F.C.C. Information Packet

prepared by

The Harvest Trust

The following documents have been assembled with the low-power FM broadcaster in mind. ***Read*** them and become familiar with them, they are your defense against the F.C.C.

TABLE OF CONTENTS

COMMITTEE ON DEMOCRATIC COMMUNICATIONS

The work of the Committee on Democratic Communications, a national committee of the Lawyer's Guild, focuses on the right of all people to a worldwide system of media and communications based upon the principle of cultural and informational self-determination.

The Committee was formed in 1987 to look at the applicability of traditional First Amendment concepts in the face of the worldwide monopolization of communications resources by commercial interest, and to work for the Right To Communicate as an international human right. The committee supports independent media organizations and forms of communication, such as micro-radio, public access television, and cyberspace resources, and works to ensure that they can function free from government or big business control. **The Committee offers legal advice and representation to groups and individuals seeking to establish and sustain such forms of communication.**

Litigation support and policy analysis are the Committee's main activities. The Committee is currently active in constitutional litigation challenging the Federal Communications Commission's policies banning low power community (micro-radio) broadcasting. In addition, the Committee is researching the micro-radio policy of countries outside the U.S. in an attempt to develop a model micro-radio policy for the U.S. that allows both for access by those interest in non-commercial broadcasting and freedom from signal interference for all broadcasters.

CDC members have represented the Guild at the international meetings of the MacBride Roundtable on Communications and assisted in drafting that organization's proposed constitution. This effort, along with articles in the CDC newsletter and meetings with human rights groups, has helped to further the application of internal law to the issue of the free flow of information in this country and worldwide. The CDC has advised the African National Congress on the proposed broadcast policy and regulations to be instituted under the new South African Constitution.

Individuals, non-profit organizations, public access coalitions, activist organizations, labor unions, community groups, schools, and libraries are only some of those who could potentially benefit from the developing telecommunications resources. The challenge will be to establish their legal and economic entitlement to these resources. Without universal access, democracy will have no meaning as we enter the 21st century. Once established, the right of expression within a human rights, international law context will need vigilant protection.

While the CDC has received partial funding from a McMillan grant from the National Office of the National Lawyers Guild, the Committee still needs financial assistance. This is and extremely exciting time for the CDC as we are in the midst of another phase of the communications revolution. Please support the CDC's work in democratizing global communication by joining today.

For further information, contact:

Committee On Democratic Communications
One Sansome St., Ste. 900
San Francisco, CA 94104

(415) 705-6464 FAX: (415) 705-6450
E-mail: pfranck@igc.apc.org

RECLAIMING THE AIRWAVES !
Let a thousand transmitters bloom

by Stephen Dunifer, Free Radio Berkeley

Using inexpensive hand-built transmitters, micro-power broadcasters such as Free Radio Berkeley and Black Liberation Radio in Springfield, IL, are challenging the information stranglehold imposed by the corporate media and enforced by federal regulation. Micro-radio is a First Amendment challenge to restrictive federal regulations which only favor those with money and power.

Most communities are denied their own voice. Unless one has at least $50,000 to start a 100 watt FM station, there is no way any community without those resources can have a voice. Before 1980 it was possible to apply for and receive a 10 watt Class D educational station license with very little money in the bank. Thanks to an alliance of reactionary elements, who sought to suppress voices outside the mainstream, and liberal elements such as the Corporation for Public Broadcasting (NPR), who sought to establish more "professional" stations (translation: more likely to be funded by corporate blood money laundered through foundations), the FCC eliminated all 10 watt station licenses as of 1980. This move prevented the 90% of the U.S. population who do not have the monetary resources from having a voice on the FM bank, especially African Americans who are underrepresented in the media by 600%.

If the airwaves were not dominated by the corporate media pirates, there would be plenty of FM radio spectrum space available for all to use. Even in the congested Bay Area Fm radio spectrum, there are quite a number of frequencies that would be appropriate for low power (.5 to 10 watts) community broadcast operations. Unfortunately, like so many other public resources such as old growth forests, the air waves have been hijacked and polluted by the corporate state in its relentless pursuit of profit and control of all public resources

In response, there is a growing movement of individuals and communities who have set up micro-power (.5 to 10 watts) broadcasting operations. Most notable of these is Black Liberation Radio, which covers a housing project area in Illinois. Black Liberation Radio has been under severe attack by both the local police and federal agencies. Despite police and federal harassment, Black Liberation Radio is on 24 hours a day offering some of the finest programs to be found anywhere on almost no budget.

Frightened by this growing movement, the FCC comes knocking at doors, slapping fines ranging anywhere from $750 to $20,000. This booklet is to help you deal with the FCC's tactics to stifle our right to communicate with each other.

Just imagine the possibilities of having hundreds of micro-power broadcasts like this across the country. Cost is not a problem since a basic station can be put on the air for less than $200. Soon, an inexpensive UHF-TV transmitter design will be available as well. With determination and purpose we can break the strangle hold on the flow of cultural and artistic expression information and ideas in this country.

WHEN THE FCC KNOCKS ON YOUR DOOR

NOTE: The following discussion assumes that you are not a licensed broadcaster.

Q) If FCC agents knock on my door and say they want to talk with me, do I have to answer their questions?

A: No. You have a right to say that you want a lawyer present when and if you speak with them, and that if they will give you their names, you will be back in touch with them. Unless you have been licensed to broadcast, the FCC has no right to "inspect" your home.

Q) If they say they have a right to enter my house without a warrant to see if I have broadcasting equipment, do I have to let them in?

A: No. Under Section 303(n) of Title 47 U.S.C., the FCC has a right to inspect any transmitting devices that must be licensed under the Act. Nonetheless, they must have permission to enter your home, or some other basis for entering beyond their mere supervisoral powers. With proper notice, they do have a right to inspect your communications devices. If they have given you a notice of a pending investigation, contact a lawyer immediately.

Q) If they have evidence that I am "illegally" broadcasting from my home, can they enter anyway, even without a warrant or without my permission?

A: They will have to go to court to obtain a warrant to enter your home. But, if they have probable cause to believe you are currently engaging in illegal activities of any sort, they, with the assistance of the local police, can enter your home without a warrant to prevent those activities from continuing. Basically, they need either a warrant, or probable cause to believe a crime is going on at the time they are entering your home.

Q) If I do not cooperate with their investigation, and they threaten to arrest me, or have me arrested, should I cooperate with them?

A: If they have a legal basis for arresting you, it is very likely that they will prosecute you regardless of what you say. Therefore, what you say will only assist them in making a stronger case against you. Do not speak to them without a lawyer there.

Q) If they have an arrest or search warrant, should I let them in my house?

A: Yes. Give them your name and address, and tell them that you want to have your lawyer contacted immediately before you answer any more questions. If you are arrested, you have a right to make several telephone calls within 3 hours of booking.

Q) Other than an FCC fine for engaging in illegal transmissions, what other risks do I take in engaging in micro-radio broadcasts.

A: Section 501 of the Act provides that violations of the Act can result in the imposition of a $10,000 fine or by imprisonment for a term not exceeding one year, or both. A second conviction

results in a potentially longer sentence. If you are prosecuted under this section of the Act, and you are indigent (unable to hire an attorney), the court will have to appoint one for you.

Q) Are there any other penalties that can be imposed upon me for "illegal broadcasts."

A: Under Section 510 of the Act, the FCC can attempt to have your communicating equipment seized and forfeited for violation of the requirements set forth in the Act. Once again, if they attempt to do this, you will be given notice of action against you, and have an opportunity to appear in court to fight the FCC's proposed action. Realize, though, that they will try to keep your equipment and any other property they can justify retaining until the proceedings are completed. You have a right to seek return of your property from the court at any time.

Q) If the FCC agents ask me if I knew I was engaged in illegal activities, should I deny an knowledge of FCC laws or any illegal activities?

A: No. You will have plenty of time to answer their accusations after you have spoken to an attorney. It is a separate crime to lie to law enforcement officials about material facts. Remain silent.

Q) If I am considering broadcasting over micro-radio, is there anything I can do ahead of time to minimize the likelihood of prosecution?

A: Yes. Speak with an attorney before you are approached by law enforcement to discuss the different aspects of FCC law. Arrange ahead of time for someone to represent you when and if the situation arises, so that you will already have prepared a strategy of defense.

Q) What can I do if the FCC agents try to harass me by going to my landlord, or some other source to apply pressure on me?

A: So long as there is no proof that you have violated the law, you cannot be prosecuted or evicted. If there is evidence of misconduct, you might have to defend yourself in court. Depending upon what the FCC said or did, you might be able to raise a defense involving selective prosecution or other equivalent argument. If the conduct of the agents is clearly harassment, rather than a proper investigation, you can file a complaint with the F.C.C. or possibly a civil action against them.

Q) If I want to legally pursue FCC licensing for a new FM station, what should I do?

A: It isn't the purpose of this Q and A sheet to advocate or discourage non-licensed broadcast operation. A person cited by the FCC for illegal broadcasting will find it virtually impossible to later obtain permission to get a license. If you want to pursue the licensing procedure, see the procedures set forth in the Code of Federal Regulations, Title 47, Part 73. The application form (Form # 301 A) is extremely complicated, and requires a filing fee of $2,030.00. If you want to contact the FCC directly, call them at their Consumer Assistance and Small Business Division, Room 254, 1919 N. St. NW, Washington, D.C. 20554, Tel (202) 632-7260. Don't bother to try this without significant financial backing.

The Legal Victory of Free Radio Berkeley

"All of the cases support us, Your Honor. The Weiner case, the Red Lion case, the NBC case, the Nutri-Cology case, the Medina case in the Southern District of Florida. In every case where an injunction has been requested by the Government to prevent unlawful, unlicensed broadcasting, the District Court has granted the injunction. There is no case that we are aware of -- and the Defendant cites none -- where a District Court has been asked to issue an injunction and the Government has proved an unlicensed radio operation where the Government has been denied that injunction.

"And there's a very good reason for that. Unlicensed broadcasting creates chaos on the airwaves. It's anarchy on the airwaves. And to allow and not to enjoin this kind of operation, the Court should consider that in doing so it encourages continuing violations not only by the Defendant, buy by those who would also see this as a signal that the law is not going to be enforced."

-- Federal Communications Commission (FCC) lawyer David Silberman speaking at a January 20, 1995 court hearing for an injunction against Free Radio Berkeley.

In what can only be termed a shocking January 30, 1995 opinion, federal judge Claudia Wilken considered the constitutional issues raised by defendant Stephen Dunifer of Free Radio Berkeley (FRB) and declined to grand an injunction against FRB. This was the first instance of a federal court failing to grant the government an injunction to prevent unlicensed broadcasting.

The immediate and dramatic result is that Radio Free Berkeley is now broadcasting 24 hours a day from a location in Oakland. For the moment, there is nothing the government can do to stop it. Gone are the days when the radio station had to be forever moved to evade detection. The FCC presumably knows exactly where the station is. With a stable studio location, a diverse group of folks put on creative and radical shows and take calls over the studio phone line. The station is community based, alternative and participatory.

Founded by Stephen Dunifer two years ago, FRB was originally on the air three hours per week. On June 1, 1993, the FCC filed a "Notice of Apparent Liability" (NAL) against Dunifer seeking a $20,000 fine. The fine was based on two broadcasts that Dunifer made without securing a license from the FCC. Dunifer's lawyers, connected with the National Lawyers Guild Committee on Democratic Communication, filed an argument against the fine based on free speech rights. The FCC did not address the constitutional issues and as of yet has not enforced the fine against Dunifer.

When Dunifer continued the broadcasts following the NAL, the FCC filed a separate lawsuit in federal court for an injunction against further FRB broadcasts. If issued, an injunction would have put the full weight of the government against FRB, probably preventing further broadcasts.

Dunifer's lawyers again raised constitutional arguments against the injunction. The FCC asserted that it merely had to prove (1) that Dunifer had no license to broadcast and (2) that he had made broadcasts nonetheless. Even Dunifer's layers admitted to this. Dunifer's lawyers argued, however, that the injunction should not issue because the FCC regulations were unconstitutional. They made it impossible for Dunifer to seek a license for micro radio broadcasts.

To obtain a preliminary injunction (which would stay in force until a trail on the merit resolved the ultimate questions of law and fact allowing the court to issue a permanent injunction) the FCC had to show that they were likely to win and there might be "irreparable harm" to the public or they had to show that while they might or might not win, the government hardships in the absence of an injunction were severe.

In this case, the court saw the "merits" of the case involving not the tow factors cited by the government (no license and broadcasts) but whether Dunifer would prevail on the constitutional issues. The FCC clearly didn't want to look at constitutional issues and expected the court to just consider the two, relatively simple questions. Probably the most surprising aspect of the judge's decision is that she considered the constitutional issues at all, rather than resolving the case with the more simple method of merely looking at the two government factors.

The judge found that there was not "probable success on the merits" given the constitutional issues raised by Dunifer. Moving to the second part of the test, she found that the hardships to the government from continued broadcasts were too severe. The FCC cited two instances when FRB interfered with licensed broadcasts to show that continued broadcasts "hurt the public." However, FCC officials had to practically trip over the transmitter in order to register the interference. Additionally, Dunifer claimed that the transmitter has since been improved and that no future interference was likely. Given this, the judge found that the constitutional issues raised were to great, and the showing of hardship too slight, to justify an injunction. The judge did not want to address the constitutional issues in the absence of arguments regarding them from the FCC. Although Dunifer raised the constitutional issues in his briefs, the FCC lawyers completely ignored these issues. The Least Restrictive Means?

Dunifer's lawyers have not argued that the FCC lacks authority to regulate radio broadcasts. Rather, he argues that the complete ban on micro power radio (the FCC does not issue licenses for stations with less than 100 watts of power) is unconstitutional.

Past Supreme Court cases dealing with FCC laws and regulations have found that radio broadcasting involves free speech (first amendment) questions. When first amendment free speech rights are impacted by government regulation, the government must establish that the contested regulations are the least restrictive means available to further a compelling state interest.

The traditional justification for FCC regulation is that there are a scarce number of frequencies available on the radio dial and that the FCC must regulate to prevent stations from interfering with each other.

Dunifer argues that, due to technological improvements in equipment, micro radio broadcasts can be made without interference to high-power broadcasters and that there is sufficient space on the radio dial to accommodate micro power radio broadcasts. He points to regulation in Canada, where micro power stations were legalized in urban areas in 1993. (Micro power broadcasters in Canada merely submit a 2 page form and affirm that their equipment meets technical standards to avoid interference.)

Dunifer argues that completely banning micro power radio broadcasts, rather than developing a system for regulating them, is unconstitutional because it is not the least restrictive means of achieving the government interest, in this cas preventing interference.

Dunifer's lawyers also argued that by completely banning micro power radio, the FCC has eliminated opportunities for community based alternatives to mainstream -- usually corporate -- radio broadcasting. Federal law requires the FCC to regulate "in the public interest," which Dunifer argues should include the who public, not just the economically powerful. Supreme Court law supports the argument that the FCC must regulate to attempt to achieve a "balanced presentation" of information.

In the end, the judge found that the FCC had not addressed the constitutional questions and that they were sufficiently convincing, and that harm had not been sufficiently shown, that the injunction should

not issue. The court indicted that the FCC should address the constitutional issues in proceedings to enforce the $20,000 fine against Dunifer, and that the court would then consider those proceedings In making a final decision on an injunction. The Court phrased the question as "[I]n light of current technology, is a total ban on new licensing of micro radio broadcasting the least restrictive means available to protect against chaos [o]n the airwaves?"

What Now?

The victory in court is very significant but it does not end the legal struggle. The government has the ball and will make the next move. There are a number of options open to them:

1. The government could follow the judge's suggestion. This would mean they would move forward with the fine against Dunifer and address his constitutional arguments. This process would likely take a long time. Only then would the court consider granting an injunction. The government cannot seek and injunction in a different court (thereby getting around this ruling) because of legal rules. Once a case is assigned to a particular judge in federal court, the case stays with that judge.

   If the government follows this course of action, there is no certainty that FRB would eventually win on the "merits." Dunifer's legal argument, while extremely clever and creative, is somewhat "novel." However, the slow wheels of justice turn, FRB will remain on the air and can build political and community support.

2. The government could decide to ignore FRB and try to win a similar case before a different judge elsewhere. Such a victory elsewhere might influence the court in Oakland, although a victory elsewhere would only be binding on the court in Oakland if the decision came from (a) the Ninth Circuit court of appeals or (b) the US Supreme Court.

   From the government's perspective, the last thing they want is for the court in Oakland to rule in favor of FRB on the "merits" of the case after considering the constitutional issues. If that happened, the case would be "persuasive" to other courts considering similar cases.

   Judge Wilken is probably the worst possible judge for the FCC because she appears to honestly and seriously consider the constitutional issues raised by FRB. The more public FRB and its violation becomes, the more pressure there will be for the FCC to do something.

3. The FCC might return to court and try to show a higher level of "harm" to the public interest from FRB than they showed in their original papers. Assuming that FRB does not interfere with other stations, the FCC could possibly make a creative argument finding some other factor creating "harm" to the public.

   One possibility, which FRB DJs might consider, is that the FCC could argue that the public interest is "harmed" by "obscene" language on the air. The

FCC would argue that "children" could get the broadcasts and that this harm, even in the absence of interference, justifies and injunction. As to the simple use of words like "fuck" on the air, this argument is pretty silly. The FCC would have to argue that such words offend community standards in order to be found "obscene." However, it is conceivable that some things going out over the air might offend community standards. We have to assume that (1) the FCC badly wants to get and injunction and (2) that they are listening to and taping everything that goes out over FRB. DJs should think about this if they want the station to stay on the air.

Implications

One potential flaw with Dunifer's legal arguments is that they conceded the FCC's authority to regulate micro radio broadcasts. This concession is probably unavoidable given the legal system. However, it raises long term questions.

If the FCC loses and the complete prohibition on micro radio licensing is found unconstitutional, the FCC would presumably have to license micro radio stations. They might do this like in Canada: with a simple 2 page form and minimal or no fees. However, they might agree to license micro radio stations, but make the standards and fees so difficult as to effectively prohibit real "grassroots" community access to the medium. For instance, a $20,000 fee (including technical studies) would completely prevent access to the airwaves by radicals. While such a fee structure would be subject to a similar legal challenge to the one currently underway (such fees would not be the least restrictive alternative), it could take years and thousands of dollars to fight such a legal battle.

Since the radio band would still be limited there is some kind of limit on the number of micro radio station even if the FCC agreed to license them. How would the FCC decide who got these limited stations? Would stations have to comply with all the FCC content regulations that apply to corporate stations?

As Dunifer's lawyers argue, micro radio is the "flyer of the 90s." We need to fight for access to this medium just as past revolutionaries fought for free access to printing presses. Even if the battle is finally won, there are going to be difficult questions down the road. -- PB Floyd

GUILD AND GUILD CLIENTS MAKE NEW LAW - CREATE NEW MEDIA

by Peter Franck

". . .the FCC is arguably violating its statutory mandate as well as the First Amendment, by refusing to revisit the issue [of the ban on very low power FM broadcasting]. . .The Court finds that the harm to the First Amendment rights of Defendant and the public at large which may result from enforcing the current regulations, outweighs the slight showing of interference proffered by the government. . ."

In an almost textbook example of partnership with a growing and vital movement of committed activists, the Guild through its Committee on Democratic Communications (CDC) has been forging a new area of law giving a vital democratic movement the legal and moral space in which to grow.

From "pirate" radio to "micro" radio; from defiantly tweaking the nose of authority to developing grass roots, effective, cheap means of piercing the media screen, the Guild and the micro radio movement have been working together to open the radio spectrum.

In an unprecedented move, the United States District Court for the Northern District of California, on January 20th, refused to grant the government an injunction against the admittedly unlicensed low power broadcasting of Free Radio Berkeley.

For years it has been the law that in order to broadcast over the air, one must have a license. Since the 1970's, the FCC has refused to consider even an application for a license for less than one hundred watts of power. The first level of the license application process involves a pile of forms half an inch thick and a $2,900.00 filing fee. In short, without mega bucks and access to high-priced Washington lawyers, there is no way a citizen can obtain a license to broadcast.

Five years ago, the CDC received a plea for help from Mbanna Kantako, an unemployed, blind black man who had scraped together a few hundred dollars for a couple of black boxes which when connected to a microphone and an antennae wire out his housing project window, put him on the air with one watt of power. Mbanna had been involved in organizing the tenants in the John Jay Homes public housing project of Springfield, Illinois. He went on air as WTRA (W. Tenant's Rights Association). WTRA was the only station serving the Springfield African American Community. It broadcasts music, community news, recorded speeches and much else. Much of the programming and operation of the station was done by Mbanna's sons and other youth from the community. No one bothered them for almost two years, until some kids in the projects reported that housing authority police beat them up. Mbanna put them on the air to tell their story and surprise! The next week the FCC, backed by the local police, was there to shut him down.

The CDC had been looking at issues of media reform and had held a major symposium at the 1989 Guild convention on the responsiblity of the media under international covenants (against racism, for women's rights ad the like). The CDC recognized the importance of radio done cheaply and easily by people, we saw it as the grass roots "green media" of the future.

CDC member Alan Korn secured a grant and spent the summer between his second and third years at law school writing a one hundred page brief laying out the Constitutional Law and International Law reasons that the ban on micro radio was unconstitutional. After fining Mbanna $750.00, the government made no

attempt to collect, and Mbanna and the CDC decided against an affirmative action, so the brief was unused for a little while.

Like many of us, Stephen Dunifer was outraged by the media screen and distortion of events surrounding the Gulf War. An electrical engineer by training, Dunifer decided there was nothing to do but go on the air himself. When he called, the CDC was ready with its brief. Over subsequent months, it worked with Dunifer and other micro broadcasters to advise them of their rights if and when the FCC knocked on their door. CDC layers developed the expertise to deal with the arcane FCC administrative structure when; not being satisfied with the uncollected $750.00 fine assessed to Mbanna, they started to assess Dunifer, Richard Edmundson of San Francisco Free Radio and others, fines in the $17,500.00 to $20,000.00 range.

Dunifer started building micro radio kits which he could sell to other practitioners and began broadcasting (literally, on the Internet) his message of the possibility and the desirability of micro radio. When people asked "Is it legal?" he referred them to the CDC. In true Guild tradition, the CDC assured no one that they could win but we did assure them that under the Constitution and International Law they had a Right to Communicate, and that we would do our best to find them legal back-up. We committed to being backup, in turn, for local counsel. All this helped the movement take itself seriously, shift from "pirate" to "micro."

Not content with the $20,000.00 fine it has assessed against Dunifer, and impatient with its own procedures (Dunifer's appeal of the fine to the Washington level of the FCC has languished for over a year) the government filed a 60 page lawsuit in District Court seeking an injunction against Dunifer. In one of the many ironies of this case, it calendared its Motion for a Preliminary Injunction on the 30th anniversary (to the day) of the Free Speech Movement at CAL (remember Mario Savio?).

Dunifer was represented personally by CDC member Luke Hiken. The CDC itself prepared an Amicus Brief addressing some of the larger issues which it was to file on behalf of the Guild and the Media Alliance. In a nice little side-flap, the government objected to the filing of the Amicus Brief on the grounds that one of the signers, Peter Franck, had signed along with Luke Hiken a prior Amicus Brief filed with the Ninth Circuit in a similar case coming out of Arizona a year earlier. In classic "shoot yourself in the foot" fashion, the government, in support of its opposition to the filing of the Amicus Brief, filed with the District Court a copy of the Amicus Brief we had filed in the Court of Appeals. The opening lines of our Court of Appeals brief revealed the fact that the 9th Circuit Panel had been very interested in the precise issues we were raising and had ordered the government to file a special brief responding to our constitutional arguments. Of course, there is no way we ourselves could have legitimately put that information before the trial court!

In a widely circulated article, Alexander Cockburn comments:

"There's nothing that so horrifies the Federal Communications Commission as freedom of speech - unless its backed by the billions now required to exercise that right on the airwaves." Cockburn goes on: "For more than 60 years, it's been the role of government to restrict access to airwaves to those powerful enough and rich enough to stake out and hold their slice of this public resource. The excuse for restriction has always been 'chaos.' But in the eyes of the FCC, chaos is not 5,000 shopping channels or 200,000 easy listening stations. Chaos is political, possibly seditious, broadcasting."

In refusing to grant the government's injunction against Free Radio Berkeley, the Court ordered the FCC to act on his much delayed appeal of their $20,000.00 fine. The judge required the Commission to help her out by addressing the constitutional and technical arguments (relating to the legal impact of recent technological change) raised by the CDC and Dunifer. She continued the hearing on the government's

motion to Friday, March 10th at 1:30 pm., Department 2, U.S. District Court, 1301 Clay Street, 4th Floor, Oakland, California. Guild members are invited to attend the hearing. There will be a rally outside the courtroom at 12:30.

The Committee on Democratic Communications is a national committee of the Guild based in San Francisco. It meets every 3 to 4 weeks in San Francisco and Guild members are invited to attend. We have just retained John Tirpak to coordinate CDC activities. He can be reached at 921-5829.

FEDERAL COMMUNICATIONS COMMISSION AUTHORITY AND JURISDICTION IN THE SEVERAL STATES OF THE UNION:

FACT OR FRAUD?

A Memorandum by David Moore

This memorandum will be construed to comply with provisions necessary to establish presumed fact (Rule 301, Federal Rules of Civil Procedure, and attending state rules) should interested parties fail to rebut any given allegation of fact or matter of law addressed herein. This position will be construed as adequate to meet requirements of judicial notice, thus preserving fundamental law. Matters addressed herein, if not rebutted, will be construed to have general application. This memorandum addresses authority and jurisdiction of the Federal Communications Commission.

INTRODUCTION

The growing interest in and popularity of "low power" radio stations in the AM and FM broadcast bands in America is a phenomenon with the potential of sweeping the nation. Thousands of people are operating "low power" transmitters (typically capable of generating less than 100 watts) in an effort to provide an alternative to the type of broadcast programming which currently dominates the airwaves offered by the well-funded media giants. It appears, however, that many do so ignorantly, believing themselves and their fellow broadcasters to be unlicensed "pirates" violating the rules and regulations of the Federal Communications Commission (FCC), and surviving only because of the FCC's limited ability to enforce the "law".

Are these people "pirates", criminals flaunting the law at the expense of others, or have they simply been led to believe this by a government agency that capitalizes on the ignorance of the general population? Is the FCC enforcing the law when it prosecutes low power broadcasters, or is it engaged in perpetrating a grievous fraud against the American people?

These questions can only be answered by following on simple rule: believe nothing unless you can prove it in your own research.

This memorandum should neither be considered exhaustive nor as legal advice, but only as a starting point for one's own research. It is hoped that other will expand upon this memorandum and dig even deeper to further expose the true nature of the FCC.

NOTE

All common definitions of words are taken from Webster's Seventh New Collegiate Dictionary, and shall be referred to simply as "Webster's". All legal definitions of words are taken from Black's Law Dictionary with Pronunciations, Sixth Edition, and shall be referred to simply as "Black's".

PART ONE: CREATION AND PURPOSE OF THE FCC

47 CFR Sec. 0.405 Statutory Provisions

The following statutory provisions, AMONG OTHERS, will be of interest to PERSONS HAVING BUSINESS with the Commission [emphasis added]:

(a) The Federal Communications Commission was created by the Communications Act of 1934, 48 Stat. 1064, June 19, 1934, as amended, 47 U.S. C. 151-609.

(b) The Commission exercises authority under the Submarine Cable Landing Act, 42 Stat. 8, May 27, 1921, 47 U.S.C. 34-39...

(c) The Commission exercises authority under the Communications Satellite Act of 1962, 76 Stat. 419, August 31, 1962, 47 U.S.C. 701-744

(d) The Commission operates under the Administrative Procedure Act, 60 Stat. 237, June 11, 1946, as amended, ... the provisions of the Administrative Procedure Act now appear as follows in the Code:

Administrative Procedure Act 5 U.S.C.

Sec. 2-9-551-558
Sec. 10-701-706
Sec. 11-3105, 7521, 5362, 1305
Sec. 12-559

This section of the Code of Federal Regulations (CFR) lists items pertinent to the FCC which have been provided for by statute. Let us examine some of them in detail.

47 U.S.C. Sec. 151 Purposes of Chapter; Federal Communications Commission Created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio..there is created a commission to be known as the "Federal Communications Commission"...

The FCC was created by an ACT OF CONGRESS (we will get to that later) "for the purpose of regulating interstate and foreign commerce..." The power of law is in the details, especially the definitions of words and phrases. Just what is "interstate and foreign commerce in communication by wire and radio"?

The common meaning of the word "interstate" is "of, connecting, ore existing between two or more states..."

"Commerce," in this context, means "the exchange or buying and selling of commodities on a large scale involving transportation from place to place."

"Foreign" means "situated outside a place or country."

When thinking of "foreign commerce," most people would imagine trade with China or Spain. However, definitions in law are often different from commonly understood definitions, as we shall shortly see.

Black's has separate definitions for "foreign," "foreign nations," "foreign states," "foreign commerce," "commerce with foreign nations," "nation," "country," "interstate," "commerce," "interstate commerce," "interstate and foreign commerce," and "state." The serious researcher should examine all of these definitions, as their thorough study could easily fill an entire book, and will not be attempted here.

In Black's we find:

Interstate commerce. Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state; commerce between two states, or between places lying in different states...

Also from Black's:

Interstate and foreign commerce. Commerce between a point in one State and a point in another State, between points in the same State through another State or through a foreign country, between points in a foreign country or countries through the United States, and commerce between a point in the United States and a point in a foreign country or in a Territory or possession of the United States, but only insofar as such commerce takes place in the United States. The term "United States" means all of the States and the District of Columbia. 49 U.S.C.A. Sec. 10102.

Note the differences between these two definitions--subtle, yet distinct.

What is the difference between a state (not capitalized) and a State (capitalized)? Are they the same as one of the "several states of the Union"? Why is the word "state" capitalized in one place and not in another? What is the difference between the "Untied States" and the "several states of the Union"?

It is no accident that the alternate use of "state," "State," "United States," and "several states of the Union" is found throughout the entire American law, as well as Black's'; yet neither offer clear reasons for this important situation. Again, a thorough study of this subject could easily fill an entire book, and will not be attempted here. However, a clue may be found in particular definition from Black's:

State/Foreign state. A foreign country or nation. The several United States are considered 'foreign' to each other except as regards their relations as common members of the Union.

In essence, the "several states of the Union" are foreign and sovereign countries, with different laws, etc. That is why people living in Kansas are not subject to the laws of Texas, and vice versa. In fact, further research indicates that the "several states of the Union" are foreign to the "United States," and the federal government!

Even further research indicates that people living in "the several states of the Union" are not subject (except in specific, limited cases) to the laws of the "United States," any more than they are subject to the laws of France! (The astute researcher will notice that the definition above does not mention the "several state of the Union," but instead mentions "the several United State," indicating that, just as there is more than one "state," there is more than one "United States." These concepts are quite astounding to most people and, in an effort to unravel and understand them, the unprepared researcher may rapidly develop a headache!)

If words are to have meaning, and laws made up of words are to be enforced, there must be a way to understand the meanings of the words used in the law. Many court decisions have state this concept, as the following:

(The) correct format for evaluating (the) constitutionality of (a) statute is: is (the) expression of crime so clearly explicit that every person of ordinary intelligence may understand specific provisions thereof and determine in advance what is and is not prohibited. -- Whaley v. State, Okl. Cr., 556 P.2d 1063 (1976).

In other words, if the ordinary man on the street cannot understand the law, then that law is probably unconstitutional!

How can the law relating to the FCC be understood? The answer lies, among other places, in the DEFINITIONS of words contained in the law itself. Words contained in law can have meanings other than those commonly understood, as long as those definitions are PART of the law. Therefore, "green" can be defined as "blue," as long as that definition is contained in the law, and this is all perfectly "legal."

Since 47 U.S.C. Sec. 151 uses the phrase "interstate and foreign commerce," then we will adhere to that definition, as it is different from the definition of "interstate commerce."

47 U.S.C. Sec. 152 Application of chapter [CHAPTER 5]

(a) The provisions of this chapter shall apply to all INTERSTATE AND FOREIGN communication by wire or radio and all INTERSTATE AND FOREIGN transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided...

(b) Except as provided in Sections 223 through 227...and Section 332...and subject to the provisions of Section 310..and subchapter V-A of this chapter, NOTHING in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with INTRASTATE communication service by wire or radio..[emphasis added]

The above section seems clear enough--47 U.S.C. Chapter 5 applies only to interstate (between states) and foreign matters, and NOT to "intrastate" (within a state) matters. Notice, however, the word "except' in (b). "Except as provided in..." The sections mentioned in)b) deal with the following:

Sec. 223 - Obscene or harassing telephone calls...
Sec. 224 - Pole attachments (connecting wires, etc. to utility poles)
Sec. 225 - Telecommunications services for hearing-impared and speech-impared individuals
Sec. 226 - Telephone operator services
Sec. 227 - Restrictions on use of telephone equipment
Sec. 332 - Mobile services (such as car phones)
Sec. 301 - License for radio communication or transmission of energy

Subchapter V-A-Cable communications

Only Sec. 301 deals with radio and its pertinent sections read as follows:

47 U.S.C> Sec. 301 License fo radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission..but not the ownership thereof...

No person shall use or operate any apparatus for the transmission of energy for communications or signals by radio (a) from one place in any State, Territory or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District or Columbia to any other State, Territory or possession of the United States; or (c) from any place in any State, Territory or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State...EXCEPT UNDER AND IN ACCORDANCE WITH THIS CHAPTER and with a license in that behalf granted UNDER THE PROVISIONS OF THIS CHAPTER. [emphasis added]

This section is one that is pointed to by many ham radio operators, who proudly proclaim they have complied with "the law," by working so hard to obtain their Amateur Radio "License." But, if they had carefully read this statute they would have discovered what appears, on the surface, to be a glaring contradiction.

If the purpose of the FCC is to regulate "interstate and foreign commerce," and the provisions of 47 U.S.C. Chapter 5 "apply to all interstate and foreign communication," and NOT "intrastate communication," then how can a person be forbidden to broadcast "from one place in any State...to another place in the same State" without first being granted a license?

The key to understanding Section 301 lies in the definitions found in Section 153, and an understanding of the word "includes."

47 U.S.C. Sec. 153 Definitions

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United Sates, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than Section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission...

(cc) "Station license", "radio station license", or "license" means that instrument of authorization REQUIRED BY THIS CHAPTER or the rules and regulations of the Commission made PURSUANT TO THIS CHAPTER... [emphasis added]

Why the authors of this statute used the word "means" in one place and the word "includes" in others remains a mystery. However, they do have distinctly different definitions which must be understood in order to unravel the purpose of the law.

The question is: how can a person be forbidden to broadcast "from one place in any State...to another place in the same State"?

47 U.S.C. Sec. 153 Definitions

(g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone...

Note the use of the word "means" here. Since Black's contains no pertinent definition of the word, we will turn to Webster's:

Means. Usage 2: (1): to have in mind as a purpose: INTEND (2): to serve to convey, show, or indicate: SIGNIFY...

If "United States means the several States," does it MEAN Texas or Ohio? Does it MEAN "the several states of the Union"?

47 U.S.C. Sec. 153 Definitions

(v) "State" includes the District of Columbia and the Territories and possessions...

Does (v) contain the words "Texas" or "Ohio"? NO! It most definitely does NOT.

But, one might say, aren't Texas and Ohio "States"? Doesn't this definition "include" them by inference, along with the other 48 "several states of the Union?"

The answer once again is a resounding NO!

Let us examine the words "include" and "includes".

According to Black's:

Include. (Lat. inclaudere, to shut in, to keep within.) To confine within, hold as in an inclosure, take in, attain, shut up, contain, inclose, comprise, comprehend, embrace, involve. Term may, ACCORDING TO CONTEXT, express an enlargement and have the meaning of "and" or "in addition to", or merely specify a particular thing already included within general words thereto fore used. "including" within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. [emphasis added]

This definition may surprise the novice researcher, who may also argue that the term should be interpreted as an enlargement. This must, however, be done "according to context," "and with a different intention apparent."

>From the "Legal Thesaurus," Deluxe Edition, by William C. Burton, MacMillian Publishing Company:

Include, verb--absorb, (Lat.) "adscribere," be composed of, be formed of, be made up of, begird, boast, bound, bracket, circumscribe, classify, close in, combine, compass, (Lat.) "complecti," comprehend, (Lat.) "comprehendere," consist of, consolidate, contain, cover, embody, embrace, encircle, encompass, engird, envelop, girdle, hold, incorporate, involve, merge, put a barrier around, span, subsume, surround, take in, unify, unite.

And from "A Dictionary of Modern Legal Usage," 2nd Edition, by Bryan A. Garner, Oxford University Press:

Included. See "Including".

Including is sometimes misused for "namely." But it should not be used to introduce an exhaustive list, for it implies that the list is only partial. In the words of one federal court, "It is hornbook law that the use of the word 'including' indicates that the specified list...is illustrative, not exclusive."...See "Including but not limited to."

Including but not limited to; including without limitation. In "drafting", these cautious phrases are often essential to defeat three canons of construction: (Lat.) "inclusion unius est exclusio alterius" ("to express one thing is to exclude the other"), (Lat.) "noscitur a sociis" ("it is known by its associates"), and (Lat.) "ejusdem generis" ("of the same class or nature"). ...Even though the word "including" itself means that the list is merely exemplary and not exhaustive, the courts have not invariably so held. So the longer, more explicit variations may be considered necessary...

Note that the definition in 47 U.S.C. Sec. 153 does not use the word "including" as a term of enlargement, but rather usees the more limiting word "include(s)." In the absence of an apparently different intention and

based upon some understanding of the rules of construction of law, it is the conclusion of this author that there is NO contradiction between Section 301 and Section 151 and 152, because the definition of "State" in 47 U.S.C. does not "include" Texas, Ohio, Kansas, or any of the other "several states of the Union."

In the context of 47 U.S.C. and the FCC, the "United States" includes ONLY the District of Columbia and the Territories and possession of the United States.

This brings up an interesting situation in which it can be argued that "interstate and foreign commerce" and "Communication" or "transmission" takes place ONLY among the District of Columbia and the Territories and possessions! Therefore, commerce, communication, or transmission between someone in Texas and someone in Kansas is not "interstate"! This may, however, be pushing the legal "envelope" a bit, and should, for now, be considered only as icing on what appears to be a well-definded cake.

CONCLUSION OF PART ONE

The FCC exists solely to regulate "interstate and foreign commerce"; that is, commerce between states and other states and/or countries. Pertaining to low power radio broadcasters and stations, 47 U.S.C. Chapter 5 applies ONLY to interstate and foreign communication or transmission, and clearly does NOT apply to commerce, communication, or transmissions taking place solely within the confines of one of the several states of the Union.

PART TWO: AUTHORITY AND JURISDICTION OF THE FCC

Bearing in mind that 47 U.S.C. Sec. 151 grants the FCC "authority with respect to interstate and foreign commerce in wire and radio communication," the rest of the law begins to fall in place and make sense, in particular Sec. 303, Powers and duties of Commission.

47 U.S.C. Sec. 303 describes various rule-making and regulation-making powers of the FCC, and certain provisions of this section are often quoted by the FCC in attempting to inspect, fine, seize, or otherwise shut down "violators." However, the very first sentence of this section should leap off of the page to the broadcaster who knows and understand his rights and legal standing:

> 47 U.S.C. Sec. 303 Powers and duties of Commission
> Except as otherwise provided in this chapter...

That sentence sets everything that follows into the context of "interstate and foreign commerce," including the dreaded Section 303(n), which the FCC, operating under "color of law," uses as its alleged authority to conduct warrantless searches.

> 47 U.S.C. Sec. 303
> (n) Have authority to inspect all radio stations associated with stations REQUIRED TO BE LICENSED... [emphasis added]

What stations are required to be licensed? Those engaged in "interstate and foreign commerce"!

The FCC has no authority to inspect any other facility, PERIOD!

It is important to examine other statutory provisions adding to the FCC's limited authority, found as follows:

47 CFR Sec.0.405(b)

The Commission exercises authority under the Submarine Cable Landing Act, 42 Stat. 8... 47 U.S.C. 34-39...

The Submarine Cable Landing Act and 47 U.S.C. Sections 34-39 deal with submarine (i.e., underwater) cables:

...directly or indirectly connecting the United States with any foreign country...

Note the definition given in Sec. 38:

47 U.S.C. Sec. 38 "United States" defined

The term "United States" as used in Sections 34-39 of this title includes the "Canal Zone and all territory continental or insular, SUBJECT TO THE JURISDICTION OF THE UNITED STATES OF AMERICA." [emphasis added]

According to Black's:

Territory. A portion of the United States, not within the limits of any state, which has not yet been admitted as a state of the Union, but is organized, with a separate legislature, and with executive and judicial officers appointed by the president.

It is also interesting to note that 47 U.S.C. Sections 34-39 are not listed in the Parallel Table of Authorities and Rules of the Code of Federal Regulations (CFR) Index. We will cover the significance of that omission later!

Another area where the FCC exercises authority is listed as follows:

47 CFR Sec.0.405(c)

The Commission exercises authority under the Communications Satellite Act of 1962, 76 Stat. 419, August 31, 1962, 47 U.S.C. 701-744.

The Communications Satellite Act of 1962 and 47 U.S.C. Section 701-744 describe participation of the United States (in the form of a private corporation!) in a vast "commercial communications satellite system, as part of an improved global communications network." However, this Act, along with the Submarine Cable Act, appears to contain nothing applicable to low power, intrastate broadcasting. Of note is the fact that Sec. 721, Implementation of Policy, which contains FCC functions, including rule- and regulation-making, is not listed in the CFR Parallel Tables of Authorities and Rules.

47 CFR Sec.0.405(d)

The Commission operates under the Administrative Procedure Act...

This section lists sections of 5 U.S.C. which cover definitions, publication in the Federal Register, the Freedom of Information Act, rule-making, adjudication's, court proceeding, hearings, sanctions, licenses, judicial review, relief, administrative law judges, government employees, and other administrative procedure matters which all federal agencies must observe. None of these sections shed any additional light on the authority and jurisdiction of the FCC relating to low power intrastate broadcasting.

Other sections of 47 U.S.C. are pertinent to FCC jurisdiction.

