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Establishment Of LP250 Stations) FCC Docket No. ____

PETITION FOR RULEMAKING BY DON SCHELLHARDT, ESQUIRE KI4PMG AND NICKOLAUS E. LEGGETT N3NL

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THE FCC'S OPENNESS TO "FURTHER STUDY" OF LP250 STATIONS

On November 30, 2012, the Federal Communications Commission (FCC) issued FCC 12-144: its final Report & Order to implement the Local Community Radio Act (LCRA). This final rule, in FCC Docket 99-25. currently limits *all* Low Power FM (LPFM) stations, in *all* locations, to LP100 status (50-100 watts). In two separate steps toward LPFM wattage standardization, the FCC eliminated the LP10 class of LPFM stations (1-10 watts) and also declined to authorize, *at this time,* proposed LP250 stations (101-250 watts).

The elimination of LP10 stations was quickly challenged by LET THE CITIES IN!! (LTCI). This newly formed citizens' advocacy group then filed, in FCC Docket 99-25, a Petition For Reconsideration. The LTCI Petition asked the Commission to allow LP10 stations and/or LP50 stations (1-50 watts) in the urban core areas of the 100 largest Arbitron Markets. However, the LTCI Petition was denied *in toto*.

The present Petition accepts the FCC's invitation, in its final rule for LCRA implementation, for interested parties to request "a second look" at LP250 licensing — in appropriate locations. To avoid any possible diversion of energy away from the LPFM "filing window" of 2013, the Petitioners delayed filing of this Petition until the 2013 filing window had closed. The Petitioners speculate that issuance of any new rule on LP250s might occur at some point in 2014.

In preparing and filing this Petition For Rulemaking, the Petitioners have been greatly encouraged by the FCC's own comments.

The Commission, in FCC 12-144 — the previously referenced Report & Order on LCRA implementation — acknowledges the claims of LP250 advocates that these stations can offer major benefits to the public. [Page 78, paragraph 205] . The Commission adds that THE NATIONAL ASSOCIATION OF BROADCASTERS (NAB) and NATIONAL PUBLIC RADIO (NPR) — the two main critics of LP250 stations — "*do not dispute the benefits cited* by those supportive of an LP250 class", arguing against the proposed stations on other grounds instead. [Ibid, with emphasis added] Still, the FCC concludes: "*At this time,* we will not adopt our proposal to create an LP250 class ... the issue of increasing the maximum facilities for LPFM stations *requires further study.*" [Page 78, paragraph 206, with emphasis added]

In particular, the FCC identifies two matters which were subject to "disagreement among commenters": (1) "LP250 station location restrictions" and (2) "technical parameters" of LP250 stations, including one broadcast engineer's proposal to increase maximum antenna heights for LP250s located west of the Mississippi. [Ibid]

The rulemaking proposed in this Petition will serve the Commission's objectives. That is: The Petitioners intend it to be a vehicle for further study — and discussion.

INFORMATION ABOUT THE PETITIONERS

At the outset, the Petitioners stress that they are in full agreement on the need to establish LP250 stations — in appropriate locations. Now that the 2013 filing window for LP100 stations is history, it is time for the Commission to consider again the possibility of licensing new LPFMs outside the range of 50-100 watts.

The Petitioners acknowledge that a newly formed citizens' advocacy group, THE POWER BOOST COALITION (PBC) of Colorado, originally announced in 2012 that it would be preparing and filing an LP250 Petition once the 2013 LPFM filing window had closed. By the summer of 2013, however, the new group lost all internal cohesion and now appears to be beyond revival.

Under the circumstances, Don Schellhardt and Nickolaus E. Leggett have "stepped into the breach" as alternative Petitioners for LP250 stations.

Don Schellhardt

In 1997, Don Schellhardt joined Nick Leggett as one of two Co-Petitioners in FCC Docket RM-9208: the first Petition For Rulemaking to propose a Low Power FM Radio Service to the FCC. The RM-9208 Petition went on to become the initial catalyst for subsequent proceedings in FCC Docket 99-25.

