

## COMMENTS

# Low-Power FM: The Federal Communications Commission's Conflicting Roles of Policing the Spectrum and Ensuring Community Access to the Airwaves

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### I. INTRODUCTION

During the development of radio in the early 1900s, the United States experienced a surge of interest in broadcasting. Americans viewed this new medium as an opportunity for expanded communication and new commercial ventures. However, because of the finite nature of the radio spectrum, it became necessary for the government to ensure that

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stations would be able to broadcast without causing interference with each other. After a series of attempts at regulating the radio spectrum, Congress created the Federal Communications Commission (Commission) in 1934 to achieve two fundamental purposes.<sup>1</sup> The role of the Commission was to license stations and reduce interference, while at the same time assuring that broadcasting occurred for the rapid, efficient, and nationwide benefit of the public.<sup>2</sup>

The dual goals of the Commission are often in conflict. This was especially apparent on the issue of low-power radio (LPFM or low-power). The LPFM initiative was an effort by the Commission to increase the diversity of voices available on radio.<sup>3</sup> However, in expanding the number of stations on the spectrum, some charged that the Commission had neglected its responsibility to protect existing broadcasters from interference.<sup>4</sup> This Comment explores the conflicting roles of the Commission in the LPFM debate, the danger of the government subsidizing alternative viewpoints, and the future of the LPFM initiative under the Bush Administration.

## II. THE PROPOSAL AND RESPONSE TO THE CREATION OF LPFM SERVICE

### A. *The Notice of Proposed Rulemaking—January 28, 1999*

On January 28, 1999, Chairman William Kennard and the Commission began the administrative process of instituting LPFM by adopting a Notice of Proposed Rulemaking, proposing the operation of

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1. See Communications Act of 1934, ch. 652, Title I, § 1, 48 Stat. 1064 (current version at 47 U.S.C. § 151 (2000)).

2. See *id.*

3. Creation of Low Power Radio Service, 65 Fed. Reg. 7616, 7618 (Feb. 15, 2000) [hereinafter LPFM Final Rule].

4. The Supreme Court has repeatedly addressed the danger of radio interference. In *Red Lion Broad. Co., v. Fed. Communications Commission*, 395 U.S. 367 (1969), the Court said,

[w]hen two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

*Id.* at 387-88.

new low-power stations.<sup>5</sup> Although the actual Report and Order issued by the Commission nearly a year later did not include many of the elements proposed in the original Notice, the Notice provides a critical background to understanding the fight over the LPFM plan.

In the Notice, the Commission cited three main goals as the basis for LPFM. First, the Commission saw LPFM as an opportunity to create a class of radio stations that would reach communities and underrepresented groups within these communities.<sup>6</sup> Specifically, the Commission sought to include religious groups, civic organizations, and schools as owners and operators of the new LPFM service.<sup>7</sup> The Commission reasoned that mergers in the broadcasting industry and the increasing price of radio ownership limited the voices and opinions with access to the airwaves.<sup>8</sup> Mergers have also led to an increase in costs for purchasing a station.<sup>9</sup> The Commission saw LPFM as an opportunity to

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5. See Proposed Rule: Creation of Low-Power Radio Service, 64 Fed. Reg. 7577 (Feb. 16, 1999) [hereinafter LPFM Proposed Rule].

6. See *id.* at 7578.

7. See *id.*

8. See *id.* Pursuant to the 1996 Telecommunications Act, Congress eased radio ownership restrictions, allowing companies to own up to eight stations in large markets and eliminating the restrictions on the number of radio and television stations owned by one corporation nationally. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 (1996) (current version at 47 U.S.C. § 151 (2000)).

Commission Chairman William Kennard argued that this legislation allows for rapid consolidation of media ownership and poses a danger to many voices in the community. However, Kennard has essentially allowed this trend to continue. During the period of 1996 through 2000, while Kennard chaired the Commission, the number of radio stations on the air grew four percent, but the number of owners dropped twenty-one percent. See John Kiesewetter, *Big Radio Airs the Sound of Sameness*, CINCINNATI ENQUIRER, Mar. 19, 2000, at A1.

Furthermore, the largest four radio conglomerates own more than fifteen percent of radio stations nationally (Clear Channel (874), Cumulus Media (318), Citadel Communications (197), CBS—Infinity (184)). See *id.*

The National Association of Broadcasters also commissioned a study examining the consolidation of radio ownership in the major markets of the United States. The study found that 71.2% of the metro stations were owned by a corporation that controlled at least one other station in the same market. Further, 48.8% of these stations were owned by a corporation that controlled three or more stations in that same market. See Congressional Testimony on FCC Spectrum Management (Feb. 17, 2000) WL 11069080. See *Hearings on Commission Spectrum Management Before the House Telecommunications Subcommittee*, 106th Cong. (Feb. 17, 2000) [hereinafter *Spectrum Management Hearings*] (statement of Eddie Fritts, President of the National Association of Broadcasters).