47 U.S.C. Sec. 401 Enforcement provisions

(a) Jurisdiction. The district courts of the United States shall have jurisdiction...to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission...the Commission...may apply to the appropriate district court of the United States for the enforcement of such order...the COURT shall enforce obedience... [emphasis added]

The FCC has not authority whatsoever to command compliance or enforce obedience! That authority lies solely with the district courts of the United States.

47 U.S.C. Sec. 401 Enforcement provisions

(c) Duty to prosecute. Upon the request of the Commission IT SHALL BE THE DUTY OF ANY UNITED STATES ATTORNEY to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter...[emphasis added]

The FCC has no authority to institute court proceedings! That duty lies with "any United States attorney... under the direction of the Attorney General" to whom "the Commission may apply." It is a little-known fact that you, too, may apply to any United States attorney to institute court proceedings.

CONCLUSION OF PART TWO

The authority and/or jurisdiction of the FCC is limited to regulating "interstate and foreign commerce." The FCC only has authority to inspect radio installations which are "required to be licensed," i.e., those engaged in "interstate and foreign commerce." The FCC has not authority to institute court proceedings, or to command compliance with or enforce the law in any way whatsoever.

PART THREE: THE PARALLEL TABLE OF AUTHORITIES AND RULES

To quote Patrick E. Kehoe, Professor of Law, Director of the Law Library at The American University in Washington, D.C., in the Forward to the Code of Federal Regulations Index:

In 1936 Congress passed legislation setting up the Federal Register and decreeing that any regulation issued by a federal agency, authorized either by Congress or the President, must appear in it in order for the regulation to have binding legal effect...In 1937, Congress, recognizing the obvious need for a subject-based codification of current regulations, enacted further legislation establishing the Code of Federal Regulations...The CFR is a specialized publication which is meant to include only those regulations which are considered to be of general effect...The CFR is by law...considered to be prima facie correct statement of any regulation which it includes...

According to the "CFR Index and Finding Aids," Revised as of January 1, 1996 as a special edition of the Federal Register:

The PTAR of the CFR lists the rule-making authority (except for 5 U.S.C. 301) for regulations codified in the CFR. Entries in the table are taken directly from the rule-making authority citation provided by Federal Agencies in their regulations.

To quote legal researcher Dan Meador:

Congress, as the legislative body for the United States, operates in at least two distinct capacities. First, Congress legislates for the state republics party to the Constitution within the framework of Constitutionally delegated authorities. Second, Congress legislates for the self-interested United States--the geographical United States, exclusive of the state republics. Any given law Congress enacts vests administrative authority in a cabinet officer or board or commission in charge of whatever the legislation applies to. The officer or entity vested with original authority must then facilitate legislation with regulations. If regulations are published in the Federal Register, the statue or statutes the regulations facilitate can or do apply to the population at large and/or the states party to the Constitution. IF ANY GIVEN REGULATION IS NOT PUBLISHED IN THE FEDERAL REGISTER, THE NATION'S LEGAL NEWSPAPER, IT DOES NOT APPLY TO THE POPULATION AT LARGE OR THE STATE REPUBLICS. It applies only to federal agencies and officers, agents and employees of federal agencies, allowing for other applications within exclusively United States jurisdiction (District of Columbia, U.S. -owned territories and insular possessions and federal enclaves).

Authorities Confirming Necessity of Regulations

Application determined by 5 U.S.C. Sec. 552, et. seq. and 44 U.S.C. Sec. 1501, et. seq.; 44 U.S.C. Sec. 1505(a) specifies that when regulations are not published in the Federal Register, application is to federal agencies and officers, agents and employees of federal agencies...

SECTIONS THAT HAVE NO REGULATIONS ARE MANDATORY AND/OR ENFORCEABLE ONLY IN THE FEDERAL UNITED STATES, INCLUSIVE OF THE DISTRICT OF COLUMBIA AND U.S.-OWNED TERRITORIES...

The necessity for regulations was emphasized by the U.S. Supreme Court in California Bankers Ass'n. v. Schultz, 416 U.S. 21, 26, 94 S.Ct. 1594, 1500, 39 L.Ed. 2d 812 (1974): "Because it has a bearing on our treatment of some of the issues raised by the parties, we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone..."

"It is a well established principle of law that all federal legislation applies only within the territorial jurisdiction of the [federal] United States unless a contrary intent appears." --Foley Brothers v. Filardo, 336 U.S. 281 (1949)...

In other words, where the several States and the general population are concerned, a statute created by Act of Congress is somewhat like a hot air balloon that won't get off the ground until someone pumps in hot air. Regulations are to statutes as hot air is to the balloon. As stated in 44 U.S.C.S. Sec. 1505(a)(1), if regulations for any given statute aren't published in the Federal Register, application is limited to Federal agencies or persons in their capacity as officers, agents, or employees of Federal agencies...

Fortunately, there is a reasonably easy way to discern what statutes in the United States Code have general application to the several States and the population at large. This is through the Parallel Table of Authorities and Rules...

Its authority is located at 1 CFR Sec.8.5(a): "(a) Parallel tables of statutory authorities and rules. In the Code of Federal Regulations Index or at some other place as the Director of the Federal Register considers appropriate, numerical lists of all sections of the current edition of the United States Code (except Section 301 of title 5) which are cited by issuing agencies as rule-making authority for currently effective regulations in the Code of Federal Regulations. The lists shall be arranged in the order of the titles and

sections of the Untied States Code with parallel citations to the pertinent titles and parts of the Code of Federal Regulations."

This handy finding aid lists United States Code statutes by title and section in the left column, if implementing regulations have been published in the Federal Register, and applicable regulations by title and part in the right. If the statute does not appear, it does not have implementing regulations which have been published in the Federal Register, signifying that, in accordance with 44 U.S.C.S. Sec. 1505(a)(1) provisions, the statute is applicable only to Federal agencies or the officers, agents, and employees of Federal agencies. If the statute number does appear and a regulation is cited, the regulation must be consulted to determine application...[emphasis added]

What does all of this mean? It means that statutes from the United States Code which do not have implementing regulations have NO LEGAL EFFECT ON THE POPULATION AT LARGE!

All of the sections from 47 U.S.C. Chapter 5 - wire or radio communication- which have no implementing regulations that appear in the PTAR are:

Sec. 157 - New technologies and services
Sec. 159 - Regulatory fees
Sec. 213 - Valuation of property of carrier
Sec. 214 - Extension of lines or discontinuance of service...
Sec. 216 - Receivers and trustees; application of chapter
Sec. 217 - Agents' acts and omissions; liability of carrier
Sec. 222 - Competition among record carriers
Sec. 223 - Obscene or harassing telephone calls
Sec. 224 - Pole attachments
Sec. 226 - Telephone operator services
Sec. 228 - Regulation of carrier offering pay-per-call services
Sec. 306 - Foreign ships; application of section 301
Sec. 320 - Stations liable to interfere with distress signals...
Sec. 321 - Distress signals and communications...
Sec. 322 - Exchanging radio communications...
Sec. 323 - Interference between Government and commercial stations
Sec. 324 - Use of minimum power
Sec. 326 - Censorship
Sec. 327 - Naval stations...
Sec. 328 - Canal Zone; representation by Secretary of State
Sec. 329 - Administration of radio laws in Territories and possessions
Sec. 331 - Allocation of very high frequency television stations and AM radio stations
Sec. 333 - Willful or malicious interference
Sec. 335 - Direct broadcast satellite service obligations
Sec. 351 - Ship radio stations and operations
Sec. 353 - Radio equipment and operators
Sec. 353a-Operators and watches on radiotelephone equipped ships
Sec. 354 - Technical requirements...
Sec. 354a-Technical requirements...
Sec. 355 - Survival craft
Sec. 356 - Approval of installations by Commission
Sec. 357 - Safety information

Sec. 358 - Master's control over operations
Sec. 359 - Certificates of compliance...
Sec. 361 - Control by Commission..
Sec. 362 - Forfeitures; recovery
Sec. 381 - Vessels transporting more than six passengers...
Sec. 382 - Vessels excepted...
Sec. 384 - Authority of Commission
Sec. 386 - Forfeitures
Sec. 395 - Assistance...
Sec. 401 - Enforcement provisions
Sec. 402 - Judicial review...
Sec. 406 - Compelling furnishing of facilities
Sec. 407 - Order for payment of money; petition for enforcement; procedure; order of Commission as prima facie evidence; costs; attorneys' fees
Sec. 408 - Order not for payment of money...
Sec. 411 - Joinder of parties
Sec. 413 - Designation of agent for service...
Sec. 414 - Exclusiveness of chapter
Sec. 415 - Limitations of actions
Sec. 416 - Orders of Commission
Sec. 501 - General penalty
Sec. 502 - Violation of rules, regulations, etc.
Sec. 503 - Forfeitures
Sec. 504 - Forfeitures
Sec. 505 - Venue of trials
Sec. 506 - Repealed
Sec. 507 - Violation of Great Lakes Agreement
Sec. 508 - Disclosure of payments to individuals connected with broadcasts
Sec. 509 - Prohibited practices...
Sec. 510 - Forfeiture of communications devices
Sec. 521 - Purposes
Sec. 522 - Definitions
Sec. 534 - Carriage of local commercial television signals
Sec. 537 - Sales of cable systems
Sec. 541 - General franchise requirements
Sec. 545 - Modification of franchise obligations
Sec. 546 - Renewal
Sec. 547 - Conditions of sale
Sec. 551 - Protection of subscriber privacy
Sec. 553 - Unauthorized reception of cable service
Sec. 555 - Judicial proceedings
Sec. 555a-Limitation of franchising authority liability
Sec. 556 - Coordination of Federal, State, and local authority
Sec. 557 - Existing franchises
Sec. 558 - Criminal and civil liability
Sec. 559 - Obscene programming
Sec. 601 - Interstate Commerce Commission and Postmaster General; duties, powers and functions transferred to Commission

Sec. 603 - Transfers from Federal Radio Commission, Interstate Commerce Commission, and Postmaster General
Sec. 604 - Effect of transfer
Sec. 605 - Unauthorized publication or use of communications
Sec. 607 - Effective date of chapter
Sec. 608 - Separability
Sec. 609 - Short title
Sec. 610 - Telephone service for disabled
Sec. 611 - Closed-captioning of public service announcements
Sec. 612 - Syndicated exclusivity
Sec. 613 - Discrimination

The astute researcher, however, will notice from the PTAR that all sections from 301 to 609 ARE covered with a blanket of regulations found in 47 CFR Parts 80, 87 and 97. However, 47 CFR 80, 87 and 97 deal only with "the conditions under which radio may be licensed and used in the maritime services," "the conditions under which radio stations may be licensed and used in the aviation services," and "to provide an amateur radio service," NONE of which extend any FCC authority or jurisdiction over intrastate broadcasters!

("Amateur" or as they are commonly known, "ham" operators, may be particularly chagrined to learn that they VOLUNTEER to be regulated by the FCC by submitting to "examination." According to 47 CFR 97.5, titled "Station license required"" "Any person who qualifies by examination" is "qualified to be an amateur operator," and therefore "must have been granted a station license of the type listed in paragraph (b)...before the station may transmit on any amateur service frequency..." A person qualifies by examination, is granted a license, and therefore submits to being regulated. Those who do not submit to examination are not required to be licesed, and, unless engaged in "interstate and foreign commerce," are not subject to regulation!)

CONCLUSION OF PART THREE

If any given regulation is not published in the Federal Register it does not apply to the population at large or the state republics. Sections that have no regulations are mandatory and/or enforceable only in the federal United States, inclusive of the District of Columbia and U.S.-owned territories. No implementing regulations exist for sections of 47 U.S.C. relating to, among other items, enforcement provisions, orders for payment of money, penal provisions, penalties, violation of rules or regulations, forfeitures, or trials which apply to broadcasters not engaged in "interstate and foreign commerce." Those statutes apply only to those in the maritime or aviation services, or those who have volunteered to be regulated by submitting to FCC examination and qualification.

PART FOUR: THE CASE AGAINST STEPHEN DUNIFER

A much popularized situation exists in Berkeley, California in which the FCC is attempting to prosecute Stephen Dunifer, a low power broadcaster operating a station called Free Radio Berkeley (FRB). In the numerous legal documents posted on FRB's World Wide Web site, it can be learned that the FCC served Dunifer with a "Notice of Apparent Liability (NAL)" which cited, among other items, 47 CFR Sec.15.29(a), 47 CFR Sec.73.201, and 47 U.S.C. Sec. 503(b). The FCC also claimed that Dunifer had violated 47 U.S.C. Sec. 301, and claimed authority under 47 U.S.C. Sec. 303(n).

Attorneys for Dunifer, after making a rather weak challenge to the FCC's jurisdiction in the matter, based the bulk of his defense on a well-documented, passionate and eloquently stated claim that the FCC had violated Dunifer's First Amendment rights by refusing to grant licenses to his low power station. This persuasive Constitutional defense led to the FCC, and much of the broadcasting community, being stunned when Judge Claudia Wilken, on January 30, 1995, in the U.S. District Court for the Northern District of California, refused to grant any injunction requested by the FCC against Dunifer.

While the case still awaits final disposition, and Judge Wilken's decision has been hailed as a victory for low power broadcasters, Dunifer's Constitutional arguments become moot in light of the facts that:

(a) Dunifer was not involved in "interstate and foreign commerce".

(b) 47 CFR Sec. 15.29(a) deals with licensing of devices pursuant to 47 U.S.C. 301 ("interstate and foreign commerce"), and states that devices not in compliance with 47 CFR 15 are prohibited under 47 U.S.C. 302. However, Sec. 302 was REPEALED in 1936!

(c) 47 CFR Sec. 73.201 deals with FM broadcast channels assigned to stations engaged in "interstate and foreign commerce."

(d) 47 U.S.C. Sec. 503(b) has no implementing regulations published in the CFR relating to those involved in "intrastate" broadcasting or commerce.

While Dunifer's persuasive Constitutional arguments may allow him to eventually prevail in his case, they are actually quite unnecessary in light of the fact that the FCC had no authority or jurisdiction over him to begin with!

As reported on William Cooper's international broadcast, "The Hour of the Time" of 03/31/97, a letter was sent to Reed Hunt, FCC Chairman, which read:

Dear Mr. Hunt:

I notice that you personally introduce your agency as being charged with regulating interstate and international communications consisting of almost all electronic methods. This leads me to ask you, does your agency, the Federal Communications Commission, have any jurisdiction over intrastate radio communications, meaning "within the state"?

If you do have jurisdiction, where may I find the implementing regulation in the Federal Register, and specifically, what section and paragraphs would pertain to radio transmissions that do not cross state borders?

Thank you very much in advance for your answer to me.

The answer was as follows:

March 3, 1997

I've been asked to respond to your letter regarding intrastate radio communications, meaning "within the state." The FCC only regulates interstate and foreign commerce in radio communications. For your reference, I have enclosed a copy of Title 1, Section 2, 47 United States Code 152. Also enclosed are

copies of other sections and titles referred to in Title 1. Respectively, they are Sections 223 through 227, Section 332, Section 301 Title 6, and Sections 201 through 205 of the Communications Act of 1934 as amended.

Intrastate, meaning "within the state," radio communications may be regulated by individual states, and I would recommend contacting your state utility commission for further information.

Signed,

Martha E. Conti
Chief, Public Service Division
Office of Public Affairs

PART FIVE: CONCLUSION

It seems that the FCC clearly understands its authority and jurisdiction but, because of fear, ignorance, and apathy on the part of the population at large, has engaged in unauthorized actions under the "color of law." Such actions are OUTSIDE of the law, and as such, are ILLEGAL. Such actions can and have been vigorously and successfully opposed by those who understand the law and their rights as citizens. When confronted by and informed and unafraid citizenry, the FCC has no choice but to obey the laws under which it was created.

June 28, 1993

Mr. Philip M Kane

Acting Engineer in Charge

Federal Communications Commission

3777 Depot Road, Room 420

Hayward, California 94545

Re: In the Matter of Stephen P. Dunifer; NAL/Acct. No. 315SF0050; SF-93-1355.

Dear Mr. Kane,

The following is our response to the Notice of Apparent Liability, filed against my client, Stephen P. Dunifer, on June 1, 1993.

INTRODUCTION

As set out more fully below, it is Mr. Dunifer's position that the Notice of Apparent Liability (N.A.L.) in this case is unwarranted, procedurally flawed, constitutionally invalid, and calls for a forfeiture amount that is grossly disproportionate to the alleged violations and which exceeds the maximum limits set by statute.

Before proceeding, however, a prefatory comment as to the broader, fundamental problem giving rise to the N.A.L. seems to be in order. The Federal Communications Commission (F.C.C.) policies with regard to micro radio broadcasting have failed to keep pace with the rapid proliferation of technological advances in the field of communication. The F.C.C.'s current regulatory scheme completely prohibits micro radio broadcasts and their listeners from accessing the public airwaves. To enforce this absolute prohibition, the FCC is relying upon regulations, and case law applying the regulations, which were intended solely for application to large-scale, commercial broadcasters, and which were promulgated long before the advent of the technology that makes possible micro radio; indeed, even before the advent of FM broadcasting. The FCC's application of these regulations violates the First Amendment rights of individuals seeking to exercise those rights via methods and mediums that were technologically impossible when the regulations were created.

The cost of owning and operating a radio station has skyrocketed into the hundreds of thousands and even million dollar range, and participation in the broadcast media has thereby become limited only to large corporations. The individual seeking to communicate and listen to others over the airwaves in his or her local community is completely left out of the licensing scheme if he or she cannot afford the expenses entailed in purchasing, obtaining a license for and operating a commercial broadcast station with at least 100 watts of power.1

Micro radio provides a format by which ordinary people can communicate with one another over the airwaves without interfering with the rights of large-scale, FCC licensed commercial stations or their listeners. The FCC , however, has not provided a means by which person wishing to avail themselves of this new technological opportunity can legally do so. The problem is not that micro radio broadcasters are

refusing to comply with FCC licensing procedures. Rather, the fundamental problem is that the FCC has not provided procedures by which micro radio broadcasters can become licensed or authorized. Instead, the FCC is applying sever administrative and criminal sanctions, intended for application to large-scale, commercial operators, to micro radio broadcasters with the goal of completely precluding all such broadcasts. The very notion of assessing a $20,000 forfeiture against Mr. Dunifer, an individual with no prior FCC violations, accused of transmitting two low power, non-commercial broadcasts of approximately 1 hour duration, is ludicrous.

It is the obligation of the FCC to construct and enforce its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low power micro radio, the FCC has failed to comply with its congressional mandate to regulate the airwaves in the public interest, has exceeded the limits of the power conferred upon it by Congress, and is violating the constitutional rights of micro radio broadcasters and their listeners.

ARGUMENT

1. The FCC Has Failed To Comply With Its Own Procedures.

Stephen Dunifer is a non-licensee and a non-applicant who falls within 47 USC §503(b)(5) and 47 CFR §1.80(d). Accordingly, prior to issuing the N.A.L., the FCC was required to send Mr. Dunifer a citation providing notice of the charged violations and to give Mr. Dunifer a reasonable opportunity for a personal interview with FCC officials. (47 USC §503(b)(5); 47 CFR §1.80(d)).2 These violations of the FCC own procedural rules constitute grounds for rescinding the forfeiture order.

2. The Forfeiture Is Based Upon Unsubstantiated Accusations With Insufficient Evidentiary Support.

The FCC has failed to present a prima facie case that Mr. Dunifer is in violation of FCC rules. The facts presented in the N.A.L. do not prove that the allegations contained therein are true, correct, or provide a valid basis for the demand of a forfeiture. Without clear and convincing evidence that Mr. Dunifer operated radio equipment without proper authorization, the FCC may not impose any forfeiture.

The N.A.L. presents insufficient evidence that Mr. Dunifer is the operator of "Free Radio Berkeley." The only indications put forth by the Bureau on the N.A.L. to substantiate this allegation are the partial transcripts of the tapes of the radio broadcast using "Free Radio Berkeley" as an identifier and that Mr. Dunifer's was among five names found on the mail slot at 809B Allston Way at the time the transmissions were alleged to have emanated from that address.

The FCC offers no supporting evidence to show that the broadcasts that were monitored on May 2, 1993, were broadcast from the same location that was monitored on April 25, 1993, and allegedly transmitted from 809B Allston Way. The Commission has not explained the basis for its conclusion that Mr. Dunifer, rather than one or more of the other persons residing at the address, was responsible for the broadcasts. Absent further explanation or discovery, it is impossible for Mr. Dunifer to prepare a proper response to the factual allegations of the N.A.L.

According to paragraph 7 of the N.A.L., an unidentified person refused inspection of 809B Allston Way. From the N.A.L., however, it is impossible to determine if the FCC agents ever specifically requested entry into the residence at any time. If the FCC agents never requested entry, it is impossible for a refusal of inspection to have occurred. Furthermore, Mr. Dunifer does not hold an FCC license that would require

him to permit entrance for inspection absent a search warrant, nor does he know of any individual living at that address who holds such a license.

The FCC concludes the voice broadcasting on April 25 and May 2 as "Free Radio Berkeley" was that of Mr. Dunifer. The FCC, however, has presented no evidence that the voice on their tapes is indeed Mr. Dunifer's, or even that the voice on their April 25 tape is the same as the voice on the tape of May 2. Even assuming, arguendo, that the voice recorded by the agents on one or both occasions is Mr. Dunifer's; this does not prove that Mr. Dunifer was the person broadcasting. Broadcasters often employ prerecorded tapes of programming, prepared off-the-air at some earlier date. The FCC has not brought forth any evidence which demonstrates that the transmissions received by the agent/investigators were "live" broadcasts. The violation alleged in the N.A.L. is the transmission of radio signals without proper authority. Establishing the identity of the individual doing the transmissions is therefore essential to sustaining the forfeiture order against Mr. Dunifer, regardless of whether it was Mr. Dunifer's voice being heard over the air.

Assuming, arguendo, that all the evidence presented, purportedly reliable in nature, is a true collection of facts, that evidence clearly shows that person other than Mr. Dunifer, could just as easily be the source of the "Free Radio Berkeley" transmissions. Several persons reside at 809B Allston Way, any of who may have access to the areas from which the transmissions were alleged to have come. It is clear that the Commission has not demonstrated a prima facie case against Mr. Dunifer. The N.A.L. should therefore be rescinded.

3. The Imposed Forfeiture Amount Exceeds The Statutory Maximum, Does Not Comply With the FCC's Established Standards For Assessing Forfeitures, And Violates The Eighth Amendment.

A. The FCC's "Policy Statement, Standards For Assessing Forfeitures" Does Not Apply To Unlicensed Micro Radio Broadcasts.

The N.A.L. states that Mr. Dunifer's forfeiture amount was determined pursuant to the FCC's Policy Statement, Standards for Assessing Forfeitures, ("Policy Statement") and that according to the standards therein, "the base forfeiture amount for operation without authorization in broadcast services is $20,000." The Policy Statement, however, was never meant to be applied to unlicensed low power micro radio broadcasters. This is readily apparent from an analysis of the legislative history of the Policy Statement, and from the fact that such application in this case results in a base forfeiture amount that violates 47 CFR §1.80(b)(3) and 47 U.S.C. §503(b)3, the statutory authority upon which the Policy Statement is based.

The Policy Statement was adopted by the FCC in July, 1991, and was released August, 1991. In June, 1992, the FCC issued a Memorandum Opinion and Order denying several petitions for reconsideration of the Policy Statement (Memorandum Opinion and Order, 70 RR 2d 1207), wherein the FCC explained the background of the Policy Statement:

"In 1989, Congress amended the Communications Act of 1934 to increase substantially the maximum dollar amounts of forfeitures the Commission could impose under Section 503(b) and under other section of the Act. Previously, Section 503(b) limited the Commission's forfeiture authority to $20,000 for broadcasters and common carriers and to $5,000 for all other services. The amended section 503(b) now provides the Commission with authority to assess forfeitures of up to $25,000 against broadcasters, cable operators, or applicants for such facilities, $100,000 against common carriers or applicants for such facilities, and $10,000 against others....The Commission's forfeiture rule [47 CFR §1.80(b)(1)-(3)] has been amended to reflect the higher forfeiture amounts...On August 1, 1991, the Commission released the

Policy Statement to assist both the Commission and licensees in adjusting to the statutory increases. The Policy Statement provides base forfeiture amounts for a wide range of generic violations...The base forfeiture amount for each type of violation is a percentage of the statutory maximum for the service involved for each violation... The base forfeiture amount may be increased or decreased by applying adjustment criteria as relevant to the facts of any particular case." Memorandum Opinion and Order, 70 RR 2d 1207 [emphasis added].

The Memorandum Opinion and Order specifically states that the Policy Statement was released to assist "the Commission and licensees," and both the Memorandum Opinion and Order and the Policy Statement itself refer numerous times to the effect of the Policy Statement on licensees, but neither make any mention whatsoever of non-licensees. Moreover, the standards set forth in the Policy Statement list thirty-eight categories of violations to which the new standards are to be applied. None of these categories refers to unlicensed radio broadcasts.

The FCC apparently based the determination of Mr. Dunifer's forfeiture amount on the standards set forth in the Policy Statement for violations within the category listed as "Construction and/or Operation Without an Instrument of Authorization for the Service." (Policy Statement, Standards for Assessing Forfeitures, appearing in the Appendix to the Memorandum Opinion and Order, 70 RR at p. 1211). The FCC, then, is apparently interpreting this category to include unlicensed micro radio broadcasting. Such an interpretation of the Policy Statement is, at best, strained.

When the FCC has, in the past, instructed its agents and the public as to the forfeiture amounts to be assessed for unlicensed radio operation, it has stated its intention plainly and clearly. Public Notice 2049, promulgated March 5, 1990, and published at 67 RR 2d 619, stated:

"FCC TO INCREASE FINES FOR UNLICENSED RADIO OPERATIONS"

Unauthorized Radio Operations; Forfeitures.

The Amount of the routine administrative monetary forfeiture for unauthorized operation of a radio station is increased from $750 to $1000. The routing forfeiture amount for first violations of the proscription of unauthorized operation in the aviation, maritime, public safety and special emergency radio services is increased from $1000 to $1,250. These increases are prompted by increasing complaints of interference stemming from illegal pirate operations and other unauthorized activities. Unlicensed Radio Operations (Routine Fines). 67 RR 2d 619 [1990].

"The Commission is increasing the amount of a routine administrative monetary forfeiture for the unauthorized operation of a radio station. The unusual amount for a first time violation will be changed from $750 to $1000....

"The increases were prompted by numerous complaints of interference resulting from "piracy" of the airwaves. FCC licensees, broadcast associations and radio listeners have reported increased illegal operations and a proliferation of abusive activities. Such malicious practices violate FCC's Rules, impede efficient management of the spectrum and frustrate spectrum users." 67 RR 2d 619

The FCC has issued no subsequent Public Notice indicating any further change in FCC policy or guidelines with respect to unlicensed micro radio broadcasting. The Policy Statement that was issued in 1991 cannot, under any reasonable interpretation of its language or history, be held to supersede Public Notice 2049.

The Policy Statement, as discussed above, was issued in response to, and in keeping with, the statutory increases contained in the 1989 amendments to 47 U.S.C. §503(b). Those increases were, as the FCC has noted, "substantial." (Memorandum Opinion and Order, 70 RR 1207). The maximum forfeiture amounts for the various categories of violators were increased, respectively, as follows: Licensed broadcasters, cable operators, or applicants for such facilities, increase of 25%, from $20,000 to $25,000; Common carriers or applicants for such facilities, increase of 500%, from $20,000 to $100,000; All Others, increase of 100%, from $5000 to $10,000. However, the FCC's attempt here to apply the policy statement to unlicensed micro radio broadcasts results in an increase of 2000%, from the $1000 indicated in Public Notice 2049 to the "base forfeiture" of $20,000 alleged in the present N.A.L. Such a result was plainly not contemplated by the authors of the Policy Statement.

If the FCC meant to change its procedures so drastically with regard to so-called "pirate" radio operations, it was required to so indicate in a manner that could be understood as clearly as Public Notice 2049. After such a clear and unambiguous statement of policy as that contained in Public Notice 2049, the Policy Statement of 1991 cannot be said to provide reasonable or adequate notice that the policy was being changed. There is a simple explanation: The FCC obviously did not intend the Policy Statement of supersede Public Notice 2049 with regard to unlicensed radio operation. Under Commission policy and procedures, then, Mr. Dunifer's forfeiture amount should be reduced to $1000, in accordance with FCC policy as expressed in Public Notice 2049.

B. Even If The Policy Statement Standards Do Apply, The FCC Has Improperly Calculated The Base Forfeiture Amount.

Even if the Policy Statement Guidelines of 1991 were intended for application to micro radio broadcasters, the FCC has improperly calculated the base forfeiture amount in this case. As noted, supra, the Policy Statement was promulgated in response to the increases contained in the 1989 amendments to 47 U.S.C. §503(b), and the FCC explicitly relied upon §503(b) and 47 CFR §1.80 as the enabling authority for its promulgation. (Memorandum Opinion and Order, 70 RR 2d 1207). In the cited Memorandum Opinion and Order, the FCC explained that "[t]he base forfeiture amount for each type of violation is a percentage of the statutory maximum for the service involved for each violation." Id. The FCC apparently arrived at the $20,000 base forfeiture in this case by reference to the category of violation labeled, "Construction and/or Operation Without an Instrument of Authorization for the Service." (Policy Statement, Standards for Assessing Forfeitures, appearing in the Appendix to the Memorandum Opinion and Order, 70 RR at p.1211). The table in which the Policy Statement Standards are set out explains that the base forfeiture amount for this category of violations is 80% of the statutory maximum for each of the three categories of violators within the violation category. These violator categories are labeled: "BC/CABLE"; "CC"; AND "Other". For each of these violator categories , the table indicates the statutory maximum, as follows: BC/CABLE: $25,000; CC: $100,000; OTHER: $10,000. These violator categories are obviously based upon the statutory maximums provided in 47 U.S.C. §503(b). Comparing the statute to the violator categories set out in the Policy Statement Standards table, it is clear that "BC/CABLE," "CC," and "OTHER" refer to §503(b)(2), which divides violators into the following three categories:

"(A)...(i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument of authorization issued by the Commission.";

"(B) common carrier[s]";

"(C) any case not covered in subparagraph (A) or (B)"

The Policy Statement sets the base forfeiture amounts for each category of violators within this category of violations as follows: BC/CABLE: $20,000 (80% of the statutory maximum of $25,000); CC: $80,000 (80% of the statutory maximum of $100,00), and; OTHER: $8000 (80% of the statutory maximum of $10,000). In arriving at the $20,000 base forfeiture amount, then, it is clear that the FCC in this case considered Mr. Dunifer to fall within the "BC/CABLE" category of violators. This is plainly erroneous, as Mr. Dunifer does not fall within 47 U.S.C. §503(b)(2)(A), since he is not a "broadcast stations licensee or permittee," nor is he an applicant for license or other authorization. Neither is Mr. Dunifer a common carrier. The only category to which Mr. Dunifer could possibly belong is the "OTHER" category. The statutory maximum for violations in this category is $10,000, and the base forfeiture amount set by the Policy Statement is $8000.4

Under established FCC procedure, however, any forfeiture imposed in this case should be substantially lower than even this amount. "It is not the Commission policy to fix the amount of the forfeiture at the maximum of the statutory limit". (Williams County Broadcasting System, Inc. 34 RR 2d 110, (1974)). Factors to be considered in determining the forfeiture amount included the seriousness of the violation, the circumstances under which they were committed, their duration, and financial condition of the licensee. (Id.; Radio Beaumont, Inc., 13 FCC 2d 965 (1968); 47 U.S.C. §503(b)(2)(D); 47 CFR §10.503(A))..In the Memorandum Opinion and Order, 70 RR 1207, the FCC stated:

"The Policy Statement does not...require the Commission to issue a forfeiture of any particular magnitude -- or any forfeiture at all...Most importantly, proposed forfeiture amounts may be challenged in any proceeding in which they are applied, and the Commission has broad discretion to take any equitable factors into account, as relevant, to insure that licensees are not assessed substantial forfeitures unless warranted." Memorandum Opinion and Order, 70 RR 1207, quoting Order, 6 FCC Rcd 7016 (1991).5

The FCC's established policy of assessing forfeiture amounts far below the statutory maximum to take into account various equitable considerations is codified in the Policy Statement's "Downward Adjustment Criteria." (Policy Statement, Standards for Assessing Forfeitures, appearing in the Appendix to the Memorandum Opinion and Order, 70 RR at p. 1213; see also 47 U.S.C. §503(b)(2)(D); 47 CFR §10.503(A)). Any forfeiture penalty imposed in this case should be determined in accordance with the "Downward Adjustment Criteria" for a minor violation. The charges against Mr. Dunifer allege violations warrants the full 90% reduction specified in the "Downward Adjustment Criteria," resulting in an adjusted forfeiture amount $800.

Additionally, the "Downward Adjustment Criteria" instruct the FCC to take into account "ability to pay." Id. While the forfeiture amount imposed in this case might be appropriate for a commercial station with the resources requisite to licensed operation, this same forfeiture is clearly not appropriate for a private individual accused of engaging in a purely non-commercial operation of very small proportions, and who has no economic resources whatsoever with which to pay either a forfeiture penalty of any amount or the attorney's fees to contest a forfeiture.6 To impose the proposed fine on Mr. Dunifer would cause an extreme financial hardship on him and his family, and this factor, which the FCC is statutorily required to consider, clearly was not considered in arriving at this outrageously high forfeiture amount.

That the FCC improperly applied their own regulations in this case is not surprising. These laws, regulations, and procedures were simply never meant for application to micro radio. The numerous

procedural errors in this case dramatically illustrate the need for changes in the regulatory framework to accommodate micro radio.

It is arbitrary and capricious for the FCC to levy this fine with no opportunity for a hearing, no opportunity to meet with the FCC, no explanation of how one might legally continue broadcasting, and without proper consideration of the statutorily mandated factors for determining the amount of the fine. The alleged two one-hour micro radio transmissions at 1/10 th or less of the power emitted by the smallest licensed commercial broadcast, without commercial profit or motive, causing no interference whatsoever, by a private individual interested only in exercising his constitutional rights cannot logically warrant the maximum penalty assessed her by the FCC.

4. The Complete And Absolute Prohibition of Micro Radio Broadcasts Resulting From The FCC's Improper Implementation Of Their Statutory Authority Violates the First Amendment.

The foremost purpose of requiring radio broadcasters to obtain licenses from the FCC is to prevent interference from other radio broadcasts. The FCC maintains that due to the finite size of the radio spectrum, or "spectrum scarcity", only a limited number of radio frequencies are capable of broadcasting at the same time in the same space without undue interference from neighboring signals. The FCC has argued that this so-called spectrum scarcity somehow justifies the application of a lower level of First Amendment protection for persons utilizing the air waves as compared to other forums.

The FCC itself, however, has found the concept of "spectrum scarcity" to be an improper basis for applying a different constitutional standard to broadcast media than to other forms of media. (In re Syracuse Peace Council, 2 FCC Rcd 5043 (1987)). As the Commission pointed out in Syracuse Peace Council, while it may be true that there are only a finite number of broadcast frequencies, this is no less true of the computers, delivery trucks, ink and newsprint which are used in the production of printed speech:

"...[W]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity -- be it spectrum or numerical -- is irrelevant. As Judge Bork said in Trac v. FCC [801 F.2d at 508], 'Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.'" 2 FCC Rcd 5043,5055.

"[The] First Amendment was adopted to protect the people not from journalists, but from the government. It gives people the right to receive ideas that are unfettered by government interference. We fail to see how this right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press." (Id. at 5057.)

It is clear that the FCC must ensure that their regulations provide micro radio broadcasters the same constitutional protections that have been established for more traditional means of expression. The FCC is constitutionally required to develop a regulatory procedure appropriate to this media rather than simply creating and enforcing a complete and absolute prohibition of micro radio. This current policy constitutes a prior restraint of free speech in violation of the First Amendment.

The people of the United States have a constitutionally protected interest in free speech by means of radio and other forms of broadcast media. Metro Broadcasting, Inc., v. FCC, 111 L.Ed. 2d 445, 110 S.Ct. 2997 (1990) stands for the premise that the rights of the listeners and viewers are paramount to the interests of the broadcasters. Given the Supreme Court's recognition of the supremacy of these public rights, the FCC's assertion of an, at best, remote, and as yet undocumented possibility that micro radio may interfere with the broadcasts of licensed, commercial stations is simply inadequate to overcome the right of radio listeners to receive the broad variety of viewpoints, perspectives, and programming formats which micro radio offers. The advent of micro radio not only gives radio listeners a low cost alternative to the perspectives presented on mainstream, commercial radio, but it furthermore allows members of the public the opportunity to participate and present their own personal and local community interests in a direct and effective way, making the public airwaves truly public for the first time.

5. The Forfeiture Imposed In This Case Violates Due Process And Equal Protection.

As a preliminary matter, it should be noted that Mr. Dunifer faces a huge forfeiture penalty and possible criminal sanctions if he is found to be in violation of 47 U.S.C. §301. Mr. Dunifer should have the right to appointed counsel, for both the civil and criminal enforcement of the Act. Federal and state courts provide counsel for indigent person who cannot afford to retain competent legal representation. In the extremely specialized area of telecommunications law, even if competent counsel could be found, their fees place their services well beyond the reach of the average person. It is a violation of Due Process and of the Fifth and Sixth Amendment rights of effective assistance of counsel for the FCC to levy a $20,000 forfeiture against Mr. Dunifer without the appointment of a competent attorney. This is especially true, given that the law provides criminal sanctions for the very violations of which Mr. Dunifer stands accused. 47 U.S.C. §501.

The FCC administrative review provisions did not provide an opportunity for Mr. Dunifer to meet with the FCC or to present his case to the full Commission prior to the institution of this excessive forfeiture. It is a violation of Due Process to subject Mr. Dunifer to a $20,000 forfeiture without a hearing or an opportunity to remedy his alleged violation of Section 301 of the Communications Act in a manner that conforms to FCC regulations.

The FCC's complete and absolute prohibition of micro radio violates Equal Protection by discriminating against minorities and the poor and by denying equal opportunity for licensing and broadcasting to anyone who is financially unable to operate a full power (100 watts or more) commercial radio station.

Finally, it is a further violation of Due Process for the Commission to selectively initiate forfeiture proceedings against Mr. Dunifer because of the political content and nature of the alleged broadcasts. The FCC is targeting alleged micro radio broadcasters because they are perceived as a challenge to the FCC's regulatory authority, rather than in response to any real threat of actual interference with licensed transmissions.

6. Prohibition Of Intrastate Micro Radio Broadcasts Exceeds The Federal Government's Regulatory Authority Under The Commerce Clause.

The Communications Act of 1934 was originally enacted to maintain the control of the United States over all the channels of interstate and foreign radio transmissions. This power is arguably in accord with Art. I Sect. 2 of the U.S. constitution, which permits Congress to regulate interstate commerce. While the language of 47 U.S.C. §301(d) states that the FCC has the authority to regulate even purely intrastate

transmissions, the statute must be interpreted and applied in a manner consistent with the constitutional limitations of Congress's power to regulate interstate commerce. Thus, FCC regulation of intrastate transmissions which interfere with, and perhaps those which are capable of interfering with, interstate commerce may be constitutional. However, where, as here, there is absolutely no showing that the low wattage signal allegedly transmitted has in any way interfered, or could possibly interfere, with interstate signals, the FCC is venturing beyond its regulatory authority. An application or interpretation of section 301 which permits such excessive regulation is unconstitutional under the commerce clause.

7. The FCC's Complete And Absolute Prohibition Of Micro Radio Broadcasting Violates Micro Radio Broadcasters' And Their Listeners' Right To Communicate Under The U.N. Declaration Of Human Rights, The International Covenant On Civil And Political Rights, and The American Convention On Human Rights.

Article 19 of the U.N. Declaration of Human Rights and the parallel Article 19 of the International Covenant On Civil And Political Rights state:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."

These international treaties promote recognition of the right to expression and information as a universal human right guaranteed by international law. The treaties expressly forbid undue restrictions on freedom of expression, and require the government to establish, and substantiate if necessary, its justification for restrictions placed upon its citizens' right of free expression. (U.N. Human Rights Committee, Communication No. 11/1977, paragraph 17). Similarly, Article 13(2) of the American Convention on Human Rights requires that any governmental "restrictions imposed...on freedom of expression depend upon a showing that the restrictions are required by a compelling state interest," and that if there exist "various options to achieve this objective, that which least restricts the right protected must be selected." (Advisory Opinion of the Inter-American Court, 13 November 1985, 8 EHRR 165).

As signatory to these international treaties, the United States government has a responsibility to conform its regulation of the electronic broadcast media to the treaties' requirements. The complete and absolute prohibition of low power micro radio broadcasting, wherein no aspiring broadcaster can obtain a license or FCC permission under any circumstances whatsoever, is a blatant violation of this most fundamental of internationally recognized human rights.

CONCLUSION

The N.A.L. issued to Mr. Dunifer is defective in numerous regards. The FCC has failed to comply with its own procedures. The forfeiture imposed is grossly disproportionate, given Mr. Dunifer's income and assets and the nature of the alleged offenses. The forfeiture is based upon unsubstantiated accusations with insufficient evidentiary support. The FCC policies upon which the forfeiture is based constitute prior restraint prohibited by the First Amendment, and are violative of Due Process and Equal Protection in that they discriminate against the poor and minorities, and do not provide for adequate representation of counsel or opportunity for a hearing or administrative review. The policies also exceed the FCC's constitutional authority, and are inconsistent with the FCC's established guidelines and function. The Notice of Apparent Liability should be rescinded.