Since 1997, Don has also served as Co-Founder and President of THE AMHERST ALLIANCE — a citizen's advocacy group for media reform — and as Attorney for LET THE CITIES IN!!, a group which advocates licensing of 10 watt LPFM stations in urban areas.

Don holds a B.A, in Government from Wesleyan University (which is where he first met Nick Leggett, 47 years ago) and a law degree from George Washington University. He also has a Master of Arts in Liberal Studies from Hollins University.

<u>Nickolaus Leggett</u>

Nickolaus Leggett is a certified electronics technician (ISCET and iNARTE) and an Extra Class amateur radio operator (call sign N3NL). He holds an FCC General Radiotelephone Operator License with a Ship Radar Endorsement. He is an inventor, holding three U.S. Patents. His latest patent is a wireless bus for digital devices and computers (U.S. Patent # 6,771,935). He has a Master of Arts degree in Political Science from the Johns Hopkins University.

Nick is one of the original petitioners for the establishment of the Low Power FM (LPFM) radi broadcasting service (RM-9208), which led to FCC Docket 99-25.

OUR PROPOSAL FOR LICENSING OF LP250 STATIONS

(1) Effective on a date certain, the Commission should issue a final rule which creates an LP250 class of stations and sets their technical parameters.

(2) Thereafter, *selected* existing LP100 stations, in *appropriate* locations, should become eligible to apply for upgrades to LP250 status.

(3) Totally new applicants, in *appropriate* locations, should also be eligible to apply.

However, such applicants, even if licensed, should not be authorized to operate above 100 watts until they have completed the two-year "shakedown cruise" that is discussed immediately below.

(4) Eligibility for an LP250 license should require a case-by-case showing that: (a) the specific applicant has operated On Air, at no more than 100 watts, for an unbroken period of at least two years ... (b) the specific applicant's overall record, during the station's period of On Air operations, demonstrates clearly a level of technical competence which is adequate or better ... (c) the specific applicant's overall record, during the station's period of On Air operations, demonstrates beyond dispute a willingness and ability to comply with all Commission regulations ... (d) the specific applicant has

available sufficient spectrum to upgrade to 250 watts without adversely affecting any other existing radio station ... (e) the specific applicant has committed itself to airing at least three hours of locally originated programming per day, effective on its first day of operation as an LP250 station, phasing up to eight hours of locally originated programming per day within two years thereafter ... and (f) the specific applicant's proposed new service area is an appropriate location for LP250 operations.

In practice, the requirement for at least two years of On Air operation — as an LP100 station — would mean in practice that some generally eligible LP100s, licensed *before* the October 2013 filing window, would be able to seek upgrades in 2014. However, LP100s licensed *during and after* the October 2013 filing window would have to wait longer.

This differential in treatment is intentional. Since the FCC requires radio stations operating above 100 watts to meet more demanding technical standards than those operating at a lower wattage, we consider it prudent to require every LP250 applicant to show successful completion of a "shakedown cruise," lasting at least two years, at an LP100 level. The Petitioners, along with Wesli AnneMarie Dymoke of Connecticut and Jeffrey Sibert of Minnesota, writing as individual commenters in FCC Docket 99-25, have all previously proposed a "shakedown cruise" of two years — at the LP100 level — for all LP250 stations.

THE CASE FOR LICENSING OF LP250 STATIONS

The Catholic Radio Association (CRA) has presented, concisely, the core case for licensing LP250 stations in locations where small communities and/or rural areas are being served.

CRA has said this to the FCC [CRA Comments in 99-25, June 10, 2011, page 8]:

" ... we urge the FCC to consider the inherent difficulty that LPFM licensees encounter — even in prosperous economic times — with respect to their efforts to maintain sustainable operations notwithstanding the limited power restrictions in this service and a corresponding limit to the coverage of potential, much less actual, listeners. The extended economic downturn will further exacerbate this difficulty faced by LPFM applicants. We submit that the 100 watt limit on power for a LPFM is unnecessarily draconian in rural areas where larger coverage areas are possible, and where such larger coverage areas would mitigate the economic challenges faced by rural LPFM operators in particular. With this in mind, the agency should open a filing window for new LPFM facilities where power is authorized up to 250 watts in rural areas. This would significantly improve the prospects for economically viable service."