9. The costs are substantial to begin broadcasting on a new commercial station. Pursuant to Commission rules, each new station is required to pay for licensing fees and engineering studies, often upwards of \$100,000. See Michael J. Aguilar, *Micro Radio: A Small Step in the Return to Localism, Diversity and Competitiveness in Broadcasting*, 65 BROOK. L. REV. 1133, 1168 (1999), (quoting Paul Davidson, *Radio Pirates Fight the Power: Low-Watt, Illegal Stations Spice up Corporate Ruled Dial*, USA TODAY, Feb. 27, 1999, at 1B.).

provide community groups with access to broadcast stations.<sup>10</sup> To achieve this goal, the Commission proposed two classes of new FM service: LP100 (a 100-watt secondary service with a range of 3-4 miles) and LP1000 (a 1000-watt primary service with a range of 40 miles).<sup>11</sup>

The second goal expressed in the Notice was that LPFM service would provide an opportunity for new entrants into the broadcasting industry.<sup>12</sup> Chairman Kennard became concerned that, during his tenure, the number of minority owned stations continued to be minimal. Therefore, the Commission proposed that at least some of the new LPFM stations would be permitted to operate on a commercial basis and that licenses would be awarded to underrepresented owners first.<sup>13</sup>

The third and final goal of the Commission was to ensure the integrity of the FM spectrum. However, the Notice called for restrictions on adjacent channel operations to be diminished.<sup>14</sup> The Notice proposed that the current limitations on third-adjacent channel operation be reduced to second-adjacent channel separations.<sup>15</sup> The Notice also suggested that the Commission would consider permitting broadcasting on a station already in service as long as interference did not result.<sup>16</sup>

### *B. Public Comments to the Notice of Proposed Rulemaking*

In the period allotted for public comment after the Notice of Proposed Rulemaking for LPFM service, several thousand individuals and groups submitted their comments and suggestions. The comments were based on three areas of concern: (1) the classes and power for potential service; (2) the nature of service and licenses, including issues of eligibility and ownership; and (3) the elimination of technical rules for separation on the FM band.<sup>17</sup>

The most controversial component of the Commission's LPFM proposal was the creation of LP1000. This proposal received criticism from both current broadcasters and proponents of LPFM.<sup>18</sup> Existing broadcast stations expressed concern over the range of LP1000 stations

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10. See LPFM Proposed Rule, *supra* note 5, at 7578.

11. See *id.* at 7578-79.

12. See *id.* at 7578.

13. See *id.* at 7581.

14. See *id.* at 7578.

15. For example, where there is a station at 98.7 mHz, the first adjacent channel would be 98.9 mHz, the second adjacent channel would be 99.1 mHz, and the third adjacent channel would be 99.3 mHz.

16. See LPFM Proposed Rule, *supra* note 5, at 7578.

17. See LPFM Final Rule, *supra* note 3, at 7617-23.

18. See *id.* at 7617.

and the potential for interference among existing stations.<sup>19</sup> The proponents of LPFM were concerned that by licensing 1000-watt stations, the amount of space available on the spectrum for other LPFM stations would be diminished.<sup>20</sup>

The reception for the proposal of LP100 stations was more positive. The commentators believed that a 100-watt station would have the ability to reach a specific segment of the community without posing severe interference that might be present with a 1000-watt station.<sup>21</sup> Others suggested that LP10 stations (broadcasting at 10-watts and a range of 1-2 miles) would better achieve the goals of the Commission, while allowing for more stations in each community. However, there remained substantial concern over the potential for interference, even on lower powered stations.<sup>22</sup>

In proposing LPFM, the Commission questioned whether the new service should be strictly noncommercial or should provide an entrance for minority broadcasters into commercial radio.<sup>23</sup> The overwhelming number of respondents believed that LPFM should be restricted to noncommercial activity.<sup>24</sup> It was argued that noncommercial service would be more diverse and provide a greater service to the local community.<sup>25</sup> To that end, many of the commentators believed that cross ownership of LPFM and full-service radio should not be allowed, in order to ensure that LPFM would be awarded to those without a current voice in radio.<sup>26</sup>

The technical rules for allocating the spectrum for LPFM service also attracted a large number of comments and attention during the public comment period.<sup>27</sup> The issues of interference and congestion within the radio band were critical because the Commission could only permit LPFM under its enabling act if it did not threaten to interfere with other stations.