Sincerely,

Louis N. Hiken

Attorney for Stephen Dunifer

1It is important to note that the 100 watt minimum is a regulatory creation of the FCC. Nothing in the Communications Act (47 U.S.C. 151 et. seq.), on its face, prohibits micro radio broadcasting. To the extent that the FCC's regulations have effectively banned micro radio, the regulations are in conflict with the statutory framework and must be set aside. 2While these sections do not apply to persons "engaging in activities for which a license...is required" (47 USC 503(5), 47 CFR 1.80(d)(3)), Mr. Dunifer clearly does not fall within this exception. The activity in which it is alleged he was engaged, broadcasting with approximately 10 watts of power, is one for which there simply is no procedure by which one can be licensed. This is the crux of the problem with the current FCC regulation dealing with small power FM broadcasting. Had Mr. Dunifer sought an FCC license to engage in the alleged activity, the FCC would not have licensed him unless he was capable of broadcasting with at least 100 watts of power. Since there is absolutely no licensing procedure for micro radio broadcasters, the FCC cannot argue that Mr. Dunifer's falls within this exception to the citation and "opportunity for meeting" requirements of 503(b)(5). 3The base forfeiture amount determined by the FCC in this case is $20,000. 47 U.S.C. §503(b) and 47 CFR §1.80 set a statutory maximum of $10,000 for violations by non-licensees who are not common carriers. 4The "base forfeiture" amount set by the FCC in this case, then, not only contravenes the Policy Statement Standards, but violates 47 U.S.C. §503(b)(2) and 47 CFR §1.80 as well. Nor should the FCC be permitted to belatedly assert that the N.A.L. amount was based upon two violations rather than one. While the N.A.L. (paragraph 12) which discusses the forfeiture amount that Mr. Dunifer's base forfeiture amount was determined by consulting the Policy Statement table entry for a single violation for "operation without authorization in broadcast services." (N.A.L., paragraph 12, at p.2) Had the FCC correctly consulted the "OTHER" violator category, even for two offenses, the base forfeiture amount would have only been $16,000. The only reasonable interpretation of paragraph 12 of the N.A.L. is that the FCC based Mr. Dunifer's forfeiture amount on a single violation for the "BC/CABLE" category, and then adjusted the amount upward because there were multiple incidents alleged and these were considered "willful." 5The specific reference here to licensees provides still further evidence that the FCC never intended the Policy Statement Standards to be applied to micro radio broadcasts. 6See statement of Stephen Dunifer, attached hereto as Appendix "A"

December 2, 1993

Chief, Enforcement Division

Field Operations Bureau

Federal Communications Commission

Room 744

1919 M Street, N.W.

Washington, D.C. 20554

Ref.: In the Matter of Stephen P. Dunifer; NAL/Acct. No. 315SF0050; SF-93-1355.

Dear Madam or Sir,

We enclose our response to the Forfeiture Order issued to our client, Stephen P. Dunifer, released by the FCC on November 8, 1993.

There appears to be a conflict in the regulations which govern review of a Forfeiture Order. The only option for obtaining review mention by the Order itself is a Petition for Reconsideration.1 Yet the Order goes on to cite both Section 1.106 of the Commission's Rules and 47 C.F.R. §1.115.

Section 1.106 of the Commission's rules parallels 47 C.F.R. §1.106, which governs the submission of Petitions for Reconsideration. 47 C.F.R. §1.115, however, governs the submission of Applications for Review of actions taken pursuant to delegated authority.2 These options represent substantively different course of action. The most significant distinction regards which government agency shall consider the appeal: An Application for Review must be acted upon by the Commission.3 A Petition for Reconsideration, however, may be acted upon by either the Commission, or by the designated authority.4

The plain language of 47 C.F.R. §1.80(i) states that: "After issuance of a forfeiture order, any request [that the Commission or its designee remit or reduce the forfeiture] shall be submitted as a petition for reconsideration pursuant to §1.106." However, the equally plain language of 47 C.F.R. §1.115(a) states that: "Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."5 Consistent with the latter is 47 C.F.R. §1.104(b), which provides that "Any person desiring Commission consideration of a final action taken pursuant to delegated authority shall file either a petition for reconsideration or an application for review (but not both) ..." The issuance of the Forfeiture Order in this case was clearly pursuant to delegated authority.6

In light of the foregoing, this response is hereby submitted as an Application for Review of action taken pursuant to delegated authority, as provided by 47 C.F.R. §1.115. In accordance with 47 C.F.R. §1.115(f)(1), we have submitted this Application for Review to: The Secretary, Federal Communications Commission, Washington, DC 20554. In compliance with the Forfeiture Order, a copy of this Application for Review has also been sent to the Field Operations Bureau.7 We point out, however, that 47 C.F.R. §0.311(a)(2) specifically requires the Chief, Field Operations Bureau, to refer this matter to the Commission en banc for disposition.

Sincerely,

Louis N. Hiken,

Attorney at Law

Louis N. Hiken

Attorney at Law

One Sansome Street, Suite 900

San Francisco, California 94104

Tel: (415) 705-6460 Fax: (415) 705-6444

December 2, 1993

The Secretary

Federal Communications Commission

Washington, DC 20554

Ref.: In the Matter of Stephen P. Dunifer; NAL/Acct. No. 315SF0050; SF-93-1355.

Dear Madam or Sir,

We enclose our response to the Forfeiture Order issued to our client, Stephen P. Dunifer, released by the FCC on November 8, 1993.

There appears to be a conflict in the regulations which govern review of a Forfeiture Order. The only option for obtaining review mention by the Order itself is a Petition for Reconsideration.8 Yet the Order goes on to cite both Section 1.106 of the Commission's Rules and 47 C.F.R. §1.115.

Section 1.106 of the Commission's rules parallels 47 C.F.R. §1.106, which governs the submission of Petitions for Reconsideration. 47 C.F.R. §1.115, however, governs the submission of Applications for Review of actions taken pursuant to delegated authority.9 These options represent substantively different course of action. The most significant distinction regards which government agency shall consider the appeal: An Application for Review must be acted upon by the Commission.10 A Petition for Reconsideration, however, may be acted upon by either the Commission, or by the designated authority.11

The plain language of 47 C.F.R. §1.80(i) states that: "After issuance of a forfeiture order, any request [that the Commission or its designee remit or reduce the forfeiture] shall be submitted as a petition for reconsideration pursuant to §1.106." However, the equally plain language of 47 C.F.R. §1.115(a) states that: "Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."12 Consistent with the latter is 47 C.F.R. §1.104(b), which provides that "Any person desiring Commission consideration of a final action taken pursuant to

delegated authority shall file either a petition for reconsideration or an application for review (but not both) ..." The issuance of the Forfeiture Order in this case was clearly pursuant to delegated authority.13

In light of the foregoing, this response is hereby submitted as an Application for Review of action taken pursuant to delegated authority, as provided by 47 C.F.R. §1.115. In accordance with 47 C.F.R. §1.115(f)(1), we have submitted this Application for Review to: The Secretary, Federal Communications Commission, Washington, DC 20554. In compliance with the Forfeiture Order, a copy of this Application for Review has also been sent to the Field Operations Bureau.14 We point out, however, that 47 C.F.R. §0.311(a)(2) specifically requires the Chief, Field Operations Bureau, to refer this matter to the Commission en banc for disposition.

Please contact us at the above address, phone or fax if we can proved further information or if you have any questions regarding this submission.

Sincerely,

Louis N. Hiken,

Attorney for Stephen P. Dunifer LOUIS N. HIKEN, SBN 45337

Attorney at Law

One Sansome Street, Suite 900

San Francisco, California 94104

Telephone: (415) 705-6460 Fax: (415) 705-6444

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN THE MATTER OF)

)

STEPHEN PAUL DUNIFER) NAL/ACCT. NO.: 315SF0050

BERKELEY, CALIFORNIA) SF-93-1355

)

APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DELEGATED AUTHORITY

TABLE OF CONTENTS

This is an application for review of action taken pursuant to delegated authority, filed in accordance with 47 C.F.R. §1.115. Applicant Stephen P. Dunifer seeks Commission review of the Forfeiture Order dated November 8, 1993, issued by the Field Operations Bureau, assessing forfeiture liability in the amount of $20,000.

Applicant Dunifer is accused of transmitting two low power (less than 10 watts) FM broadcasts without an FCC license. The alleged broadcasts caused no interference with licensed, navigational or any other signal. The outrageously excessive forfeiture amount was determined by improper application of the FCC's Policy Statement, Standards for Assessing Forfeitures, 8 FCC Rcd. 6215 (1993). 16

At issue in this case are several critically important constitutional, legal and policy issues that must be resolved by the Commission. Current FCC regulations and policies enforcing those regulations have resulted in a complete and absolute prohibition of micro radio broadcasting. While Applicant Dunifer stands accused of failing to obtain an FCC license prior to engaging in such broadcasts, in fact no such license is available under the current regulatory framework as enforced by the Commission. The problem is not that micro radio broadcasters are refusing to comply with FCC licensing procedures. Rather, the fundament problem is that the FCC has not provided procedures by which micro radio broadcasters can become licensed or authorized. Instead, the FCC is applying sever administrative and criminal sanctions, intended for application to large-scale, commercial operators, to micro radio broadcasters with the goal of completely precluding all such broadcasts. The very notion of assessing a $20,000 forfeiture against Applicant Dunifer, and individual with no prior FCC violations, accused of transmitting two low power, non-commercial broadcasts of approximately 1 hour duration, is ludicrous.

The current ban of all micro radio broadcasting violates the First Amendment. In addition, the Forfeiture Order in this case is procedurally flawed and calls for a forfeiture amount that is grossly disproportionate to the alleged violations and which exceeds the maximum limits set by 47 U.S.C. 503(b)(2)(C).

Applicant Dunifer seeks rescission of the Forfeiture Order and FCC authorization to engage in unlicensed 10 watt or lower FM micro radio broadcasts that create no interference with licensed or navigational broadcasts. APPLICATION FOR REVIEW OF ACTION TAKE PURSUANT TO DELEGATED AUTHORITY.

In accordance with 47 C.F.R. §1.115, Stephen P. Dunifer hereby requests review by the Commission of the following action taken pursuant to delegated authority: the issuance of the Forfeiture Order assessing liability for a monetary forfeiture in the amount of $20,000, released November 8, 1993 by the Field Operations Bureau, and signed by Philip M. Kane, Engineer in Charge.

QUESTIONS PRESENTED

In accordance with 47 C.F.R. §1.115(b)(1), the following questions are presented for review:

1. Whether the Commission's rules, as presently formulated and applied, constitute a complete and absolute prohibition of micro radio... Whether the Commission's rules, as presently formulated and applied, constitute a complete and absolute prohibition of micro radio. The Forfeiture Order asserts that there is no such prohibition.17

2. Whether the Commission's complete and absolute prohibition of micro radio violates the First Amendment... Whether the Commission's complete and absolute prohibition of micro radio violates the First Amendment.; As noted above, the Forfeiture Order asserts that there is no complete prohibition of micro radio. Beyond this denial, the Order refused to consider or address Applicant Dunifer's First Amendment arguments.18

3. Whether the Commission intended for its "Policy Statement" to be applied to micro radio broadcasters... Whether the Commission intended for its "Policy Statement" to be applied to micro radio broadcasters.; The Forfeiture Order found that the "Policy Statement" was intended for application to micro radio broadcasters.19

4. Whether, if the Commission did intend that its "Policy Statement" be applied to micro radio broadcasters, the "Policy Statement" was properly applied in this case... Whether, if the Commission did intend that its "Policy Statement" be applied to micro radio broadcasters, the "Policy Statement" was properly applied in this case.; The Forfeiture Order applied the "Policy Statement" to this case differently than the manner in which it was applied by the NAL. The determined forfeiture amount, however, is the same.20

a) Is the dramatic increase in the proportion of the "upward adjustment" in the NAL to that in the Forfeiture Order permissible?

b) Is the Forfeiture Order's complete deletion of the "downward adjustment" contained in the NAL permissible?

5. Whether a sufficient factual basis exists for the Forfeiture Order issued to Applicant Dunifer...Whether a sufficient factual basis exists for the Forfeiture Order issued to Applicant Dunifer.; The Forfeiture Order found sufficient factual basis.21

6. Whether the exception in 47 U.S.C. §503(b)(5) for persons "engaging in activities for which a license, permit certificate, or other authorization is required" applies to micro radio broadcasts...Whether the exception in 47 U.S.; The Forfeiture Order found that the exception does apply to micro radio broadcasts.22

7. Whether the Commission's complete prohibition of micro radio exceeds the Federal Government's authority under the Commerce Clause... Whether the Commission's complete prohibition of micro radio exceeds the Federal Government's authority under the Commerce Clause.; As noted above, The Forfeiture Order asserts that there is not complete prohibition of micro radio. The Order further found that the Commission's regulations as applied to micro radio broadcasts do not exceed the Federal Government's authority under the Commerce Clause.23

8. Whether the Commission's complete prohibition of micro radio violates international law... Whether the Commission's complete prohibition of micro radio violates international law.; As noted above, The Forfeiture Order asserts that there is no complete prohibition of micro radio. Beyond this denial the Order refused to consider or address Applicant Dunifer's international law arguments.24

9. Whether the Forfeiture Order in this case violates Due Process and Equal Protection...Whether the Forfeiture Order in this case violates Due Process and Equal Protection.; The Forfeiture Order found no violations of either Equal Protection or Due Process.25

FACTORS WARRANTING COMMISSION CONSIDERATION OF THE QUESTIONS PRESENTED

Each of the following factors, enunciated in 47 C.F.R. §1.115(2), warrant Commission consideration of the questions presented: The action taken pursuant to delegated authority is in conflict with the Commission's own rules, the regulations codifying those rules, established Commission policy, and the United States Constitution; the action involves several questions of law or policy that have not previously been resolved by the Commission; the action involves application of a precedent of policy which should be overturned or reversed; the delegated authority made an erroneous finding as to an important fact, and; there have been several prejudicial procedural errors.

RESPECTS IN WHICH THE ACTION TAKEN BY THE DESIGNATED AUTHORITY SHOULD BE CHANGED

The action taken by the designated authority should be changed in the following respects: The Forfeiture Order should be rescinded by the Commission, or, in the alternative, the amount should be reduced to an amount consistent with a correct application of FCC procedures and commensurate with the fact that Applicant Dunifer is an indigent individual with no prior FCC violations accused of responsiblity for two non-commercial low power broadcasts that created no actual interference.

FORM OF RELIEF SOUGHT

Applicant Dunifer seeks the following relief from the Commission: The Forfeiture Order should be rescinded, and Applicant Dunifer should be granted authorizations to conduct, with no FCC license, 10 watt or lower FM micro radio broadcasts that create no interference with licensed or navigational broadcasts.

ARGUMENT

I. The Commission's rules, as presently formulated and applied, constitute a complete and absolute prohibition of micro radio...The Commission's rules, as presently formulated and applied, constitute a complete and absolute prohibition of micro radio.;

The FCC's current regulatory scheme completely prohibits micro radio broadcasters and their listeners from accessing the public airwaves. The Forfeiture Order goes to great lengths to argue that its regulations do not in fact completely prohibit micro radio.26

A careful analysis of the Forfeiture Order's listed plethora of opportunities for micro radio broadcasting within the FCC current regulatory framework reveals that there is, in fact, a complete prohibition of micro radio broadcasting. The suggestions offered by the Commission bread down to the following:

1) Petition the Commission to change the current regulatory framework;

2) Apply for a license to operate a 10 watt station above 92 MHz;

3) Broadcast as permitted under 47 C.F.R. 15.239(b);

4) Apply for a license to operate a Non-Commercial Educational FM Broadcast station under 47 C.F.R. §§73.501 et. seq.

Number 2 above is, in effect, the same as petitioning for a rule change, since the minimum power requirements for acquiring a license to operate above 92 MHz are 100 watts or a six kilometer reference distance.27 Number 3 above is meaningless, since the field strength permitted by §15.239(b) is so low as to preclude any micro radio broadcast capable of being received beyond 1 or 2 blocks from the transmitter. The Commission's suggestion that a 10 watt broadcast could comply with the field strength limitations imposed by §15.239(b) is misleading, at best.

Number 4 above is similarly misleading. 47 C.F.R. §73.511(a) explicitly provides that "No new Non-Commercial Educational station will be authorized with less power than minimum power requirements for commercial Class A facilities," that is, less than 100 watts. While it may be true that no one is precluded under the current regulatory framework from applying for a license as the Commission suggests in number 4 above, it is also true that no such application can possibly be approved by the Commission under its current regulations.

The deceptively long list provided by the Commission, then, boils down to "ask us to change our rules." Given that there are absolutely no standards or limitations governing the Commission's discretion in considering an application for a rule change or waiver, this "option" is meaningless.28 It is well established in First Amendment jurisprudence that regulations which vest absolute or near absolute discretion in an agency to approve or deny exceptions to a generally applicable rule are unconstitutional.

The Forfeiture Order seems to suggest that Applicant Dunifer has somehow failed to exhaust his administrative remedies because he did not petition for a rule change under the A.P.A. If the FCC's rules, as currently formulated and applied, completely prohibit micro radio, then the rules violate the First Amendment. Citizens have no responsibility whatsoever to petition the FCC to change unconstitutional regulations -- rather, the FCC is required to structure its regulatory framework so as to comply with the First Amendment.29

Despite the Forfeiture Order's protestations to the contrary, the FCC is indeed obligated to modify its rules when the rules violate the Constitution; no to "accommodate Mr. Dunifer's agenda,"30 but rather to accommodate the First Amendment rights of Applicant Dunifer and all other similarly situated. The FCC must construct and enforce its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low power micro radio, the Commission has failed to comply with its congressional mandate to regulate the airwaves in the public interest, has exceeded the limits of the power conferred upon it by Congress, and is violating the constitutional rights of micro radio broadcasters and their listeners.

II. The Commission's Complete And Absolute Prohibition Of Micro Radio Violates The First Amendment The Commission's Complete And Absolute Prohibition Of Micro Radio Violates The First Amendment.;

It is well established that when First Amendment free speech rights in a traditional or designated public forum are impacted by government regulation, the government must establish that the contested regulations are the least restrictive means available to further a compelling state interest. The absolute and complete ban of all micro radio broadcasting effected by the current regulatory scheme is obviously not the least restrictive means available to the government to satisfy the state interest in regulating the airwaves. The government need look no further than to our immediate neighbors to the North for examples of much less restrictive means of addressing micro radio.

Since 1978, Canada has licensed low power FM radio broadcasters in remote communities with a simple three-page application form.31 The Canadian Radio-Television and Telecommunications Commission (CRTC) has recently modified its rules to permit such broadcasts even in urban areas, where frequency space is much more scarce.32 Indeed, in a report on low power television, the FCC itself attached as an appendix a copy of Canadian recommendations regarding the regulation of low power FM broadcasting. These recommendations included the suggestion that application forms and required information be simple enough to allow for easy application by potential low power licensees.33 Review of this FCC report and the attachments thereto reveals that the licensing and administrative requirements necessary to oversee operation of micro radio stations is not overly burdensome. Indeed, these licensing forms reveal that micro radio can be easily regulated so as to prevent any risk of signal interference.

Further evidence of the less restrictive alternatives available to the Commission in this regard is available in the FCC's own history. Until relatively recently, Non-Commercial Educational FM broadcast stations could be licensed by the FCC to broadcast with up to 10 watts of power.

The absolute ban on micro radio is a creation of the Commission that can be easily eliminated without detrimentally impacting the government's interest in regulating the airwaves. The ban therefore violates the First Amendment and must be rescinded.

III. The FCC's "Policy Statement, Standards For Assessing Forfeitures" Does Not Apply To Unlicensed Micro Radio Broadcasts...The F."s "Policy Statement, Standards For Assessing Forfeitures" Does Not Apply To Unlicensed Micro Radio Broadcasts.2;

Applicant Dunifer presented argument in this regard in his Reply to the N.A.L., which is already before the Commission.34

In response to this argument, the Forfeiture Order states:

"The reply goes on at great length about the Commission not being specific about "micro radio broadcasters" and how the pre-1991 Public Notice had set the penalty for unlicensed operation at $1000 and that any change was not valid because the Commission had not given notice to the public about the change in forfeiture penalty level.

There is no category of operation as "micro power broadcasting." Unauthorized operation -- operation without blanket or specific authorization -- remains unauthorized operation in spite of its advocates' and practitioners' attempts to give it a cachet of respectably.

It is clear from the proceedings concerning the 1991 and 1993 Policy Statements that it is within the Commission's discretion to raise the "announced" level of penalty assessable for unlicensed operation from $1000 to $10,000, as long as this change is within the statutory maximum. The "notice" was by issuance of the Policy Statements. The 1991 Policy Statement did in fact supersede the 1990 Public Notice 2049 with regard to penalties for unlicensed operation."35

The Forfeiture Order's response misses the point. The argument set out in the Reply is that the "Policy Statement" was not intended by the Commission to be applied to micro radio broadcasts, such that a single infraction would result in a forfeiture of $20,00036, rather than the $1000 amount set by the 1990 Public Notice. Even setting aside for the moment the disingenuous manner in which the Forfeiture Order seeks to gloss over the obvious and significant mistake made in the N.A.L.'s determination of the "base forfeiture amount,"37 the problem the Commission must address here remains: Even if the "revised" method of determining the base forfeiture amount is used, to hold that the "Policy Statement" was meant by the Commission to supersede its policy announced in Public Notice 2049 requires the conclusion that the intention was to level an 800% increase in the fine for this offense. This is vastly disproportionate to the other increases wrought by the "Policy Statement." The fact that the Commission has the discretion to levy forfeitures up to the statutory maximum is irrelevant in this regard. The very existence of the "Policy Statement" evinces the Commission's intent to assess forfeitures below the statutory maximum. The argument presented in the Reply is that the intent of the Commission was not to increase the forfeiture amount for these offenses by 800% or more, regardless of the Commission's power to do so. If the intent of the Commission was not to enact such a disproportionate increase, then the "Policy Statement" is not properly applied to these offenses. The power of the Commission to charge up to the statutory maximum is irrelevant to ascertaining the Commission's intent in enacting the "Policy Statement."

Similarly off-mark are the Forfeiture Order's comments regarding the fact that "there is no category of operation as 'micro power broadcasting.'" In the Reply to the N.A.L., Applicant Dunifer pointed out that there was no mention whatsoever of unlicensed broadcasts in the "Policy Statement" itself or in subsequent FCC Orders in which the "Policy Statement" is discussed.38 The point is that this lack of specific reference, given the repeated references to licensed broadcasts and licensees in these documents, and the specific reference in Public Notice 2049 to unlicensed radio operation, supports the conclusion that the Commission did not intend the "Policy Statement" to apply to micro radio broadcasts, nor to supersede Public Notice 2049 in this regard.

Finally, if the Commission were to hold that the "Policy Statement" was intended to apply to micro radio broadcasts as asserted by the Forfeiture Order, the substantial difference between the degree of specificity of the language in Public Notice 2049 and that in the "Policy Statement" renders the latter insufficient to notify the public of this significant change. Without reasonably sufficient notice, imposition of the $20,000 forfeiture in this case violates Due Process.39

IV. Even If The Policy Statement Standards Are Applicable to Micro Radio, The FCC Has Improperly Calculated The Forfeiture Amount...Even If The Policy Statement Standards Are Applicable to Micro Radio, The F. Has Improperly Calculated The Forfeiture Amount.;

Applicant Dunifer presented argument in this regard in his Reply to the N.A.L., which is already before the Commission.40

In the Reply, Applicant Dunifer explained that even if the "Policy Statement" was intended for application to micro radio, the FCC had improperly calculated the base forfeiture amount. The Reply pointed out that it is clear from reading the N.A.L. that the manner in which the Commission determined the $20,000 forfeiture amount was be reference to the category labeled "BC/CABLE."41 The Reply pointed out that this was clearly erroneous, as Applicant Dunifer can not conceivably fall within the ambit of 47 U.S.C. §503(b)(2)(A).42 The Reply also pointed out that the base forfeiture amount assessed by the N.A.L. violated 47 U.S.C. §503(b)(2) and 47 C.F.R. §1.80, since the statutory limit set by those sections for violators in the "Other" category is $10,000.43 Finally, the Reply predicted that in response to this argument, the Commission would attempt to belatedly assert that the $20,000 forfeiture amount was based upon two violation rather than one.44 As the Reply pointed out,

"While the N.A.L. does discuss two separate incidents, it is clear from reading the section of the N.A.L. (paragraph 12) which discusses the forfeiture amount that Mr. Dunifer's base forfeiture amount was determined by consulting the Policy Statement table entry for a single violation for "operation without authorization in broadcast services." (N.A.L., paragraph 12, at p.2) Had the FCC correctly consulted the "OTHER" violator category, even for two offenses, the base forfeiture amount would have only been $16,000. The only reasonable interpretation of paragraph 12 of the N.A.L. is that the FCC based Mr. Dunifer's forfeiture amount on a single violation for the "BC/Cable" category, and then adjusted the amount upward because there were multiple incidents alleged and these were considered 'willful.'"45

In perhaps the most egregious manipulation of FCC procedure by the Commission staff to date in this case, the Forfeiture Order attempts to evade the N.A.L.'s obvious error in precisely the fashion predicted by Applicant Dunifer's Reply. At page four, the Forfeiture Order tacitly admits that the N.A.L. improperly calculated the base forfeiture amount, stating that, "The base amount for operation without authorization in services other than Broadcast, Cable or Common Carrier is $8,000."46 The Forfeiture Order's less-than candid mea culpa continues: "No matter how a "base amount" is determined, the Commission staff has the discretion to adjust it upwards and downwards within [the] statutory maximum upon articlable reason."47

The Forfeiture Order, then, admits, without really so stating, that the N.A.L. erred in calculating the base forfeiture amount, but then argues that the error really doesn't matter, since the Commission has the authority to set the forfeiture at whatever limit it chooses, within the statutory limit. Any fair reading of the N.A.L. cannot avoid the conclusion that the Commission staff based the forfeiture amount on one offense, and determined the amount by reference to the BC/CABLE category. The staff then clearly adjusted the amount upward 100% due to the operation being "intentional," and then downward 100% "because Stephen P. Dunifer is an individual and has no history of past violation."48 The Forfeiture Order, in a blatantly result oriented attempt to gloss over the error in the N.A.L. is fully $12,000 too high, completely discards the N.A.L.'s upward and downward mitigation analysis49, and implicitly attempts to change the basis of the forfeiture from one offense to two.

Even if the "Policy Statement" is to be applied in this case, the Commission should not permit this manipulation of the procedure by which the forfeiture amount is determined. The Commission staff already

determined that the appropriate forfeiture amount in this case, after consideration of the upward and downward adjustment criteria, was equal to the Policy Statement's "base amount." Now, after being forced to acknowledge the N.A.L.'s calculation error, the Commission staff claims that the forfeiture amount should be 150% above the base amount. Nothing about the offense or the mitigation criteria has changed in the interim between issuance of the N.A.L. and the Forfeiture Order. There is absolutely no basis for this increase, other than the Commission staff's desire to hit Applicant Dunifer with the most sever fine within their power.50 The amount assessed by the Forfeiture Order, however, goes beyond even this limitation. Since the forfeiture here was clearly based upon only one offense51, the forfeiture amount assessed violates even 47 U.S.C. §503(b)(2)(C).

The obvious difficulties encountered by the Commission staff in attempting to apply the "Policy Statement" to the activities alleged in this case underscore the fundamental problem here: the forfeiture amounts and analysis detailed in the "Policy Statement" were simply never intended for application to micro radio. If any forfeiture at all is to be levied in this case, it cannot exceed the $1000 amount set out in Public Notice 2049.

V. The Forfeiture Is Based Upon Unsubstantiated Accusations With Insufficient Evidentiary Support... The Forfeiture Is Based Upon Unsubstantiated Accusations With Insufficient Evidentiary Support.;

Applicant Dunifer presented argument in this regard in his Reply to the N.A.L., which is already before the Commission.52 While the Forfeiture Order purports to respond to this argument, it fails to address the fact that even assuming, arguendo, that the voice recorded by the agents on one or both occasions is Applicant Dunifer's, this is insufficient to prove that Applicant Dunifer was the person broadcasting. Broadcasters often employ prerecorded tapes of programming, prepared off-the-air at some earlier date. The FCC has not brought forth any evidence which demonstrates that the transmissions received by the agent/investigators were "live" broadcasts. The violation alleged in the N.A.L. is the transmission of radio signals is therefore essential to sustaining the forfeiture order against Applicant Dunifer, regardless of whether it was Applicant Dunifer's voice being heard over the air.

VI. The Exception In 47 U.S.C. §503(B)(5) For Persons "Engaging In Activities For Which A License, Permit Certificate, Or Other Authorization Is Required" Does Not Apply To Micro Radio Broadcasts... The Exception In 47 U.S.;

The FCC's failure to comply with the citation, notice, and opportunity for meeting provisions of 47 U.S.C. §503(b)(5) and 47 C.F.R. §1.80(d) renders the N.A.L. and subsequent Forfeiture Order in this case invalid. Applicant Dunifer presented argument in this regard in his Reply to the N.A.L., which is already before the Commission.53

VII. (a) The Commission's Complete Prohibition Of Micro Radio Exceeds The Federal Government's Authority Under the Commerce Clause...(a) The Commission's Complete Prohibition Of Micro Radio Exceeds The Federal Government's Authority Under the Commerce Clause.;

(b) The Commission's complete prohibition of micro radio Violates Micro Radio Broadcasters' And Their Listeners' Right To Communicate Under The U.N. Declaration Of Human Rights, The International Covenant On Civil And Political Rights, And The American Convention On Human Rights

(c) The Forfeiture Order In This Case Violates Due Process and Equal Protection.

Applicant Dunifer presented argument on each of these points in his Reply to the N.A.L., which is already before the Commission.54 Counsel believes that these issues have been adequately briefed by Applicant Dunifer in these arguments which are already part of the record. However, these arguments were largely ignored by the Commission's staff in the Forfeiture Order. Counsel would ask that the Commission provide a meaningful analysis and response to the significant questions raised by these arguments.

CONCLUSION

The Forfeiture Order issued to Applicant Dunifer is defective in numerous regards. The FCC has failed to comply with its own procedures. The forfeiture imposed is grossly disproportionate, given Applicant Dunifer's income and assets and the nature of the alleged offenses. The forfeiture is based upon unsubstantiated accusations with insufficient evidentiary support. More importantly, the FCC policies upon which the forfeiture is based constitute prior restraint prohibited by the First Amendment, and violate Due Process and Equal Protection in that they discriminate against the poor and minorities, and do not provide for adequate representation of counsel or opportunity for a hearing or administrative review. The policies also exceed the FCC's constitutional authority, and are inconsistent with the FCC's established guidelines and function. The Forfeiture Order should be rescinded, and Applicant Dunifer should be granted Commission authorization to engage in unlicensed 10 watt or lower FM micro radio broadcasts that create no interference with licensed or navigational broadcasts.

Respectfully Submitted,

Louis N. Hiken,

Attorney for Stephen P. Dunifer

1Forfeiture Order at p.10. 2Perhaps the Forfeiture Order's citation of both of these sections constitutes notification that either of these options is available to Respondent Dunifer. If so, we would respectfully suggest that future notifications to Respondents regarding their rights of appeal be made in a less obtuse fashion. 347 C.F.R. §1.115. The section also provides that an Application for Review is a prerequisite to judicial review of any action taken pursuant to delegated authority. 47 C.F.R. §1.115(k) 447 C.F.R. 1.106(a)(1). It is unclear from the regulation's language who decides, and by what criteria the decision is made, which of these government agents is to act upon a Petition for Reconsideration. 547 C.F.R. §1.115(a) (emphasis added). 647 C.F.R. 0.311(d)(1). 7Forfeiture Order at p.10. 8Forfeiture Order at p.10. 9Perhaps the Forfeiture Order's citation of both of these sections constitutes notification that either of these options is available to Respondent Dunifer. If so, we would respectfully suggest that future notifications to Respondents regarding their rights of appeal be made in a less obtuse fashion. 1047 C.F.R. §1.115. The section also provides that an Application for Review is a prerequisite to judicial review of any action taken pursuant to delegated authority. 47 C.F.R. §1.115(k) 1147 C.F.R. 1.106(a)(1). It is unclear from the regulation's language who decides, and by what criteria the decision is made, which of these government agents is to act upon a Petition for Reconsideration. 1247 C.F.R. §1.115(a) (emphasis added). 1347 C.F.R. 0.311(d)(1). 14Forfeiture Order at p.10. 15This summary is provided in accordance with 47 C.F.R. 1.49(c) 16Hereinafter referred to as "Policy Statement." While the 1993 "Policy Statement" amends the 1991 version, none of the changes are relevant to this case. 17Forfeiture Order at pp. 3,6. 18Forfeiture Order at p.6. The Forfeiture Order states that, "The issue of First Amendment protections connected with the content of radio transmissions is not germane to this proceeding...indeed this stage of the proceedings is not the forum to make such arguments." 19Forfeiture Order, pp. 4.6. 20Compare N.A.L. at p.2, paragraph 12, to Forfeiture Order, pp. 4-6. 21Forfeiture Order, p. 4. 22Forfeiture Order, p.3. 23Forfeiture Order at p.8.

24Forfeiture Order at p.9. The Forfeiture Order stated that, "This stage of the instant proceedings is not the proper forum for arguing alleged conflicts amongst provisions of international treaty obligations and national regulatory statutes and regulations." 25Forfeiture Order at pp. 7-8. 26See Forfeiture Order, pp.3,6. 2747 C.F.R. §§73.211 et. seq., 73.511. 28To the extent that any standards or procedures do exist pertaining to the Commission's suggestion that we request a rule change or waiver, or that persons should apply for a license despite the fact that they know they do not meet the regulatory requirements, we would request at this time that the Commission provide such standards or procedures to us, to guide us in attempting to comply with the Commission's suggestions. 29According to the Forfeiture Order's argument, no court could ever hold a law unconstitutional because one can always petition Congress to change it. 30Forfeiture Order, p.3. 31Sample form attached hereto and marked as Exhibit A. 32Public Notice CRTC 1993-95, CRTC (1993), attached hereto and marked as Exhibit B. 33Report and Recommendations in the Low Power Television Inquiry, Appendix 1 (BC Docket No. 78-253). 34Reply, pp. 4-7, paragraph number 3(a). 35Forfeiture Order, p.5. 36See the N.A.L. at p.2, paragraph 12. 37See argument at pp. 14-17, below. 38Reply at pp. 5-6. 39As to the Forfeiture Order's accusation that Counsel is guilty of "attempting to give micro power broadcast a cachet or respectability" by so characterizing the activity, we would refer the Commission to the recent Order filed by the Ninth Circuit Court of Appeals in Dougan v. FCC (93-55433, DC No. CV-91-06431-RG, Order filed November 23, 1993), in which the Court itself refers to "micro power broadcasts." Rather than being a cachet, micro radio constitutes a legitimate vehicle for democratic communication in this country; one which the FCC should be eager to embrace. 40Reply, pp. 7-10, paragraph number 3(b). 41Reply, pp. 7-8. 42Ibid. 43Ibid. 44Id., at note4. 45Ibid. 46Forfeiture Order at p.4. Compare to the N.A.L. at p.2, paragraph 12. 47Forfeiture Order at p.4. 48N.A.L., at p.2, paragraph 12. 49The Forfeiture Order, after determining a base amount of $8000, adjusts this amount upward by $12,000(150%), and maintains that no downward adjustment whatsoever is warranted. 50The Forfeiture Order's upward and downward mitigation analysis, in addition to being clearly result-oriented, raised new factual allegations never before presented to Counsel for Applicant, and for which absolutely no factual basis exists in the record before the Commission. (See Forfeiture Order at p.5, third full paragraph.) Furthermore, the Forfeiture Order's mitigation analysis improperly weighs what it terms a "major confrontation to the regulatory authority of the Commission." The Forfeiture Order's assertion that confronting the regulatory authority of the Commission is enough alone to render an offense "egregious" and incapable of being considered "minor" has absolutely no support whatsoever in either the "Policy Statement" nor its legislative history. The obviously affronted tone of this argument suggests that the Commission staff who authored the Forfeiture Order have taken personal offense at Applicant Dunifer's activities, and are manipulating these forfeiture procedures to wage an improper vendetta against him. 51See the N.A.L. at p.2, paragraph 12. 52Reply, pp. 3-4. 53Reply, pp. 1-2, note 2. 54Those arguments appear, respectively, at Reply, p.12, paragraph number 6; pp. 12-13, paragraph number 7; pp. 11-12, paragraph number 5.

LOUIS N. HIKEN, SBN 45337
Attorney at Law
One Sansome Street, Suite 900
San Francisco, California 94104
Tel: (415)705-6460 Fax: (415)705-6444

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff

v.

Stephen Paul Dunifer,

Defendant

No. C 94-3542 CW

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant answers plaintiff's complaint for declaratory and injunctive relief as follows:

1. Paragraph 1 contains legal conclusions to which no answer is required.

2. Defendant admits the allegations of paragraph 2 of the complaint.

3. Defendant admits to the extent that defendant resides in Berkeley, California, in the Northern District of California. In all other respects, defendant neither admits nor denies the allegations of paragraph 3.

4. The allegation of paragraph 4 is jurisdictional, to which no answer is required.

5. Paragraph 5 contains a legal conclusion to which no answer is required.

6. Defendant admits that the FCC is an independent federal regulatory agency created by Congress to regulate interstate and foreign radio communications pursuant to the Communications Act, and that one of its responsibilities is to monitor and enforce national and international radio regulations. Defendant denies that it is the responsibility of the FCC to insure that no person

transmits radio signals within United States territorial boundaries without an FCC license.

7. Defendant denies that 47 U.S.C. §301 prohibits all transmission of energy or communications or signals by radio within the United States without an FCC license.

8. Defendant admits the allegations of paragraph 8 of the complaint.

9. Defendant admits the allegations of paragraph 9 of the complaint, expect to the extent that said paragraph suggests that current FCC regulations provide any mechanism whatsoever for the licensing of low-power (less than 100 watts) radio stations operating on the band 88 to 108 MHz that are not in compliance with Part 15 of 47 CFR.

10. To the extent that paragraph 10 contains legal conclusions to which no answer is required, defendant proffers no answer. Defendant denies that any and all "radio transmitters" must be made available upon demand for inspection by the FCC.

11. Defendant admits that 47 U.S.C. §401(a) provides the district courts with power to enjoin some violations of the Communications Act. In all other respects, defendant denies the allegations of paragraph 11.

12. Defendant lacks information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. Defendant lacks information sufficient to form a belief as to the truth of the allegations of paragraph 13.

14. Defendant lacks information sufficient to form a belief as to the truth of the allegations of paragraph 14.

15. Defendant lacks information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Defendant lacks information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. Defendant admits that Zears confronted defendant at the "Nuclear Free Rally." In all other respects, defendant lacks information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. Defendant lacks sufficient information, regarding activities conducted by FCC Engineers or the content of FCC records and/or files, to form a belief as to the truth of the allegations of paragraph 18.

19. To the extent that the allegations of paragraph 19 suggest that Hayward, California is North of Berkeley, California, defendant denies said allegations. In all other respects, defendant lacks sufficient information, regarding activities conducted by FCC Engineers or the content of FCC records and/or files, to form a relief as to the truth of the allegations of paragraph 19.

20. No answer is required to the allegations of paragraph 20.

21. Defendant denies the allegations of paragraph 21.

22. Defendant denies the allegations of paragraph 22.

Defendant requests that judgment be entered in his favor and against plaintiff, that the relief sought in the complaint for declaratory and injunctive relief be denied, that he be granted his reasonable costs and attorney's fees incurred in defending this action, and that he be granted such other and such further relief as the court deems just and proper under the circumstances.

DATED: _____, at San Francisco, California.

Respectfully submitted,

LOUIS N. HIKEN, SBN 45337
Attorney for Defendant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff,

v.

Stephen Paul Dunifer

Defendant No. C 94-3542 CW

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS ANSWER TO PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ARTICLE 19 24

AMERICAN CONVENTION OF HUMAN RIGHTS, ARTICLE 13(2) 24

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff,

v.

Stephen Paul Dunifer,

Defendant No. C 94-3542 CW

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS ANSWER TO PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

Micro radio1 represents a technological advancement comparable to the invention of the printing press. For the first time in history, the technology exists whereby an individual without corporate or government backing, or independent wealth can, for less than one hundred dollars, obtain equipment by which she can broadcast to her neighborhood, making possible truly community oriented, originated, and controlled radio. Micro radio is the leaflet of the 1990's permitting citizens to communicate with their neighbors by a method heretofore reserved for huge radio stations promoting commercial interests from distant locations.

The central issue in this case is the FCC's prohibition of micro radio broadcasting. Despite plaintiff's protestations to the contrary2, the FCC is indeed enforcing a complete and absolute ban of all micro radio broadcasts--that is, all original FM broadcasts of less than 100 watts capable of reaching a listening audience. Federal law prohibits anyone from broadcasting without a license3, and the FCC refuses to grant anyone a license unless they are capable of broadcasting with a minimum of 100 watts.4 While 47 C.F.R. part 15 permits certain unlicensed "broadcasts,"5 this exception to the 100 watt minimum applies only if the field strength of the broadcast is less than 250 micro volts/meter at three meters.6 As plaintiff is well aware, a broadcast in compliance with the parameters of 47 C.F.R. part 15 could not be received by anyone farther than a house or two away from the source. Plaintiff's denial that their rules completely prohibit micro radio is deceptive, and begs the question before this court.

Plaintiff has stated to this court that, "The same public interest considerations that require licensing of other radio devices apply equally to low power stations: namely to prevent the 'cacophony of sounds' and chaos on the limited radio spectrum."7 Assuming, arguendo, that this is true, plaintiff has never proffered an explanation as to why, if "the same public interest considerations" apply, the government has refused to establish any procedure by which defendant or anyone else can engage in licensed, regulated micro radio broadcasting. Plaintiff's regulations apply to broadcasters in rural areas with virtually no spectrum competition just as they do to areas with a concentrated number of stations.

Plaintiff has argued to this court that the "logical extension" of defendant's agreement is that "anyone proclaiming that he will not cause interference can set up a radio station without FCC oversight."8 Defendant, however, does not challenge the FCC's authority to regulate micro power broadcasts. Rather, defendant herein challenges the constitutionality of the FCC's complete ban of all FM broadcasts of less than 100 watts.

The FCC is statutorily required to regulate the airwaves in the public interest, and to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §303(g). 47 U.S.C. §157(a) provides that, "It shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. §324 provides that, "In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired." Micro radio provides a perfect opportunity for the FCC to fulfill these statutory mandates. Instead, the FCC is enforcing an irrational ban of micro radio. The government assets repeatedly its interest in "regulating the airwaves," but nowhere explains to this Court how this ban serves the public interest, or why it has chosen to prohibit micro radio altogether.