The Commission notes, in its recent Report & Order, that "The LPFM community offers broad support for the creation of a new LP250 class". [Page 78, paragraph 205]

The FCC goes on to summarize, as follows, the overall benefits which LP250 advocates assert these stations can provide: (1) "improved LPFM station viability through better access to underwriting"; (2) "more consistent signal coverage throughout

the communities served" and (3) "the ability to serve areas of low population density and/or more distant communities". [Ibid]

The Petitioners join in the LPFM community consensus that these benefits are both realistically available *and* important to the radio listening public. As we have noted, the FCC adds that opponents of LP250 stations "do not dispute the benefits cited". [Ibid]

THE CASE AGAINST LICENSING OF LP250 STATIONS

Without disputing "the benefits cited", LP250 opponents have challenged such stations on other grounds. According to the FCC, these allegations are fourfold. [Ibid]

(1) "An LP250 class [of stations] would pose a greater risk of interference to full power stations". This is a familiar refrain from the NAB and NPR, which made the same claim against LP100 stations when LPFMs were first proposed. Those claims were later disproven decisively — first by the Commission's own technical staff and then, following a Congressionally mandated independent study, by the MITRE Corporation.

Since they were caught, in the recent past, "crying wolf" about alleged interference from LP100s, the NAB and NPR should be expected to meet a higher burden of proof now that they are alleging interference from LP250s. Among other things, they should be expected to explain why, exactly, a potential 250 watt station poses a major risk of causing interference if it is run by an LPFM operator — while an existing 250 watt

station poses no such risk when it is run by a translator broadcasting chain.

If the NAB and NPR are implying — and can go on to demonstrate — that LPFM broadcasters need better training before they operate LP250s, then the solution is to develop reasonable training and certification standards for such broadcasters. It is *not* a fair nor rational solution to keep *all* LPFM broadcasters, everywhere, from operating a 250 watt station, no matter how capable an individual LPFM broadcaster may be.

In this regard, we remind the Commission of our own recommendation — on pages 6 and 7 of this Petition — that no LP100 should be eligible for an upgrade, to LP250 status, until and unless it has first demonstrated a "track record" of competence and integrity, over a "shakedown cruise" period of at least two years On Air.

(2) LP250 stations are "unnecessary given the availability of 250 watt Class A licenses". Unfortunately, however, Class As are not really a viable alternative to LPFMs.

If they were considering Class A options, *most* LPFM aspirants (at least two thirds) would be drawn to *non-commercial* licenses because these aspiring broadcasters *want* to be non-commercial. However, non-commercial Class A stations would not be comparable to LPFMs *unless* the FCC attaches to Class A's the kind of station ownership restrictions which attempt to keep LPFMs locally based, locally focused and independently owned.

***Some* aspiring LPFM broadcasters (perhaps a quarter, or a bit more) would strongly prefer to be free to air commercials, but accept the current LPFM requirement for uniform non-commercial status as a necessary "trade-off" for getting On Air. These broadcasters are not seeking commercial Class A licenses because even the smallest Class A**

stations are allocated through mandatory auctions, where aspiring LPFM broadcasters typically fall far short of the financial resources needed to present a competitive bid.

If the NAB and NPR truly wish to see the commercially oriented minority of LPFM aspirants considering the ownership of Class A stations instead, then the NAB and NPR should support an exemption from mandatory auctions for — or, at the very least, the establishment of major "bidding credits" for — locally based, locally oriented and independently owned applicants for 250 watt Class A commercial licenses.

(3) LP250 stations would "go beyond the clear intent of Congress in enacting the LCRA". The Petitioners strongly agree with the FCC's own assessment that "the LCRA does not contain any language limiting the power levels at which LPFMs may be licensed", nor does the legislative history establish such a limitation.