Many opponents of the LPFM proposal, most notably the National Association of Broadcasters (NAB), saw the technical rules as an opportunity to either restrict the amount of LPFM stations or the overall proposal. The NAB, along with the Consumer Electronics

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19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See* LPFM Proposed Rule, *supra* note 5, at 7581.

24. *See* LPFM Final Rule, *supra* note 3, at 7617.

25. *See id.*

26. *See id.* at 7618.

27. *See id.* at 7623.

Manufacturers Association and the National Lawyers' Guild Committee on Democratic Communications, filed technical studies of FM receivers that showed the likelihood of interference from LPFM broadcasting on co-channel, first-adjacent channel, and second-adjacent channel broadcasting.<sup>28</sup> It was argued that the LPFM proposal would result in signal interference with the existing analog broadcast stations.<sup>29</sup> The NAB also contended that the LPFM plan would harm in-band digital service that broadcasters planned to introduce over the next several years.<sup>30</sup>

There were also several studies submitted that did not find large levels of interference from the proposed LPFM service levels. The Commission's Office of Engineering and Technology submitted a receiver study that found that the risk of interference posed by LPFM radio was negligible if minimal separation requirements were imposed.<sup>31</sup> The Media Access project found that a 100-watt station could serve as many as 186,512 people and could result in interference for 2912 people (1.6% of the total).<sup>32</sup> The report suggested that this level of interference was comparable to the amount of interference already existing on the FM band.<sup>33</sup>

### C. Report and Order—January 20, 2000

The Commission authorized the operation of LPFM through a scaled-down rule adopted by a Report and Order issued on January 27, 2000.<sup>34</sup> This final rule provided for the establishment of two new classes of radio stations: LP100 (operating at a maximum power of 100 watts) and LP10 (operating at a maximum power of 10 watts).<sup>35</sup> The Commission chose to eliminate the proposal for LP1000 because there was greater potential for interference with existing broadcast stations and

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28. See *id.* at 7626.

29. See *Spectrum Management Hearings*, *supra* note 8.

30. See *id.* Broadcasters intend on introducing "in-band-on-channel" technology that allows digital and analog signals to be broadcasted on the same frequency. Because broadcasting both signals increases the broadcasting power of the station, there is a greater possibility of interference between neighboring frequencies. Bill McConnell, *Big Flap over Small Stations*, BROAD. & CABLE, Apr. 19, 1999.

31. See LPFM Final Rule, *supra* note 3, at 7626.

32. See *Spectrum Management Hearings*, *supra* note 8.

33. See *id.*

34. See LPFM Final Rule, *supra* note 3. On September 28, 2000, the Commission released a Memorandum Opinion and Order on Reconsideration denying petitions for reconsideration of the Report and Order. See *In the Matter of Creation of Low-Power Radio Service*, MM Docket No. 99-25, RM-9208, RM-9242 (Sept. 20, 2000).

35. See LPFM Final Rule, *supra* note 3.

because LP1000 exceeded the power requirements necessary to reach a small geographical community.<sup>36</sup>

Both forms of LPFM service were limited to noncommercial educational entities that did not otherwise own a media outlet.<sup>37</sup> The rule furthered the Commission's goal of creating a voice for local groups, including schools, churches, and other local community-based organizations.<sup>38</sup> The Commission was concerned that because of the nature of commercial stations, including ratings and revenues, a station might attempt to maximize audience size, leading the station to neglect community service.<sup>39</sup> Therefore, the Commission determined that noncommercial licenses would be more likely to meet the particular needs and interests of the local community.<sup>40</sup> Noncommercial licenses also have a greater likelihood of being held by local community groups because noncommercial licenses are not subject to the competitive bidding process enumerated in 47 U.S.C. § 309(j).<sup>41</sup> The Notice also prohibited cross ownership of LPFM and any other broadcast station because the Commission reasoned that common ownership was inconsistent with small, community-based ownership of LPFM stations.<sup>42</sup>

The Commission imposed several technical limits on the operation of LPFM stations. Low-power broadcasting was restricted to second-adjacent and intermediate frequency (IF) channels, solely on the FM band.<sup>43</sup> The Commission found that limiting LPFM to third-adjacent channel separation requirements was unnecessary because the risk of interference from 100-watt and lower stations is small and outweighed by the benefits of LPFM service. Further, because the spectrum is already crowded in many areas, limiting LPFM operation to only third-adjacent

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36. *See id.* at 7617-18.

