FCC Docket 99-25, seeking authorization of LP10 stations and/or LP50 stations in urban areas. To date, the FCC has neither granted nor denied this Petition.

I am writing to address certain remarks you made yesterday, and placed On The Record in FCC Docket 99-25, during the Media Bureau's public briefing on the October filing window for LPFM stations. This E-Mail response from LTCI is also being placed in FCC Docket 99-25, as an Ex Parte Notice.

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LTCl's response is focused on two of your statements, each drawn from the sixth paragraph of your September 26, 2013 remarks.

\*\*\*\*

1. You said this:

"Radio is a mature service and it does not come as a surprise to learn that no spectrum remains for LPFM stations in the core areas of a few of the country's largest cities. This is extremely regrettable ... "

(A) Unfortunately, the problem of low to zero spectrum availability for LPFM stations extends far -- far! -- beyond "the core areas of a few of the country's largest cities".

The FCC's current ban on LPFM stations below 50 watts -- which renders illegal the only stations that are small enough to "fit" into the crowded radio spectrum in many urban areas -- will adversely affect many, many communities across America. It is vitally important for you, and the other Commissioners, to understand the \*\* full \*\* impact of the FCC's current, and inflexibly uniform, ban on LPFM stations below 50 watts.

(i) For one thing, more than "a few large cities" are being affected. Of the 285 American communities with a population of more than 100,000, 27 -- roughly 1 in 10 -- will have no LPFM stations at all if the Commission continues to ban LPFM stations below 50 watts (which, as noted above, would generally be small enough to "fit" into crowded urban radio spectrum).

In declining order of population, these 27 totally excluded cities are

as follows: New York City ... San Jose ... Detroit ...  
Riverside ... Pittsburgh ... Toledo ... Newark, NJ ...  
Buffalo ... Jersey City, NJ ... San Bernardino ...  
Moreno Valley, CA ... Yonkers ... Santa Rosa, CA ...  
Paterson, NJ ... Bridgeport ... Lakewood, CO ... Warren,

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MI ... Elizabeth, NJ ... Allentown ... Denton, TX ...

Vallejo, CA ... Provo, UT ... Ann Arbor ... Berkeley  
... Fairfield, CA ... Cambridge ... and Rialto, CA.

For more details, please see the ATTACHED document. It contains a key excerpt from LTCl's August 23, 2013 letter to Jocelyn Samuels, Acting Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice.

In addition to the 27 cities in which no LPFM stations at all are currently allowed, there are another 46 cities -- all of them with a population exceeding 100,000 -- in which only 1 or 2 LPFM stations can be licensed at present. Meanwhile, the average for the 285 cities as a whole is 6 LPFM stations per city.

Overall, then:

Of the 285 American communities with a population of more than 100,000, 73 will have no frequencies at all, or else only 1 or 2 frequencies, available for LPFM stations (compared to the sample average of 6). This means that LPFM stations will be severely under-represented, if not absent completely, in roughly 1 out of every 4 cities with a population that exceeds 100,000.

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(ii) In addition to affecting 73 of the nation's 285 cities with

more than 100,000 people -- far more communities than just "a few of the country's largest cities" -- the problem of low to zero LPFM availability also extends beyond "the core areas" of metropolitan regions.

To cite one example, consider my hometown of Livingston, NJ. It is located 20 miles to the west of Manhattan: outside of New York City's "urban core". Yet, under the FCC's current "LP100s only" policy, it would have no LPFM stations at all. For that matter, there would be virtually no LPFM stations anywhere in all of New Jersey.

On The Other Hand, according to data from REC NETWORKS of Maryland, Livingston can have \*\* two \*\* LPFM stations if LP10 stations and/or LP50 stations are allowed. This is the kind of difference a shift from "LP100s only" can produce in urban areas -- and, less frequently, in some suburban areas as well.

For more details on this latter point, please see Table III of the Report To THE AMHERST ALLIANCE on Spectrum Scarcity. This Report can be found in the Appendix to my November 24, 2012 personal Reply Comments, in FCC Docket 99-25, to REV -- PEOPLE'S PRODUCTION HOUSE.

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(iii) LTCl also reminds you of a point which has been raised repeatedly, On The Record, in FCC Docket 99-25, by LTCl ... by

THE AMHERST ALLIANCE ... and by myself as an individual citizen.

That is:

Those areas in which LPFM stations are now under-represented, or excluded completely, are disproportionately populated by non-white Americans. Thus, the FCC's current "LP100s only" policy has a racially disparate impact -- which materially impedes, in affected communities, both potential employment and potential community development.

Under present precedents in Constitutional law, such an adverse and racially disparate impact, generated by an arm of government, can be considered Constitutional \*\* only \*\* if a "compelling state interest" is being served by the policy.

It does not matter to the courts whether or not an adverse and racially disparate impact is being inflicted intentionally. It matters only that such an impact is in fact occurring, whether intentionally or not. If it is, then the government policy must be

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changed unless a "compelling state interest" can be shown.