The constitutionality of the FCC's prohibition of micro radio is a matter of first impression. The cases cited by plaintiff9 regarding the district court authority to enjoin unlicensed broadcasts involved full power broadcasts; activities for which the enjoined parties could have been licensed, had they gone through the appropriate procedures. The ban of micro radio at issue here is distinguishable from cases in which the FCC has denied a broadcast license to an individual applicant. Here, a whole class of broadcasters is denied even the opportunity to apply for a license, based upon the FCC's unreasonable decision to impose the 100 watt minimum. Defendant herein could never be licensed to conduct micro radio broadcasts under the current regulatory framework, because of the 100 watt minimum.

The fact that this case presents a matter of first impression does not leave the court without applicable standards. Several Supreme Court cases, including four cases cited but not discussed by plaintiff, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), FCC v. League Of Women Voters of California 468 U.S. 364 (1984), National Broadcasting Co. v. United States 319 U.S. 190 (1943), and Federal Communications Commission v. National Citizens Committee for Broadcasting et al. 436 U.S. 775 (1978), provide the constitutional and statutory standards with which the government's regulation of the airwaves must comply.

These cases make clear that while the FCC is granted wide latitude in its regulation of the airwaves, its discretion is far from absolute. The Commission's regulations governing the licensing of broadcasters must serve the public interest, convenience, or necessity. This mandate includes the requirement that the airwaves must be regulated in a manner which protects and furthers the public's First Amendment rights to have access to a broad and diverse range of opinions and perspectives, and to receive a balanced presentation of views on diverse matters of public concern.

Furthermore, while the doctrine of "spectrum scarcity" results in a modified First Amendment analysis for the broadcast media, even this modified analysis has permitted government restrictions of broadcasters' First Amendment rights only when such restrictions were narrowly tailored to further a substantial government interest.

Plaintiffs have chosen to ignore the central issue in these proceedings (the constitutionality of their prohibition of micro radio), and in so doing might characterize the question before this court as a simple matter of deciding whether or not the FCC has the authority to regulate the airwaves, and whether or not defendant has broadcast without an FCC license. Defendant does not herein challenge the FCC's authority to regulate the airwaves, nor does defendant deny that he has broadcast without an FCC license. Defendant does not have an FCC license to engage in micro radio broadcasting because the FCC simply does not provide any mechanism or procedure whatsoever by which such a license can possibly be obtained, by defendant or by anyone lese. This prohibition of micro radio broadcasting is unreasonable, does not serve the public interest, and violates the First Amendment. If the regulations as currently enforced by the FCC violate the agency's statutory mandate and are unconstitutional, defendant's violation thereof cannot form the basis for granting the declaratory and injunctive relief sought by plaintiff.

I. The FCC Should Be Required To Complete Its Pending Administrative Review Of These Issues Before Seeking Relief From This Court.

On June 1, 1993, the FCC issued a Notice of Apparent Liability (N.A.L.) against defendant Stephen Dunifer, in which the FCC sought to impose a forfeiture of $20,000 against defendant for allegedly engaging in two unlicensed low power FM broadcasts. On June 28, 1993 defendant filed his Response to the N.A.L., and, on December 2, 1993, pursuant to 47 C.F.R. §1.115, filed with the FCC and Application for Review of Action Taken Pursuant To Delegated Authority. That Application set forth the constitutional and procedural arguments as to why the FCC's N.A.L. in defendant's case, as well as the ban of all micro radio broadcasting, is illegal.10

More than a year and a half has passed since defendant first file his request for relief challenging the FCC's ban of micro radio. The FCC has not responded to that request. The FCC should be required to complete its own internal review of these issues before seeking this Court's intervention.

Plaintiff cites United States v. McIntire, 365 F.Supp 618 and 370 F.Supp 1301 (D.N.J. 1974) in this regard, but McIntire is distinguishable from the present case. In McIntire, the defendant lost his FCC license, and then engaged in full power broadcasts from a boat offshore. There is no currently-pending administrative review action, as there is here, initiated by the FCC and raising the precise issues as those before the federal court.

It is ironic that the FCC claims that defendant herein has failed to pursue discretionary administrative relief, such as a rule-change or waiver request, and yet has itself refused to respond to defendant's administrative appeal which has been before it for more than eighteen months.

There are factual and legal questions to which to the FCC itself should be required to respond; this will provide guidance useful to the Court in its evaluation of the pending issues. This Court should exercise its discretion to retain jurisdiction over this case, and require the FCC to complete its internal administrative review of defendant's claim.

II. The Prohibition Of Micro Radio Violates The FCC's Statutory Mandate To Regulate The Airwaves In The Public Interest, To Encourage The Larger And More Effective Use Of Radio In The Public Interest, To Encourage The Provision Of New Technologies And Services To The Public, And To Promote Diversification Of The Mass Media As A Whole.

The authority for the FCC's regulatory power is derived from the Communications Act. 47 U.S.C. §303(r) provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall ...[make] such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]." 47 U.S.C. §154(i) provides that, "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

The Communications Act also provides that, "...[t]he Commission from time to time, as public convenience, interest, or necessity requires, shall...[s]tudy new usees for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §303(g).

The Supreme Court analyzed these statutory basis of the FCC's regulating authority in National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (hereinafter "NBC"). In NBC, the Court upheld challenged FCC regulations prohibiting multiple ownership of AM radio stations. The Court, after reviewing the statutory framework, found that, "[the] avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States," and that "[t]he criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity.'" 319 U.S. at 215, 217. The Court acknowledged that because "[t]he facilities of radio are not large enough to accommodate all who wish to use them," Congress had committed to the FCC the task of allocating the available spectrum space, but then stated:

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the public interest, convenience, or necessity, a criterion which is a concrete as the complicated factors for judgment in such a field of delegated authority permit. This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services.

The public interest to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.' [citing 47 U.S.C. §303(g)]. The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." NBC, supra, 319 U.S. at 216, internal quotations and citations omitted.

The Supreme Court again reviewed the FCC's regulatory authority, and the "public interest, convenience, and necessity" standard, in Federal Communications Commission v. National Citizens Committee For Broadcasting et al. 436 U.S. 775 (1978) (hereinafter NCC). In NCC, the Court upheld FCC regulations prospectively barring the initial licensing or the transfer of newspaper-broadcast combinations where there is common ownership of a radio or television broadcast station and a daily newspaper located in the same community. The Court discussed a length the relationship between the doctrine of spectrum scarcity, the First Amendment, and the FCC's obligation to regulate in the public interest:

"As we have discussed on several occasions [citing NBC and Red Lion], the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the public interest. And the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. It was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the

maximum benefit to the public interest would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.

Our past decisions have recognized, moreover that the First Amendment...values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. The public interest standard necessarily invites reference to First Amendment principles and, in particular, to the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources." NCC, supra, 436 U.S. at 795, internal quotations and citations omitted.

47 U.S.C. 307(a) directs that "the Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license provided for by this Act." In making initial licensing decisions between competing applicants, the FCC has long given primary significance to diversification of control of the media of mass communications. Federal Communications Commission v. National Citizens Committee For Broadcasting et al. 436 U.S. 775,794 (1978). Yet under the FCC's current policy, no one is even permitted to apply for, much less be granted a license to engage in micro radio broadcasting. Micro radio represents a significant opportunity to further the important public interest and First Amendment goal of diversification of control of the mass media. Instead of fulfilling their statutory and constitutional mandate to regulate the airwaves in the public interest, and in a manner designed to achieve "the widest possible dissemination of information from diverse and antagonistic sources,"11 the FCC is relegating the airwaves to the exclusive control of mega watt stations serving corporate and commercial interests.

III. The FCC Regulations Prohibiting Micro Radio Violate The First Amendment.

A. The Spectrum Scarcity Doctrine Neither Requires Nor Justifies The Regulations.

The government seems to be asserting that the doctrine of spectrum scarcity provides to FCC regulations absolute immunity from First Amendment challenge. This interpretation of the Supreme Court's First Amendment analysis in this area is correct.

As the cases cited in the above section make clear, the FCC's regulations must meet the "public interest, convenience and necessity" standard. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power," and the "public interest to be served under the Communications Act is...the interest of the listening public in the larger and more effective use of radio." NBC, supra, 319 U.S. at 216. "[The] public interest standard necessarily invites reference to First Amendment principles, and, in particular, to the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources." NCC, supra, 436 U.S. 775,795. See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94,122 (1973); Associated Press v. United States, 326 U.S. 1,20 (1945).

While the decisions cited by the FCC indicate that the broadcast spectrum is subject to a different First Amendment standard than other media, the Supreme Court in these cases repeatedly emphasized its concern with broadening and diversifying the sources of information available to the public. None of these decisions permitted the type of across-the-board prohibition of a new means of community-based communication that is at issue in the present case.

In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Supreme Court upheld the FCC's "fairness doctrine" against a First Amendment challenge brought by broadcasters.12 The Red Lion

decision enunciated the classic formulation of the "scarcity doctrine," establishing that the finite number of frequencies available in the broadcast spectrum mandated a modified First Amendment analysis for determining the constitutionality of government regulations of the broadcast medium. The Court, however, repeatedly emphasized that the paramount First Amendment concern underlying their decision was the right of the public to have access to perspectives, opinions, and ideas as wide and varied as possible on matters of public concern. The public's First Amendment rights were held by the Court to outweigh those of broadcasters forced by the fairness doctrine to air views and opinions at odds with their own:

"This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in [forbidding] FCC interference with the right of free speech by means of radio communication. Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee...It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 389-390, internal quotations and citations omitted.

The public has a First Amendment right to receive the broad variety of viewpoints, perspectives, and programming formats which micro radio offers. The advent of micro radio not only gives radio listeners a non-governmental, non-commercial alternative to the perspectives presented on mainstream commercial or "public" radio; this new technology allows individual citizens to broadcast themselves, and present their own personal and local community interests directly and effectively, making the public airwaves truly public for the first time. Unlike commercially controlled interests involving huge financial investments, micro radio broadcasters will not shy away from controversial or wide-ranging topics of discussion to please the largest possible audience.

The government's assertion that the doctrine of spectrum scarcity requires or permits their ban of micro radio is unsupported by the case law to which they cite the Court. In FCC v. League Of Women Voters of California 468 U.S. 364 (1984), the Supreme Court struck down a federal statute13 prohibiting public broadcasters from endorsing political candidates or editorializing. The Court plainly stated that the restrictions placed upon the broadcast media under the spectrum scarcity rationale are permitted because the overall impact is to further and protect the public's First Amendment rights of access to broad and diverse perspectives. Furthermore, the Court pointed out, never had restrictions based on spectrum scarcity been permitted absent a showing that they were narrowly tailored to further a substantial government interest:

"...[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on divers matters of public concern...But, as our cases attest, these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balance coverage of public issues." FCC v. League Of Women Voters of California, supra, 468 U.S. at 380-381, emphasis added, citations omitted.

Applying this standard, the Court held that the statute before them violated the First Amendment because not all of the interests asserted by the government were deemed "substantial," and the statute was not narrowly tailored to further those interest that were so deemed. 468 U.S. at 398-402.

B. The Regulations As Applied In This Case Are Content Based Restrictions Of Speech, And Are Not Narrowly Tailored To Further A Substantial Government Interest.

The FCC's decision to seek injunctive relief against defendant in this case is based upon the nature and the content of his broadcasts, and statements he has made in other print and broadcast media. Defendant herein is one of many micro radio broadcasters nationwide.14 Yet the government has sought to enjoin only defendant, the most prominent and outspoken critic of the FCC and their regulatory authority.15

The government asserts that unless enjoined by this Court, defendant will cause irreparable injury to the public. Yet after months of intensive monitoring of Free Radio Berkeley (hereinafter "FRB"), the FCC can point to only two instances of "interference." In both instances, the only interference to which to government refers was reported by FCC agents themselves, and in at least one of these instances, only in the immediate proximity of the FRB transmitter.16

In its October 14, 1994 response to a FOIA request filed by the newsletter of the National Lawyers Guild, the FCC admitted that it had received no complaints regarding interference from the FRB signal.17 Rather, as the FCC response makes clear, the FCC received a handful of complaints regarding the fact that defendant was broadcasting at all. Some of these complainants apparently never even heard an FRB broadcast, but had seen flyers or otherwise heard about FRB's challenge to the FCC regulations. Defendant's public criticism of the FCC, rather than actual interference with licensed broadcasts, is the reason he has been targeted by the FCC in this federal court action.

Under the holding of FCC v. League Of Women Voters of California, supra, and the cases cited therein, content-based restrictions of speech, even in the broadcast media, are permissible only if narrowly tailored to further a substantial government interest. 468 U.S. at 380-381.

The FCC asserts that the government interest served by the prohibition of micro radio is the prevention of "chaos" and a "cacophony of sound."18 The prohibition of micro radio broadcasting effected by the current regulatory scheme, however, is far from narrowly tailored to achieve this goal; there are clearly less restrictive means of regulation available which would not unduly burden the government. All of the government's asserted concerns can be addressed by the regulation of micro radio broadcasting; the creation of a similar system of licensing broadcasters, assigning frequencies and monitoring the technical specifications of broadcasting equipment as that which exists for full power broadcasts.

The government need look no further than to Canada for examples of much less restrictive means of addressing micro radio. Since 1978, Canada has licensed low power FM radio broadcasters in remote communities with a simple three page application form.19 The Canadian Radio-Television and Telecommunications Commission (CRTC) has recently modified it rules to permit such broadcasts even in urban areas, where frequency space is much more scarce.20 Indeed, in a report on low power television, the FCC itself attached as an appendix a copy of Canadian recommendations regarding the regulation of low power FM broadcasting. These recommendations included the suggestion that application forms and required information be simple enough to allow for easy application by potential low power licensees.21 Review of this FCC report and the attachments thereto reveals that the licensing and administrative requirements necessary to oversee operation of micro radio stations is not overly burdensome. Indeed, these

licensing forms reveal that micro radio can be easily regulated so as to prevent any risk of signal interference.

Further evidence of the less restrictive alternatives available to the Commission in this regard is available in the FCC's own history. Until relatively recently, Non-Commercial Educational FM broadcast stations could be licensed by the FCC to broadcast with up to 10 watts of power.22

Finally, the FCC's own regulations pertaining to FM translators provide an example of how the FCC could regulate micro radio. The FCC permits translators to rebroadcast, on frequencies within the normal commercial and noncommercial FM radio band, signals that originate from huge radio stations located far from the community in which the translator is placed.23

Current FCC regulations24 permit low power transmitters to operate with less than 100 watts if they are transmitting a signal originating from a full power radio station, but prohibit local broadcasters from using a transmitter with identical wattage to broadcast any program originating in the listener's community. The FCC has promulgated translator regulations to address issues such as frequency assignment25, interference26, licensing requirements27, power limitations28, antenna location29, transmitters and equipment30, frequency tolerance31, frequency monitors and measurements32, and time of operation.33 Many of these regulations could be just as easily applied, almost verbatim, to micro radio broadcasts originating in the communities to which they are being broadcast.

IV. Plaintiff's Suggestion That Defendant Has Not Pursued "Available" Means Of Obtaining FCC Authorization To Engage In Micro Radio Broadcasting Is Fatuous.

Plaintiff suggests that defendant has not availed himself of possible avenues by which FCC permission might be sought and obtained.34 This suggestion is disingenuous. Defendant, in his Application for Review currently pending before the FCC, responded to a similar contention raised by the FCC in those proceedings.35 In their argument to this Court, the government has dropped some the FCC's more transparent "suggestions" as to how defendant could supposedly have sought FCC approval for micro radio broadcasting. Still remaining, however, are the FCC's assertions that, 1) defendant could legally broadcast without a license under the provisions of 47 C.F.R. §15.239(b);36 and 2) defendant could have "asked the agency to establish rules that would permit him to operate...[by presenting] a rulemaking petition pursuant to the [A.P.A.], or a request for waiver."37 The first "option" is meaningless, since the field strength permitted by §15.239(b) is so low as to preclude any micro radio broadcast capable of being received beyond approximately one blcok away from the transmitter. The activity for which defendant is seeking FCC permission consists of communicating with his neighbors and his community via the new technology which for the first time in history makes low power FM broadcasting economically feasible for individual citizens. The government's suggestion that a micro radio broadcast could comply with the field strength limitations imposed by §15.239(b) is misleading, at best.

The second option suggested by the government, petitioning the Commission for a rule change or waiver, again begs the question before this Court. Defendant is challenging the FCC's regulatory framework, as currently formulated and enforced, because they violate the FCC's statutory mandate and the First Amendment. Plaintiffs seek to avoid addressing the constitutional infirmity of the current rules by suggesting that defendant should have asked the FCC to change or waive their rules. Citizens have no responsibility whatsoever to petition the FCC to change unconstitutional regulations--rather, the FCC is required to structure its regulatory framework so as to comply with the relevant statutory standards and the First Amendment.38

Similarly evasive is the government's suggestion that there is no complete ban of micro radio because defendant could initiate a formal rule-change procedure under the A.P.A. Neither defendant, nor any other individual citizen of modest means, could conceivably afford the monetary expense involved in initiating and participating in such a process; nor could defendant hope to meaningfully compete with the commercial interests and their lobbyists that would inevitably become involved in and eventually control such a process.39 The historical significance of micro radio lies precisely in the fact that defendant to initiate a formal rule-making procedure under the A.P.A. would serve the same function as the 100 watt minimum: it would place the ability to engage in this new form of communication out of the reach of all but the very wealthy.

V. The Prohibition Of Intrastate Micro Radio Broadcasts Exceeds The Federal Government's Regulatory Authority Under the Commerce Clause.

The Communications Act of 1934 was originally enacted to maintain the control of the United States over all the channels of interstate and foreign radio transmissions. This power is arguably in accord with Art. I Sect. 2 of the U.S. constitution, which permits Congress to regulate interstate commerce. While the language of 47 U.S.C. §301(d) states that the FCC has the authority to regulate even purely intrastate transmissions, the statute must be interpreted and applied in a manner consistent with the constitutional limitations of Congress's power to regulate interstate commerce. Thus, FCC regulation of intrastate transmissions which interfere with, interstate commerce may be constitutional. However, where, as here, there is absolutely no showing that any of the FRB transmissions has in any way interfered, or could possibly interfere, with interstate signals, the FCC is venturing beyond its regulatory authority. An application or interpretation of 47 U.S.C. §301 which permits such excessive regulation is unconstitutional under the commerce clause.

VI. The FCC's Prohibition Of Micro Radio Broadcasting Violates Micro Radio Broadcasters' And Their Listeners' Right To Communicate Under the U.N. Declaration Of Human Rights, The International Covenant On Civil And Political Rights, and The American Convention On Human Rights.

More than at any time in the world's history, communication amongst the world's people plays a pivotal role. Events in places such as Bhopal, Chiapas, or Chernobyl can and do profoundly impact societies and communities halfway around the world. As a result, each nation's communications policies take on an importance unparalleled in many other fields of law. Given the international scope of events that the world's peoples must learn about, it is more important than ever for the Court to incorporate into its evaluation of the issue pending before it those treaties and international principles that shed light on this subject. These treaties are made part of the law of our nation through Article VI of the U.S. Constitution, and are highly relevant to consideration of the issues argued herein.

Article 19 of the U.N. Declaration Of Human Rights and the parallel Article 19 of the International Covenant On Civil And Political Rights state:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."

These international treaties promote recognition of the right to expression and information as a universal human right guaranteed by international law. The treaties expressly forbid undue restraints on freedom of expression, and require the government to establish, and substantiate if necessary, its justification for

restrictions placed upon its citizens' right of free expression.40 Similarly, Article 13(2) of the American Convention on Human Rights requires that any governmental "restrictions imposed...on freedom of expression depend upon a showing that the restrictions are required by a compelling state interest," and that if there exist "various options to achieve this objective, that which least restricts the right protected must be selected."41

As signatory to these international treaties, the United States government has a responsiblity to conform its regulation of the electronic broadcast media to the treaties' requirements. The FCC's ban of micro radio ban of micro radio broadcasting is a blatant violation of this most fundamental of internationally recognized human rights.

Conclusion

For the reasons stated above, defendant respectfully requests that the Court deny the relief sought by defendants, and declare the FCC prohibition of micro radio unconstitutional and in violation of the FCC's statutory mandate to regulate the airwaves in the public interest.

DATED: _____, at San Francisco, California.

Respectfully submitted,

LOUIS N. HIKEN, SBN 45337

Attorney for Defendant

1The term "Micro radio" refers to low power FM broadcasting, ranging from 1 watt or less to about 30 watts, as contrasted with the thousands, or even hundreds of thousands, of watts generated by most commercial and public broadcasting radio stations. 2See PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at p.11. 347 U.S.C. 301 (1994). 447 C.F.R. §73.211(a) provides that FM stations must operate with a minimum effective radiated power (ERP) of 0.1 kW, or 100 watts. 47 C.F.R. §73.056 provides that noncommercial educational FM stations may broadcast with less than 100 watts, but in 1985 the FCC promulgated 47 C.F.R. 73.511(a), which provides that "No new noncommercial educational station will be authorized with less power than minimum power requirements for commercial Class A facilities [100 watts]." 5See 47 C.F.R. §15.1 et. seq. 647 C.F.R. §15.239(a). 7IBID. 8PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION at p.6. 9United States v. Medina, 718 F.Supp 928 (S.D.Fla. 1989); United States v. McIntire, 365 F.Supp 618 (D.N.J. 1973); United States v. McIntire, 370 F.Supp 1301 (D.N.J. 1974). 10The Response to the N.A.L. and the Application for Review were submitted to this Court with Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, as, respectively, Exhibits A and B thereto. 11Federal Communications Commission v. National Citizens Committee For Broadcasting et al. 436 U.S. 775,795 (1978). 12The fairness doctrine imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues be given fair coverage. Red Lion, supra, 395 U.S. at 369. The doctrine included components, codified as formal rules promulgated by the FCC, which required broadcasters to allow equal time for response by any identified person or group "personally attacked" on the air, and equal time for candidates opposing any candidate endorsed editorially by the broadcasters. Id. at 373; see also 32 Fed. Reg. 10303, twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362 (1968). 13Section 399 of The Public Broadcasting Act of 1967. 14The FCC has filed N.A.L.s against numerous micro radio

broadcasters who have continued their unlicensed broadcasts. The FCC has not sought injunctive relief against any of these other broadcasters in spite of the fact newspaper and magazine articles attached as Exhibits A and B to PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; Hartshorn Declaration and Zears Declaration. In one of these instances, the alleged interference was encountered only after the FCC agent drove literally right up to the transmitter. See Zears Declaration at ¦¦ 7-10. The broadcast discussed therein was intended for and capable of reception by only the participants in the Anti-Nuclear Rally in immediate vicinity of the transmitter. **17**Copies of the FOIA request and the FCC response are attached hereto and marked as Exhibit A. **18**To the extent that the FCC justifies its ban of micro radio based upon the possibility that some micro radio broadcasters might cause interference to other licensed broadcasters, the ban constitutes an impermissible prior restraint of speech. New York Times Co. v. United States 403 U.S. 713 (1971); Near v. Minnesota 283 U.S. 697 (1931). **19**Sample form attached hereto and marked as Exhibit B. **20**Public Notice CRTC 1993-95, CRTC (1993), attached hereto and marked as Exhibit C. **21**Report and Recommendations in the Low Power Television Inquiry, Appendix 1 (BC Docket No. 78-253). **22**47 C.F.R. §73.511(a). **23**See Radio World, August 10, 1994, p.9, "Radio Translators Fill in Coverage Gaps", attached hereto and marked as Exhibit D. **24**47 C.F.R. §74.201 et. seq., copy attached hereto and marked as Exhibit E. §74.1202(b), which provides the frequencies on which translators may broadcast, refers to the frequencies as "channels." 47 C.F.R. §73.201 explains that the frequencies available for FM broadcasting are given numerical designations, or channel numbers. §73.201 also contains a table that provides the channel numbers designated for each available frequency. For the Court's easy reference, a copy of §73.201 is attached hereto and marked as Exhibit F. **25**See 47 C.F.R. §74.1202. **26**See 47 C.F.R. §74.1203. **27**See 47 C.F.R. §74.1232. **28**See 47 C.F.R. §12.1235. **29**See 47 C.F.R. §12.1237. **30**See 47 C.F.R. §74.1250. **31**See 47 C.F.R. §74.1261. **32**See 47 C.F.R. §74.1262. **33**See 47 C.F.R. §74.1263. **34**See PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at p.8, n3. **35**See Defendant's APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DELEGATED AUTHORITY at pp. 4-6, submitted to the FCC on December 2, 1993, in response to the FCC's FORFEITURE ORDER dated November 8, 1993. The APPLICATION FOR REVIEW is attached as exhibit B to DEFENDANT'S MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, filed with this Court on November 14, 1994. **36**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at p.10. **37**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION at p.8, n.3. **38**Furthermore, defendant has requested that, "To the extent that any standards or procedures do exist pertaining to the Commission's suggestion that we request a rule change or waiver, or that persons should apply for a license despite the fact that they know they do not meet the regulatory requirements, we would request at this time that the Commission provide such standards or procedures to us, to guide us in attempting to comply with the Commission's suggestions." See Defendant's APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DELEGATED AUTHORITY at p.5, n.18, submitted to the FCC on December 2, 1993, in response to the FCC's FORFEITURE ORDER dated November 8, 1993. The APPLICATION FOR REVIEW is attached as exhibit B to DEFENDANT'S MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, filed with this Court on November 14, 1994. The FCC has not responded to this request. **39**For the definitive discussion of why it is a cruel hoax to suggest that an individual such as defendant might obtain relief through this process, see Telecommunications, Mass Media, and Democracy; The Battle for the Control of U.S. Broadcasting, 1928-1935, by Robert W. McChesney, Oxford University Press, 1993. **40**U.N. Human Rights Committee, Communication No. 11/1977, paragraph 17. **41**Advisory Opinion of the Inter-American Court, 13 November 1985, 8 EHRR 165. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 5

LOUIS N. HIKEN, SBN 45337
Attorney at Law
One Sansome Street, Suite 900
San Francisco, California 94104
Tel: (415) 705-6460 Fax: (415) 705-6444

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff,

v.

Stephen Paul Dunifer

Defendant

No. C 94-3542 CW

DEFENDANT'S MOTION IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Date: December 2, 1994
Time: 10:30 a.m.
Place: Courtroom 2
1301 Clay Street,
Oakland

Introduction

There is no emergency in this case. The plaintiffs, themselves, argue that Steven Dunifer has been broadcasting for at lest one and ½ year with low power wattage. The FCC has had pending before it for that entire period of time pleading which challenge their regulatory scheme. Rather than responding to those pleadings, and the issues raised therein, the FCC now comes to this court seeking an injunction.

The declarations filed by the plaintiffs indicate that they are scrupulously monitoring the broadcasts of Radio Free Berkeley, and know precisely when and how often it broadcasts. If there were

truly and immediate threat of injury or harm to anybody, why did they wait for over 18 months to bring it to this court's attention?

The obvious answer is that there is no immediate harm posed by Radio Free Berkeley's broadcasts. There are micro radio broadcasters all over the country challenging the FCC's authority to limit the issuance of radio licenses to only wealthy commercial broadcasters. The questions posed by this lawsuit should be resolved through thorough litigation on the merits of the issues. An injunction at this point would only reinforce the arbitrary and discriminatory regulatory scheme enacted by the FCC. It would deny what little non-commercial democratic voice exists over the airwaves and it would protect no interest that require immediate protection.

Argument

On June 1, 1993, the F.C.C. issued a Notice of Apparent Liability (N.A.L.) against defendant Stephen Dunifer, in which the F.C.C. sought to impose a forfeiture of $20,000 against defendant for allegedly engaging in two unlicensed low power FM broadcasts. On June 28, 1993, defendant filed his Response to the N.A.L. A copy of that Response is attached hereto as exhibit A. We excerpt from that Response:

> "The Federal Communications Commission (F.C.C.) policies with regard to micro radio broadcasting have failed to keep pace with the rapid proliferation of technological advances in the field of communication. The F.C.C.'s current regulatory scheme completely prohibits micro radio broadcasters and their listeners from accessing the public airwaves. To enforce this absolute prohibition, the F.C.C. is relying upon regulations, and case law applying the regulations, which were intended for solely for application to large-scale, commercial broadcasters, and which were promulgated long before the advent of the technology that makes possible micro radio; indeed, even before the advent of FM broadcasting. The F.C.C.'s application of these regulations violates the First Amendment right of individuals seeking to exercise those rights via methods and mediums that were technologically impossible when the regulations were created.
>
> The cost owning and operating a radio station has skyrocketed into the hundreds of thousands and even million dollar range, and participation in the broadcast media has thereby become limited only to large corporations. The individual seeking to communicate and listen to others over the airwaves in his or her local community is completely left out of the licensing scheme if he or she cannot afford the expenses entailed in purchasing, obtaining a license for and operating a commercial broadcast station with at least 100 watts of power.
>
> Micro radio provides a format by which ordinary people can communicate with one another over the airwaves without interfering with the rights of large-scale, F.C.C. licensed commercial stations or their listeners. The F.C.C., however, has not provided a means by which persons wishing to avail themselves of this new technological opportunity can legally do so. The problem is not that micro radio broadcasters are refusing to comply with F.C.C. licensing procedures. Rather, the fundamental problem Is that the F.C.C. has not provided procedures by which micro radio broadcasters can become licensed or authorized. Instead, the F.C.C. is applying severe administrative and

criminal sanctions, intended for application to large-scale, commercial operators, to micro radio broadcasters with the goal of completely precluding all such broadcasts. The very notion of assessing a $20,000 forfeiture against Mr. Dunifer, an individual with no prior F.C.C. violations, accused of transmitting two low power, non-commercial broadcasts of approximately 1 hour duration, is ludicrous.

It is the obligation of the F.C.C. to construct and enforce its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low power micro radio, the F.C.C. has failed to comply with its congressional mandate to regulate the airwaves in the public interest, has exceeded the limits of the power conferred upon it by Congress, and is violating the constitutional rights of micro radio broadcasters and their listeners." Response to N.A.L., N.A.L./Acct. No. 315SF0050, SF-93-13555, at pp. 1-2. [Footnote omitted, emphasis in original].

After the F.C.C. denied defendant's June 28, 1993 request for relief, defendant, pursuant to 47 CFR §1.15, filed with the F.C.C. and Application for Review of Action Taken Pursuant To Delegated Authority. That Application set forth, in detail, the constitutional and procedural arguments as to why the F.C.C.'s N.A.L. in defendant's case, as well as the absolute ban of all low power FM broadcasting, is illegal.

A copy of that document is attached hereto as exhibit B and incorporated herein by reference. As of the date of this filing, the F.C.C. has not acted upon that Application for Review. At footnote 21 of the Application, defendant asks the F.C.C. to provide defendant with any rules or authority that would permit him to seek and obtain F.C.C. authorization to engage in low power FM broadcasts. The F.C.C. has not responded to that request for the simple reason that no regulations exist by which defendant or any other citizen can apply for or be granted F.C.C. authorization to engage in low power FM broadcasts.

Defendant's formal application for F.C.C. review has been pending for nearly a year and a half with absolutely no response or action by the F.C.C. In July of this year, the Court of Appeals for the D.C. Circuit struck down the entire administrative fine structure upon which the F.C.C. relied to levy its $20,000 fine against plaintiff. Now, plaintiff comes to this Court seeking the extraordinary relief of a Temporary Injunction, claiming imminent and irreparable harm.

In his Answer to the plaintiff's Complaint, Defendant will set forth in detail the constitutional and procedural reasons why the F.C.C.'s regulatory scheme must be rejected by this Court. At this juncture, however, there are several compelling reasons why this Court should reject plaintiff's request for injunctive relief:

1) The F.C.C., itself, has pending before it documents which seek to permit Mr. Dunifer to broadcast with low power transmissions. They have been sitting on those documents for over a year without acting on them. They should be compelled to respond to those arguments, even if their response is to be in the negative, before seeking the assistance of this court.

2) Evidence to be presented at hearing will demonstrate that Mr. Dunifer, if authorized to broadcast at a low power frequency by the F.C.C. can insure that agency that his transmissions will not interfere with emergency channels, or with other licensed broadcasters. The transmitters he has created possess the same ability to insure filtering and frequency accuracy as any officially approved by the F.C.C. Because of the F.C.C.'s current licensing scheme which completely prohibits all low power FM broad-

casting, there are no means by which Mr. Dunifer can get formal approval to broadcast with these transmitters. At trial, expert evidence will be presented to demonstrate that adequacy of these devices to broadcast without interference.

On the rare occasions in the past when Free Radio Berkeley broadcasts did possibly interfere with another channel, it immediately went off the air, corrected any problem that caused the interference or moved to a frequency where such interference would not occur.

The Communications Act of 1934, section 324, requires that broadcasters use the "minimum amount of power necessary to carry out the communications desired" for their broadcasts. Instead of authorizing micro broadcasting, the F.C.C. licenses stations with tens of thousands of watts. These high power stations (some of which are as powerful as 100 kilowatts) result in frequent reception difficulties due to the overloading of the FM receivers possessed by many individuals, thereby preventing the reception of nearby F.C.C. licensed broadcast signals of a lessor power. This problem results in a much greater degree of interference than anything that could be accomplished by a micro broadcaster.

At trial, defendant will offer expert testimony to support his representation that his transmitters meet all technical requirements which are constitutionally imposed by the F.C.C.

3) Mr. Dunifer is currently accused of broadcasting for a 3-hour period once a week from the Berkeley Hills. In an 18 month period, the F.C.C. has cited to only two possible occasions when they believe Mr. Dunifer interfered with another station. Evidence at trial will demonstrate that many station actually licensed by the F.C.C. regularly interfere with other potential broadcasters more frequently than any interference alleged to have been cause by Mr. Dunifer, and with more harmful results.

4) Plaintiffs cite to this Court the Ninth Circuit's decision in U.S. v Nutri-Cology, 982 F.2d 394 (1992) for the proposition that the government has met their burden of showing the "irreparable injury" required before this Court can grant the Temporary Injunction. As that decision clearly states, however, the fact that a statutory violation is alleged does not relieve the government of its obligation to make a showing of irreparable injury. 982 F.2d 394, 398. Indeed, in Nutri-Cology, both the district court and the Ninth Circuit found the government had failed to make an adequate showing of irreparable injury, and both courts denied the government's request for injunctive relief. A primary factor in the Court's decision was that the statutory violation alleged was "substantially disputed, and has been disputed since 1982." 982 F.2d 394, 398. Also of importance to the Court was the considerable delay in the government's seeking relief. 982F.2d 394, 396. Immediately following the passage quoted by plaintiffs in their Points

and Authorities Memorandum (p.6), the court stated:

> "However, in statutory enforcement cases where the government can make only a "colorable evidentiary showing" of a violation, the court must consider the possibility of irreparable injury." 982 F.2d 394, 398.

In the present case, as in Nurti-Cology, the alleged statutory violation is disputed, and has been consistently disputed from the inception of the still-pending administrative proceedings. Furthermore, the only injury alleged by the government here consists of the two minor incidents in which Free Radio Berkeley has been said to have interfered with the licensed broadcasts of a high school radio station late on a Sunday night. As defendant has repeatedly pointed out the F.C.C. (see exhibits A and B), the agency's allegations of potential interference with aircraft navigational broadcasts have never been documented, and are spurious.

If there is irreparable harm to be found in this case, it is the ongoing policy of the F.C.C. to license only the rich, and a handful of educational institutions, that creates such harm. Technology currently exists to allow thousands of Americans to have access to the airwaves in ways that could assure the democratic process. Instead, the F.C.C. has created a system whereby the public listens, and the elite broadcast.

Allowing Stephen Dunifer to continue broadcasting within a 5-30 watt limit on a frequency that is not being used by other licensed broadcasters poses a threat to no one. Mr. Dunifer is willing to inform the F.C.C. as to what frequency he will be broadcasting from, and what the wattage will be, if the F.C.C. will permit him the opportunity to continue broadcasting during the pendency of these proceedings. This court has the power and discretion to seek such a compromise from the F.C.C. during these proceedings. Such would provide an excellent test case regarding the opposing assertions made by the parties herein. The F.C.C. has refused to acknowledge that there could be safe, non-interfering micro power broadcasts, and have made no provisions for authorizing them.

The myriad of constitutional violations set forth in exhibits A and B, which arise as a result of the F.C.C.'s decision to preclude the poor from having any access to the airwaves, must not be sanctioned by this court. There are numerous less restrictive alternatives to the current licensing scheme enforced by the F.C.C. that would provide the American people with the use of the airwaves.

For the reasons set forth in the Response and Application currently pending before the F.C.C., their request for a Temporary Injunction should be denied. The F.C.C.'s current regulations result in the prior restraint of speech, the suppression of diverse ideas, and the unavailability of the airwaves for democratic communications in this country. Those are the rights which defendant seeks to vindicate in this proceeding, and he should not be cut short at this stage by the unfounded accusations of the plaintiffs.

DATED: _____, at San Francisco, California.

Respectfully submitted,

LOUIS N. HIKEN, SBN 45337
Attorney for Defendant

United States Telephone Association v. F.C.C., No. 92-1321, No. 93-1526, 1994 U.S. App. Lexis 17002. Had defendant, rather than plaintiff, come to this Court seeking injunctive or declaratory relief, the F.C.C. would be vehemently urging denial of review pending exhaustion of administrative remedies. In fact, in a very similar case, Dougan v. F.C.C., 94 C.D.O.S. 2735, No. 92-70734 (9th Cir. 1994) the F.C.C. argued to the Ninth Circuit that the only avenue for judicial review in these cases is appeal to the District Court after the F.C.C. has initiated formal enforcement proceedings to seize the forfeiture amount.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff,

v.

Stephen Paul Dunifer,

Defendant No. C 94-3542 CW

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: February 2, 1996

Time: 10:30 a.m.

Place: Courtroom Two

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

47 U.S.C. § 303(g) 15

47 U.S.C. § 401(a) passim

47 U.S.C. § 402(a) 4, 7, 8, 12

47 U.S.C. § 501 11

47 U.S.C. § 504(a) 8, 9, 10

Rules

Fed.R.Civ.P. 56 13

Treatises

28 Fed. Proc, L.Ed. § 62:547 13

28 Fed. Proc, L.Ed. § 62:565 13

LOUIS N. HIKEN, SBN 45337

Attorney at Law

One Sansome Street, Suite 900

San Francisco, California 94104

Tel: (415) 705-6460 Fax: (415) 705-6444

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff,

v.

Stephen Paul Dunifer,

Defendant No. C 94-3542 CW

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff's motion for summary judgment cannot succeed. Plaintiff's attack on this Court's jurisdiction is misplaced, and there are myriad disputed material facts in this case which, if resolved in defendant's favor, would entitle him to judgment on the merits as a matter of law. The Court should deny the motion and set this matter for trial.

Before moving to defendant's arguments in opposition to the motion for summary judgment, a few words are in order regarding what this case is , and is not, about.

Plaintiff's and their supporting amici curiae rest the bulk of their respective positions in this case upon two straw man arguments, which they then proceed to destroy with great relish. The first is that defendant claims an absolute First Amendment fight to engage in unlicensed micro radio broadcasts. This has never been defendant's contention. Defendant challenges the FCC's regulations which entirely prohibit micro radio broadcasts. Defendant does not suggest that the only way in which the FCC's regulatory framework can pass constitutional muster is by permitting unlicensed broadcasting. Rather, defendant asserts that the FCC could easily permit licensed micro radio broadcasting without threatening or interfering with existing or future full power radio operations. Such a regulatory change would serve to further the First Amendment goals of diversity in programming that underlie and define the FCC's statutory mandate to regulate the airwaves in the public interest, without hindering the FCC's ability to "prevent chaos" on the airwaves.

The second straw man argument present by Plaintiff's and their amici curiae is that the FCC must choose between full power and micro power broadcasting. Once they have defined the issue in this manner, it doesn't take them long to conclude that full power broadcasting is obviously a more efficient use of the scarce spectrum space, and that therefore it is in the public interest to ban micro radio. This is a false dichotomy. Full power and micro power radio stations can easily coexist on the broadcast spectrum. Indeed, given the fact that full power stations require a "buffer zone" around their assigned frequencies to prevent interference from one another, placing micro power stations in the gaps between full power stations would result in an even more efficient use of the total available broadcast spectrum. A careful analysis of the rationale proffered by the FCC in their Memorandum and Order affirming the Forfeiture Order against the defendant reveals that much of the FCC's reasoning is based upon this false dichotomy.

The government insists that this case is about a "recalcitrant individual"1 who is seeking to sneak around the ordinary processes for review of FCC regulations, and the government has repeatedly demand that if the defendant doesn't like the FCC's rules, he could just initiate a rulemaking proceeding. This ignores the reality that initiating and participating in a meaningful way in such a proceeding is far beyond the financial means of the average person. This also ignores the fact that the FCC has now stated, in no uncertain terms, that it feels that it has fully considered and reviewed the issue of micro broadcasting, and sees "no reason to undertake a reexamination of the issue at this time."2 Finally, this ignores the fact that under our system of constitutional law, the federal courts have the authority and the duty to refuse to enforce a law which violates the constitution.

The FCC has an affirmative statutory obligation to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."3 Rather than attempting to fulfill this obligation, the FCC has steadfastly refused to even consider the possibilities presented by this new technology, and instead treats those who pioneer its use as criminals. The cautionary words of Justice Black, uttered nearly fifty years ago in dissenting from a Supreme Court decision upholding a local ordinance prohibiting use of the then new communications technology of an old-fashioned "sound truck," still ring true today:

"Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as other that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus, unless constitutionally prohibited, laws like this... ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it seems to me, is the inevitable result of today's decision. For the result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry." Kovacs v. Cooper 336 U.S. 77, 102 (1949), Justice Black, joined by Justices Douglas and Rutlidge, dissenting.

In today's world of mega-media mergers and incredible concentration of media ownership, micro radio, brought "into being by creative genius," should be nurtured and protected, not silenced. The constitution, and the public interest, demand no less.

I. This Court Has Jurisdiction To Review All Of The Statutory and Constitutional Challenges Defendant Has Raised In Defending Himself Against The Government's Enforcement Action.

A. Procedural History

The FCC's extraordinary efforts to prevent review of the constitutionality and statutory validity of their regulations banning micro radio are well documented. On June 1, 1993, the FCC issued its Notice of Apparent Liability (NAL) to defendant. In his June 28, 1993 response to the NAL, defendant raised his numerous challenges to the regulations and the FCC's application of them in defendant's case. The FCC ignored the arguments contesting the validity of the regulations and issued a Notice of Forfeiture. Pursuant to FCC regulations, defendant filed on December 2, 1993 an Application for Review, repeating his challenges to the regulatory framework.