37. *See id.* at 7618. A noncommercial educational broadcast station is defined as "a noncommercial educational radio . . . broadcast station . . . which is owned and operated by a public agency or nonprofit private foundation, corporation or association, or . . . is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes." *See* 47 U.S.C. § 397(6) (1999).

38. *See* LPFM Final Rule, *supra* note 3, at 7616.

39. *See id.* at 7618.

40. *See id.*

41. *See id.*

42. *See id.* at 7619.

43. *See id.* at 7616. The creation of low-power service was limited to the FM band for two main reasons. First, the allocation of a new spectrum for community based broadcasting would require listeners to purchase new equipment capable of receiving the signal. This would result in higher costs to the listener and would delay the implementation and effectiveness of community radio. *See* LPFM Final Rule, *supra* note 3, at 7623. Second, low-power stations on the AM band were more likely to cause interference because of the propagation characteristics of the AM signal. *See id.*

channels would result in severely limiting the availability of LPFM in many communities.<sup>44</sup> However, the risk of interference posed by LPFM signals was sufficient to retain second-adjacent channel protection requirements.<sup>45</sup>

*D. The Challenge to LPFM on Capitol Hill*

In the period following the public announcement of Chairman Kennard's proposal for LPFM service, the commercial ownership voices in radio rapidly began to mobilize in an attempt to halt the implementation of low-power radio. The NAB, an organization that represents most of the commercial radio owners nationally, did not believe that it was possible for the Commission to license several hundred new stations on the FM band without resulting interference.<sup>46</sup>

The NAB's strategy to defeat LPFM involved a three-prong attack. First, NAB and its member corporations submitted comments to the Commission after the Notice of Proposed Rulemaking was issued.<sup>47</sup> However, the NAB recognized that support for LPFM service on the Commission and within the executive branch was strong.<sup>48</sup> Therefore, attempts to limit LPFM, or eliminate the proposal outright, would be more productive if brought before Congress and the courts than in petitioning the executive branch.

The NAB's second prong of attack was to file a complaint at the United States Court of Appeals for the D.C. Circuit.<sup>49</sup> In its brief, the NAB argued that LPFM would create intolerable interference for existing broadcasters and that the Commission had failed to undertake a proper cost/benefit analysis in evaluating LPFM service.<sup>50</sup> However, the NAB focused on defeating low-power service through political pressure in Congress—the third prong of their attack against LPFM.<sup>51</sup>

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44. See *id.* at 7616.

45. See *id.* at 7626.

46. Kennard has insinuated that the protests of the NAB may not be based solely on concerns over spectrum interference, but rather the fear among established owners that any new competition in the marketplace will harm their properties.

47. The comments of the NAB are listed above.

48. The LPFM initiative was strongly supported by President Clinton. See Bill McConnell, *Congress Reins in LPFM*, BROAD. & CABLE, Jan. 1, 2001, at 47.

49. See *Nat'l Ass'n of Broadcasters v. Fed. Communications Comm'n*, Nos. 00-1054, 00-1100 (D.C. Cir. filed Feb. 16, 2000).

50. See *id.*

51. The NAB received political support in the fight against LPFM radio from an unlikely source, National Public Radio (NPR). NPR opposed LPFM service for two main reasons. First, NPR faces the same potential interference problems as commercial stations. Second, NPR was concerned about protecting reading services for the blind, which are available on separate sub-

The attempts by the NAB to lobby congressional members on the LPFM issue began shortly after the public announcement of Chairman Kennard proposing the new service. Even before the Notice of Proposed Rulemaking was issued, the NAB created a task force to defeat the LPFM initiative on Capitol Hill. The NAB lobbying became most fierce during the period following the issuance of the Notice. The NAB urged its members to speak with their home state congressional delegations about the LPFM plan and ask those members to send letters of concern to the Commission.<sup>52</sup> Despite these attempts, the LPFM program continued to draw support within the Commission and in public comments to the Notice.

As the LPFM proposal continued through the administrative process, it started to become clear that the most effective—and possibly only—method of preventing the enactment of LPFM was through legislation. After the issuance of the Notice of Proposed Rulemaking, and during public comment, members of both houses of Congress began to introduce legislation to limit or ban outright the LPFM plan.