In this case, :LTCl does not believe such a showing has been made -- or \*\* can \*\* be made -- by the FCC. The Commission's

expressed concerns regarding LP10 stations are much less than "compelling" substantively -- and they have also been tainted by procedural errors which greatly impeded full discussion of the policy by the public.

For more detailed discussions, please see :LTCI's December 27, 2012 Petition For Reconsideration and its August 23, 2013 letter to Acting Assistant Attorney General Jocelyn Samuels of the Justice Department. Both documents can be found in FCC Docket 99-25.

(B) Radio may indeed be "a mature service" -- at least given the technologies that are presently available for spectrum utilization.

Perhaps, then, you are right that people should expect to encounter some general scarcity of spectrum in specific locations.

\*\*\*\* However, there is no inevitable force which decrees that general scarcity of spectrum has to mean little or no spectrum for LPFM. \*\*\*\*

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Little or no spectrum for LPFM is, in reality, the result of specific decisions by the FCC. The FCC made these decisions -- and the FCC has every right to modify them, or undo them, wherever the law permits. The FCC does not have to accept the status quo passively,

as if it were the Hand of God, when in fact the status quo is the handiwork of the FCC.

God created the amount of radio spectrum which is currently usable with present technology. However, it wasn't God Who decided how to divvy up that currently limited spectrum among all of its existing and potential users. That was the work of the FCC.

It was the FCC which took the 1934 Communications Act mandate for "equitable and efficient" license allocation, with its broad phrasing, and interpreted the mandate to mean:

-- That full power stations are always better than Secondary Service stations, even if the Secondary Service station can do a better job of serving the public

-- That established stations should always trump newcomers in the same Service Class, even if the newcomer offers locally originated

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programming while the established broadcaster is a "satellator" with 100% standardized programming from 2,000 miles away

And

-- In the current case, that higher wattage LP100 stations are

always better than lower wattage LP10 stations, even when putting a single LP100 On Air in San Francisco means silencing several other voices that could have served the city over LP10s

Once again:

"Bigger Is Always Better" and "First Come First Served" are not principles dictated to Humanity by either God or Nature. They are principles established by human beings -- and human beings have the God-given right to change them.

With spectrum shrinking -- and the public becoming more populist -- perhaps it's time for "Spread The Opportunities Around" to be enshrined alongside, or even slightly above, "Bigger Is Always Better" and "First Come First Served".

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2. In the same paragraph, you went on to say this:

"I know firsthand that the need for a greater diversity of voices in these areas is huge. As a result we must continue to look for ways to expand media opportunities for minority groups, underrepresented ethnic and niche language communities in particular and I pledge to do so."

Chairperson Clyburn, the Members of LTCl commend you for your loyal and longstanding support of the Low Power FM Radio Service.

We are also heartened by your continuing commitment to develop new licensing opportunities for minority broadcasters in particular -- and newcomers to radio in general.

LTCl encourages you as you "look for" ways to do this.

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We want to add, however, that some good ideas are already On The Table at the FCC. We suggest you start your search by taking a look at them.

(A) Obviously, there is the solution LTCl has already advanced.

The FCC can "fit" more LPFM radio stations into the cities by allowing

them to be smaller than 50-100 watts. LP50s would definitely "Spread The Opportunities Around" in urban America. LP10s would spread them even further.

Licensing of LP10s -- at least in some areas -- has been endorsed by LTCI. THE AMHERST ALLIANCE of Connecticut, THE MEDIA ALLIANCE of California, COMMON FREQUENCY of California, REC NETWORKS of Maryland, CHRISTIAN COMMUNITY BROADCASTERS of Georgia and NEXUS BROADCASTERS of Texas. All of these groups have been active advocates for LPFM.

(B) While LTCI as a group is neutral on this matter, THE AMHERST ALLIANCE and various translators have joined forces to advocate allowing translators to air their own locally originated programming.

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This approach could quickly turn outposts of broadcast empires into engines of localism. It is possible that amazing progress toward the rebirth of certain communities could be made in a matter of months.

(C) The Local Community Radio Act (LCRA) bars the FCC from allowing LPFM stations to displace existing translators, or allowing translators to displace existing LPFM stations, in the competition for

licenses. However, nothing in the LCRA prohibits the FCC from favoring one group of LPFMs over another group of LPFMs, or one group of translators over another group of translators, based on reasonable grounds.

Noting this distinction, THE AMHERST ALLIANCE has made the following proposal to the Commission:

(i) A translator which has \*\* made a commitment \*\* to locally originated programming should be allowed to displace a translator which has not.

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(ii) An LPFM station which has \*\* made a commitment \*\* to locally originated programming should be allowed to displace an LPFM station which has not.

(iii) A "commitment to locally originated programming" should be defined as: (a) the immediate airing of at least 2 hours of locally originated programming per day; (b) "ramping up", over a transition period of 2 years, to at least 8 hours of locally originated programming per day; and then (c) remaining at the latter level

indefinitely.

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Thank you, Chairperson Clyburn, for reading this Message and considering the points LTCl has presented.

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Sincerely,

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