Nearly two years later, still having failed to respond to defendant's Application for Review, the United States filed this complaint for declaratory and injunctive relief under 47 U.S.C. § 402(a). In their briefing and in oral argument before this court on their motion for preliminary injunction, the government did not respond to the defendant's substantive challenges to the regulations, instead insisting that they were entitled to relief simply on the basis that defendant had broadcast without an FCC license. This Court denied the government's motion for preliminary injunction, stating that, "If the FCC's current regulations, which prevent Defendant from complying with the statute's licensing requirement, violate the agency's statutory mandate and the First Amendment, Defendant's violation of the statute cannot form the basis for granting the declaratory and injunctive relief the government seeks...the government has failed to establish a probability of success on its contention that the current regulatory ban on micro broadcasting is

constitutional." Order at p.7. The Court, pursuant to the doctrine of primary jurisdiction, stayed all further proceedings in this action pending the FCC's ruling on the defendant's Application for Review.

Finally, on August 2, 1995, the FCC issued its Memorandum Opinion and Order, denying defendant's Application for Review, with the exception of reducing the forfeiture amount from $20,000 to $10,000.4 Now, in their motion for summary judgment, the government for the first time argues that this Court lacks jurisdiction to rule on the validity of the regulations upon which the FCC relies in its request for injunctive and declaratory relief.

The Court should reject the FCC's latest attempt to shield their ban of micro broadcasting from judicial scrutiny. The government has invoked the jurisdiction of this Court, and under the plain language of 47 U.S.C. § 401(a) and the Ninth Circuit's decision in Dougan v. FCC, 21 F.3d 1488 (9th Cir. 1994), the Court has jurisdiction to review and decide the constitutional and statutory issues raised herein.

B. This Court Has Complete Jurisdiction Under The Plain Language Of 47 U.S.C. § 401(a) And Under The Court's Supplemental Jurisdiction Pursuant To 28 U.S.C. § 1367.

47 U.S.C. § 401(a) provides as follows:

(a) Jurisdiction. The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act [47 USCS §§ 151 et. seq.] by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act [47 USCS §§ 151 et. seq.]

§401(a) provides an enforcement mechanism for failure to comply with the provisions of the Communications Act. The FCC in the present case alleges that defendant has violated the Act's requirement (47 U.S.C. §301) that no one shall broadcast without a license. Defendant's defense to this enforcement action is that the FCC is applying the licensing requirement in a manner which violates the First Amendment. The regulations the FCC has promulgated to apply the licensing requirement are unconstitutional in several respects5, and in fact precluded him from even being able to apply for, much less be granted, a license. Furthermore, the FCC has selectively chosen to enjoin defendant based upon the content of his broadcasts and statements to the media. Defendant also raises an equal protection claim, as well as a constitutional challenge, under the commerce clause, to the authority of the federal government to regulate his purely intrastate broadcasts that are technically incapable of interfering with interstate transmissions.

As even the government concedes6, this Court clearly has jurisdiction to determine whether 47 U.S.C. §301 is constitutional on its face or as applied. The Court therefore has jurisdiction to hear and rule upon defendant's constitutional defenses, and defendant's remaining claims are cognizable under the Court's supplemental jurisdiction pursuant to 28 U.S.C. §1367.7

C. This Court Has Complete Jurisdiction Under The Ninth Circuit's Holding In Dougan v. FCC.

The only published opinion addressing the FCC's micro broadcasting prohibition, and the district courts' jurisdiction to hear challenges thereto, is Dougan v. FCC, 21 F.3d 1488 (9th Cir. 1994). In Dougan, the plaintiff broadcaster was issued a Forfeiture Order after broadcasting with a power of ½ watt out of a backyard shed at his home in Phoenix, Arizona. 21 F.3d 1488, 1489. Dougan, relying upon 47 U.S.C.

§402(a)8, filed for review in the Ninth Circuit Court of Appeals, challenging the constitutionality of the FCC regulations banning micro broadcasting. The FCC objected strenuously, arguing that, "Jurisdiction to decide Dougan's arguments is vested in a United States District Court only in a proceeding brought by the government."9 The Ninth Circuit, after reviewing the relevant jurisdictional statutes, agreed, and dismissed Dougan's appeal for lack of jurisdiction.

The Ninth Circuit acknowledged that the plain language of the jurisdictional statues relied upon by the government in the instant case, 47 U.S.C. §402(a) and 28 U.S.C. §2342, seemed to vest exclusive jurisdiction in the Court of Appeals. 21 F.3d 1488, 1490. The Court pointed out, however, that "forfeiture cases in particular are discussed at 47 U.S.C. §504(a), which provides:

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, ..., in a civil suit in the name of the United States brought in the district where the person or carrier has its principle operating office...Provided, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo..." Ibid. (emphasis added by the Ninth Circuit).

The court noted that, "While a notice of forfeiture is clearly a final agency order reviewable under section 402(a), the FCC argues that the specific provision regarding forfeiture, section 504(a) trumps the general rule in section 402(a)." Ibid.

Dougan may well have based his belief that the Court of Appeals was the proper forum upon the fact that 47 U.S.C. §504(a) discusses only a suit "in the name of the United States." The Ninth Circuit, however, relied upon the D.C. Circuit Court of Appeals decision in Pleasant Broadcasting v. FCC, 564 F.2d 496 (D.C. Cir. 1977), to conclude that §504(a) "is a special review statute which vests jurisdiction over forfeiture actions in the district court, and therefore cuts off simultaneous jurisdiction in other courts...We hold that 47 U.S.C. §504(a) vests exclusive jurisdiction in the district court to hear enforcement suits by the government, and suits by private individuals seeking to avoid enforcement." 21 F.3d 1488, 1491 (emphasis added by the Ninth Circuit).

The government in the instant case relies upon 47 U.S.C. §401(a) for this Court's jurisdiction to grant the injunctive relief sought by the FCC. Section 401(a), like §504(a), explicitly grants the district court jurisdiction to hear a specific type of case involving the FCC; cases in which the FCC seeks an injunction based upon their licensing regulations. Like §504(a), the specific grant of jurisdiction effected by §401(a) "trumps the general rule in section 402(a)."

Tellingly, the government fails to acknowledge or discuss the Dougan case in their argument to this Court. Perhaps this is because the statutory construction now urged by the FCC is completely at odds with the Dougan decision and with the FCC's own argument before the Ninth Circuit in that case. If the statutory construction urged by the FCC in the present case had been applied in Dougan, the result would have been that district courts would have jurisdiction over review of FCC forfeiture orders, but would be precluded by 47 U.S.C. §402 and 28 U.S.C. §2342 from reaching any constitutional issues or challenges to the regulatory framework raised therein. The Ninth Circuit, however, clearly understood that Dougan was raising constitutional challenges to the regulations themselves, and held in no uncertain terms that the district has exclusive jurisdiction to hear those challenges.

Similarly, the FCC itself clearly understood that Dougan was raising constitutional challenges to their regulatory framework, akin to those raised by defendant in the instant case. Yet the FCC argues in Dougan

that, "Jurisdiction to decide Dougan's arguments is vested in a United States District Court only..." Surely the FCC could not turn around in the district court and argue that the district court hearing Dougan's case would be prohibited from reaching the constitutional challenges to the regulations. Yet that is precisely what the FCC is arguing here. There is no valid basis for distinguishing between the scope of the district court's jurisdiction to hear a challenge to the regulatory framework under §504(a) and that under §401(a).10

The absurdity of the government's position is further illustrated by the fact that were defendant to file in this Court tomorrow a complaint for declaratory relief seeking review of the Forfeiture Order, raising the exact same challenges to the FCC's regulatory framework that he presented in the instant action, there is no question that this Court would have jurisdiction to hear the regulatory challenges.11 Defendant was heretofore precluded from filing such a complaint by the fact that the FCC had refused to rule on defendant's Application for Review; only after being ordered to do so by this Court did the FCC finally issue its final decision regarding the defendant's Forfeiture Order. Defendant, who is indigent and who is being represented pro bono, felt that in the interests of judicial efficiency, it was not necessary to file a complaint seeking review of the Forfeiture Order once it was finally issued, given that the identical issues regarding the validity of the regulations were already before this Court, and that resolution of those issues might very well render a separate challenge to the Forfeiture Order moot.

Given these circumstances, what possible rationale could permit this Court to rule on the validity of the regulations in the context of the Forfeiture Order, but not in the context of the legitimate defenses raised in response to the government's present enforcement action?12

The FCC chose this court and invoked this court's jurisdiction when they filed their complaint for injunction and declaratory relief. With their jurisdictional argument, they now essentially are telling the Court, "You have jurisdiction to grant the relief that we seek, but not to rule against us." If in fact the defendant's substantive contentions have merit, the FCC is in effect seeking this court's complicity in enforcing regulations which are unconstitutional and in violation of the FCC's statutory mandate. The relief sought by the FCC is equitable in nature; equitable principles and considerations weigh strongly against this Court's turning a blind eye and rubber stamping a violation of constitutional magnitude.

If instead of seeking an injunction, the government were criminally prosecuting defendant herein, as they have the power to do under 47 U.S.C. §501, would the FCC be able to successfully argue that defendant could not raise in district court as a defense the unconstitutionality of the regulations prohibiting micro broadcasting? If the FCC regulations at issue here stated, on their face, that no license to broadcast would be issued to any person of color, could the FCC come into this court, invoke this court's jurisdiction it issue an injunction under §401(a) against an African American who dared broadcast without a license in violation of the Communications Act, and then tell this Court that it could not reach the constitutionality of the abhorrent regulation -- that it had no choice but to issue the injunction? Such are the conclusions mandated by the statutory construction urged by the government. Surely this is not the case.13

II. Summary Judgment Is Inappropriate Where There Are Disputed Material Facts.

In a motion for summary judgment, the burden is on the moving party to establish both that there is no genuine issue as to any martial fact and that the movant is entitled to judgment as a matter of law. Quadra v. Superior Court of San Francisco, 378 F.Supp. 605 (N.D. Cal. 1974). The requirement that there be no genuine dispute as to any material fact before summary judgment is granted is to be strictly construed so as to insure that factual issues will not be determined without the benefit of the truth seeking procedures of

trial. Corely v. Life & Casualty Ins. Co., 296 F.2d 449 (D.C. Cir 1961). Summary judgment should not be granted where there is any doubt as to whether there is a material fact in dispute. Griffeth v. Utah Power & Light, 226 F.2d 661 (9th Cir. 1955). The issue of material fact required by Fed.R.Civ. P. 56(e) to be present to entitle a party to proceed to trial is not required to be resolved in the favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. First National Bank v. Cities Service Co., 391 U.S. 253 (1968).

"It is a fundamental maxim that on a motion for summary judgment under Fed.R.Civ. P. 56 the court cannot try issues of fact; it can only determine whether there are issues to be tried. The court cannot assess the credibility of the evidence presented on the motion, weigh the movant's evidence against that of the responding party, resolve conflicts presented by the parties' affidavits and other supporting materials, or grant summary judgment because it does not find the responding party's evidence to be convincing." 28 Fed. Proc, L. Ed. §62:547, at pp. 41-42.

Summary judgment is seldom appropriate where a case presents issues involving state of mind or subjective feelings and reactions, such as motive, intent or good faith. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Shuman v. Standard Oil Co., 453 F.Supp. 1150 (N.D.Cal. 1978). "[C]ourts should be cautious in granting summary judgment in cases presenting complex issues of law or fact, or important or unsettled questions of law." 28 Fed. Proc, L. Ed. §62:565, at pp. 57-58, citing Zweig v. Hearst Corp., 521 F.2d 1129 (9th Cir. 1975), cert. den., 423 U.S. 1025. "Caution is especially appropriate in cases where the law is undeveloped, as in cases of first impression or test cases." 28 Fed. Proc, L. Ed. §62:565, at p. 58.

Under these well-established standards, the government has not carried its burden, and summary judgment should be denied in this case of first impression to determine the statutory validity and constitutionality of the FCC's ban prohibiting micro radio.

III. Summary Judgment Is Inappropriate Here Because There Are Disputed Material Facts Regarding Defendant's Claim That The FCC Regulations Violate The First Amendment and Are Not in The Public Interest.

A. The Factual Basis For The FCC's Determination That The Ban Of Micro Radio Is In The Public Interest Are Subject To This Court's Review.

The government and it s supporting amici seem to believe that the FCC has unfettered discretion to determine whether their regulations meet the statutory public interest standard. This is not the case. As defendant pointed out in the points and authorities in support of his answer, the Supreme Court analyzed the statutory basis of the FCC's regulating authority in National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (hereinafter "NBC"). In NBC, the Court upheld challenged FCC regulations prohibiting multiple ownership of AM radio stations. The Court, after reviewing the statutory framework, found that, "[the] avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States," and that "[t]he criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity.'" 319 U.S. at 215, 217. The Court acknowledged that because "[t]he facilities of radio are not large enough to accommodate all who wish to use them," Congress had committed to the FCC the task of allocating the available spectrum space, but then stated:

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the public interest, convenience, or necessity, a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit. This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services.

The public interest to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.' [citing 47 U.S.C. §303(g)]." NBC, supra, 319 U.S. at 216, internal quotations and citations omitted."

That it is proper for this Court to conduct a factual review of the FCC's determination of "public interest" is evident by reference to cases in which other courts have done so. Courts have reviewed, and struck down, FCC policies that implicated constitutional rights and that the FCC justified on the basis of the public interest standard. In these cases, the courts conducted a fact-specific review to determine whether there was sufficient evidence supporting the FCC's determination of the public interest to justify the infringement of constitutional rights.

In Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992), the plaintiff challenged FCC policies which established gender-based preference for women in determining which applicants would be granted construction permits and operational licenses for full power radio broadcast stations. The U.S. Supreme Court had already upheld, in Metro Broadcasting v. FCC, 497 U.S. 547 (1990), similar preference for ethnic and racial minorities, partially on the basis of statistical studies which showed a relationship between minority ownership and programming from a ethnic or racial minority perspective. The court in Lamprecht, however, found that there was insufficient evidence to support the FCC's conclusions that the same type of nexus exists with regard to gender. In order to so conclude, the court conducted a detailed review of the factual basis upon which the FCC's public interest determination had been based:

Metro Broadcasting confirms that although we are to five great weight to the decisions of Congress and to the experience of the Commission, we are still obliged in the end to review the government's policy - both the judgment of law that the policy is constitutional and the findings of fact that underlie it. The Court [in Metro] explained: We do not defer to the judgment of the Congress and the Commission on a constitutional question, and would not hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to equal protection principles. In Justice Brandeis's formulation, where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. We examine, then, the relationship between achieving diversity on the airwaves and the Commission's policy of preferring women owners... Lamprecht, supra, 958 F.2d 382, 391-392.

See also Metro Broadcasting, supra, and the cases cited therein; See also Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985).

In order to rule on the government's summary judgment motion in this case, the Court must review the factual basis proffered by the FCC for their prohibition of micro broadcasting, and must determine if any of those facts are in dispute. If there are disputed facts, summary judgment is only proper if after resolving such disputes in defendant's favor, plaintiff is entitled to judgment as a matter of law.

B. There Are Disputed Material Facts Regarding Whether The FCC's Regulations Are In The Public Interest.

In the present case, the VCC relied upon, inter alia, the following factual allegations in determining that their ban of micro broadcasting is in the public interest and constitutionally valid:

1) The FCC's rules do not prohibit all low power services. Memorandum Opinion And Order, ¦7 at p. 5.

2) Micro broadcasting was sufficiently considered during the 1978 and 1979 hearings regarding changes to rules governing low power operations, and the 1990 and 1993 hearings regarding FM translator service.14 No further consideration by the FCC, in the form of rulemaking proceedings or otherwise, is necessary or warranted. Memorandum Opinion And Order, ¦12 at p.5, ¦13 at p.6-7, n10 at p.7.

3) "[A] low power station could not coexist [on the same frequency,] with a near by high power station; the interference received would be too destructive. However, at the edge of the high power station's protected service contour, a low power station could operate...but this is unacceptable from a public interest perspective because the low power station would cause objectionable interference to the reception by the audience of the primary station's signal. Such interference to the primary station could be difficult to identify and correct, and would serve to lower the quality of the primary station's signal...Unauthorized low power transmitters which are typically used by unlicensed radio operators do not meet minimum operating standards for stability and signal purity...Inevitably some of them will generate spurious emissions that will cause interference but will be difficult to locate." Memorandum Opinion And Order, ¦14 at p.7.

4) Low power FM radio broadcasting is an inefficient use of the broadcast spectrum. Memorandum Opinion And Order, ¦15 at p.7.

5) The relative problems associated with permitting co-channel operations lead to the conclusion that high power stations are more efficient, and this in turn supports the FCC's decision that banning low power broadcasts is in the public interest. Memorandum Opinion And Order, ¦17 at p.8.

6) If preclusion (as defined by the FCC) is treated as a cost and service, (as defined by the FCC), is treated as a benefit, the cost/benefit ration improves with power, but the ratio is very poor for low powered stations. Memorandum Opinion And Order, ¦18 at p.8.

7) Canada does not permit unlicensed low power broadcasts, and there are "vast and critical differences" between the U.S. and Canada that justify the FCC's more restrictive policy regarding micro broadcasting. Specifically, the far greater number of full power stations in the U.S. means that "while Canada can allow low power stations even in urban areas, spectrum efficiency considerations create different obstacles for low power services in the U.S.", and these obstacles justify the FCC's determination that its ban of micro is in the public interest. Memorandum Opinion Order, ¦20 at p.9. 15

8) The FCC's 1990 decision to continue its prohibition of program origination by translators, and its 1993 decision to prohibit licensing of any new low power stations, were based upon and contribute to the promotion of program diversity, while enhancing the incentives for efficient broadcast station development. The same considerations relative to micro broadcasting are sufficient to justify the FCC's determination that the ban of micro radio is in the public interest. Memorandum Opinion And Order, ¦12 at pp. 5-6, ¦13 at pp. 6-7.

Each of these factual contentions by the FCC is disputed by defendant herein. See attached affidavits of Stephen Dunifer and Robert McChesney.16

As McChesney and Dunifer point out, and as the Supreme Court explicitly recognized in Metro Broadcasting, supra, the content of radio broadcasts can be expected to differ substantially depending upon who owns the station, or who sponsors the broadcasts. Non-government, non-corporate sponsored radio will therefore present information and perspectives that are not otherwise available to the listening public. The FCC's ban of micro radio inhibits rather than promotes program diversity; the FCC's contention that diversity is somehow promoted by prohibiting micro radio is fatuous, and is not supported by any of the factual evidence they have presented to this Court.

As discussed in the attached affidavit of Stephen Dunifer, technology has changed radically since the 1978 rulemaking proceeding referred to by the FCC's Memorandum and Order in this case, and it is now possible for individuals to operate low power stations with equipment that meets or exceeds FCC standards for stability and signal purity, and for these stations to operate within gaps on the spectrum that are required (under the FCC's own rules) to separate full power stations. The result of permitting micro broadcasting would therefore result in an overall more efficient use of the spectrum.

The 1978 rulemaking proceedings cited by the FCC are the only time the FCC has considered the issue of the 100 watt minimum. The 1978 proceedings focused on a problem perceived by the Commission regarding the lack of available spectrum space for new full power non-commercial educational stations, allegedly due to the number of then-existing low power stations that were protected from displacement by or interference from existing or new full power stations. The Commission decided that it would be a more efficient use of the spectrum space to move the existing low power stations from the part of the band reserved for non-profit educational stations, to free up this spectrum space for new full power non-profit educational channels. The existing low power stations were moved to open frequencies in the regular commercial portion of the spectrum, and rules regarding the degree to which the low power stations would be protected from future displacement and interference were changed, to permit the future addition of new full power stations, even if this resulted in the low power stations being forced off the air. The FCC also prohibited any future licensing of low power stations, and required that any new station be licensed operate under the class A restrictions, which included broadcasting with a minimum of 100 watts. They denied reconsideration of these changes, with no further analysis, in the 1979 rulemaking proceedings cited by the FCC.

These proceedings are insufficient to support the FCC's contention that they have complied with their statutory mandate to regulate the airwaves in the public interest and to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest,"17 and that the findings of those proceedings support their conclusion that the ban of micro radio is in the public interest.

First, the relevant technology has advanced incredibly in the nearly 20 years since those proceedings. For the first time, micro broadcasting is cheap enough for an individual of modest means to go on the air from their garage or home. The equipment now available is capable of operating at or above FCC standards for signal purity and stability. Simply put, micro radio technology, as it exists today, was not remotely considered by the FCC in the 1978 hearings.

Secondly, the factual findings of the 1978 hearings to do not support the FCC's contention that a total ban of micro radio is in the public interest. Micro radio stations could be licensed and granted secondary priority in terms of protection from displacement by, and interference from, full power stations. The FCC's position implicitly assumes that the government must make a choice between either full power stations, or low power. This is not the case. Even in most densely populated urban areas, there exists available spectrum space for a multitude of micro power stations in the gaps necessary to separate full power

stations from one another. A regulatory framework could easily be implemented whereby any and all currently existing and future full power stations retain top priority, and micro broadcasters are relegated to whatever spectrum space remains available.

In the 1990 rulemaking proceedings cited by the FCC, only the narrow issue of program origination by translators was before the FCC. The FCC reaffirmed that the appropriate role for translators was to rebroadcast full power programming. The 1993 proceedings had absolutely no further analysis, only the one-sentence statement that the FCC remained "committed to providing FM radio broadcast service in a manner that promotes program diversity while enhancing the incentives for efficient full-service broadcast station development."

Determining the proper role for translators is a separate and distinct question from whether permitting micro broadcasting is feasible. None of the hundreds of micro broadcasters now on the air took part in the 1990 or 1993 proceedings regarding translators. Furthermore, even in the three years that have elapsed since the last translator hearings, micro radio technology has advanced a great deal in terms of affordability and signal purity and stability.

The FCC devotes a great deal of time in the Memorandum Opinion And Order to discussing the problems attendant to allowing co-channel broadcasting, in which the same frequency is used by two different broadcasters. These factors, however, do not support the current ban of micro radio. Co-channel operation need not be permitted in order to allow some micro broadcasters to go on the air.

The equipment now available and in use, including that used by Free Radio Berkeley, does meet the FCC's standards for stability and signal purity. Spurious emissions, either in terms of frequency or impact, are no greater a problem with micro power than with full power.

Even under the FCC's definition of "efficiency," the most efficient use of the spectrum would be a combination of low power and full power stations. Full power stations require a buffer zone of spectrum space around them. In the Bay area, there are numerous slots in between the existing full power stations that are suitable for micro broadcasts that would not cause interference with the licensed stations. A regulatory framework could be established whereby micro stations would be licensed to use these gaps in the spectrum, without needing to be granted full protection from full power stations' interference, or from future displacement by new full power stations. That this is feasible is illustrated by the very existence today of several micro stations broadcasting in the Bay area without interference to or from full power stations. Beyond the allegations in their initial filings with this court, the FCC has alleged no further interference from Free Radio Berkeley, or from any other micro broadcaster in the country. Surely if any such interference were occurring, the FCC would have brought it to the Court's attention.

Defendant does not suggest that the FCC must permit unlicensed micro broadcasts in order to comply with the constitution and the FCC's statutory mandate. Rather, defendant asserts that a less restrictive regulatory framework is feasible that would permit some micro broadcasting. The FCC's contentions regarding Canada's regulations are misleading, and beg the question. Canada's licensing scheme entails filling out a one page form and paying a small fee, while the FCC's current application requires expert legal assistance to complete, and entails a filing fee of thousands of dollars, not including the expense involved in retaining the necessary legal assistance; even this process is unavailable to micro broadcasters, who cannot obtain a license under any circumstances at all.

As evidenced by comparing the attached affidavits and the records of the 1978, 1979, 1990 and 1993 rulemaking proceedings to the factual allegations proffered by the FCC in their Memorandum Opinion And

Order, there are a multitude of disputed material facts. Given the additional consideration that this case involves important constitutional issues, and issues of first impression regarding the new micro radio technology, the plaintiff's motion for summary judgment cannot succeed.

C. If The Disputed Issue Of Material Facts Are Resolved In Defendant's Favor, Defendant Is Entitled To Judgment As A Matter Of Law.

The courts have long recognized that the public interest standard and the First Amendment are inextricably intertwined. Whether or not the regulations banning micro broadcasting violate the constitution and the FCC's statutory mandate to regulate the airwaves in the public interest18 and to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest,"19 constitute mixed questions of fact and law. The FCC's determination of what is in the "public interest" must be based upon relevant facts, and must be reasonable in light of those facts. The public interest standard also "necessarily invites reference to First Amendment principles and, in particular, to the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources." Federal Communications Commission v. National Citizens Committee For Broadcasting et al. 436 U.S. 775, 795 (1978) (hereinafter NCC). The government cannot evade compliance with the First Amendment simply by asserting that their regulations are in the public interest, and that they are the final arbiters of what constitutes the public interest. While the so-called "spectrum scarcity" doctrine has been repeated like a mantra by the FCC in the instant proceedings, the Supreme Court has held that even where the spectrum scarcity doctrine has served as the basis for a lower First Amendment standard of review in broadcast cases, the overall thrust of the jurisprudence in this area has been to broaden the public's access to diverse perspectives and sources of information, and the Courts have still required restrictions to be narrowly tailored to further a significant government interest:

"...[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on divers matters of public concern...But, as our cases attest, these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues." FCC v. League Of Women Voters of California, supra, 468 U.S. 364, 380-381, emphasis added, citations omitted.

In the present case, the FCC can point to no countervailing First Amendment interest, or other interest of constitutional magnitude, to justify their ban of micro radio. Instead, they rely solely on their determination that the ban is "in the public interest." Because there are no countervailing First Amendment interests furthered by the challenged regulations, and because the challenged regulations and the FCC's decision to bring this enforcement action involve content-based discrimination, the standard enunciated by League of Women Voters, supra, is appropriate here, rather than the rational basis test urged by the FCC and by amici curiae in support of the plaintiffs. However, even under the lower rational basis standard of review, the FCC is not entitled to summary judgment. If the disputed material facts discussed supra are resolved in defendant's favor, there is no rational basis for the FCC's prohibition of micro radio.

D. There Are Disputed Material Facts Regarding Defendant's First Amendment Claims Of Content-Based Discrimination.

As the Court pointed out in its January 30, 1995 Order, "Defendant asserts that the FCC prohibits micro radio broadcasting generally, and selectively seeks to enjoin Defendant specifically, because of the political

content of their speech." Order at p.5. Defendant's content-based discrimination claim has two aspects. First, defendant claims that the FCC has selected to seek this enforcement action against him because of the content of his broadcasts and statements defendant has made to the media.20 Second, defendant claims that the FCC's prohibition of micro radio is based at least in part upon the government's desire to preclude the listening public from having access to the diverse sources of information, and the diverse political and social perspectives, that micro broadcasters have and will make available over the air.21 See, e.g. Buckely v. Valeo, 424 U.S. 1, 48-49 (1976).

The plaintiff has failed to refute these content-based discrimination allegations. Without a single piece of countervailing evidence, and absent the opportunity to conduct discovery, cross-examination, or any of the other truth seeking procedures of a trial, it is impossible for this Court to determine as a matter of law that defendant's content-based discrimination claims are without merit. The plaintiff is therefore not entitled to summary judgment as to these claims.

Conclusion

For the reasons stated above, defendant respectfully requests that the Court deny the plaintiff's motion for summary judgment and set this matter for trial.

DATED: _____, at San Francisco, California.

Respectfully submitted,

LOUIS N. HIKEN, SBN 45337

Attorney for Defendant

1 FCC's August 2, 1995 Memorandum Opinion And Order, ¦32 at p.13. The Order has already been supplied to the Court by the U.S. Attorney. 2 Memorandum Opinion and Order at n.10, p.7. 3 47 U.S.C. §303(g) 4 The FCC acknowledged that their Policy for determining forfeiture amounts had been vacated by the decision in USTA v FCC, 28 F.3d 1232 (D.C. Cir. 1994), and assessed the maximum forfeiture permitted by statute (47 U.S.C. §503(b)(2)(C)). See Memorandum Opinion and Order, ¦31 at p.13. 5 See arguments, infra, and those presented in defendant's Points and Authorities Memorandum in support of his Answer to plaintiff's Complaint for Injunctive and Declaratory Relief. 6 Plaintiff's Motion for Summary Judgment and Memorandum of Law at p.6. 7 In addition to an injunction under §401(a), the plaintiff's complaint also seeks declaratory relief and relies upon, as basis for this Court's jurisdiction, 28 U.S.C. §§1331, 1337 and 1345. Since §401(a) does not provide for declaratory relief, the FCC is explicitly relying upon the other jurisdictional statutes for this claim. 8 §402(a) provides: Judicial review of Commission's orders and decisions (a) Procedure. Any proceeding to enjoin, set aside, annual or suspend any order of the Commission under this Act [47 USCS §§151 et seq.] (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United Stated Code [28 USCS §§2341 et seq.]. 28 U.S.C. §2342 provides: The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -- (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. 9 Government's Motion to Dismiss, at p.6 (excerpt attached hereto as exhibit 1). at p.6 10 The FCC may argue that §504(a)'s specific reference to a "trial de novo" distinguishes it from the injunction statute. Such an argument should be rejected. The trial de novo designation affects only the weight to be given by the district court to the

agency's factual findings regarding the forfeiture, and cannot be read as affecting the scope of the court's jurisdiction to consider a challenge to the regulatory framework. 11 Consistent with their perennial machinations to avoid judicial review of the ban of micro radio, the FCC has maintained that §504(a) permits review of Forfeiture Orders in the district court only upon application of the government; that is, the FCC has argued that a micro broadcaster issued a Forfeiture Order cannot initiate district court review. This specious assertion is plainly contradicted, however, by the Dougan and Pleasant Broadcasting decisions. In Pleasant Broadcasting, the court stated: "The fact that section 504(a) does not expressly provide for initiation of review by aggrieved licensees in no way renders the district court an inadequate forum. If, notwithstanding the protection furnished by section 504(c), a licensee is suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding, we assume that the licensee could bring a declaratory judgment action against the United States in the district court, and that all issues of fact and law presented by the licensee would be subject to the trial de novo procedure set forth in section 504(a)." 564 F.2d 496, 502. The Ninth Circuit in Dougan expressly relied upon Pleasant Broadcasting to hold that '47 U.S.C. §504(a) vests exclusive jurisdiction in the district court to hear enforcement suits by the government, and suits by private individuals seeking to avoid enforcement." Dougan, supra (emphasis supplied by the Ninth Circuit). 12 If the Court is of the opinion that the filing of a complaint for declaratory relief seeking review of the Forfeiture Order, pursuant to the holdings in Pleasant Broadcasting and Dougan, would provide jurisdiction where none exists otherwise, defendant would request that the Court stay these proceedings for two weeks to permit him to file such a complaint. 13 Defendant is aware of the line of decisions that held that in lawsuits between private parties for injunctive relief under 47 U.S.C. §401(b), and one where the agency itself is seeking to vindicate its own conduct. The §401(b) cases all involved the same FCC Preemption Order regarding depreciation rates and methods for the interstate operations of telephone companies. The validity of the Preemption Order was, at the time the §401(b) cases were heard, on appeal to the United States Court of Appeals for the Fourth District. See Virginia Corp. Comm. v. FCC, 737 F.2d 388 (4th Cir. 1983). Many of the parties against whom private-party injunctions were sought were also parties to the Fourth Circuit appeal and had taken no steps to stay the Preemption Order while the appeal was pending. The equitable considerations in these cases were quite different from those in the present case. The determination that private parties seeking injunctive relief under §401(b) should not be required to defend the validity of the FCC order upon which the injunction requests were based makes sense; especially given the fact that the FCC was currently defending the Order at issue in proceedings (initiated by some of the same parties) under 47 U.S.C. §402(a) in the Court of Appeals. In the present case, by contrast, defendant is an indigent individual, being represented pro bono, defending himself against an enforcement action by the FCC based upon the FCC's unconstitutional application of the Communications Act. Neither the FCC, nor Congress, has the authority to order the district courts, once vested with jurisdiction to hear an action, to ignore determinative constitutional violations. 14 1978 and 1979 Proceedings: In the Matter of Changes in the Rules Relating to Commercial Educational FM Broadcast Stations, 69 FCC 2d 240, 44 RR 2d 235 (1978), amended, 70 FCC 2d 972, 44 RR 2s 1695 (1979); WL 44256 (F.C.C.) (ft cont. next p 1990 and 1993 Proceedings: Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 5 FCC rcd 7212 (1990), recon. denied, 8 FCC rcd 5093 (1993)). 15 The FCC's assertions regarding the Canadian regulations are relevant to determining whether there are less restrictive means available for the FCC to obtain its interest in precluding chaos on the airwaves. 16 Exhibits 2 and 3, respectively. 17 47 U.S.C. §303(g) 18 47 U.S.C. §303(r) 19 47 U.S.C. §303(g) 20 See the affidavit of Stephen Dunifer, attached hereto and marked as exhibit 2. See also the FCC's Memorandum Opinion And Order, in which the FCC acknowledges that the Forfeiture Order is based at least in part upon the fact that defendant "decided to willfully operate a radio transmitter without the required FCC authorization, as a protest against the regulatory power of the Commission." Memorandum and Order, ¦32, at p.13. 21 See the affidavits of Stephen Dunifer and Robert McChesney, attached hereto as exhibits 2 and 3. 1 2 3 4 5 6 7 8 9 10 11 12 13

14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22
23 24 25 26 27 28 29 30 31 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28
25

Declaration of Stephen Paul Dunifer

I, Stephen Paul Dunifer, hereby declare:

1. My name is Stephen Paul Dunifer, and I am the defendant in the case of U.S. v. Dunifer, No. C 94-3542, presently pending before this court.

2. I am indigent, and do not have the funds to retain legal support in my efforts to defend myself against the FCC in this action. All of the legal work that has been done on my behalf has been pro bono.

3. After obtaining my first class commercial radio/telephone license in 1969, I worked as a broadcast engineer at numerous television and radio stations. Having embarked on a course of self-study in electronics at the age of 12, I started an electronics design and prototyping business in 1973. Although I have approximately 5 years of college, most of my engineering work has been self-taught. I have worked as a hardware engineer for several computer firms and as a testing consultant to Ziff Davis Labs. I have extensive design and development experience in analog, digital and RF circuit design. Based upon my qualifications and experience, I am competent to testify to the matters stated herein.

4. Over the past several years, I have been in contact with many individuals who have sought to obtain permission from the FCC to broadcast over micro radio transmitters of less than 100 watts. These requests have been uniformly denied by the FCC, and there is no procedure that an individual can follow to get permission from the FCC to broadcast with fewer than 100 watts that permits radio transmissions of more than a hundred yards.

5. In order to comply with the current licensing procedures established by the FCC it would be impossible for a person without thousands of dollars in financial backing to receive a radio license. I am attaching several articles and letters regarding the failed attempts by such individuals to obtain permission to broadcast from the FCC. There are literally dozens of individuals and groups who have indicated to me that they are prepared to testify at trial in this case and describe to the court the ways in which the FCC has refused to accommodate their desires to broadcast legally.

6. As a result of the litigation in this case, I have been contacted by hundreds of individuals who have attempted to obtain permission to broadcast without having to comply with the 100 watt requirement established by the FCC. To my knowledge there has not been one example of the FCC approving such broadcasts, regardless of the fact that some stations exist in rural areas where there are virtually no other stations around, and no conceivable concern about "spectrum scarcity."

7. In spite of the fact that there are numerous unlicensed micro radio stations that are broadcasting full-time throughout the nation, the FCC has brought this injunction against me solely because of my vocal opposition to their abuse of their regulatory authority. The FCC has not sough injunctive relief against the following stations, even though some of them have been on the air for years, with FCC knowledge: Mbanna Kantako has been broadcasting for over 5 years, 24-hours/day. San Francisco Liberation Radio has been broadcasting 24 hours/day for over a year; KAFR in Arizona, Radio Libre in San Francisco, and dozens of others have all been broadcasting without FCC licenses, with the full knowledge of the FCC. Rather than attempting to accommodate the interest of these stations, the FCC has taken an intransigent position that no waivers or exceptions will be made to their 100 watt minimum requirement, and their financial requirements of extensive engineering studies.

8. The FCC's prohibition against micro radio broadcasters is content-related, and is designed to generally prevent the airing of opinions similar to those held by the above-mentioned individuals. Micro radio broadcasters, because they are not sponsored or funded by the government or by corporations, are willing to broadcast information and present perspectives that commercial and even public radio broadcasters will not. The FCC's ban of micro radio is at least partly motivated by the government's desire to keep these alternative perspectives and this alternative information from being available to the public. My own discussions and contacts with the FCC make it obvious that they are specifically attempting to silence me because of my outspoken views regarding the importance of micro radio as a new technology providing a vehicle for broader use of the airwaves.

9. In addition to my communication nationally with other broadcasters, I have communicated with people and groups from other nations who are applauding the new technology of micro radio as one providing for exciting democratic communications in their nations. I am attaching an article concerning the decision of the government in Columbia to license 1000 community radio stations. I recently traveled to and spoke with President Aristide, of Haiti, concerning the adaptation of our technology to rural communities in Haiti that do not have any other means of access to affordable, simple-to-operate communications systems.

10. I have received requests for my transmitter kits from UNESCO. That international agency intends to adapt them for use in the Philippines, in communities that otherwise would not have access to their own radio stations. I have communicated with Bruce Girard, the director of AMARC, in Canada, who is presently attending an international radio conference in Quito, Ecuador, where the importance of micro radio as an inexpensive, efficient system of democratic communications has just been endorsed at the plenary sessions of that meeting. Mr. Girard has indicated that he is prepared to testify on my behalf at a trial concerning the issues presented in this case.

11. I am attaching an article by educator Robert McChesney that has recently appeared in a publication entitled Radio Resister's Bulletin, Issue #13, Winter 1996, published by Frank Haulgren. This article describes the destructive impact that FCC regulations have had on democratic communications in this country, and what the implications of that approach portends for the future use of the computer "superhighway."

12. My attorney and I have communicated with educators Ben Bagdikian and Ed Herman, authors, professors, and specialists in the communications area. They are prepared to testify at my trial that the current regulatory scheme established by the FCC does not serve the "public interest" but instead has rendered the airwaves captive to monopolized commercial broadcasting interests. Public and educational radio has been marginalized, and even those alternatives to the corporate-owned outlets totally fail to address the needs which can be filled by local, micro radio stations.

13. There are reasonable alternative which exist to the current regulatory scheme - especially in rural areas. There are several reasonable alternative ways of allocating spectrum space that will accommodate both the needs of high-watt transmitters as well as micro radio transmitters. Even in large cities, there is adequate space to permit micro radio stations along with mega stations, without fear of interference or "chaos" (politically or technologically).

14. Allegations by both the FCC and NAB which characterize me as someone who is intent on breaking the law for its own sake and opposed to any sort of regulation are entirely false. For quite some time I have publicly advocated the creation of a low power (1/2 to 50 watts) FM service, a concept entirely rejected by the FCC. Such a service would be based on relaxed licensing procedures, closer to a registration process rather than full scale licensure. Because the FCC allows such high power levels, 30-50 times the signal

strength needed by an average FM receiver in the primary service area, the FM spectrum in the major urban areas has no room left for additional full power stations, in spite of the fact that there are numerous unused channels. This creates pockets which can be filled by micro power FM stations.

15. For example. The frequency used by Free Radio Berkeley is also assigned to a 50,000 watt station in Modesto. Due to the distance the Oakland/Berkeley area does not fall within the primary service area of this station. A full power station could not be put on this frequency in San Francisco due to possible interference with Modesto, however. A micro power station such as Free Radio fits into this pocket efficiently with no possibility of interfering with the primary service area of Modesto due to the low power and antenna position.

16. In the rural, less populated areas of this country the FCC's position can not be justified in any respect. Every small town could have its own community voice for $1000 or less as opposed to the huge sums required under current FCC regulations. Yet, the FCC has refused to even consider this possibility. Instead, it insists that full service broadcasters can somehow best serve these communities. In many cases the population base could not support a full service broadcast entity. They could certainly support a ½ watt to 50 watt micro power FM station staffed by community volunteers, however.

17. A regulatory framework could easily be devised (similar to the FCC regulations governing translators) which gives priority to existing and future full power stations. Technology has changed radically since the FCC's 1978 rulemaking procedure which addressed the 100 watt minimum requirement that is still in place today. It is now possible for individuals to operate low power stations with equipment that meets or exceeds FCC standards for stability and signal purity, and for these stations to operate within gaps on the spectrum. These 1978 proceedings were the only time the FCC looked at the issue of the 100 watt minimum. The 1978 focused on a problem perceived by the Commission regarding the lack of available spectrum space for new full power stations that were protected from displacement and interference. The Commission decided that a more efficient use of the spectrum would be to move the existing low power stations from the part of the band reserved for non-profit educational stations, to free up this spectrum space for new full power non-profit educational channels. The existing low power stations were moved to open frequencies in the regular commercial portion of the spectrum, and rules regarding the degree to which the low power stations would be protected from future displacement and interference were changed. The FCC also prohibited any future licensing of low power stations, and required that any new station to be licensed operate under the class A restrictions, which include broadcasting with a minimum of 100 watts. They denied reconsideration, with no further analysis, in 1979.