Shortly before the Commission adopted a Report and Order authorizing LPFM, five members of the House Commerce Committee, led by Representative Michael Oxley (R-OH), introduced legislation to prohibit new low-power FM radio stations or any other low-power radio service.<sup>53</sup> The legislation, H.R. 3439 (The Radio Broadcasting Preservation Act of 1999), mandated a reversal of the Commission's decision to authorize changes to the minimum distance requirements to accommodate the LPFM plan, as proposed in the Notice of Proposed Rulemaking issued earlier that year.<sup>54</sup> Pursuant to the legislation, any change in the minimum distance separation requirements would have to be approved by Congress.<sup>55</sup> The legislation also called for a retroactive effect to the legislation to overrule any action taken by the Commission in support of LPFM before the enactment of the legislation.<sup>56</sup>

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carrier signals on approximately 90 of the 270 stations affiliated with NPR nationally. Bill McConnell, *FCC Alters LPFM Rules*, BROAD. & CABLE, Oct. 2, 2000, at 48.

52. Shortly after the Notice of Proposed Rulemaking, Representative Michael Oxley (R-OH) and Representative Cliff Stearns (R-FL) drafted letters to the Commission calling the LPFM proposal "ill-advised." McConnell, *supra* note 30. Both representatives sent another letter to the Commission later in the year. That letter was a nearly verbatim copy of a model letter issued by the NAB to its clients. See *Like Minds*, BROAD. & CABLE, Aug. 30, 1999.

53. See H.R. 3439, 106th Cong. (1999).

54. See *id.*

55. See *id.*

56. There was widespread support on Capitol Hill for some type of restriction on the low-power service approved by the Commission. When legislation was introduced in the House, there

During consideration of the legislation before the House Commerce Committee, a compromise position began to emerge. Instead of completely eliminating the LPFM proposal, several members on the committee, including ranking minority member Representative John Dingell (D-MI) and Representative Heather Wilson (R-NM), sought to continue LPFM without relaxing the Commission's channel separation requirements.<sup>57</sup> The compromise also required the Commission to seek congressional approval for any changes in current interference standards.<sup>58</sup> As a practical matter, this meant that the Commission's proposal to create 400 LPFM stations in the nation's sixty largest markets might be limited to as few as 100 stations.<sup>59</sup> The compromise measure was approved by the House by a vote of 274-110 and sent to the Senate.<sup>60</sup> Despite the margin of more than two to one, the bill remained sixteen votes shy of a veto-proof margin.<sup>61</sup>

Legislation that mirrored the original House bill to completely limit LPFM, sponsored by Representative Oxley, was introduced in the Senate by Senator Judd Gregg (R-NH) as S. 2068 (Radio Broadcasting Preservation Act of 2000).<sup>62</sup> Gregg, at the time, was the chairman of the appropriations subcommittee that authorizes expenditures by the Commission. The legislation had thirty-six cosponsors, including former Appropriations Committee Chairman Ted Stevens (R-AK), former Budget Chairman Pete Domenici (R-NM), and former Senate Majority Leader Trent Lott (R-MS).<sup>63</sup> However, due to the Senate rules and narrow Republican majority, passage of LPFM legislation was uncertain.

Adding to the uncertainty over congressional action on LPFM was legislation introduced by Senator John McCain (R-AZ) and Senator Bob Kerrey (D-NE). Under this legislation, LPFM radio would continue as envisioned by the Commission in its Report and Order.<sup>64</sup> The McCain-Kerrey bill, S. 2989 (Low-Power Radio Act of 2000), would allow LPFM

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were more than seventy cosponsors and overwhelming support among Republicans and moderate Democrats. *See id.*

57. *See* H.R. 3439 (revised).

58. *See id.*

59. *See id.* Although the compromise legislation did not completely eliminate LPFM stations, existing broadcasters announced that the legislation was a victory.

60. *See id.*

61. President Clinton issued a statement that he would veto limitations placed on low-power service. Therefore, there was some question whether the legislation approved by the House would ultimately be enacted into law.

62. *See* S. 2068, 106th Cong. (2000).

63. *See id.*

64. *S.2989, 106th Cong. (2000).*

to begin operation, while providing an opportunity for current broadcasters to appeal to the Commission should interference occur.<sup>65</sup>

Senator Rod Grams (R-MN) and seven cosponsors also introduced legislation to slow the original LPFM plan.<sup>66</sup> The legislation introduced by Grams, S. 3020 (Radio Broadcasting and Preservation Act of 2000), would limit the Commission to testing LPFM in nine markets and considering the levels of resulting interference before expanding LPFM service further.<sup>67</sup> The level of interference resulting from the field tests in selected markets would be evaluated by an independent testing entity.<sup>68</sup> This legislation mirrored the compromise bill that emerged from the House Commerce Committee earlier and passed overwhelmingly in the full House.