(4) LP250 stations "would be a departure from the local character of the LPFM Service". This argument would be "right on target" *if* THE AMHERST ALLIANCE and THE CATHOLIC RADIO ASSOCIATION — the first major parties to propose LP250 stations in FCC Docket 99-25 — had urged the FCC to place them in cities and suburbs. In fact. however, Amherst proposed to license LP250s *"in truly rural areas"*. CRA, when it later endorsed Amherst's idea, spoke of *"small communities and rural areas"*. The FCC itself —— as we mentioned in the top paragraph of page 9 — cited as one key benefit of LP250s "the ability to serve *areas of low population density and/or more distant communities"*.

So long as the spirit of these quotations is prevalent at the Commission, the licensing of LP250s will pose no threat to the distinctive "local character of the LPFM Service". We do believe placing LP250s in areas of high to medium population density would be a corruption of the founding ideals of LPFM.

OUR PROPOSAL FOR SITING OF LP250 STATIONS

Don Schellhardt is Co-Founder of THE AMHERST ALLIANCE and served as President of this media reform group for 12 of its first 14 years. Nick Leggett has been an Active Member of Amherst from the start.

Perhaps, then, it is no surprise that we recommend adoption of Amherst's standing proposal for the siting of LP250 stations.

In proposing LP250s to the Commission, back in 1998, Amherst was inspired by a general concept first advanced by THE COMMUNITY RADIO COALITION (CRC). Unfortunately, CRC is now defunct — but it managed to propose, before its demise, the establishment of LP250 stations to serve "in small towns and rural areas".

Amherst then refined the proposal and brought it before the FCC. It proposed to establish LP250s wherever "the proposed service area would fall completely outside of any Standard Metropolitan Statistical Area and/or any *Micro* Standard Metropolitan Statistical Area". [Emphasis added]

This is still a good idea today.

We advise the Commission, in assessing Amherst's proposal, to review the Census Bureau map at the following URL:

http://www.census.gov/population/metro/files/metro_micro_Feb2013.pdf

In this map of the United States, dark green areas indicate Standard Metropolitan Statistical Areas while light green areas indicate Micro Standard Metropolitan Areas. White spaces are areas where LP250s would be allowed under the Amherst proposal.

LP250s would be limited to perhaps a quarter of the Lower 48 States land area.

***If* the Commission decides that Amherst's proposed geographical restrictions are too stringent, it could adopt as a compromise the licensing of LP250 stations in *Micro* Standard Metropolitan Areas — but not the larger *Standard* Metropolitan Areas. This approach would allow LP250s into the light green areas of the map, but not the dark green areas of the map, bringing areas of LP250 eligibility to perhaps half of the Lower 48 land area.**

THE SIBERT ANTENNA HEIGHT PROPOSAL

The FCC has noted differences of opinion among commenters in FCC Docket 99-25, about LP250 "technical parameters". In Footnote 539 of its Report & Order, it cites a proposal by Jeffrey Sibert, a broadcast consulting engineer in Saint Louis Park, Minnesota. [Ibid]

Mr. Sibert notes that 250 watt translators, located west of the Mississippi, are allowed antenna heights of roughly 100 meters, compared to 30 meters farther east. He proposes the same policy for Western LPFMs. [Written Comments, May 7, 2012, page 4]

We agree with Mr. Sibert that LPFM stations should be allowed a combination of 250 watts and approximately 100 meters HAAT *if* they are sited west of the Mississippi and *if* they have successfully met all of the criteria for licensing as an LP250. We acknowledge the FCC's repeated observations that translators and LPFMs have different missions. However, for translators and LPFMs operating in the West, *at the same power level of 250 watts,* we do not see why the different missions preclude identical antenna heights.

CONCLUSIONS

For the reasons set forth herein, Don Schellhardt, Esquire and Nickolaus E. Leggett urge the Commission to initiate a proposed rulemaking that is based on their Petition.

Respectfully submitted,

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