18. These proceedings are insufficient to support the FCC's contention that they have thoroughly considered the issue of micro broadcasting as they are required to do. Nor do the findings of those proceedings support the FCC's conclusion that the ban of micro radio is in the public interest.

a) First, the relevant technology has advance incredibly in the nearly 20 years since those proceedings. For the first time, micro broadcasting is cheap enough for an individual of less-than substantial means to go on the air from their garage or home. The equipment now available is capable of operating at or above FCC standards for signal purity and stability. Simply put, micro radio technology, as it exists today, was not remotely considered by the FCC in the 1978 hearings.

b) Secondly, the factual findings of the 1978 hearings do not support the FCC's contention that a total ban of micro radio is in the public interest. Micro radio stations could be licensed and could be granted secondary priority in terms of protection from full power stations. The FCC's position implicitly assumes that they must make a choice between either full power stations, or low power. This is not the case. Even in

most densely populated urban areas, there exists available spectrum space in the gaps necessary to separate full power stations from one another for a multitude of micro power stations. A regulatory framework could easily be implemented whereby and all currently existing and future full power stations retain top priority, and micro broadcasters are relegated to whatever spectrum space remains available.

c) In the 1990 rulemaking proceeding referred to by the FCC in their August 2, 1995 Memorandum and Order upholding their Forfeiture Order against me, only the narrow issue of program origination by translators was before the FCC. The FCC reaffirmed that the appropriate role for translators was to rebroadcast full power programming. The 1993 rulemaking proceedings referred to by the FCC's August 2, 1995 Memorandum and Order had absolutely no further analysis, only the one-sentence statement that the FCC remained "committed to providing FM radio broadcast service in a manner that promotes program diversity while enhancing the incentives for efficient full-service broadcast station development." Determining the proper role for translators is a separate and distinct questions from whether permitting micro broadcasting is feasible. None of the hundreds of micro broadcasters now on the air took part in the 1990 or 1993 proceedings regarding translators. Furthermore, even in the three years that have elapsed since the last translator hearings, micro radio technology has advance a great deal in terms of affordability and signal purity and stability. At the present time a 5-10 watt micro power transmitter meeting all basic FCC requirements could be produced in volume and sold for about $200.00 or less.

19. The following assertions are made in response to the Memorandum and Order issued by the FCC denying my request that they set aside the Forfeiture Order:

a) Co-channel operation need not be permitted in order to allow some micro broadcasters to go on the air.

b) Spurious emissions and harmonics are less of a problem with micro power broadcasters than full power broadcasters due to the much weaker signal. Proper design, configuration, equipment and setup eliminate these problems. Although not tested by a compliance lab, equipment used by FRB has been examined with appropriate test equipment which indicates good signal quality and frequency stability.

c) For several years the FCC has been boasting of its ability to track and identify, and locate signal without any difficulty. A major budget item was the acquisition of 70-80 new vehicles with the latest tracking gear including Global Position Satellite receivers for precision mapping and targeting of signals.

d) Even under the FCC's definition of "efficiency," the most efficient use of the spectrum would be a combination of low power and full power stations. Full power stations require a buffer zone of spectrum space around them. In the Bay area, no additional full power stations can be added, yet there are still approximately ten slots in between the existing stations that are suitable for micro broadcasts that would not cause interference with the licensed stations. A regulatory framework could be established whereby micro stations would be licensed to use these gaps in the spectrum, without needing to be granted full protection from full power stations' interference. Current examples of this exist in the Bay area and throughout the country. There have been no reports of interference with full power stations.

e) Since the cost of putting a micro power broadcast station on the air can be $1000 or less and maintained with an entirely volunteer staff, the cost/benefit ratio is actually very high. In the case of FRB, for example, the potential audience is at least 250,000 people. With about a $2000 station investment that works out to less than 1 cent per potential listener.

f) We are not contending that the FCC must permit unlicensed broadcasts, only that a less restrictive regulatory framework is feasible that would permit micro broadcasting. Canada's licensing scheme entails

filling out a one page form and paying a small fee, while the FCC's current application requires expert legal assistance to complete, and entails a filing fee of thousands of dollars, not including the expense involved in retaining the necessary legal and technical assistance; and even this process is unavailable to micro broadcasters, who cannot obtain a license under any circumstances at all.

g) First amendment expression and the principles of democratic communications stand to benefit greatly from micro power broadcasting technology. Clearly, the FCC, working from a top down hierarchic viewpoint, has done everything within its power to bring about a closure of first amendment activity with a regulatory structure which only allows the wealthy and powerful to have a voice.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on December 22, 1995.

_____

Stephen Paul Dunifer

Supplemental Affidavit of Stephen Paul Dunifer

I, Stephen Paul Dunifer, hereby declare:

1. My name is Stephen Paul Dunifer, and I am the defendant in the case of U.S. v. Dunifer, No. C 94-3542, presently pending before this court. I am competent and qualified to testify to the matters stated herein.

2. Subsequent to the filing by my attorney of my Opposition to Plaintiff's Motion for Summary Judgment ("Opposition") and my supporting affidavit, I discovered on the Internet transcripts of several recent speeches made by FCC Chairman Reed E. Hundt. (Transcripts attached hereto as exhibits A through D).

3. In these speeches, Chairman Hundt discussed at length the FCC's implementation and application of the "public interest" standard to radio and television broadcasters. In on of these speeches (see Exhibit A), Chairman Hundt admitted that the FCC's implementation of the public interest standard requires nothing of broadcasters, constitutes a meaningless hoax on the American public, and that the FCC has failed to hold broadcasters even to this vague, meaningless standard. Specifically, Chairman Hundt stated:

"[T]he FCC's current implementation of the public interest mandate is intellectually indefensible. Either our rules actually require something -- and something unknowable -- of broadcasters, in which case they should be rejected as constitutionally intolerable. Or they actually require nothing of broadcasters, in which case they are a meaningless hoax on the American public.

In fact, the latter statement describes our rules, and the Commission's failure actually to hold broadcasters even to its vague standard has mitigated the potential injury to constitutional principles. But this is certainly no sufficient justification for vague standards that give the public nothing in exchange for the valuable public resource broadcasters are permitted to use." (Exhibit A at p.15; see also exhibit C at p.9).

4. In another one of these speeches, Chairman Hundt further stated that while the FCC has long believed that the public interest would be served if all Americans could participate in the ownership of TV and radio licensees, and therefore have established many incentives to foster minority ownership, the FCC's commitment to minority ownership is in jeopardy as the result o f recently proposed media mergers, which may make it harder for small businesses and minority-owned businesses to develop the financial strength to compete, and Congress's plan to remove ownership limits in radio, and to remove certain barriers to cross-ownership. (See Exhibit B at pp. 5-6).

5. In another one of these speeches, Chairman Hundt further stated that, "In America the mass media threaten the viability of representative democracy for one specific reason: the desperate imperative for politicians to buy advertising time to run for office. The nearly impossible task of doing TV politics has greatly reduced the effectiveness of local, state, and federal government. For democracy to survive and thrive worldwide, the power of modern communication must be used to enhance participation and reasoned debate, not frustrate it." (Exhibit C at p.7).

6. In another one of these speeches, Chairman Hundt admits that the FCC's policy, since 1981, in implementing the public interest standard has been to "Do nothing -- on the theory that competition will generate public interest deliverables like educational television for children or educational PSAs on radio." (Exhibit D at p.2). In this same speech, Hundt discussed at length the delertious impact the increasing consolidation of ownership is having, and will continue to have, on the public's ability to obtain diverse programming, information, and perspectives. (See exhibit D).

7. The current FCC Chairman's admission that the public interest standard as implemented by the FCC requires nothing of broadcasters and constitutes a meaningless hoax on the American public, his statements regarding the threat to minority ownership of broadcast stations posed by the concentration of media ownership, and his statements regarding the threat posed to representative democracy posed by mass media's obstruction of public participation and debate in social and political issues, should all be considered by this Court in evaluating the FCC's claim that the prohibition of micro radio is required by and serves this very same public interest standard. Furthermore, this Court should refer to the FCC Chairman's admission that the FCC's current implementation of the public interest standard is a "meaningless hoax" when the Court considers the government's argument that the Court must defer to the FCC's determination of whether its regulations prohibiting micro radio serve the public interest.

8. Also subsequent to the filing by my attorney of my Opposition, and article entitled "Broadcast Bill Attuned to Radio" appeared in the December 26, 1995 edition of the San Francisco Examiner. (Copy attached hereto as exhibit E).

9. The aforementioned article, discussing the major telecommunications bill pending in Congress, reports that "radio broadcasters were the biggest media winners in the overhaul of telecommunications law" and that the new law "will give radio broadcasters virtually unlimited freedom to buy more station in major markets". The article further reports that the legislation "will undo years of regulations" and that "critics... say it will let large media companies control access to the public, particularly in smaller regions where there is little competition."

10. The information reported in this article highlights the continuing consolidation of ownership of the media, including, and especially, radio stations. This ongoing consolidation, viewed in conjunction with Chairman Hundt's statements transcribed in exhibits A through D (and in particular exhibit D) belies the FCC's claim that its prohibition of micro radio furthers, or is required by, the public interest, and that the prohibition serves to insure a diversification of the programming, information, and perspectives available to the listening public.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on.

_____

Stephen Paul Dunifer

CHAIRMAN REED E. HUNDT

FEDERAL COMMUNICATIONS COMMISSION NAB RADIO SHOW

New Orleans, Louisiana September 8, 1995

(As Prepared for Delivery)

RADIO MERGER MANIA AND THE PRICE OF OVER CONCENTRATION

I am pleased and honored to be with you on this 75th anniversary of radio broadcasting.

I love radio. I grew up on AM, listening to the Washington Senators losing to everybody, the Washington Redskins losing to everybody, t he Baltimore Bullets losing to everybody. So with all this experience in losing, I was well prepared to be a life-long Democrat.

But I'm delighted to be at a convention where everyone seems to be a winner. Revenues are up. Sale prices are soaring. Formats are getting more varied and successful every year. Advertisers like the new ways stations are finding to attract desirable audiences.

And merger mania is sweeping the industry. Many acquisitions reflect the necessities of the marketplace. But some, the way I hear it, reflect not market necessities but the opportunities presented by the possibility that Congress will lift all ownership limits as part of the telecommunications reform legislation.

I am far from sure that the President will sign such a bill. But if the Communications Act is rewritten to eliminate all radio ownership limits, I don't believe that's good for this industry or for this country.

Let me explain. Under the Communications Act, radio licensees must serve the public interest, convenience and necessity. The FCC can't grant licenses without making that determination. It must deny the renewal applications of licensees who fail to serve the public interest. And it must deny license transfers if they are not in the public interest.

For 61 years the FCC has struggled with the statutory public interest standard. But there have always been just three basic ways to implement it: Do nothing -- on the theory that it doesn't really matter how broadcasters use the spectrum. Do nothing -- on the theory that competition will generate public interest deliverables like educational television for children or educational PSAs on radio. Or impose specific, concrete and meaningful duties on users of the public property of the airwaves.

Too often the FCC has elected the first option, by adopting vague requirements that have no real-world effect on the programming of broadcasters. That is essentially the explanation for the fact that in the last 15 years the Commission has not pulled a single TV license for failure to serve the public interest. For the FCC, this has been sort of a reverse Cal Ripken record: we've showed up everyday and not done our job. With respect to radio, until 1981 the Commission tried, at least to a degree, option three. It imposed a number of duties on radio licensees. These were frustratingly inexact and, in the view of many, did not generate positive results for listeners. These Commission rules were in great need of rewriting.

Instead, in 1981 the FCC abandoned option three with respect to radio. It launched a large scale experiment in option number two. The Commission removed virtually all substantive public-interest requirements for radio licensees while implementing a policy of very vigorous competition in an extremely de-concentrated

industry. As many of you know from painful personal experience, this led directly to the era of hundreds of new FM licenses granted in Docket 80-90.

The idea of this experiment was that competition among many independent voices would inevitably produce diverse programming that would satisfy the information, education and entertainment needs of everyone in the audience. This experiment in interpreting the public interest standard has certainly produced vigorous competition for radio listeners and advertising dollars, both locally and nationally. It has generated many new programming formats. It has encouraged many radio licensees to strengthen their community activities, in part because they are good corporate citizens, and in part because it's important to have community visibility when you are selling an invisible product.

On the other hand, it is far from clear that vigorous competition has led to a better performance by radio in terms of informing adults, increasing participation in the political process, or educating children. The market failure seems particularly acute with kids. More than 98% of children ages 2-11 listen to the radio each week; yet there is virtually nothing appropriate for kids that age. And teenagers listen to music as often as they always have; yet how many of those stations make serious efforts to educate and inform teens in the crucial years before they begin exercising their right to vote?

In any event, the premise of the FCC's ongoing experiment in applying the public interest standard in radio has been vigorous de-concentration and competition. The congressional reform threatens the premise of the experiment, and the experiment itself.

I am sure that the House and Senate bills propose to lift radio ownership because of the view that radio competes with other media for advertising dollars and, therefore, that the current national radio ownership limits are too strict to permit radio groups to compete effectively for those dollars. I agree with that. Even if no reform emerges from the legislative process, I would raise the current national cap of 20 AM and 20 FM stations. I also thing there is room to raise the local cap of 2 AM and 2 FM stations, certainly in medium and large markets. But the House and Senate would allow a few companies to buy all the radio licenses in the country. And if you think that's far-fetched in practice, it is just a disturbing -- and more at odds with the theory underlying the FCC's 1981 programming deregulation -- to see that in a local market Congress may allow a single company to buy all the radio licenses. No doubt most of you think that can't happen. But I'm reminded of what the Harvard Law School dean used to tell first-year students at orientation: Look to your left, and look to your right; in two years only one of you will still be here. I see some of you looking around.

The fact is that the incredible upsurge in duopolies and LMAs in the last few years demonstrates how rapidly the radio industry can be restructured. And consider cable. That industry started with 16,000 separate franchises -- half again the number of radio licensees in the country -- and today just two companies serve more than 50% of the nation's cable subscribers. But don't rely on my crystal ball. I'm just echoing the experts. One investment banker was recently quoted as saying that independent radio stations will become "road kill" if ownership restrictions are completely eliminated.

Now, it may be an exaggeration to say that if the Senate bill or, especially, the House bill becomes law this year you could soon hold this convention in a phone booth. But it is no exaggeration to say that the enactment of such a law would strip away the premise of the FCC 1981 programming deregulation order.

Without vigorous competition among many independent voices throughout the country, how could the FCC honestly justify its current rules -- or lack of rules -- as a legitimate application of the public interest standard to radio?

Certainly, in the event of major consolidation in the radio industry, there would be calls to reinstate the fairness doctrine as a way to offset media concentration. Certainly we would be asked to return to specific programming requirements, to provide for citizen access, and to adopt other concrete measures to ensure diversity of viewpoints over the air. And what would be our justification for say no?

Some people think that a counterbalance to over concentration in local radio will be new competition from digital audio radio service -- DARS. This satellite technology was long delayed by the FCC primarily in order to let in-band digital radio develop in a similar time frame. But now its time has come.

As you know, we are in the middle of a rulemaking on DARS, and I haven't prejudged the matter. But I tentatively think that DARS spectrum should be auctioned. The spectrum should be used for whatever purposes the auction winners want. Anyone who wants to participate in the auctions should be allowed in. No one should be able to monopolize the spectrum. And DARS licensees should have meaningful public interest obligations. On the subject of digital radio, I should let you know that I am as excited as anyone about the prospect of terrestrial broadcasters taking advantage of digital technology. I understand that recent tests have been successful, and I look forward to working with you to ensure that our rules allow existing radio operators to pursue the revenue generating possibilities digital technology offers.

But I don't think that the introduction of national radio from the sky in anyway justifies allowing a handful of firms to buy all or even almost all of the radio licenses on the ground. We should let DARS compete with terrestrial. Every instinct tells me that the results of that competition will be better radio service for the American public. And there is no reason to assume that terrestrial will do poorly in this competition. I don't think there was ever a chairman of the FCC who was more committed to vigorous competition in communications markets than I am. I'm proud to have presided over the funerals of fin/syn and PTAR, two rules that mindlessly meddled in the strictly commercial aspects of the TV business. When the issue is competition in delivering entertainment over the mass media of TV and radio, I say let the market not the government pick the winners.

And no one feels more strongly than I do that the rules we retain should be clear and speedily enforced. As many of you know, over the past few months we have reduced to zero the unconscionable backlog of radio and TV license transfer applications that we inherited, and we have taken steps to maintain speedy service and to prevent a new backlog from developing. Roy Stewart and the Mass Media Bureau should be congratulated for these achievements, and I am happy to thank the NAB for adopting a resolution earlier this year praising them.

Another set of rules that I know are of importance to you are our EEO rules. I am firmly committed to our EEO program, which is about providing equal opportunity, not imposing quotas or set asides. Many of you have told me that you fully support the goals of our EEO program but believe that our rules can be modified to ease their paperwork burden on small broadcasters without reducing their effectiveness. I agree. And I hope that the Commission will take steps in that direction in the near future.

Incidentally, you should know that our backlog reduction accomplishments were the result of the extra resources that the last Congress gave us. But yesterday the Senate Appropriations Subcommittee voted to cut our budget 1/3 below what I requested. This would require hundreds and hundreds of layoffs. Yet at the same time Congress has not eliminated any of our tasks or functions and indeed the telecommunications reform bills would give us much more to do. If we have continued legal duties and inadequate resources, the result will be delay and frustration for all of you and all of the other industries subject to the laws that Congress has passed and that implement.

In any event, I also want to raise with you this question: Will the coming concentration in radio do anything to address the occasional failing of radio? For example, we know that radio occasionally but seriously fails to inform accurately our citizens. I am talking, of course, about talk radio. Millions of people rely on talk show hosts for entertainment and information. The name Rush comes to mind. I am sure many listeners think Rush Limbaugh is entertaining. But I am also sure that many trust him to provide accurate information about history, current events, and political issues.

I think it is a disservice to our democracy for a talk show host to misinform an audience that relies on him for information and trusts him to tell the truth. And from time to time that's what Rush Limbaugh does. As Ring Lardner wrote, you can look it up. Two entire books already have been written compiling various bizarrely wrong, flatly false assertions of Mr. Limbaugh.

But as long as I am the chairman of the Federal Communications Commission I will defend to the death Rush Limbaugh's right to say just what he wants. And I think radio broadcasters have a First Amendment right to allow him to attract an audience. I don't believe that the FCC should in any respect whatsoever punish a radio station for broadcasting Rush's inaccuracies, even though as a citizen I believe this sort of disinformation damages our democracy, dumps down our civic discourse, and destroys confidence in our institutions of public trust.

So when I talk about the public interest that radio must serve I do not mean that the FCC should monitor or punish untruths or inaccuracies that radio licensees may broadcast.

In asserting this view I am confident that the American experiment in democracy will survive even the widespread dissemination of untruth and distortion by popular figures like Rush Limbaugh and his imitators, whether of the right or the left. But the premise of my confidence is that there are many other ways for the public to learn the truth about history, to hear different opinions about important public issues. And the danger of the telecommunications reform legislation working its way through Congress is that it undermines the basis of that confidence.

This, I think, is why the issue of media concentration, ignored during the early public discussions about telecommunications reform, is now seen by many to be the principal flaw in the House and Senate bills. In a real sense, Rush Limbaugh's freedom to inform -- and to misinform-- the public depends on our government's commitment to ensuring a diversity of voices over the public airwaves in both local and national markets.

I believe strongly that Rush Limbaugh should have that freedom, and that's why I hope it's not too late for Congress to take another look at the concentration issues the legislation raises.

CHAIRMAN REED E. HUNDT

FEDERAL COMMUNICATIONS COMMISSION

CONFERENCE FOR THE SECOND CENTURY OF THE UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

A NEW PARADIGM FOR BROADCAST REGULATION

September 21, 1995

(As Prepared for Delivery)

It is a great pleasure to be with you today to help celebrate the centennial of the University of Pittsburgh School of Law, and to help inaugurate its second century.

It is no small accomplishment for a school to have survived and thrived for one full century. To have done so is a special tribute to how well the University of Pittsburgh School of Law has fulfilled its mandate to educate the future lawyers of our nation. Under the continued leadership of Dean Peter Shane, I know this venerable institution will help lead the country into the twenty-first century.

In eighteen-ninety-five, the year the University of Pittsburgh School of Law was founded, a boundary dispute between Great Britain and Venezuela drew England and the U.S. to the verge of war. The revolt of Cuba against Spain broke out. The Red Badge of Courage was published. The first professional football game was played in Latrobe, Pennsylvania, and the first U.S. Open golf tournament was held in Newport, Rhode Island. The first U.S. patent for a gasoline-driven automobile by a U.S. inventor was issued, and the first gasoline-driven automobile race in the U.S. was held. X-rays were discovered. Utah amended its constitution to recognize the right of women to vote, and women's skirts were shortened for bicycling wear. They were shortened an inch or two above the ankle, and the hems were weighted with lead.

We've all come a long way.

And, oh yes, 1895 was also the year Marconi began the experimental work that led him to develop the radio. We've come a long way in the world of technology, as well. But, no matter how forward-thinking Marconi was, could he have imagined satellites and fiber optics and computers and digitalization, and a thing as fantastic as the very idea of an Information Superhighway? Surely even the most futuristic thinkers and inventors would be stunned by the progress of truly gargantuan proportions that human beings have made in the area of communications technology. These are inventions that fairly leave one in awe of the seemingly infinite understanding human beings can achieve, and of the inventions we can create. Communications has taken forms and meanings that no one could have predicted, and their benefits far outweigh their drawbacks.

However, the pace of advances in communication technology has far outstripped the capacity of the legal community to formulate laws and procedures to deal with the varied and complex issues that have arisen at a faster and faster pace. In fact, there are serious deficiencies in current theory and practice of communications law.

My speech to day is the first in a series of three in which I will explore the source of these deficiencies and possible ways to address them. The theme of this conference is "The Adequacy of Current Legal Paradigms

to Meet Future Challenges." In line with that theme, I will speak today about the legal paradigms related to the theory of broadcast policy, and about a subject of vital importance to our Nation's future: the promise of television to educate and inspire our children. I will focus particularly on the need to impose only concrete and enforceable obligations on broadcasters to make this promise a reality.

The vague standards that the Commission has imposed in the past are not only ineffective in addressing these and other public interest concerns, but -- if they are anything more than a charade -- are also extremely difficult to reconcile with the free speech concerns of the First Amendment that must guide our broadcast policy. In fact, as I will demonstrate to you in a few moments, these vague standards have been ineffective in ensuring that broadcasters provide programming that market forces would not otherwise generate -- such as programming that is beneficial to our children.

In two subsequent speeches I will turn to the implications that our vague standards have had for political discourse and to our rules for protecting children from violent and indecent programming.

THE THEORY OF BROADCAST POLICY

The theory of broadcast policy has its origins in the Communications Act of 1934, which adopted a uniquely American approach to regulating the new technology of broadcasting. Broadcasters would be private, Congress decided, but the scarce spectrum would remain public and its use would be limited to those who served the "public interest." Ever since, implementation of that theory has been and effort to find a balance between permitting commercial use of the public airwaves by the private sector and ensuring that this private use accords with the public's view on the desirable use of this very public resource.

In my view, the balance has swung too far in the direction of private commercial use. Certainly "entertainment" is a public good, but it is not the only good the public desires or deserves.

Just as the University of Pittsburgh School of Law is reflecting on its own history and role in the world, so is the FCC. It is particularly appropriate that we do so at this moment in our own history as we prepare to bring to a close the analog era of television, and to launch the next era: that of digital broadcast television.

Now, as the Commission considers various critical issues relating to the new spectrum set aside for digital broadcast television, we have a rare opportunity. We have a second chance to get TV regulation right, to put real meaning into the public interest. If we are not to squander our good fortune, we must temper our look at the future with a look back, to assess and to revise as necessary the theory and practice that have informed our regulation of broadcast television over the past six decades.

As I look forward I see two possibilities.

The Commission can take what I call the "low road," by getting out of the business of granting and renewing licenses based on whether the broadcaster is serving and will serve the public interest. Under this approach, the FCC's ongoing role would be that of traffic cop, policing the airwaves to prevent interference and to identify prohibited uses of the spectrum, such as indecent broadcasting. Inevitably, this paradigm would support the proposition that the FCC should auction the digital broadcast spectrum, just as we have recently auctioned other portions of the spectrum for use by competitors to cellular telephone operators. After all, we would not give a portion of one of our national forests to a logging company for free.

To be clear, I am not taking a position on whether the digital spectrum should be auctioned. I'm simply saying that, if broadcasters are not obligated to provide public interest programming that the market fails to

generate, then it will be exceedingly difficult to explain to the American people why digital spectrum worth billions of dollars should be given to broadcasters and not auctioned to the highest bidder. It would be similarly difficult to justify special measures for broadcasters such as laws requiring cable operators to carry broadcast signals and to give them favorable channel placement.

Free digital spectrum, must carry, channel placement -- these are all easy to justify, it seems to me, if broadcaster give something to kids and communities in return for use of the public's spectrum.

In any event, the low road is not a legal option for the Commission. The Communications Act requires us to enforce the public interest mandate. Important portions of that law -- such as the Children's Television Act, which was added in 1990 -- and decades of FCC decision making establish that enforcement is largely to be accomplished through requirements relating to broadcaster's programming.

That leaves the "high road," which involves translating broadcaster's duty to serve the public interest into a few clear and concrete requirements-- rules that are understandable and enforceable. These could be determined by Congress or, as is currently the case, by an mixture of law and regulation. The 1990 Children's TV Act plainly makes educational TV for children one such requirement.

On the high road, as I see it, these few specific public interest requirements would be virtually the only requirements on broadcasters. The Commission would get out of the business of meddling in the strictly commercial aspects of broadcasters' businesses.

The Commission, of course, is well on the road to that kind of aggressive deregulation. In the last 12 months, we have teed up for review virtually every rule governing broadcaster's commercial practices, rule that have been on the books for a very long time. And we very recently announced the demise of two rules that have needlessly tied the economic hands of broadcasters for more than 15 years: fin/syn and PTAR. I am proud to be the Chairman who presided at those funerals. As between the two roads I've described, you surely suspect which I prefer, but before I spell out what the "high road" would involve generally and for children's programming in particular, let's consider for a moment the fact that the Commission currently subscribes to neither road -- and the intellectual indefensibility of that posture.

For 61 years, the Federal Communications Commission has acquiesced in an incoherent compromise with television broadcasters. The rules it has adopted to implement the public interest mandate are vague to the point of meaninglessness.

Our rules implementing the Children's Television Act, for example, are so vague that broadcasters can claim -- and have claimed -- that shows like the Jetsons and G.I. Joe are "educational."

Our main public interest requirement states only that broadcasters have an "obligation to provide programming that responds to issues of concern to the community" -- a laudable goal but one whose meaning in practice is hopelessly indeterminate.

And, under our rules, a broadcaster is entitled to presumptive renewal if its service is "sound, favorable and substantially above a level of mediocre service which might just warrant renewal."

What do those rules mean? Who knows? As former FCC Chairman Dean Burch told broadcasters some time ago: "If I were to pose the question, what are the FCC's renewal policies, everyone in the room would be on an equal footing. You couldn't tell me. I couldn't tell you -- and no one else at the Commission could do any better."

Unsurprisingly, the Commission has for at least 15 years not taken away a single one of the approximately 1500 TV licenses or 10,000 radio licenses in this country for failure to serve the public interest. This is not to say that there have been no encouraging moments in the Commission's efforts to give meaning to the public interest standard. Just yesterday, Westinghouse announced that if it acquires the CBS network it would provide three hours per week of educational and informational children's programming.

Responding to the announcement yesterday, my friend and fellow Commissioner Jim Quello issued a statement saying that he would "consider long and hard" any transaction that includes an agreement relating to the content of a broadcaster's programming. There is ample Commission precedent for him to consult.

In recent years, the Commission has explicitly relied on "concrete" and "quantifiable" programming commitments of broadcasters in granting waivers of its ownership rules to facilitate the acquisition of broadcast stations. Just months ago, for example, a unanimous Commission relied on NBC's pledge to increase locally originated news programming from 14 ½ hours per week to 27 hours per week, with a substantial part of the increase to be devoted to issues relating to New Jersey. In another case, a unanimous Commission relied on a similar pledge made by Fox, as well as another Fox pledge to launch a weekly, 30 minute program covering issues relating to minorities -- pledges the Commission said it "expect[ed] will be fully executed."

And in 1993, when Jim was Chairman, the Commission granted an ownership waiver to the Pulitzer Broadcasting Company, but only after relying on the company's representation that it would "enhance [the station's] programming for children" by producing and airing an informational show targeted to children ages 11 to 15 and hosted by teenagers.

The Westinghouse application remains before us, and I am not prejudging it. I will simply say this. If the public interest is served by the concrete, quantifiable promise of one broadcaster to provide educational programming for children, then surely it is served by having a clear rule applicable to all broadcasters. Indeed, without such a rule it is hard to see how one broadcaster, standing alone, can keep its promise. The vigorous competition that characterizes the broadcasting industry will drive even the best intentioned broadcaster to the lowest level, as it does now.

Now, no one who watches much television can seriously assert that the Commission has clearly enforce the statutory duty that broadcasters must serve the public interest. Let me try to explain why the Commission's past approach is not only unclear, but incoherent.

If our rules actually require something of broadcasters -- that is, if failure to do something would actually result in some government sanction -- but if at the same time our vague rules don't tell broadcasters what that something is, then why aren't those rules profoundly offensive to the First Amendment? Why aren't rules like that be precisely the kind of "unascertainable standard" that the Supreme Court has said chills protected expression and that is neither wise nor constitutionally tolerable?

It is ironic to me that the Commission's vague rules are sometimes defended as required by the First Amendment. Evaluating broadcasters by vague standards disserves First Amendment principles, as well as the Due Process principle that the government punish only after giving proper notice.

But while vague rules increase the power of government officials over First Amendment speakers, clear rules limit governmental power. While vague rules chill First Amendment expression, clear rules do not.

While vague rules force broadcasters to worry about their entire programming schedule, clear rules leave broadcasters free to do as they please after satisfying the minimum requirements.

The FCC's own history certainly demonstrates that vague rules create real possibilities for mischief. Two examples can be drawn, on from the McCarthy era, the other from the Nixon Presidency. In the 1950s, Commissioner John C. Doerfer, a Joseph McCarthy protégé, instituted an investigation of a broadcaster to test his fitness as a licensee. The apparent genesis of the investigation was that the particular broadcaster was anti-McCarthy. The FCC investigators manufactured evidence that he had attended meetings of Communist sympathizers "where gin was drunk and caviar eaten." Admittedly, this "evidence" seems ludicrous and dated, and even in the 1950s it was flimsy. The FCC's case collapsed. However, the chilling effects of the McCarthy era were serious and long term.

Moreover, the experience was nearly repeated in the Nixon Administration. News accounts from 1974 recount a conversation, recorded on the Watergate tapes, in which the President and his top aides discussed using the FCC's license renewal process in order to pay back the Washington Post for its Watergate coverage.

On being informed that the Post owned two television stations in Florida that would soon be seeking renewal, President Nixon is reported to have said, "The main thing is the Post is going to have damnable, damnable problems out of this one. They have a television station...and they're going to have to get it renewed."

Similarly, Bob Haldeman and John Dean informed Nixon that the Post also owned a radio station and that the practice by non licensees of filing competing applications at renewal time had increased. Nixon reportedly responded by stating that "its going to be goddamn active here...Well, the game has to be played awfully rough." Three months after this conversation three applications were filed against the renewal application of the Post's Jacksonville station, and one against the renewal application of its Miami station. Participants in one of the Jacksonville applications and in the Miami application included a number of individuals identified as friends and supporters of the President and the Administration. Whether these applications were part of an effort to carry out President Nixon's threats is unclear. Even so, they demonstrate the potential for abuse that resides in vague, ominous, and empty standards that can be manipulated in a pernicious manner by an ill-motivated Commission.

Let me return to my earlier point: that the FCC's current implementation of the public interest mandate is intellectually indefensible. Either our rules actually require something -- and something unknowable -- of broadcasters, in which case they should be rejected as constitutionally intolerable. Or they actually require nothing of broadcasters, in which case they are a meaningless hoax on the American public.

In fact, the latter statement describes our rules, and the Commission's failure actually to hold broadcasters even to its vague standard has mitigated the potential injury to constitutional principles. But this is certainly not sufficient justification for vague standards that give the public nothing in exchange for the valuable public resource broadcasters are permitted to use.

How, then, can we at the Federal Communications Commission fulfill our responsiblity to the American public to guard "the public interest?" Following the "high road," we must translate the obligation to serve the public interest into a few specific actions that should be performed to more fully benefit society. These could be determined by Congress or, as is currently the case, by a mixture of law and regulation. The 1990 Children's Television Act plainly makes educational TV for children one such requirement. Such required duties ought to create incentives for broadcasters to produce programming that they are unlikely to produce

in response to the competitive market pressures to attract a mass audience, and which are different from those generated by a competitive marketplace. Both children's educational programming and free campaign advertising fit this criterion. Unless the public interest standard requires broadcasters to take actions other than those that the marketplace generates, there is no meaning to the public interest standard.

Specific rules that indeed alter the workings of the marketplace should be clear and concrete enough to ensure that broadcasters understand them and know how to fulfill their responsibilities so as to avoid losing their licenses. But any violation of such rules should be punished by a fine or other appropriate sanction. Yet, the Commission has no coherent policy for punishing even minor transgressions of it public interest standard. This sort of regime -- clear rules; appropriately moderate sanctions; very unusual circumstances justifying non renewal -- is especially appropriate if Congress intends to lengthen renewal terms. It is not only appropriate, it is constitutionally superior to the vagueness of the status quo.

And while we're on the subject of the Constitution, let me add this about the First Amendment. Subjugation of the First Amendment in our democratic society cannot be tolerated. No matter what requirements the FCC implements, viewpoint discrimination must always be off-limits, as must any effort to suppress speech on any topic. For example, I disagree with much of what Rush Limbaugh and Gordon Liddy have to say on talk radio today. In fact, I believe that the factual inaccuracies and misinformation that we hear today on many talk radio shows is anathema to the very concept of informed self-government. But I would defend to the death Mr. Limbaugh's and Mr. Liddy's right to advance what I may view as their misguided views on any topic they choose.

So with these principles in mind, how should the FCC develop coherent and meaningful rules for children's educational TV that comport with First Amendment principles?

The Commission is currently studying proposals to require broadcasters to improve their record with respect to children's educational television. So important is this issue that for the first time in living memory a President has weighed in on a specific FCC proposal -- the FCC's proposal that broadcasters be required to provide at least three hours of quality children's programming per week, and at reasonable times of the day. In a letter to me earlier this week, the President wrote: "I urge you again to review the purpose of the Children's Television Act and the broadcast programming our children are offered today. To paraphrase former FCC Commissioner Newton Minow, if we can't figure out how the public interest standard relates to children, the youngest of whom can't read or write, and all of whom are dependent in every way on adults, then we will never figure out the meaning of the public interest standard."

Another recent development further underscores the significance of our efforts to improve television for children. This week, the University of California, Los Angeles, released a network-backed study concluding that television continues to disservice children. Gratuitous violence, the study found, pervades Saturday morning children's cartoons.

Earlier studies have found that violence on television harms children. Conversely, other studies have found that educational television helps children -- that it can prepare kids, particularly lower income kids, for school; that it can mean the difference between whether a child will develop into a full participant in our economy and our democracy. How have broadcasters responded to these studies? Too often by refusing even to discuss them, using the First Amendment as an excuse. Broadcasters have too often wielded the First Amendment to cut off debate about television's affect on kids and society. When, for example, a private group organized a national Turn Off the TV Day to protest television's negative impact on society, the president of the association that represents ABC, CBS, and NBC responded by labeling the effort an infringement of the network's First Amendment rights -- even though the clause protects only against

government action, and even though the group's members were simply exercising their First Amendment rights. That is not right. Broadcasters have an obligation to respond to the growing body of evidence about the social costs of violent programming and the lost benefits of educational programming -- both in words and deeds. And nothing in the First Amendment forbids government from "promot[ing] programming that helps children and discourag[ing] programming that harms them, "as one of our country's renowned experts on the First Amendment, Professor Cass Sunstein of the University of Chicago Law School, recently wrote.

In fact, a focus on children's educational programming promotes interest at the core of the First Amendment. James Madison, the father of the First Amendment, viewed the First Amendment as being "about public deliberation and democratic self-government."

As Professor Sunstein recently noted, "the First Amendment is associated with public discussion about public issues. It has educational and aspirational functions."

And it is not just Professor Sunstein to whom I turn. He has merely summarized the views so elegantly expressed by perhaps our greatest Supreme Court Justice -- Justice Brandeis -- who explained that the First Amendment is about democratic self-governance; that it is about preparing and educating citizens to take their civic duty seriously, to avoid that "greatest menace to freedom" -- "an inert people."

Two issues of particular importance in crafting a concrete requirement regarding educational programming for children are the numbers of hours of educational programming that should be broadcast, and the time of day that the programming is aired. These questions are important because the value of broadcast TV as an educational tool is clear. Studies have proven that watching educational TV increases test scores and encourages children to read more books. Educational TV can be especially important for lower-income children because of the disproportionate number of hours they watch TV.

Given these facts, it is crucial that broadcasters be required to fulfill their responsibilities under the Children's Television Act. Former FCC Chairman Newton Minow agrees with that assessment, and I recommend his recent book, Abandoned in the Wasteland: Children, Television, and the First Amendment, in which he argues eloquently and passionately that there is no communications issue more important than fostering children's educational television.

The fundamental problem with respect to children's educational TV is that programs focusing on educating children are not what advertisers want to sponsor. Simply put, they just don't think there's any money in it. Moreover, even when advertisers are willing to support a show directed at children, they prefer to have the show develop the impulse to consume, rather than to develop children's minds. And, of course, the market does not provide any incentive to sponsor educational TV. To the contrary, in our advertiser-driven market, the primary motivation of programmers is to develop children's shows that are little more than commercials for toys, because that is what advertisers will support. Under these circumstances, there is every incentive to develop children's programming that will sell toys to children, and little incentive to develop educational programming for children. Such a market cannot further the public interest.

Would the requirement that broadcasters devote a specified number of hours per week to children's educational programming be upheld by the courts? I believe it would. With respect to broadcasters, strict scrutiny does not apply under Red Lion and should not apply because the spectrum is scarce. That paradigm governing broadcast regulation is sound. It is true that engineers are devising new ways -- notably, digitization -- to get more use out of the spectrum. But they are figuring out new ways to use the spectrum even more quickly than they are figuring out how to use the spectrum more efficiently.

The constraint on the use of spectrum is illustrated by the fact that bidders recently paid $7.7 billion for licenses to use 60 megahertz of spectrum to provide wireless telecommunications services. The losing bidders are shut out of the wireless telecommunications market. If one of them subsequently persuades a winning bidder to sell its license, that winning bidder will have to relinquish its use of the spectrum. In short, at present, it is simply not possible for more than a handful of broadcasters to use the spectrum in any geographic area. The digital broadcasting parallel to or simultaneously with today's analog broadcast. This could mean that the potential number of channels increases fivefold in terms of today's quality of signals.

A higher quality of picture, called high definition, would consume the greater part of the digital bit stream, and thus would add roughly one high-definition signal broadcast digitally for every signal currently broadcast in analog. Even this digital expansion of spectrum plainly would leave many more prospective spectrum users than may be accommodated. Therefore, what Justice Frankfurter said in 1943 and what the unanimous Supreme Court said in 1969 remains true: the radio spectrum is not large enough to accommodate all who wish to use it and, thus "it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." In addition, and as the Supreme Court has consistently held in similar contexts, a standard less demanding than strict scrutiny should apply to a regulation requiring broadcasters to provide children's programming. The children's' programming alternatives I have described should be upheld under that standard because they are clearly no more intrusive than the fairness doctrine was.

In short, there is no good reason why government favoritism of educational television ought to be presumptively unconstitutional. All of the Court's tests ask what the government's interest is in regulating speech, and test the relationship between the regulation at issue and the government's interest. Under strict scrutiny, the government interest must be "compelling," and the government must choose the "least restrictive alternative" available to achieve its interest, whereas under lesser standards it is enough for the government interest to be "important" and that the regulation at issue "not burden substantially more speech than is necessary."

There is no question that the government interest in promoting the educational development of children is an interest of the highest order and would be found to be "compelling." The Supreme Court has said that the government has an interest of the highest order in "diligently promot[ing]...education and the acquisition of knowledge."

This summer the Court of Appeals for the District of Columbia Circuit highlighted the government's compelling interest in promoting the healthy development of children in two important decisions upholding the constitutionality of various methods of protecting children from indecent programming.

In the so-called Act III case, the court upheld rules requiring that indecent programming be confined to hours in which children are less likely to be watching. (Action for Children's Television v. FCC 58 F.3d 654 [D.C. Cir. 1995.])

Finally, in Alliance, the Court upheld rules requiring cable operators that carry indecent programming on leased access channels to segregate that programming onto one or more such channels and to block their transmission until a subscriber submits a written request for unblocking. Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995). Consequently, I don't really think that anyone would dispute the proposition that the government has a compelling interest in promoting the education and development of the nation's children or that the courts would find otherwise. Is a requirement that broadcasters devote a modest portion of their time to educational television the least restrictive means of achieving the

government's interest? I think it is. After all, television is where kids are: the typical child watches more than 20 hours of television a week.

An alternative to those I have suggested for requiring educational programming would be to charge broadcasters for their spectrum and use the proceeds to fund children's programs on their channels or on government channels. I'm sure that such an alternative is constitutional, but I'm not at all sure that the broadcasters would view it as less restrictive. I hope they will tell us in the comments that are due in October as part of our ongoing rulemaking proceeding. If that is what they prefer, the FCC could oblige. Broadcasters could have the option of paying in kind -- by providing children's educational programming -- or in cash -- by funding it in return for their use of the spectrum.

The need for children's educational programming and more generally for a specific and concrete definition of the public interest are two of the issues of great importance to the Federal Communications Commission in our 61st year. We are at a crossroads. New challenges and new opportunities have opened up for us to take a closer look at our own role, and to try to make a difference in the lives of our most important treasure: our children.

So new challenges and opportunities open up for the University of Pittsburgh School of Law. As it enters its second century, it undoubtedly will contemplate its course for the next one-hundred years, just as we at the FCC contemplate our own course of action. Both institutions will move forward in an era of unparalleled technological change as we search for new and better legal paradigms. Let us hope we act wisely, and in the public interest.

Thank you.

CHAIRMAN REED E. HUNDT

FEDERAL COMMUNICATIONS COMMISSION

NABOB CONVENTION Washington, D.C.

September 22, 1995

(As prepared for delivery)

INTRODUCTION

Thank you, Jim, for that kind introduction.

So we are in the middle of a communications revolution. Some welcome it. Some are frightened by it. Everyone is affected by it.

The revolution is inevitable. What is not inevitable is whether that revolution will benefit all Americans, or only some. As the French Revolution was unfolding, France was convulsed by change. One of the changes was a huge increase in the price of bread. Working men and women could not afford the new prices. The queen of France, Marie Antoinette, responded by saying, If they can't afford the bread, let them eat cake. The question for the country now is whether, as the communications revolution unfolds, we sat to all the small business, minorities, children, and others: We will make sure this revolution brings you into the society, makes you part of the economy, gives you a world of opportunity. Or will we say, as we find that small businesses, minorities, and children are not necessarily benefiting from this revolution, Who cares? Let them eat cake.