However, the full Senate did not directly vote on the legislation proposed by Grams. Because passage of the bill was uncertain, the compromised restriction on LPFM service was included as a rider within the appropriations bill for the departments of Commerce, Justice, and State. Despite an earlier threat to veto any legislation limiting access to LPFM, President Clinton signed the appropriations bill into law.<sup>69</sup>

Pursuant to the enacted legislation, the Commission's plan to allow LPFM radio on second-adjacent channels was overruled. Instead, Congress continued the long-standing requirement that radio stations must have at least two open channels between them. These restrictions drastically reduce the number of LPFM radio stations available in the major markets because it is more difficult to find space on an already crowded radio spectrum. In New York, Los Angeles, Chicago, and San Diego, there is no space available on the spectrum for a 100-watt LPFM station operating on a third-adjacent channel.<sup>70</sup> The resources are also limited in other major markets. Philadelphia has spectrum space for one 100-watt station, San Francisco has room for two 100-watt stations, Dallas and Washington each have room for three 100-watt stations, and Miami has space for four 100-watt stations.<sup>71</sup>

The legislation also limited the Commission to testing LPFM in no more than nine radio markets.<sup>72</sup> The Commission was mandated to publish the results of the experimental program and field tests, and then

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65. *See id.*

66. *See* S. 3020, 106th Cong. (2000).

67. *See id.*

68. *See id.*

69. *See* Letter from the President, Oct. 26, 2000, 2000 WL 1598636.

70. Bill McConnell, *LPFM OK'd*, BROAD. & CABLE, Jan. 24, 2000, at 22.

71. *See id.*

72. *See* H.R. 5548, 106th Cong. § 632(b)(1) (2000).

allow public comment on the results.<sup>73</sup> Congress also retained an active role in the battle over LPFM by requiring the Commission to submit all data to the House Commerce Committee and the Senate Committee on Commerce, Science and Transportation, as well as their evaluation of this data.<sup>74</sup>

### III. ANALYSIS OF THE LPFM PROPOSAL

#### A. *The Conflict Between the Dual Roles of the Commission*

The LPFM proposal has put the Commission in a difficult position between its dual roles of policing the spectrum to minimize interference and assuring access to the airwaves. The role of the government in regulating the finite radio spectrum emerged from the Radio Act of 1927. This legislation created the Federal Radio Commission in order to regulate interference, allocate frequencies, and ensure that broadcasting continued for the “public’s convenience, interest or necessity.”<sup>75</sup> Faced with increasing broadcasting on the spectrum and a need for more regulation, Congress approved the Communications Act of 1934. This act transformed the Federal Radio Commission into the Federal Communications Commission and increased its authority to regulate broad-casting.<sup>76</sup> The role of the Commission was to protect the public interest in broadcasting, while increasing the amount of communications services generally available to the public.<sup>77</sup> The Supreme Court has said that “[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.”<sup>78</sup> This includes “the widest possible dissemination of information from diverse antagonistic sources.”<sup>79</sup> However, the ability of the Commission

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73. *See id.*

74. *See id.*

75. *See* Radio Act of 1927, ch. 169, § 4, 44 Stat. 1162 (current version at 47 U.S.C. § 151).

76. *See* 47 U.S.C. § 151.

77. *See id.* (creating the Commission as a central authority

[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication . . .).

47 U.S.C. 151. However, there is no right to receive a license or use a frequency. *See* Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1973).

78. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943).

79. *Fed. Communications Comm’n v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978), (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

to provide access to communications is limited by available frequencies in the spectrum over which a station can operate without causing interference with others.<sup>80</sup>

The dual roles of the Commission flow from the same principle—protecting the public interest in broadcasting.<sup>81</sup> The Commission's role in policing the spectrum to reduce interference is based on the protection of the public, and not protection of the members of the broadcasting industry. This means that while current stations must be protected from interference, they should not be protected from competition. Therefore, if it is possible for LPFM to be instituted without causing interference, the creation of affordable outlets for community groups and community-based services is appropriate. However, if unacceptable interference results from LPFM service, it will be the public, not the industry, that is ultimately harmed.

Therefore, the most pressing issue in the LPFM debate is interpreting the studies that have been commissioned by a variety of groups that—depending on the sponsor—argue that LPFM will result in impermissible interference or that LPFM can be instituted without any danger of a bleeding signal. The studies commissioned by the proponents and opponents of LPFM are difficult to decipher. Both sets of studies have produced essentially the same levels of interference on the FM band. However, there are conflicting opinions as to whether that interference will cause degradation of current FM service.

Many opponents of LPFM have suggested that it may be appropriate for low-power stations to be tested in a restricted number of markets so that actual interference can be measured. However, there is already some evidence as to the level of interference that would be caused by LPFM. Since 1997, the Commission has allowed 312 full-power radio stations to operate under relaxed interference standards, similar to those envisioned by the Commission for LPFM stations.<sup>82</sup> Despite their opposition to LPFM, the NAB supported the waivers that were necessary to allow these full-power broadcast stations to continue operations.<sup>83</sup> The inconsistent actions of the NAB to support a waiver for its member stations, but oppose LPFM despite almost identical technical standards, cause the organization to lose credibility. It also gives

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80. See *Fed. Communications Comm'n v. Stahlman*, 40 F. Supp. 338, 339 (D.C. Dist. 1941).

81. See *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

82. *Take a Number*, BROAD. & CABLE, Apr. 17, 2000.

83. See *id.*

credence to the theory that the NAB opposed LPFM solely because it increased competition for its member stations.

The role of evaluating the contrasting studies and technical information rests with the Commission. The Commission contends that the technical data submitted during the period for public comment, as well as the studies conducted within the Commission, show that interference is small and will be outweighed by the new benefits of LPFM.<sup>84</sup> The Commission also was not persuaded that unacceptable interference to existing stations would result from the operation of LPFM stations.<sup>85</sup> This decision should not be second-guessed because there has been no showing that the Commission failed to follow its responsibility to protect the spectrum. Absent any showing of malfeasance, Congress must be wary about substituting its political judgment for the technical expertise possessed by the Commission.<sup>86</sup>

*B. The Danger in the Government Subsidy of Alternative Voices*

The one great danger of LPFM is that, in effect, the government is providing a subsidy by allowing competitors to begin broadcasting without incurring the startup costs for commercial stations. The government has an obligation to allow radio to develop within the freedoms and constraints of the open market. The government should only interfere with the competitive system in the most stringent circumstances.<sup>87</sup>

The government must also be leery of granting a license solely on the basis of the composition of an ownership group. The Commission must first be concerned with the benefits received by the listening audience from access to a wider variety of information sources.<sup>88</sup> In many cases, it is likely that minority ownership will benefit the listening audience by providing a wider diversity of information.<sup>89</sup> However, decisions to license LPFM stations must remain focused on the needs of the community and not the desire to create diverse ownership groups. The Commission must also act within the confines of its enabling act, which mandates that the Commission must make communications

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84. See LPFM Final Rule, *supra* note 3, at 7637.

85. See *id.* at 7616.

86. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

87. See *Columbia Broad. Sys.*, 412 U.S. at 94.

88. See *Metro Broad., Inc. v. Fed. Communications Comm'n*, 497 U.S. 547, 568 (1990).

89. See *id.* (citing *Minority Ownership of Broadcast Stations: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong. 66 (1989) (testimony of Roderick Porter, Deputy Chief, Commission Mass Media Bureau)).

services available to the people of the United States without discrimination on the basis of race, color, religion, national origin, or sex.<sup>90</sup>

Radio is most effective when it is used as a forum for community expression of many different viewpoints.<sup>91</sup> Therefore, there is a danger that the consolidation of ownership among commercial radio stations will limit the voices that have access to the spectrum.<sup>92</sup> However, it is not clear that the consolidation has limited the perspectives available on the radio dial. A variety of political and social opinions are available on radio in most markets. Furthermore, if there is a strong market demand for a new voice or opinion, there is no reason to believe that an economically rational commercial station would not allow airtime for this view.

#### IV. CURRENT LAW AND IMPACT

##### A. *Access and Eligibility for LPFM Service*

In April 2000, as the fight over the future of LPFM was waged on Capitol Hill, the Commission continued the process of licensing noncommercial applicants for low-power stations pursuant to the Report and Order adopted by the Commission earlier that year.<sup>93</sup> Applications have been accepted for three of the five filing windows that take place at approximately three-month intervals.<sup>94</sup> Each window is open to the residents of a limited number of randomly selected states and territories.<sup>95</sup>

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90. See 47 U.S.C. § 151.

91. See *Take a Number*, *supra* note 82.

92. The Supreme Court has repeatedly failed to find any First Amendment right to use the spectrum. See *Nat'l Broad. Co.*, 319 U.S. at 227.

93. See News Release: FCC Lottery Today Determines Order for Accepting Applications for Low-Power FM Radio Station Licenses (Mar. 27, 2000).