We ought to be concerned right now with all of the following issues: How can small businesses, and especially minority-owned small businesses, participate in the communications revolution? How can the unique point of view of minorities find voice in markets dominated by huge media conglomerates? How can children, especially minority children, be helped and not harmed by the media? Specifically, how can we guarantee that free over the air educational TV can help raise test scores and education levels for all the children in the country -- especially for those who rely on the public property of the airwaves, as well as on the public schools to help deliver the equal opportunities that education can provide.

And how can we make sure that the President's vision of communications technology in every classroom in the United States comes true as soon as possible for all children -- not just for those who are lucky enough to go to private schools or to public schools in affluent neighborhoods? You have a special opportunity, right now, to make sure the country answers all these questions in a way that will make us proud for decades to come. The country needs your help and the FCC needs your help. We need your help on all these issues, and not just some.

Let me go into more detail about the threat to small business and minority ownership posed by the possibility of over-concentration. As everyone has read, huge media mergers are being manufactured right now. The cash flow and capital formation power of these media conglomerates would be unprecedented. The future for small businesses, and particularly minority-owned small businesses in media market is quite seriously at risk.

The FCC is supposed to decide, as a panel of judges, whether the public interest is served by any proposed license transfer. No transfer can be approved unless it serves the public interest. The transferee, and all broadcast licensees, don't own the public's airwaves. They are just the trustees. Their highest duty has to be to the beneficiaries of this trust: the public.

Our concern should be for all members of the public -- including small businesses, minorities, and children. We should be concerned about the effects of concentration on all members of the public. We should be concerned about whether the proposed new trustees will use the airwaves to educate children. The scope and sale of the proposed TV license transfers is so great that the FCC's decisions will certainly shape the future of broadcast TV for a generation. And that means that our decisions will have a major impact on the future of our country, because TV is that important.

Surely we all agree that TV is one of the major influences on our society, and particularly on children. It can entertain us -- and there's no doubt that it does that job extremely well. Yet, it can also teach our children. It can also provide all Americans insight into the unique perspectives of the hundreds of minority groups that make up the great mosaic of American life. It can also inform all Americans about the great issues that deserve public debate.

Whether television achieves its potential -- in addition to the potential to entertain -- is the fundamental question before us. That is the fundamental question involved in applying the public interest standard to the proposed transfers before the FCC. It is the fundamental question at stake when the FCC considers whether new specific, concrete rules could give real and better meaning to the public interest standard in the future. One example of specific meaning for the public interest standard is this: The FCC has long believed that the public interest would be served if all Americans could participate in the ownership of TV and radio licensees. We established many incentives to foster minority ownership. We have implemented EEO rules to encourage minority employment.

The FCC's commitment to minority ownership is in jeopardy for at least three reasons. First, the proposed media mergers may make it harder for small businesses and minority-owned businesses to develop the financial strength to compete. Second, Congress is threatening to remove ownership limits in radio, and to remove certain barriers to cross-ownership. And third, the Adarand case is a serious blow to the FCC's traditional methods of promoting minority ownership.

As you know, Adarand requires that any federal programs that make distinctions based on race must serve a compelling interest. I was very pleased to hear at the last Commission meeting that three other Commissioners support my commitment to develop a record that will pass the Adarand test. We intend to conduct a so-called Croson study. Our goal is to demonstrate, as the Adarand case requires, the compelling need to continue to provide incentives, to encourage the participation of minority and women-owned businesses in the communications industry.

Over concentration and Adarand present new challenges to African-American ownership. However, the FCC will continue to consider initiatives to increase access to capital by minorities and women who seek entry into the communications industry. Our Minority/Female Ownership rulemaking proposed a number of incentives. These include the so-called "incubator program". Through this program existing mass media entities would be encouraged, through ownership-based incentives, to assist new entrants into the communications industry.

However, this initiative, and others, was based on the possibility that mainstream media participants would receive some relief from ownership limits. If Congress removes ownership limits, the FCC's proposal to encourage mainstream corporations to invest in new entrants would b sorely undermined.

Let's talk statistics for a moment. According to the National Telecommunications and Information Administration, in 1993 minorities owned 3.5% of all AM stations and 2% of all FM stations, in the United States. According to the 1994 Broadcast and Cable Employment Report, minorities represented 18.4% of the full-time broadcast work force, and 12.9% of the managerial work force.

But, studies suggest that minority-owned companies tend to hire minorities, whereas non-minority-owned firms tend to hire non-minorities. This is the case even when those firms are located in minority communities. If minority ownership were further hindered by the suggested new rules of the game, I fear that bright, able, promising minority youth will find it even more difficult to gain the kind of employment experience they need to become successful in the communications industry, or in the workplace generally. Further, I fear they will be unable to get the all-important hands-on experience they will need to perhaps themselves become minority owners someday. Lots of minority youth out there have such a dream -- to own a broadcasting company. Others dream of being a general manager, or a deejay, or an anchor, or a reporter, or a writer, or president of the company. Many of you had those dreams. You understand. To the extent that new interpretations of the Constitution or new laws make it more difficult to realize that dream, both the dreamer and our whole society are diminished.

As I explained in my Pittsburgh Law School speech yesterday, the Commission ought to apply the public interest standard in a specific way, with concrete duties imposed on broadcasters.

But in thinking about those duties, the Commission should first have a dream. It should have a dream of how our great communications media can make our country grow together. It should dream about how the communications revolution can make equal opportunity be something we take for granted because it is so widely available. It should dream about how the communications revolution can help us win at last the battle against ignorance and despair.

These dreams everyone in the country should dream together. These dreams of real meaning to the concept of the public interest in communications have to be encouraged by everyone in the country, and especially by everyone in this room. These dreams, like all beautiful dreams, must be vivid, bright, specific, real.

Broadcast TV does and should make millions of dollars for many Americans. It does and it should provide free entertainment for all of us. It does and should create many jobs. But broadcast TV should not just put money in the bank for some people. It should also give a gold coin to our children. And that coin should have two sides. On one side there should be free, over-the-air educational TV guaranteed by every TV license holder fo r every child in every market. And on the other side, there should be a promise that indecent and overly violent programming will be limited by responsible broadcasters.

These are two sides of the same coin. It is a coin that every trustee of the public's airwaves ought to put into the hand of every child in this country. I'm not asking for much. It is only one coin from the stream of cash that commercial TV will generate.

I want all that cash to keep flowing. And I want all of us to be proud to see that golden coin of opportunity be put into the hand of every single child.

No one has a bigger stake in these issues than African-American broadcast owners. Your moral authority can be tremendously persuasive in the great debate that is occurring over the meaning of the public interest standard. And you have long recognized your special responsiblity to your own community. We need you to assume your rightful place in your own bully pulpits and to tell the country what to expect from the FCC, from the media, from the communications revolution.

Each on of you know from your own personal experience that against fearsome odds you can be successful. The odds of success on children's educational TV, over concentration, excessive violence -- the odds on all these issues are less daunting than the odds so many of you faced when you started your careers. So there's nobody in the country in whom I have more confidence than you. I look forward to your participation in these great debates. We are fighting the familiar fight for opportunity and justice, but we have new battlegrounds. We are going to win.

CHAIRMAN REED E. HUNDT

FEDERAL COMMUNICATIONS COMMISSION

"RESHAPING REGULATION"

MUNICH CIRCLE CONFERENCE

September 25, 1995

(as prepared for delivery)

Dr. Witte, Dr. Boetsch, honored guests:

I am grateful for the opportunity to share with you the experience of the FCC in reshaping regulation as America moves towards telecommunications competition. Since all of the countries represented here today are engaged in their own restructuring from monopolies to competition -- albeit at considerably varying paces -- there is much we can learn from one another. I'd like to share with you first some thoughts about the role of the FCC within the U.S. government, and then to describe some of my principle goals for it.

What Kind of Regulator? According to the brave description of American administrative law scholars, the FCC is called and "independent agency". This means that formally we belong neither to the Executive Branch -- we are not a Cabinet agency nor report to one -- nor to the Legislative Branch. Rather, we follow a statutory mandate from the Congress, and have a staff of civil servants to carry it out.

So much for the theory. In practice, there are a couple of additional points worth remembering. First, we depend on Congress for our annual funding. This of course affects rather dramatically our resources and our priorities. Moreover, legislators have been known to try to attach their particular agendas to appropriations bills. A good bit of my time these days is in fact taken up with the difficult question of next year's FCC funding.

Second, the President appoints me and my four fellow Commissioners, subject to approval by the Senate. Terms last for five years, so no President chooses the entire Commission. (By tradition, the President does choose the Chairman, however). So even though I'm not part of the Executive Branch, I am certainly part of the Administration's communications policy structure.

America's Founding Fathers christened this mix of legislative and executive control "checks and balances," and regarded it as essential to ensure that neither branch of government assumed a dominant -- or as they thought at the time, imperial -- character. It is a noble concept, but it makes for a very complicated daily existence.

I offer this brief civics lesson not because, in the grand American tradition, we think our model should apply everywhere. Rather, because we have learned certain lessons about our "independence" from both legislative and Executive branches that do have more general value. As many of your countries are considering creating, or are in the process of structuring, independent communications regulatory authorities, our experience may therefore by instructive.

Exactly how a specialized communications regulator fits into the governmental structure will, of course, depend in part on a country's particular national political institutions. Parliamentary systems have not

experienced the same tradition of independent agencies, just as they cannot result in differing parties controlling the legislature and Executive branches. But we all share the same political realities -- powerful, wealthy business interest attempting to influence the regulator. Thus, whoever regulates communications must be given a strong mandate to act independently. This is in large part a negative principle: the regulatory authority must in principle be free from intervention by the Executive and legislature -- and by the dominant carriers. Appointment and appropriation powers are unavoidable aspects of constituting and operating a regulatory agency, but aside from these, additional control mechanisms must be avoided. For example, creation of advisory boards with representation of Executive or legislative officials would only invite micro-managment of the regulator's tasks.

Further, public confidence in the independence of the regulator will be strengthened if its rulemaking and adjudicatory processes are transparent and available for all interested parties to use. Regulatory decisions should be made in accordance with administrative procedure, and in principle subject to judicial review. These procedural protections both help regulators to reasoned decisions, and keep us honest. I can appreciate that the rigors of U.S. administrative procedure may not be to every non-American's taste, but they do help in creating public confidence that decisions are not made behind closed doors.

Administrative process need not be seen just as a necessary burden, but also can serve a pedagogical purpose. The FCC regularly uses rulemaking and inquiry proceedings to solicit industry and public views on emerging issues. Much of the technical, economic and legal analysis which figures in our decisions is developed in this way. Industry feels it is participating, and it is right.

There is one other feature of the FCC's mandate that I would emphasize: the integration of both broadcasting and telecommunications regulation in one national institution. "Convergence" of these two industries is not just a slogan of the moment; it is a basic force driving business strategies today. The "mega-mergers" that have swept America in recent months -- Disney and Capital Cities/ABC to name just one -- show the progressive blurring of the distinctions between these two branches of regulation.

There are obvious efficiencies to unifying regulatory resources in one place to deal with the issues of competition and concentration that convergence raises. I recognize that for some countries, such as Germany, state (as opposed to federal) regulation of broadcasting is even a constitutional prerogative. But rethinking of this separation of broadcasting and telecommunications regulatory authority is essential in light of the onrushing technological and economic changes in the industries.

What Is to Be Done?

So, secure in our independence, armed to the teeth with legal weapons to protect it, what are the FCC's priorities today? First, some general axioms, then some specific reforms.

1) The New Information Society: Just as the printing press made the Reformation inevitable, so the combinations of cheap communications and PCs -- let's call it the networked society -- will reshape all private and public institutions. All countries should accept this change at more or less the same time, even though it threatens the status quo. This is the core of the American mission to convert the G-7 and all the UN nations to the principles of the Buenos Aires Declaration expressed by VP Gore in his farsighted speech a year and a half ago;

2) ...And The Existential Crisis: At least outside this room, the curse of the modern age is that people do not feel that they are in charge of their lives. But computer networks have the capability to provide each human with what the brilliant Yale computer scientist David Gelernter calls "top sight." By this he means

the ability to manage the astounding complexities to the modern world. Providing this "top sight" is crucial to solving the crisis of alienation in the 21st century.

3) Communications and Democracy: In America the mass media threaten the viability of representative democracy for one specific reason: the desperate imperative for politicians to buy advertising time to run for office. The nearly impossible task of doing TV politics has greatly reduced the effectiveness of local, state, and federal government. For democracy to survive and thrive worldwide, the power of modern communication must be used to enhance participation and reasoned debate, not frustrate it.

4) The Jobs Dilemma: We need to admit that in modern economies, modern communications does confront us with the real, chronic, and challenging problem of job elimination. The communications revolution destroys jobs. And it creates jobs. And it creates a better standard of living. But we can't deny that if we are to have a peaceful world those caught in the transition to the information age must be helped, not discarded.

5) Keeping Government on the Job: The communications revolution will permanently alter the powers and performance of government at all levels, from the county sheriff to the United Nations. That is why there couldn't be a course of conduct more shortsighted right now than a repudiation of positive government. Instead we should remember that government, when it is smart and responsive, is the way we act together to improve our common lot.

Turning to specifics, here are the top 5 things I believe that the FCC should do, in increasing order of importance:

5) The FCC should reform the access charge and universal service schemes in this country. Neither can survive competition. Each needs total overhaul. In particular we need a tight focus for universal service and the elimination of all subsidies that don't serve an important national goal. Similarly, we should continue the dozen steps we have taken in the last year to treat basic cable more as a universal service, lowering its price in return for having the price of enhanced basic go up.

4) We should move to spectrum auctions and flexible use of the spectrum as the twin paradigms for domestic use of the airwaves.

3) We should continue to deregulate the business dimension of commercial broadcasting, such as by eliminating rules that specify rights to distribute programming in syndication.

At the same time we should, at last, after 61 years of operation under a general "public interest" standard contained in the Communications Act of 1934, explain better what this term concretely obliges industries to do in this era of the communications revolution.

In 1973, FCC Chairman Dean Burch told a broadcast industry group: "If I were to pose the questions, what are the public interest guidelines that are the basis of the FCC's renewal policies, everyone in the room would be on equal footing. You couldn't tell me. I couldn't tell you-- and no one else at the Commission could do any better.

It's in this connection that we should have a specific number of hours of children's educational television required of al TV licensees, so that they know clearly what is expected in return for their free licenses to use the airwaves.

2) On the international front, we should continue to press for harmonious rules of open competition in all countries. Our proposed reform of foreign ownership rules will make competitive opportunity abroad a key determinant of whether we allow foreign ownership of our communications properties. It is a conscious attempt to reward like-minded countries.

Our preference is for widespread market-opening through the WTO's ongoing negotiating group on basic telecommunications (NGBT). A multilateral agreement within the framework of the GATS is the firmest possible foundation for global liberalization of telecommunications services. But a 'minimalist' NGBT -- as some have called for -- is not enough. If we don't tackle the hard questions now, in this forum, we will have achieved very little indeed. In truth, we will only be leaving the real work to another day and another forum -- which undoubtedly will be a less universal one than we can now achieve.

These negotiations are heading into crucial months. One of our most important collective tasks will be to work within our governments to see that they succeed.

And last, but in truth first:

1) Communications must revolutionize education. We spend $200 billion a year in America on educating 45 million kids without getting a decent return on our investment. The return should be this: these kids are supposed to keep the American Dream alive. But as of now :

Sixty percent of the new jobs in the year 2000 will require skills possessed by only 22 percent of the young people entering the labor market. Workers' lack of information literacy now cost business an estimated $25 million annually in poor product quality, low productivity and accident.

We need classrooms in which every child and every teacher uses a networked computer to learn, to communicate, to develop. I have seen networked classrooms, and they work. I've been to test schools in Washington, D.C.; Harlem, New York; Silicon Valley; Osaka, Japan; Dallas, Texas. Networks engage children. Attendance goes up, test scores go up, failure rates go down. What a surprise; the productivity gains achieved by the private sectors because of modern communications are entirely possible in the education sector.

A market for educational technology will allow businesses to make money bringing classrooms into the information age. Companies like TCI, Time Warner, Apple, AT&T and others have great ideas on the drawing board. But as of now only 1.4 percent of educational spending in America is dedicated to technology. And our kids are getting further and further behind.

Communications and education are not part of a nationalist agenda. On the contrary, it is a crucial challenge faced by all of our countries as we strive to prepare our children for a work world that is fundamentally changing. It's up to us -- students of the communications revolution with perhaps a bit more understanding of how radically it is changing our societies -- to persuade our governments of the need for quick action.

In the U.S., the Administration believes legislative action is needed to lower the cost to schools of investing in information technology. We also need government action as a catalyst to create a functioning market for communication technology in education. Public-private partnerships should work to build model schools. The government should be a clearinghouse of new ideas learned in these models. Some of your countries, which have a more expansive view of the role of government in society, doubtless will have even more elaborate visions than these.

There is room for all of them. This is the right time and right place to pick up and install the best ideas for communications policies in this country and around the world. The idea of a networked economy is untested in history. If, for all its glories, it displaces workers, alienates citizens, widens educational gaps, it will ultimately fail. So now is also the right time and the right place to lay the foundation for a networked society in which the public interest as well as private interests can prosper, and all can have the opportunity to be winners.

Declaration of Robert W. McChesney

I, ROBERT W. MCCHESNEY, do hereby declare:

My name is Robert W. McChesney. I teach journalism at the University of Wisconsin-Madison. I have authored a book entitled "Telecommunications, Mass Media and Democracy: The battle for the Control of U.S. Broadcasting, 1928-1935)" and have studied and written extensively on the subject of radio communications and the FCC.

I am familiar with the current licensing processes of the FCC, and their decisions as to who should receive licenses and why. I believe that the current licensing distribution scheme established by the FCC fails to meet the needs of the public in numerous ways:

a) by catering primarily to large scale commercial broadcasters, the FCC has abdicated its role to ensure that the airwaves are available for a broad cross-section of debate and discussion of other interests.

b) by allocating spectrum space to mega watt broadcasters, the FCC has made a policy decision to deny a voice to many, while giving a voice to the wealthy few.

c) by establishing a regulatory framework that is expensive and burdensome, the FCC has created a situation where large segments of the American people do not have the finances or skills to gain access to broadcasting technology.

d) by failing to accommodate the creation and use of new micro radio technologies that are simple and inexpensive to operate, the FCC has failed to meet its obligation to establish a licensing scheme that meets the public interest.

e) the principles and interests that underlie the issuance of licenses for "translators" (10 watt transmitters that are may not be used for locally originated programs) are different than those that apply to local programming that originates from the source.

f) The content of broadcast information is largely determined and affected by those who own and sponsor the broadcasting station. The content of non-government, non-corporate sponsored stations will be substantially different than other stations. The current regulatory scheme enforced by the FCC is based upon that agency's desire to keep these different viewpoints, perspectives and sources of information from being broadcast widely over the airwaves.

g) In my studies of the communications laws, I believe the following statements to be factually correct:

1. Congress has never formally enunciated and established broadcast policy. The Radio Act of 1927 and the Communications Act of 1934 (and the new Communications Act of 1995) were both drafted and passed with minimal public participation. Special interests dominated the legislation.

2. In 1934 corporate broadcasters used their immense political power to see that there was no possibility for congressional hearing about the legislation before it was passed. Historical research shows that Congress was manipulated against public sentiment in 1934 concerning broadcast legislation. Indeed, in 1927 there was a general consensus that the term public interest as it applied to broadcasting meant that the government should favor nonprofit groups in the allocation of licenses. There has never been a subsequent Congressional debate overturning that sentiment.

3. Corporate power has been able to make certain that the FCC has done exactly what corporate power wanted. Studies show that a high percentage of FCC members leave the FCC for lucrative careers in the commercial broadcasting industry. The entire history of the FCC is one of acceding to corporate interests.

I am prepared to testify on behalf of Stephen P. Dunifer in the case currently pending before this court regarding the above issues, as well as many other considerations that I have written about concerning access to the airwaves.

I declare under penalty of perjury that the foregoing is true and correct to the best of knowledge and belief.

Executed on January, 1996.

_____

Robert W. McChesney

FILED
JAN 30 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. STEPHEN PAUL DUNIFER, Defendant.

No. C 94-03542 CW MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND STAYING THIS ACTION

BACKGROUND

Defendant is the operator of "Free Radio Berkeley," which broadcasts at low FM frequencies without a license from various locations in the Berkeley Hills and Albany. Defendant cannot obtain a license to broadcast because the FCC's regulatory scheme does not allow for licensing of "micro radio broadcasting" (ten watts or lower). On his broadcasts and in interviews with the press, Defendant criticizes the FCC's refusal to license micro radio.

The United States seeks declaratory and injunctive relief against Defendant for operating a radio station without a license in violation of 47 U.S.C. s 301. This Court has jurisdiction under 47 U.S.C. S 401(a).

After establishing that Defendant had broadcast Freed Radio Berkeley without a license on two specific dates, the FCC first imposed a monetary forfeiture against him in November 1993. Defendant filed two documents with the FCC in connection with this fine: a response to the notification of the impending forfeiture order, and an application for review of the forfeiture order after it was issued. See Def.'s Exhs. A & B. In both documents Defendant argued that the existing regulations, which preclude the possibility of licensing micro radio broadcasting are unconstitutional.[1] The FCC has taken no further action on the forfeiture. Meanwhile, the C.C. Circuit struck down the fine structure on which Defendant's $20,000 forfeiture amount was based, on grounds that it violates the Administrative Procedure Act. United States Telephone Assoc. v. FCC, 28 F.3d 1232, 1236 (D.C. Cir. 1994).

Rather than addressing Defendant's arguments regarding the validity of the FCC regulations at issue by pursuing the forfeiture, the FCC seeks to stop Free Radio Berkeley's broadcasts in the present action for injunctive relief.

LEGAL STANDARD

The moving party is entitled to preliminary injunction if it establishes either:
1. a combination of probable success on the merits and the possibility of irreparable harm, or
2. that there exist serious questions regarding the merits and the balance of hardships tips sharply in its favor.

Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987); California Cooler v. Loretto Winery, 774 F.2d 1451, 1455 (9th Cir. 1985); see also Wm. Inglis & Sons Baking Co. v. ITT Continental

Baking Co., 526 F.2d 86, 88 (9th Cir. 1975); County of Alameda v. Weinberger, 520 F.2d 344, 349 (9th Cir. 1975).

The test is a "continum in which the required showing of harm varies inversely with the required showing of meritoriousness." Rodeo Collection, 812 F.2d at 1217 (quoting San Diego Comm. Against Registration and the Draft v. Governing Board of Grossmont Union High School Dist., 790 F.2d 1471, 1473 n.3 (9th Cir. 1986). To overcome a weak showing of merit, a plaintiff seeking a preliminary injunction must make a very strong showing that the balance of hardships is in her favor. Rodeo Collection, 812 F.2d at 1217.

DISCUSSION

Probability of success on the merits

The government has shown probably success on the merits on the narrow issue that Defendant has violated the existing statute prohibiting radio broadcasting without a license. However, the government has failed to show a probability without a license. However, the government has failed to show a probability of success on the central issue raised by Defendant, i.e., whether the FCC's complete prohibition of micro radio is constitutional.

Defendant argues that by completely prohibiting micro radio broadcasts, the current FCC regulatory scheme deprives the prospective broadcasters and their listeners of access to the public airwaves in violation of the First Amendment. When First Amendment free speech rights are impacted by government regulation, the government must establish that the contested regulations are the least restrictive means available to further a compelling state interest. See FCC v. League of Women Voters of California, 468 U.S. 364, 380-81 (1984). Traditionally, FCC regulation of the airwaves has been justified because the radio spectrum cannot accommodate an unlimited number of users. See Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445, 2456 (1994). Defendant argues that the regulations prohibiting micro radio broadcasting, and the FCC's justifications for them, are based on out-of-date assumptions about technological capabilities. Contrary to the FCC's assertions in support of its ban on micro radio, Defendant argues that micro radio broadcasting can be permitted without risk of signal interference to high-power broadcasters. Defendant cites Canadian law, which licenses low power FM radio broadcasters, and an FCC report which cited Canadian law, in support of this contention. See Exh. B at 7-8. Thus, Defendant argues that the FCC's assertion that micro radio broadcasting may interfere with the broadcasts of licensed, high-powered commercial radio stations does not meet the constitutional test of imposing the least restrictive means available to further a compelling government interest, and thus, violates First Amendment free speech rights.

Moreover, Defendant argues that by prohibiting micro radio broadcasting, the FCC effectively eliminates opportunities for low cost broadcasting on community issues as an alternative to mainstream perspectives, and thereby violates its mandate to regulate in the interests of the whole public, not just the economically powerful. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3010 (1990) (people as a whole have First Amendment rights in radio, including the right to balanced presentation of information on issues of public importance, which is sufficient constitutional basis for FCC's minority ownership policies). Finally, Defendant asserts that the FCC prohibits micro radio broadcasting generally, and selectively seeks to enjoin Defendant specifically, because of the political content of their speech.

The government has responded with argument and citations to Supreme Court cases which affirm the statutory authority of the FCC to regulate and license radio broadcasters, and which affirm the scarcity doctrine as a valid grounds for such regulation. As Plaintiff and Amici point out, this is not the issue.

Defendant does not challenge the FCC's authority to regulate micro-power broadcasts. Rather, Defendant challenges the constitutionality of the present regulations, which impose a complete ban on licensing FM broadcasts of less than 100 watts. None of the cases cited by the government involved these specific regulations. Accordingly, they do not establish as a matter of law that the regulations at issue are constitutional. The fact that the statute is constitutional does not compel the conclusion that regulations promulgated under it are also constitutional. Such a conclusion would be untenable; it would render meaningless the very inquiries undertaken by the Supreme Court in the cases cited by the government, i.e., whether certain restrictions imposed by the FCC met the First Amendment constitutional test of the least restrictive means available to further a compelling state interest, as well as the statutory mandate. See, e.g., 47 U.S.C. S 303(r) (providing FCC with authority to regulate in the public interest, convenience or necessity.)' NBC v. United States, 319 U.S. 190 (1943) (upholding regulations re: multiple ownership of AM stations under statutory mandate); Red Lion Broadcasting Co. v. FCC, 393 U.S. 367 (1969) (establishing the scarcity doctrine and finding FCC rules creating the fairness doctrine constitutional); FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding regulations barring common ownership of newspaper and broadcasting stations under statutory mandate and First Amendment).

The government also argues that the FCC has met its statutory mandate by undertaking an extensive study of the feasibility of allowing micro radio broadcasts before deciding to prohibit them. See 47 U.S.C. S 303(g) (FCC required to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"). The problem with this argument is that the FCC study was done in 1978. The crux of Defendant's challenge is that technology has changed since then, and the feasibility of micro-power broadcasting has changed with it. As Defendant points out, in 1993 Canada modified its rules to permit micro-power broadcasting in urban areas (Canada had allowed micro-power broadcasting in remote communities since 1978). This supports Defendant's argument that determinations based on 1978 technology are obsolete. Accordingly, the FCC is arguably violating its statutory mandate as well as the First Amendment by refusing to revisit the issue. See 47 U.S.C. S 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public"); id. S 324 ("In all circumstances, except in the case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired").

If the FCC's current regulations, which prevent Defendant from complying with the statute's licensing requirement, violate the agency's statutory mandate and the First Amendment, Defendant's violation of the statute cannot form the basis for granting the declaratory and injunctive relief the government seeks. For the reasons discussed above, the government has failed to establish a probability of success on its contention that the current regulatory ban on micro broadcasting is constitutional. At most, the government has raised serious questions as to the constitutionality of these regulations.

Irreparable harm/balance of hardships

Citing United States v. Nutri-Cology, 982 F.2d 394 (9th Cir. 1992), the government argues that there is a presumption of irreparable injury in this case because the government has established a likelihood of success on its assertion that Defendant is violating the applicable statute by broadcasting without a license. In Nutri-Cology, the court held that "where the government has met the 'probability of success' prong of the preliminary injunction t est, we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public." Id. at 398. However, as Defendant argues, the Ninth Circuit in that case was careful to establish that the presumption applies only where the violation of a statute is not adequately disputed. Id. Where, as here, the

constitutionality of the implementing regulations, and their validity under the statutory mandate, is at issue, the resulting violation of the statute is also at issue, and the government must show a likelihood of success regarding the constitutional challenges before the Court can presume that violations of the statute amount to irreparable injury as a matter of law. In cases challenging the constitutionality of regulations promulgated under a statute, it cannot be presumed that violations of the statutory/regulatory scheme amount to public harm. Indeed, the opposite is asserted by the constitutional challenge.

The government also attempts to establish irreparable harm by asserting that Defendant's broadcasting may interfere with legitimate licensed broadcasting. The government argues that it has documented tow occasions of such interference, and further, that because Defendant's equipment is not FCC-approved, it must be considered likely to emit spurious signals without warning, thus causing harmful interference to air navigation and communications operations. However, the record does not support the latter assertion. Although a declarant for the government asserts has witnessed such interference from other homemade radio equipment, he does not clearly state that micro radio broadcasts specifically can cause it. See Kane Decl. P 29. The government has not shown that Defendant's equipment is defective, and Defendant asserts that it is not.

Defendant also asserts that on one of the two occasions of documented interference with licensed broadcasting, the government agent had to drive right up to Defendant's transmitter to provoke interference. Defendant states that he immediately discontinued broadcasting on those two occasions when his signal wavered, and no other instances have been documented over an 18-month period. Finally, and most troubling, Defendant asserts that the FCC has not sought injunctions against several other micro broadcasters known to the FCC, who have also been subjected to forfeiture proceedings by the FCC, and that in some cases, such micro broadcasters have continued their broadcasting for several years. Under these circumstances, the government's contention that Defendant's broadcasts present a threat of irreparable harm is unpersuasive.

At most, the government's allegations of two instances of brief interference present an issue for balancing of hardships. The Court finds that the harm to the First Amendment rights of Defendant and the public at large which may result from enforcing the current regulations outweighs the slight showing of interference proffered by the government.

CONCLUSION

The government has so far failed to address the constitutional issues in the FCC forfeiture action and has inadequately addressed them in arguments before this Court. Under the doctrine of primary jurisdiction, this Court should not rule on the constitutionality of the regulations at issue until the FCC has itself adequately addressed the issue. See Far East Conference v. United States, 342 U.S. 570, 574-75 (1952); United States v. Western Pacific R. Co., 352 U.S. 59, 63-64 (1956); Writer's Guild of America v. American Broadcasting, 609 F.2d 355, 366 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980). This Court defers in the first instance to the FCC to provide guidance on the factual and technical issues related to the constitutionality of the regulatory scheme. That is, in light of current technology, is a total ban on new licensing of micro radio broadcasting the least restrictive means available to protect against chaos in the airwaves? The FCC could provide this guidance in the context of addressing Defendant's arguments in the pending forfeiture proceeding, or in the context of its rulemaking powers.

On the present record, this Court does not find a probability that Plaintiff will succeed on the merits, particularly in the absence of guidance from the FCC on Defendant's constitutional challenge to the

99
129

regulations at issue. While there may be serious question as to the merits, on the present record the Court does not find that the balance of harm tips sharply in favor of the FCC.

Accordingly, Defendant's motion for a preliminary injunction is hereby DENIED, and the present action is STAYED, to allow the FCC to address the constitutional issues in the appropriate forum.

IT IS SO ORDERED.

Dated: JAN 30 1995
CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

Copies mailed to counsel noted on attached sheet

July 12, 1996

The Honorable Claudia Wilken

U.S. District Court for the

Northern District of California

1301 Clay Street

Courtroom 2, 4th Floor

Oakland, CA 94612

RE: U.S. v. Stephen P. Dunifer, No. C 94-3542 CW

Dear Judge Wilken,

We received the "Notice of Recent Ninth Circuit Decision" filed by the government, and thought that a brief response was appropriate to point out the significant distinctions between Wilson v. A.H. Belo Corp. et. al, and the instant case.

First, and most importantly, the Wilson case, like Moser v. FCC, 46 F.3d 970 (9th Cir. 1995) cert. denied, 115 S.Ct. 2615 (1995)), did not involve a statute specifically granting the district court jurisdiction. In the present case, 47 U.S.C. §401(a) plainly grants the district court jurisdiction. This specific grant of jurisdiction is analogous to that of 47 U.S.C. §504(a), vesting the district court jurisdiction over challenges to FCC forfeiture orders. As the Ninth Circuit concluded in Dougan v. FCC, 21 F.3d 1488 (9th Cir. 1994), the specific language of §504(a) trumps the general rule of 47 U.S.C. §402(a); §504(a) "is a special review statute which vest jurisdiction in other courts." 21 F.3d 1488, 1491. Perhaps recognizing that if the district court has jurisdiction to decide constitutional issues in the context of a challenge to forfeiture action under §504(a), the district court likewise has jurisdiction to do so in this case, the FCC asserted at oral argument on April 12, 1996 that even in a §504(a) hearing, this court would not have jurisdiction to consider a constitutional challenge to FCC regulations. (Transcript of 4/12/96 hearing, at pp. 8-9). This assertion ignores that fact, however, that the Ninth Circuit recognized that the plaintiff was raising constitutional challenges to the FCC regulations: "Dougan challenges the jurisdiction of the FCC over his intrastate broadcasts and the constitutionality of the licensing regulations." 21 F.3d 1488. If the FCC's current position were correct, then Dougan was in the right court to raise his constitutional challenges. In Dougan, however, the FCC argued that the district court, not the Court of Appeals, was the only viable forum for those arguments, because they arose in the context of a FCC forfeiture action, and §504(a)'s specific grant of jurisdiction controlled. As noted, the Ninth Circuit agreed.

Secondly, Wilson, like Moser, is distinguishable from the present case because in neither of those cases did the government affirmatively assert and seek the jurisdiction of the district court. Defendant here is not seeking to circumvent the jurisdiction of the Court of Appeals. Defendant did not seek this forum; the FCC did. The FCC has invoked the jurisdiction of this court to seek equitable relief for an unjust position. Unlike the plaintiffs in Wilson and Moser, defendant herein has not sought to affirmatively set aside FCC actions or regulations, but rather, in his defense, asks that the "public interest" requirements of the Act be carried out lawfully.

140
130

Very Truly Yours,

Allen Hopper

Louis N. Hiken,

Attorneys for Stephen Dunifer

cc: Patricia Duggan, Assistant U.S. Attorney

David Silberman, Counsel, FCC

Current Legal Status:

To summarize the current situation - court action continues with the FCC. After much delay the FCC finally ruled on the administrative appeal we had filed almost two years ago on the matter of the $20,000 fine against Stephen Dunifer and Free Radio Berkeley. Of course, it took a court decision by Federal Judge Claudia Wilken to force this ruling. In this ruling they take a rather indefensible position by stating that it would not be in the public interest for those currently without a voice to have one through low power FM service. Further, they go on to say that the greatest diversity of voices can be best served by the full service broadcasters and shut the door entirely on the possibility of micro power FM stations. Just substitute "corporate interest" every time they say "public interest", this will give a truer perspective on the matter.

Currently, this is the legal status. On December 4, 1995 the FCC filed a motion for summary judgment on a permanent injunction to silence Free Radio Berkeley. Judge Claudia Wilken has show an interest in allowing us to have a trial on the merits to determine the facts and is unlikely to grant the FCC's motion. In character, the FCC is taking the rather arrogant attitude that the court only has jurisdiction as long as they ruled in their favor. After a paper fusillade of response and counter response we appeared in Oakland Federal Court on Friday, April 12, 1996 for a hearing on the motion for summary judgment. After hearing oral arguments, the judge took the motion under submission. A ruling will be issued at some point. If this motion is denied it is likely the FCC will appeal this to the 9th Circuit Court of Appeals. Two actions are possible by the 9th Circuit, they could reject the appeal on its face and throw it back to Federal Judge Claudia Wilken or they could take it under consideration. If the former happens it means we would go to trial in late 196 or early 1997. Otherwise, it will be a year before the 9th Circuit holds a hearing on the appeal and at least several month beyond that before an opinion is released. If the appeal is rejected, it is back to trial or we appeal the granting of the injunction. Whew!

What it really means is that this matter will not be settled anytime soon and the whole issue of Micro Power broadcasting is going to remain in a gray area of neither be legal nor illegal, according to our attorneys. The window of opportunity remains open. Now is the time to make a concerted national effort at the community level to put as many stations on the air as possible. Let ten thousand transmitters blossom!

This window of opportunity exists largely due to our incredible attorneys who have put a great deal of research and time into defending Micro Power broadcasting. Our legal costs are increasing as the legal battle continues. Your financial support is critical to the success of this battle for free speech. Any amount you can send will help. If you can organize fund raisers, do door to door canvassing, put on benefits, etc. that would be great. We have videos that can be shown for public events.

NATIONAL LAWYERS GUILD
COMMITTEE ON DEMOCRATIC COMMUNICATIONS
One Sansome Street, Suite 900
San Francisco, California 94104
Telephone: (415) 705-6464

LOUIS N. HIKEN, SBN 45337
One Sansome Street, Suite 900
San Francisco, California 94104
Telephone: (415) 705-6464

PETER FRANCK, SBN 34402
One Sansome Street, Suite 900
San Francisco, California 94104
Telephone: (415) 705-6464

UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

No. 92-70734

WILLIAM LEIGH DOUGAN,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondent

)
)
)
)
)
)

5/133

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Other:

TABLE OF CONTENTS

F.C.C.'S STATUTORY AUTHORITY.

III. THE FCC VIOLATES ITS STATUTORY MANDATE TO SERVE THE PUBLIC CONVENIENCE, INTEREST AND NECESSITY BY ITS FAILURE TO ALLOW MICRO POWER RADIO BROADCASTING WHICH RESULTS IN THE COMPLETE PROHIBITION OF ALL MICRO RADIO BROADCASTS.

IV. TO THE EXTENT THAT THERE IS A LEGITIMATE GOVERNMENTAL INTEREST IN REGULATING MICRO RADIO THE FIRST AMENDMENT REQUIRES THAT IT USE THE NARROWEST POSSIBLE MEASURES TO ACCOMPLISH THIS OBJECTIVE.

V. THE GOVERNMENT ACTION IN COMPLETELY PROHIBITING MICRO POWER RADIO CANNOT PASS CONSTITUTIONAL MUSTER WHERE NEIGHBORING COUNTRIES WITH LESS STRINGENT FREE SPEECH GUARANTEES PROVIDE A SIMPLE AND APPROPRIATE REGULATORY STRUCTURE FOR MICRO RADIO.

VI. CONCLUSION.

I. INTRODUCTION1

This honorable Court has asked the Government to file special briefs specifically addressing the issue of the way in which the Federal Communication Commission's regulations banning micro power broadcasting serve the public convenience, interest and necessity, and has asked the government to explain its interest in precluding micro power broadcasts.

Micro radio is a method by which ordinary people can communicate with one another over the airwaves without having to invest huge sums of money, and without interfering with the rights of large-scale, F.C.C. licensed commercial stations or their listeners. The F.C.C., however, has not provided a means by which persons wishing to avail themselves of this technological opportunity can legally do so, and has, in fact moved vigorously to suppress it.

The National Lawyers Guild's Committee on Democratic Communications contends that Federal Communications Commission (F.C.C.) policies with regard to micro radio broadcasting have failed to keep pace with the rapid proliferation of technological advances in the field of communication. The F.C.C.'s current regulatory scheme completely prohibits micro radio broadcasters and their listeners from accessing the public airwaves.2

To enforce this absolute prohibition, the F.C.C. relies upon regulations, and case law applying the regulations, which were intended solely for application to large-scale, commercial broadcasters, and which were promulgated long before the advent of the technology that makes possible micro radio; indeed, even before the advent of FM broadcasting. As a result, the F.C.C.'s application of these regulations violates the First Amendment rights of individuals seeking to exercise those rights via methods and mediums that were technologically impossible when the regulations were created.

The cost of owning and operating a radio station has skyrocketed into the hundreds of thousands and even million dollar range, and participation in the broadcast media has thereby become limited only to large corporation. The individual seeking to communicate and listen to other over the airwaves in his or her local

community is completely left out of the licensing scheme if he or she cannot afford the expenses entailed in purchasing, obtaining a license for and operating a commercial broadcast station with a least 100 watts of power.3

It is the obligation of the F.C.C. to construct and enforce its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low-power micro radio, the F.C.C. 1) fails to comply with its congressional mandate to regulate the airwaves in the public convenience, interest and necessity, 2) exceeds the limits of the power conferred upon it by Congress, and 3) violates the constitutional rights of micro radio broadcasters and their listeners.

II. THE COMPLETE AND ABSOLUTE PROHIBITION OF MICRO RADIO BROADCASTS RESULTING FROM THE F.C.C.'S IMPROPER IMPLEMENTATION OF THEIR STATUTORY AUTHORITY VIOLATES THE FIRST AMENDMENT.

The F.C.C. must uphold the First Amendment rights of micro radio broadcasters and their audience as part of their mandate to regulate the airwaves in the public interest, convenience and necessity. That is, the F.C.C. may not outlaw this media under the constitution, although the Commission may develop a regulatory procedure appropriate to this media if such is found necessary. Currently, F.C.C. policy constitutes a prior restraint of free speech in violation of the First Amendment.

The people of the United States have a constitutionally protected interest in free speech by means of radio and other forms of broadcast media. The Supreme Court has previously recognized the supremacy of the rights of the people as a whole to have the medium of radio function consistently with the ends and purposes of the First Amendment. Red Lion Broadcasting, 395 U.S. 367, 390 (1969). Given the Supreme Court's recognition of the supremacy of these public rights, the F.C.C.'s assertion of an, at best, remote, and as yet undocumented possibility that micro radio may interfere with the broadcasts of licensed, commercial stations is simply inadequate to overcome the right of radio listeners to receive the broad variety of viewpoints, perspectives, and programming formats which micro radio offers. The advent of micro radio not only gives radio listeners a low-cost alternative to the perspectives presented on mainstream, commercial radio, but it furthermore allows members of the public the opportunity to participate and present their own personal and local community interest in a direct and effective way, making the public airwaves truly public for the first time.