94. See *id.*

95. The first window was open May 30 through June 5, 2000 for Alaska, California, the District of Columbia, Georgia, Indiana, Louisiana, Maine, the Mariana Islands, Maryland, Oklahoma, Rhode Island, and Utah. See Public Notice: Low-Power FM Filing Window (Apr. 28, 2000). The second window was open August 28 through September 1, 2000 for Connecticut, Illinois, Kansas, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, Puerto Rico, Virginia, and Wyoming. See Public Notice: Low-Power FM Filing Window (July 28, 2000). The third window was open January 16 through January 22, 2001 for American Samoa, Colorado, Delaware, Hawaii, Idaho, Missouri, New York, Ohio, South Carolina, South Dakota, and Wisconsin. See Public Notice: Low-Power FM Filing Window (Dec. 15, 2000). The filing window for the fourth group (Arizona, Florida, Iowa, New Jersey, North Dakota, Oregon, Tennessee, Texas, the Virgin Islands, Vermont, and West Virginia) and the fifth group (Alabama, Arkansas, Guam, Kentucky, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Pennsylvania, and Washington) will be announced shortly. See News Release: FCC Lottery Today Determines Order for Accepting Applications for Low-Power FM Radio Station Licenses (Mar. 27, 2000).

Although the adoption of the Commerce, Justice, and State Appropriations Bill limited access to third-adjacent channels on the FM band, the Commission announced that 255 noncommercial educational applicants from the first two filing windows remain eligible for a LPFM license.<sup>96</sup>

*B. The Future of the LPFM Initiative Under the Bush Administration and Chairman Michael Powell*

The legislative fight over the future of LPFM service may be far from over. Former Senate Commerce Committee Chairman McCain has insisted that he will reintroduce legislation supporting LPFM as originally proposed by the Commission.<sup>97</sup> McCain said that he believes that the passage of the Commerce, Justice, and State Appropriations Bill, which included the limitations on LPFM, was “obscene” because it did not allow for hearings on the issue.<sup>98</sup>

The future of LPFM is uncertain with the appointment of Chairman Michael Powell to head the Commission. Pinpointing the exact position of Powell on the issue of LPFM is no easy task. Powell said that he supports the LPFM service in theory, but has some reservations in practice.<sup>99</sup> In the official Commission action creating LPFM service, Commissioner Powell approved in part and dissented in part.<sup>100</sup> In his statement, Powell said that the creation of LPFM service will serve two worthwhile goals. First, LPFM will open opportunities in radio broadcasting for new entrants.<sup>101</sup> Second, the new service will facilitate community radio by addressing unmet information needs.<sup>102</sup>

However, Powell remains concerned that existing broadcasters might experience interference. Because the technical studies commissioned by both sides have found such contrasting results, Powell

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The Commission will resolve mutually exclusive applications through a point system based on local presence, proposed hours of service and locally originated programming. *See id.* The system will also encourage mutually exclusive applicants to consider an arrangement to share the frequency. *See id.*

96. *See* News Release: FCC Announces First 255 Applicants Eligible for Low-Power FM Radio Stations (Dec. 21, 2000). The list of applicants includes a diverse group of organizations, including the Newport Musical Arts Association (Newport, RI), Jackson Ski Community Radio (New Bartlett, NH), and Mount Vernon Missionary Baptist Church (Noxapater, MS). *See* McConnell, *supra* note 48, at 47.

97. *McCain Irked at NAB Over Low-Power FM*, BROAD. & CABLE, Jan. 8, 2001, at 14.

98. *See id.*

99. *See* Report and Order in the Matter of Creation of Low Power Radio Service (MM Docket 99-25) (statement of Commissioner Powell).

100. *See id.*

101. *See id.*

102. *See id.*

has viewed the decision to enact LPFM service as a close call.<sup>103</sup> Powell has also expressed concern over the impact that LPFM might have on potential conversion to terrestrial digital radio service.<sup>104</sup>

#### V. CONCLUSION

In the next few months, the Commission will begin to submit reports, to both houses of Congress, on the actual findings of interference from LPFM radio service. It appears likely that regardless of the actual levels of interference shown, both sides will have different interpretations of the numbers. Therefore, the Congress must ensure that the results are interpreted by the Commission without imposing any political pressure. This will ensure that LPFM has a fair opportunity to be weighed on its merits, and that existing broadcasters will be free from interference. Congress must also keep a watchful eye to make certain that the NAB does not prohibit new competition on the spectrum under the claim of interference.

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103. *See id.*

104. *See id.*