The foremost purpose of requiring radio broadcasters to obtain licenses from the F.C.C. is to prevent interference from other radio broadcasts. The F.C.C. claims that due to the finite size of the radio spectrum, i.e. "spectrum scarcity", only a limited number of radio frequencies are capable of broadcasting at the same time in the same space without undue interference from neighboring signals. The F.C.C. argues that this so-called spectrum scarcity somehow justifies the application of a lower level of First Amendment protection for persons utilizing the air-waves a compared to other forums. See, e.g., F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940).

The F.C.C. itself, however, has found the concept of "spectrum scarcity" to be an improper basis for applying a different constitutional standard to broadcast media than to other forms of media. In re Syracuse Peace Council, 2 F.C.C. Rcd 5043 (1987). As the Commission pointed out in Syracuse Peace Council, while it may be true that there are only a finite number of broadcast frequencies, this is no less

true of the computers, delivery trucks, ink and newsprint which are used in the production of printed speech:

> ...[W]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity -- be it spectrum or numerical-- is irrelevant. As Judge Bork said in Trac v. F.C.C. [801 F.2d at 508], 'Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.' 2 F.C.C. Rcd 5043, 5055.
>
> The Commission went on to state that:
>
> [The] First Amendment was adopted to protect the people not from journalists, but from the government. It gives people the right to receive ideas that are unfettered by government interference. We fail to see how this right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. (Id. at 5057.)

III. THE FCC'S FAILURE TO PROVIDE FOR MICRO RADIO BROADCASTING RESULTS IN THE COMPLETE PROHIBITION OF ALL MICRO RADIO BROADCASTING, IN VIOLATION OF 47 CFR § 73.201 ET SEQ.

It is the obligation of the F.C.C. to construct and enforce its regulatory framework in such a way as to safeguard, and indeed strengthen, the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low power micro radio, the Commission has failed to carry out its congressional mandate to regulate the airwaves in the public interest, has exceeded the limits of the power conferred on it by Congress, and is violating the constitutional rights of micro radio broadcasters and their listeners.

The problem is not that micro radio broadcasters are refusing to comply with F.C.C. licensing procedures. Rather, the fundamental problem is that the F.C.C. has not provided procedures by which micro radio broadcasters can become licensed or authorized. Instead , the F.C.C. is applying sever administrative and criminal sanctions, intended for application to large-scale, commercial operators, to micro radio broadcasters with the goal of completely precluding all such broadcasts. These F.C.C. policies are consistently violative of Due Process and Equal Protection guarantees in that they discriminate against the poor and minorities, and do not provide for adequate representation by counsel or opportunity for a hearing or administrative review. Furthermore, by assessing forfeitures of as much as $20,000 against individuals with no prior F.C.C. violations, accused of transmitting a brief, low power, non-commercial broadcast, the F.C.C. violates the statutory authority upon which its forfeiture policies are based.

The Commission has recently gone to great lengths to argue that its regulations do not in fact completely prohibit micro radio. In its "Forfeiture Order" in a case very similar to Mr. Dougan's, the Commission

stated that there "is clear indication that there is no 'complete and absolute prohibition'" against micro power radio broadcasting. In the Matter of Stephen P. Dunifer, NAL/Acct. No. 315SF0050; SF-93-1355, Forfeiture Order at 6 (Appendix A). The Commission here cites four methods by which it alleges that micro radio broadcasting may be permitted pursuant to its current regulatory framework. These methods are summarized as follows:

1) Petition the Commission to change the current regulatory framework that prohibits non-commercial broadcasts of less than 100 watts;

2) Apply for a license to operate a 10 watt station above 92 MHz on the FM Band;

3) Broadcast as permitted under 47 CFR 15.239(b);

4) Apply for a license to operate a Non-Commercial Educational FM Broadcast Station under 47 CFR §§ 73.501 et. seq.

However, an analysis of the claimed opportunities for micro radio broadcasting within the F.C.C.'s current regulatory framework reveals that there is, in fact, a complete prohibition of micro radio broadcasting.

Number 1 above would require micro radio broadcaster (or anyone else) to petition to change a rule that is unconstitutional on its face. Such a principle would completely deprive the courts of the rights (and duty) to declare laws conflicting with the constitution unconstitutional, since (the argument would go) an aggrieved party could petition congress to change such a law.

Number 2 above is, in effect, the same as petitioning for a rule change, since the minimum power requirements for acquiring a license to operate above 92 MHz are 100 watts or a six kilometer reference distance.4 47 C.F.R. §§73.211 et. seq., 73.511.

Number 3 above is meaningless, since the field strength permitted by §15.239(b) is so low as to preclude any micro radio broadcast capable of being received beyond 1 or 2 block away from the transmitter. The Commission's suggestion that a 10 watt broadcast could comply with the field strength limitations imposed by §15.239(b) is misleading, at best.

Number 4 above comes very close to being disingenuous. 47 CFR §73.511(a) explicitly provides that "No new Non-Commercial Educational station will be authorized with less power than minimum power requirements for commercial Class A facilities," that is, less than 100 watts. While it may be true that no one is precluded under the current regulatory framework from applying for a license as the Commission suggests in number 4 above, it is also true that no such application can possibly be approved by the Commission under its current regulations.

Although the F.C.C. states that micro power radio broadcasters should ask the agency to establish rules that would permit them to operate, this does not alter the fact that existing F.C.C. regulations governing micro power radio are unconstitutional.

IV. TO THE EXTENT THAT THERE IS A LEGITIMATE GOVERNMENTAL INTEREST IN REGULATING MICRO RADIO THE FIRST AMENDMENT REQUIRES THAT IT USE THE NARROWEST POSSIBLE MEASURES TO ACCOMPLISH THAT OBJECTIVE.

Although the Commission retains regulatory over micro radio, no compelling interest supports the blanket prohibition of very low power community radio broadcasts. The Communications Act of 1934 states that the Commission may assign bands of frequencies to the various classes of stations, assign frequencies for each individual station and determine the power which each station shall use. 47 U.S.C. §303(c). However, while the Commission serves the role of "traffic cop" with regard to spectrum allocation, a blanket refusal to permit low power FM broadcasts is an arbitrary and capricious abuse of Congressional authority, and is therefore and unconstitutional violation of the First Amendment rights of micro radio broadcasters.

The FM band of the electromagnetic spectrum is a place where speakers communicate messages to an audience, and, like any other forum where First Amendment activity is subject to interference, government may make reasonable rules for its use, FCC v. League of Women Voters, 468 U.S. 364 (1984). While the government may regulate activity in a First Amendment forum so long as reasonable rules are adopted to regulate the time, place and manner of protected speech, it is equally true that upon opening a forum to First Amendment activity the government is constrained in the exclusions it may enforce. A designated public forum is created when the state opens to the public generally "a place for expressive activity." Perry Ed. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983). Regulation of designated public forum is subject to strict scrutiny. Id. at 46. A designated public forum must be "held open to the general public" or made available for indiscriminate use by the general public." Id. at 47.

Because the electronic media is today the dominant means of communicating with the public, any policy that absolutely denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 196 (1973) (Brennan, dissenting) (citing Red Lion, supra, at 386 n. 15) Most Americans today rely on the electronic media almost exclusively to obtain information previously obtained through the print media or social gathering places. As a result, the airwaves must be appropriately analogized to a designated public forum, with strict scrutiny required to uphold any time/place/manner regulations impinging upon First Amendment rights, and the means used narrowly drawn to accomplish the Commission's regulatory objective.

V. THE GOVERNMENT ACTION IN COMPLETELY PROHIBITING MICRO POWER RADIO CANNOT PASS CONSTITUTIONAL MUSTER WHERE NEIGHBORING COUNTRIES WITH LESS STRINGENT FREE SPEECH GUARANTEES PROVIDE A SIMPLE AND APPROPRIATE REGULATORY STRUCTURE FOR MICRO RADIO.

While the Commission cites the risk of cacophony over the airwaves, as well as public safety and aviation concerns, such concerns have not stopped the Canadian Radio-television and Telecommunications Commission (CRTC) from adopting policies with respect to micro power radio broadcasting. In June of 1993 the CRTC established a priority system allowing Very Low Power FM (VLPFM) radio operators to obtain broadcast licenses in urban areas. Public Notice CRTC 1993-95, CRTC (1993) (see Appendix B). VLPFM has been defined as an FM broadcaster having transmitting power of one watt or less. Broadcast Procedure BP-15, Canada Department of Communications, p.1 (1978). Since 1978 Canada has licensed VLPFM broadcasters in remote communities with a simple 3 page application form (see Appendix C). BP-15. Canada presently allows VLPFM broadcasts in urban area where frequencies are scarce, including the metropolitan area of Toronto, Montreal and Vancouver.

In their notice Broadcast Procedure BP-15, the Canadian Department of Communications recommends that application forms and required information for the operation of very low power FM transmitters be simple enough to allow for easy application by potential low power licensees. Id. at 50. A sample of such an

application, along with rules governing broadcasts on low power micro radio stations, is included here as Appendix C. These forms request operational information (name of licensee, address, etc.), technical information (frequency/channel, antenna location, type of equipment, etc.) information concerning the community being served, and statements as to how operation of a low power transmitter will serve the needs of the community. A cursory examination of Appendix C indicates that the licensing and administrative requirements necessary to oversee operation of micro radio stations are not burdensome. Indeed, these licensing forms reveal that micro radio can be easily regulated so as to prevent any risk of signal interference. It is therefore obvious that FCC regulations prohibiting the operation of micro power radio unduly burden First Amendment rights, inasmuch as there exists obviously less restrictive means of furthering the government's interest in regulating the airwaves.

VI. CONCLUSION

FCC policies prohibiting all operation of micro radio broadcasting clearly violate the First Amendment, freedom of expression and the right of citizens to communicate. Furthermore, the F.C.C.'s failure to comply with its own procedures when issuing forfeitures, the grossly disproportionate amounts of the forfeitures levied, and the fact that the forfeitures are based upon unsubstantiated accusations with insufficient evidentiary support, all illustrate the fundamental problem in these cases: The F.C.C. is attempting to apply its regulatory framework to a new situation, micro power radio, that was never meant to be encompassed by these regulations.

Based on the foregoing, the National Lawyers Guild Committee on Democratic Communications urges the Court to hold that the present Regulations imposing a complete ban on micro radio broadcasting are in violation of the Constitution. If the F.C.C. finds a need to assert authority over micro radio, it must develop regulations and procedures in accord with the First Amendment. If micro broadcasting is to be regulated at all, it must be done in a manner that is least restrictive pursuant to First Amendment principles, and in accord with the F.C.C.'s statutory mandate to serve the public interest, convenience and necessity.

Dated: Respectfully submitted,

NATIONAL LAWYERS GUILD

COMMITTEE ON DEMOCRATIC COMMUNICATIONS

LOUIS N. HIKEN

Attorney

PETER FRANCK

Attorney

1This amicus brief was drafted with the assistance of Alan Korn. Mr. Korn has been admitted to the California Bar, and will be sworn in before this honorable Court on December 14, 1993. 2The F.C.C. has refused to license all FM stations (except some in Alaska) that operate with less than a minimum effective radiated power of 100 watts since their 1978 Second Report and Order, In the Matter of Changes in the Rules Relating to Commercial Educational FM Broadcast Stations, 69 F.C.C. 2d 240, 44 R.R. 2d 235 (1978), amended, 70 F.C.C. 2d 972, 44 R.R. 2d 1685 (1979). 3It is important to note that the 100 watt minimum is a regulatory creation of the F.C.C. The F.C.C.'s imposition of this restriction was justifiably criticized shortly after implementation in Note, Educational FM Radio - the Failure of Reform, 34 Fed. Com. L.J. 432 (1982). Nothing in the Communications Act (47 U.S.C. 151 et. seq.), on its face, prohibits micro radio broadcasting. To the extent that the F.C.C.'s regulations have effectively banned micro radio, the regulations are in conflict with the statutory framework and must be set aside. 4"Reference distance" is a technical concept defined at 47 C.F.R. §73.211(b)(1)(i)

STATEMENT OF FACTS

Public access to the electronic mass media has long been denied to minority communities and those without the financial resources to operate an FCC licensed radio or television outlet. As a result, an ever increasing number of disenfranchised individuals and organizations have chosen to speak directly with their local communities by means of low poor, micro radio broadcasts. Because the FCC has made no provisions to permit this type of low power broadcasting, micro radio broadcasters are forced to bypass typical FCC licensing procedures. The FCC has chosen to label micro radio practitioners "pirates," although such practitioners are merely exercising their First Amendment and international law right to communicate, and in no way interfere or compete with other licensed radio outlets. The criminalization of micro radio activity by the FCC violates the legal and Constitutional rights of such broadcasters, as the example below illustrates.

Mbanna Kantako, a legally blind African American citizen of the Untied States, is a resident of the John Hay Homes public housing project in Springfield, Illinois. On November 23, 1988, he began broadcasting community-oriented radio programs over a one watt FM radio station from his apartment with the aid of two "black boxes" which he purchased from a catalogue for $600.00. The station was initially named "WTRA." The name was subsequently changed to "Zoom Black Magic" radio, and changed again to "Black Liberation Radio" following events outlined in this brief.

WTRA was founded following Kantako's introduction to Mike Townsend, professor of social work at nearby Sangamon State University in the summer of 1985. The two met at a meeting addressing issues facing the tenant's Residents Council within the John Hay Homes. Townsend's presentation led to the subsequent formation of an organization called the Tenants Rights Association (TRA). This community group was initially successful in persuading the Springfield School Department to provide necessary bus service to school children living in the John Hay Homes. However, a subsequent voting rights dispute convinced Kantako that the commercial broadcast media of Springfield were unable to reach that city's minority community. Kantako realized that the local media were unresponsive to cultural, politically and news issues in the black community, and felt a need to respond.

Rather than starting a local newspaper, Kantako's blindness and past experience as a disk jockey convinced him that he should start a radio station. Kantako believed that newspapers are rapidly becoming an obsolete medium of communications. In addition, Kantako felt that a radio station was more likely to reach African American men, who suffer a disproportionately low literacy rate. However, Kantako never obtained a broadcasting license since no FCC licensing provision exists for stations operating at less than one hundred watts. The estimated start up cost of a one hundred watt station is in excess of $50,000. Mbanna Kantako, a 32 year old low-income public housing resident could not afford the prohibitive cost of such a venture.2

WTRA began broadcasting in November 1988 at 107.1 MHz. Kantako's broadcasts could be received within a mile and a half of the transmitter by a population of approximately 2,000 people with 1,500 living in the John Hay Homes of Springfield, Illinois. The population of the John Hay Homes is 98% African American. The surrounding area is approximately 75% African American and 25% white.

Until Kantako's station went on the air, no Black owned or Black run stations existed in Springfield.3 As a result WTRA/Black Liberation Radio began broadcasting community information and music unavailable anywhere else in Springfield.4 In a given week, Kantako broadcasts the voices of anywhere from 20 to 50 persons from the community.5 This programming included interviews with authors, scholars and activists around the country concerned about black genocide; lots of politically conscious rap and reggae music (no sexist or materialistic stuff); discussions and commentary (from a critical perspective) on local and national events effecting the Black community; interviews with victims of police misconduct and abuse; criticism of the NAACP and Urban League for being co-opted and irrelevant to current conditions in Black America; anti-drug messages recognizing the drug plague as a method of social control of Black men; sever criticism of U.S. domination of people of color around the world; re-broadcasting of speeches by Malcolm X, Minister Louis Farrakhan, Stokley Carmichael, Huey Newton, Angela Davis, and other Black activists. . .

S. Shields and R. Ogles, "Black Liberation Radio: A Case Study of the Micro-Radio Movement" (paper, presented at 22nd annual meeting of Popular Culture Association) (March, 1992).6 The community has provided strong support for Kantako's broadcasts, particularly Kantako's neighbors in the John Hay Homes and other members of Springfield's African American community.7 Volunteers have offered music tapes, leads on stories, and technical and air time assistance.

WTRA broadcast community-oriented programming for 18 months without government interference. In January 1989, following the beating of a local boxing coach and his son by Springfield security police, Kantako broadcast a taped hospital bedside interview with the victims, which led to considerable outrage among Kantako's listeners. Soon other victims of alleged police brutality began calling the station and airing their stories. Following Kantako's broadcast of these calls and accusations of a police cover-up during a three day hostage crisis in which two people were killed, local police notified the FCC, citing a

citizen's alleged complaint of on-air profanity. Evidence suggests that this complaint was generated by the police department in response to these broadcasts condemning local police misconduct.

On April 5, 1989, a representative of the FCC, accompanied by five local police officers, visited Kantako and ordered him to cease broadcasting. Kantako complied with the FCC order until April 17, 1989, when he again resumed broadcasting. The FCC then cited Kantako for broadcasting without a license and fined him $750.00. Kantako unsuccessfully appealed the fine, asserting his First and Fourteenth Amendment Rights. The FCC subsequently brought Kantako before a Federal Judge to obtain a judgment against Kantako in the amount of $750. At the hearing on March 20, 1990, Kantako refused to proceed until he was represented by an attorney. Since Kantako's low income prevented him from hiring an attorney, he demanded the government appoint him counsel. Kantako's request was refused on the grounds that the FCC violation involved a civil, not a criminal, penalty. Kantako subsequently refused to participate in any further proceedings. Judgment was issued against Kantako. Kantako continues to refuse to pay the $750 fine ordered by the Court.

Today, Black Liberation Radio continues to operate despite the outstanding $750 fine ordered by the Federal court. In fact, since August 14, 1990, Black Liberation Radio has expanded its broadcast schedule to 24 hours a day, 7 days a week. Kantako reports that 40 to 50 people speak on Black Liberation Radio in any given week, Many of these participants have suffered retribution from local police. This retribution often takes the form of minor harassment like selective parking enforcement or more serious acts, such as searches and arrests based on questionable evidence. See: L. Rodriquez, "Rappin' in the Hood," The Nation, 193, Aug. 12/19, 1991. At one point, Springfield police arrested, booked and took mug shots of Kantako's 9-year old son, a radio volunteer, after he became involved in a shoving match during a soccer game at his elementary school. Then in late 1991, a .357 Magnum slug was fired through the Kantako family's front room window as Kantako was broadcasting a live telephone interview on the subject of white supremacy. The bullet barely missed Kantako's head. The Springfield Police, who have a substation located in the housing projects near the Kantako's apartment, never came to investigate, despite the fact that they daily monitor and tape the station. The Springfield Housing authority, which regularly tries to evict the Kantako family on a variety of charges, also failed to inquire about this murder attempt.

Mbanna Kantako and his family have also been threatened with eviction from his housing project apartment. The Housing Authority has put forth a variety of reasons for the attempted eviction, but a new provision added to the lease of the apartments in the John Hay Homes where Kantako lives suggests the real reason. The new provision requires that tenants refrain from the installation of any antenna, radio equipment and/or other communications devices on any SHA (Springfield Housing Authority) property without written consent of management.

Taken literally, this overboard prohibition would outlaw plugging in a television or radio without prior consent. This provisions appears to be aimed at silencing Kantako and his station Black Liberation Radio.

In April 1992 following the acquittal of four police officers accused in the Rodney King beating, the John Hay Homes experienced uprisings similar to those occurring throughout the country. Rather than examining the implications of the verdict's response, the authorities in Springfield instead assigned blame on those operating Black Liberation Radio. Recently there have been renewed calls for the FCC to act on its judgment against Kantako and to shut down the station.

OVERVIEW OF STATUTORY FRAMEWORK

THE FEDERAL COMMUNICATIONS COMMISSION'S AUTHORITY TO REGULATE BROADCASTING STEMS FROM CONGRESS CONSTITUTIONAL POWER TO REGULATE INTERSTATE COMMERCE.

The Communications Act of 1934 was enacted to maintain the control of the United States over all the channels of interstate and foreign radio transmissions. 47 U.S.C. §301 (1989). This regulatory authority is in accord with Congress' commerce clause powers under the Constitution, permitting the regulation of commerce "among the several states." U.S. Constitution, Art., §. Congress stated in the Communications Act that:

No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio...within any State when the effects of such use extend beyond the borders of that State, or when interference is caused by such use, or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders from within said State, or with the transmission or reception of such energy, communications or signals from and/or to places beyond the border of side State...except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

47 U.S.C. §301(d)(1989). The language of §301 clearly states that Congress intended to regulate the transmission of signals by radio which interfered with interstate commerce. Power to regulate radio broadcasts was granted to the FCC pursuant to §303 of the Communications Act. According to §303, the Commission may make regulations not inconsistent with law as necessary to prevent interference between station and to carry out the provisions of the Communications Act as public convenience, interest or necessity requires. 47 U.S.C. §303(f) (1989). In addition, the Commission may make rules and regulations, and prescribe restrictions and conditions not inconsistent with law, to carry out the provisions of the Communications Act or other treaties or conventions to which the Untied States is a party. 47 U.S.C. §303(r) (1989).

FEDERAL COMMUNICATIONS COMMISSION RULES REQUIRE THAT ALL NEW FM STATION HAVE A MINIMUM EFFECTIVE RADIATED POWER (ERP) OF 100 WATTS, PURSUANT TO 47 C.F.R. §73.211(A)(1)(i).

The broadcasts of Black Liberation Radio are currently prohibited under current FCC rules and regulations. The Commission has authority to allocate space on the radio spectrum at 47 U.S.C. §303(c). Since 1978, the Commission has required that all FM station (except those in Alaska) maintain a minimum effective radiated power (ERP) of 100 watts. 47 C.F.R. §73.211(a)(1)(i)(1990). FM stations licensed to broadcast with an ERP between 100 and 6,000 watts are denominated as Class A stations. Id. Class A stations may have an ERP of less than 100 watts provided that the station's reference distance equals or exceeds six kilometers. 47 C.F.R. §73.211(a)(3)(1990). "Reference distance" is a technical concept defined in the regulations at 47.C.F.R. §73.211(b)(1)(i)(1990). Because of the limited effective radiated power of Black Liberation Radio (approximately 1 mile), this station's signal is unable to exceed this minimum reference distance requirement of six kilometers.

The prohibition on licensing new FM stations operating at less than 100 watts ERP stems from a 1978 Commission Report and Order issued by the Commission pertaining to Class D FM Educational Broadcast Stations operating at a minimum 10 watts. This freeze on 10 watt operations was initiated following issuance of the Commission's First Report and Order, 68 F.C.C.2d988 (1978). The Commission's rationale for requiring a minimum broadcast signal of 100 watts for most Class D educational FM radio

stations is found in the FCC's 1978 Second Report and Order, In The Matter of Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations 69 F.C.C.2d240,44R.R.2d235 (1978), amended, 70 F.C.C.2d972,44R.R.2d1685 (1979). Prior to the Second Report and Order, Class D educational stations could operate with no more than 10 watts Effective Radiated Power (ERP). This was the lowest FM power licensed by the Commission. Class D licenses are available only for noncommercial educational operation. The Commission sought to remove these low power Class D stations from the FM band based on a judgment that these channels were not being used in an effective and efficient manner. Memorandum Opinion and Order, 70 F.C.C. 2d973 (197(). Because of this ruling, no new Class D applications may now be field with the Commission. 47 CFR §73.512(c) (1989).

THE FEDERAL COMMUNICATIONS COMMISSION REQUIRES THAT THOSE APPLYING FOR NEW RADIO BROADCAST STATIONS DEMONSTRATE ACCESS TO MINIMUM FINANCIAL CAPITAL RESERVES, THEREBY PREVENTING POOR AND MINORITY COMMUNITIES FROM GAINING ACCESS TO BROADCAST FACILITIES.

Applicants for new radio broadcast stations are required to demonstrate an ability to construct and operate the station for three months, without relying upon advertising or other revenue to meet these costs. Financial Qualifications standards of aural broadcast applicants, 69 F.C.C. 2d 407 (1978). The Commission alleged that this policy would specifically benefit minority applicants seeking entry into the radio broadcast service inasmuch as station financing had been a principal barrier to minority broadcast ownership. Id. However, such a financial barrier is discriminatory on its face in that it prevents those without wealth from gaining access to the radio medium. Furthermore, this financial barrier as applied works to discriminate against minority broadcasters who lack the $50,000 to $100,000 necessary to operate a station at a loss for three consecutive months. The effect of this rule is to deny underrepresented poor and minority communities any effective voice on the airwaves, thereby violating their right to impart and receive communication over the public airwaves.

FOR A SHOWING OF RACIAL DISCRIMINATION UNDER THE EQUAL PROTECTION ACT, THE SUPREME COURT REQUIRES DISCRIMINATORY INTENT OR PURPOSE. UPON A SHOWING THAT RACIAL DISCRIMINATION IS A SUBSTANTIAL OR MOTIVATING FACTOR, TH BURDEN OF PROOF MUST SHIFT TO THE LAW'S DEFENDERS.

The Supreme Court has recently argued that a showing of racial discrimination under the Equal Protection clause requires proof of racially discriminatory intent or purpose. Once racial discrimination is shown discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor. Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).

In Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990) the Supreme Court, in upholding the Commission's policy permitting distress sales to minority broadcasters, held that the promotion of minority ownership and implementation of the FCC minority ownership policies serves an important national interest. Yet under the guise of broadcast deregulation, the Commission has eradicated the power of the broadcast media to serve minority interest. In light of the detailed pattern and practice of racial discrimination which existed within the FCC up through the 1970's, the Commission's actions with respect to broadcast deregulation reveal a pattern of active disregard and neglect with regard to the needs of minority broadcasters and communities. See infra at 85. Commission rules prohibiting the unlicensed operation of micro radio by minority broadcasters when these broadcasts advance the public interest reflect the Commission's continuing discriminatory policies and practices.

ARTICLE 19 OF THE INTERNATIONAL CONVENANT ON CIVIL AND POLITICAL RIGHTS, RECENTLY RATIFIED BY THE UNITED STATES SENATE, GRANTS CITIZENS OF ALL NATIONS ADDITIONAL RIGHTS OF FREEDOM OF EXPRESSION.

The International Covenant on Civil and Political Rights was ratified by the United States Senate on April 2, 1992. This document was deposited at the United Nations by President Bush on June 8, 1992, and became effective on September 8, 1992. On September 8, 1992, this Human Rights document will have the force of law in the United States. Article 19(2) of this International Covenant states that everyone shall have the right to freedom of expression. This right includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice." Although Article 19(3) of the International Covenant indicates that the above rights may be subject to certain restrictions, these restrictions may only be such as are provided by law and necessary for respect of the rights or reputations of others, or for the protection of national security, public order, or public health and morals.

THE AMERICAN CONVENTION ON HUMAN RIGHTS: ARTICLE 13,

Article 13 of the American Convention on Human Rights entered into force on July 18, 1978. This document states that everyone has the right to freedom of thought and expression, including the freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing, in print, in the form of art, or through an other medium of one's choice. The exercise of this right is subject to some limitations such as respect for the rights and reputation's of others, and the protection of national security, public order, or public health or morals. However, this right of expression may not be restricted by "indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or implements or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."

EUROPEAN CONVENTION ON HUMAN RIGHTS: ARTICLE 10

Article 10 of the European Convention on Human Rights, amended according to the provisions of Protocol No.3 entered into force on 21 September 1970, and amended according to the provisions of Protocol No.5 entered into force on 20 December 1971. This document states that everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 10 does not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. However, the interpretation of Article 10(2) in the case of Radio Gropera v. Switzerland, Judgment of 28 March 1990, Series A No. 173, calls into question the validity of prohibiting radio stations with less than 100 watts. See infra at 109.

ARGUMENT

FCC JURISDICTION UNDER THE COMMERCE CLAUSE

THE FCC HAS NO AUTHORITY TO REGULATE LOW POWER FM BROADCASTS WHICH 1) DO NOT EXTEND BEYOND STATE BORDERS OR WHICH 2) DO NOT INTERFERE WITH OTHER BROADCAST THAT EXTEND BEYOND STATE BORDERS.

The Communications Act of 1934 was enacted to maintain the control of the United States over all the channels of interstate and foreign radio transmissions. 47U.S.C. §301 (1989). Congress expressly stated within the Communications Act of 1934 that:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio...within any State when the effects of such use extend beyond the borders of that State, or when interference is caused by such use, or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications or signals from and/or to places beyond the borders of said State...except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

47 U.S.C. §301(d) (1989). This language clearly states that Congress intended to regulate the transmission of signals by radio which interfered with interstate commerce. Power to regulate radio broadcasts is granted to the FCC pursuant to §303 of the Communications Act. Under §303, the Commission may make regulations not inconsistent with law as it may deem to necessary to prevent interference between stations and to carry out the provisions of this Act as public convenience, interest or necessity requires. 47 U.S.C. §303(f) (1989) (emphasis added). In addition, the Commission may make such rules and regulations, and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act or other treaties or conventions to which the United States is a party. 47 U.S.C. §303(r) (1989) (emphasis added).

Although the Commission may regulate every aspect of radio broadcasting that touches upon interstate commerce, the Commission has no authority to regulate those activities which consist solely of intrastate commerce. While Congress may lawfully require the licensing and regulation of intrastate radio broadcasting stations where their operation interferes with interstate commerce, United States v. Gregg, 5 F.Supp.848, 857 (S.D. TX, 1934), the Commission has no authority to regulate micro radio broadcasts which extend only 1 mile, where these broadcasts are transmitted on an open frequency and do not interfere with the transmission or reception of broadcast signals transmitted from outside the State into that State, or transmitted from inside the State and crossing the borders into another State. As a result, the broadcast of micro radio signals in no way implicates the powers of Congress or the Commission to regulate interstate radio broadcasts.

Intrastate micro radio broadcasts must be distinguished from other low power radio broadcasts found to be subject to regulation under the Communications Act. In United States v. Gregg, 5 F. Supp848 (1934), the Federal Radio Commission (FRC), the Commissions predecessor, sought to stop the broadcast of a community radio station operated in Houston by the Voice of Labor, Inc. In that case, defendants broadcast on an AM radio station at 1,310 kilocycles with station power from 2 to 4 watts. Id. at 850. The court upheld the FRC's jurisdiction over the Houston station's intrastate broadcasts after observing that the "service area" (the area within which the program being broadcast can be heard over an ordinary receiver set) extended an average of 30 miles surrounding the station. Id. at 851. In addition, the court noted that the "nuisance area" (area where the broadcast is sufficiently strong to produce heterodyne interference with the broadcasting of other stations, but not sufficient to allow the listener over the ordinary radio to understand it) was "some considerable distance beyond the service area." Id. Based on the wide radius of the Houston station's broadcasts, the court was persuaded that defendant's radio signals significantly interfered with the transmission of energy, communications and signals by other licensed radio stations at

the same frequency of 1,310 kilocycles from places beyond the limits of Texas to places within Texas. Id. Because the daytime broadcasts of the Houston station seriously interfered with the radio signals from outside the State, the court concluded that Congress and the FRC was within its authority to regulate this intrastate activity.

Unlike the Houston station's broadcasts in the above case, micro radio broadcasters typically transmit a signal that can be heard only within a radius of approximately 1.5 miles of the station transmitter. Although the "nuisance area" of this signal extends somewhat farther, the maximum potential radius of interference caused by a micro radio signal cannot go far. Additionally, this signal in no way interferes with the transmission or reception of signals of other licensed in-state or out-of-state stations broadcasting at 101.7 megahertz on the FM band.

In fact, micro radio broadcasters are typically harassed by government officials for reasons having little to do with signal interference. For example, Mbanna Kantako's early broadcast went largely unnoticed outside the black community of Springfield until his coverage of the police beating of Johnny Howell brought the station to the attention of the Springfield community. When the FCC issued their first complaint in April 1989, WTRA had been on the air for 18 months broadcasting programs of music and community information without incident. In addition, although the police claim they alerted the FCC after a citizen's complaint of on-air obscenity, evidence suggest that it was the police themselves who generated the complaint following these particularly strong programs on police misconduct. The record otherwise reveals no complaints to the FCC regarding Black Liberation Radio's signal interference with other stations at 107.1 MHz on the FM band. Because the broadcast radius of Kantako's micro radio station is relatively insignificant by comparison to defendant's 30 mile signal radius in United States v. Gregg, and because no interference can be found with the broadcast signal of any station either broadcasting into Illinois from out-of-state, or from Illinois to outside the State's borders, micro radio broadcasts such as those of Black Liberation Radio can be distinguished from the serious interference with interstate broadcasts found in United States v. Gregg.

The case of United States v. Brown 661 F.2d 855 (1981, 10th Cir.), also provides insight into the Commission's regulation of radio signals which may extend or interfere with signals extending beyond the borders of the State pursuant to §301 of the Communications Act. In United States v. Brown, the court ruled that evidence that an unlicensed citizen's band radio transmission was powerful enough to cross the state border was sufficient to sustain a conviction for violation of §301(d) of the Communications Act, although the jury was never instructed that the Government must show the signals actually left the State. In sustaining defendant's conviction, the court noted that §301(d) expressly states that the United States intends to control all channels of interstate radio transmission. Id. at 856. Here, the court held that a violation of §301(d) is satisfied by proof that defendant's transmission was merely powerful enough to cross the state border. Id. In Brown, the court found there was sufficient evidence presented to the jury to support a judgment that defendant was in violation of §301(d). Id. This evidence consisted of radio transmissions intercepted within in broadcaster's state by FCC agents. Although these radio signals were intercepted only a few miles from defendant's transmitter, the wattage of the transmissions was greater than FCC allowed for citizen's band use, and evidence was sufficient to show that the transmissions could have crossed state borders or interfered with interstate radio signals. Id. at 855-56. Defendant's transmitter, which was confiscated by the FCC, was later found capable of transmitting signals over 100 miles. Id. at 855.

Again, there is no such showing that the 1 watt signal of a micro radio broadcaster in any way interferes or could interfere with radio signals traveling interstate. The broadcast signal of most micro radio stations

extends approximately 1.5 miles, not 100 miles. For instance, the signal of Black Liberation Radio can be heard only within an area of Springfield, Illinois encompassed by the John Hay Homes, a housing project in a neglected area of that community. As a result, micro radio broadcast signals are significantly weaker than those signals found in cases upholding the FCC's authority to regulate interstate and certain intrastate radio transmissions. If the FCC were to later allocate open frequencies to a licensed broadcaster, micro radio practitioners concede that it would be more practical to change frequencies rather than interfere with a licensed station's broadcast signal. However, inasmuch as no interference with any licensed broadcast outlet currently exists, and inasmuch as it is physically impossible for most micro radio broadcasters to transmit its signal across state lines, no violation of §301(d) can be found.

The plain language of §301(d) makes it clear that the Commission is authorized only to regulate those broadcasts transmitted across state borders, or those broadcasts which in some other manner interfere with licensed stations engaging in commerce among the States. "If Congress had intended to regulate broadcasts which could but do not in fact extend beyond state boundaries, it was capable of saying so." Id. at 857 (McKay, dissenting). In fact, the language of the §301(d) reveals that Congress intended to regulate less than the full commerce clause power inasmuch as this language covers two kinds of broadcasts only: 1) those whose effects extend beyond state borders; and 2) those whose effects do not extend beyond state borders but which interfere with other broadcasts that themselves extend beyond state borders. Id. As such, the operation of micro radio station Black Liberation Radio is not governed by any of the statutory language of §301(d) nor by any subsequent case law. The Commission therefore lacks authority to regulate Black Liberation Radio's micro radio broadcast inasmuch as that station is engaged solely in intrastate broadcasting, with no discernible or likely impact on interstate broadcasts of any kind. The Commission's attempt to silence micro radio broadcasts violates these broadcaster's First Amendment right to communicate, in that the Commission has exceeded Congressional authority pursuant to §301(d) and §303(f) of the Communications Act. Because the FCC lacks authority to regulate this micro radio station, the Commission must respect the First Amendment right of these broadcasters to communicate as well as that community's right to receive these low power broadcasts.

THE RIGHT TO COMMUNICATE AND THE FIRST AMENDMENT

THE FIRST AMENDMENT AND THE DEMOCRATIC PROCESS - THE PURPOSE OF THE FIRST AMENDMENT IS TO PROTECT THE DEMOCRATIC PROCESS BY ALLOWING FOR A) AN INFORMED PUBLIC; B) EXCHANGE OF UNPOPULAR AND UNORTHODOX OPINIONS ALONG WITH REGULAR COMMERCE; AND C) BROAD DIALOGUE AMONG THE POPULACE; FIRST AMENDMENT RIGHTS ARE THE RIGHTS OF THE HEARERS AS WELL AS THE COMMUNICATORS.

MEIKELJOHN ARGUMENT

..."speech concerning public affairs is more than self-expression; it is the essence of self-government (cited at Syracuse Peace Council, 2 FCC Rec. 5043). Because it is the people in a democratic system who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," the "[g]overnment is forbidden to assume the task of ultimate judgement, lest the people lose their ability to govern themselves." (locate FN 220 and 221 in Syracuse).

As the Court has previously noted, "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). In addition, "(i)t is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and

experiences...(and) that right may not constitutionally be abridged either by Congress or by the FCC." Red Lion Broadcasting, supra, at 390. Consequently, the Commission's failure to permit the continued operation of low power micro radio outlets constitutes and unconstitutional violation of these broadcasters First Amendment rights, as well as the paramount First Amendment rights of the listening community.

47 CFR §73.506 OF THE TELECOMMUNICATIONS ACT IS UNCONSTITUTIONAL ON ITS FACE: BLANKET REFUSAL TO LICENSE OR OTHERWISE PERMIT VERY LOW POWER RADIO BROADCASTS IS, ON ITS FACE, AN UNCONSTITUTIONAL VIOLATION OF FIRST AMENDMENT RIGHTS.

Even assuming the FCC has jurisdiction to regulate micro radio pursuant to §301(d) et. seq., the Commission's refusal to license or otherwise permit low power micro radio broadcasts unlawfully infringes upon the First Amendment rights of micro radio broadcasters and their listeners.

The Supreme Court has previously noted that the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. Red Lion Broadcasting, 395 U.S. 367, 390 (1969). In addition, "(i)t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. Id., citing Associated Press v. United States, 326 U.S. 1, 20 (1945), New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting). The Supreme Court also observed in Columbia Broadcasting System, Inc. v. Democratic National Committee 412 U.S. 94 (1973) that:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty...The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solution adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence.

The Congressional mandate of the Commission is to regulate the airwaves in the public interest, convenience and necessity. The Commission was created to regulate interstate commerce in communication by radio "so as to make available, so far as possible, to all the people in the United States a rapid, efficient, nation-wide and worldwide wire and radio communication service." C.J. Community Services, Inc. v. FCC, 15 R.R. 2029, 2032 (D.C. Cir., 1957)(citing "Can Community Antenna TV Be Enjoined"?, 20 Albany L.Rev. 69, 75 (1956). As a result, the Commission has a duty to "devise through its rule-making authority, the basis upon which 'all the people of the people of the United States' may receive service through a licensed station." Id. The language of the Communications Act enables the Commission to take into account extenuating circumstances where the technical violation of unlicensed broadcasting has occurred as a means to facilitate the public interest. See Id.

Because of the need for micro radio in Springfield and other communities, the Commission must accommodate this new communications technology rather than perpetuate its outright prohibition. In 1987, the Commission affirmed the Supreme Court's assertion in FCC v. League of Women Voters that "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to electronic media." In re Complaint of Syracuse

Peace Council, 2 FCC Rcd 5043, 5058 (1987)(citing FCC v. League of Women Voters at ___). The Commission went on to say that:

> Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act.

Id. Additionally, the Communications Act provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall...study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest. 47 U.S.C. §303(g) (1989). In light of the Commission's statutory duty, failure to permit micro radio broadcasts under any circumstances constitutes an infringement of these broadcasters' First Amendment right to communicate. In addition, the right of the surrounding community to receive information is impermissibly burdened by the FCC's failure to authorize micro radio broadcast where these broadcasts serve to promote vital First Amendment concerns and no interference with licensed broadcasts otherwise occurs. Again, "(t)he First Amendment must...safeguard not only the right of the public to hear debate, but also the right of the individual to participate in that debate and to attempt to persuade others to their points of view." Columbia Broadcasting Services, Inc. v. Democratic National Committee, 412 U.S. 94, 193 (1973)(Brennan, dissenting)(citing Thomas v. Collins, 323 U.S. 516, 537 (1945); and NAACP v. Button, 371 U.S. 415, 429-30 (1963). Thus, failure of the Commission to license or otherwise permit micro radio broadcasts is unconstitutional where there is unused space on the radio spectrum and low power access to the airwaves does not interfere with or otherwise impede the transmission of other radio signals.

THE FM PORTION OF THE SPECTRUM IS A FIRST AMENDMENT FORUM: HAVING OPENED THE FORUM TO FIRST AMENDMENT ACTIVITY, THE GOVERNMENT MUST APPLY FIRST AMENDMENT STANDARDS TO ITS USE.

Although the Commission retains regulatory authority over micro radio, no compelling interest supports the blanket prohibition of very low power community radio broadcasts. The Communications Act of 1934 states that the Commission may assign bands of frequencies to the various classes of stations, assign frequencies for each individual station and determine the power which each station shall use. 47 U.S.C. §303(c). However, while the Commission serves the role of "traffic cop" with regard to spectrum allocation, a blanket refusal to permit low power FM broadcasts is an arbitrary and capricious abuse of Congressional authority, and is therefore an unconstitutional violation of the First Amendment rights of micro radio broadcasters.

The FM band of the electromagnetic spectrum is a place where speakers communicate messages to an audience, and, like any other forum where First Amendment activity is subject to interference, government may make reasonable rules for its use, FCC v. League of Women Voters, 468 U.S. 364 (1984); compare Lovel v. Griffin, 303 U.S. 444 (1938), Kovacs v. Cooper, 303 U.S. 77 (1949), Feiner v. New York, 340 U.S. 315 (1951), Widmar v. Vincent, 454 U.S. 263 (1981), Ward v. Rock Against Racism, U.S. (19). Thus Congress enacted the Communications Act of 1934, 47 U.S.C.A. 151 et seq., and created the Federal Communications Commission empowering it to make such regulations as are necessary to prevent interference and otherwise to carry out the provisions of the Act, 47 U.S. C. A. 303, 303(f), and 303(r). But the Commission is specifically forbidden to promulgate any rule or condition "which shall interfere with the right of free speech," 47 U.S.C.A. 326, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

While the government may regulate activity in a First Amendment forum so long as reasonable rules are adopted to regulate the time, place and manner of protected speech, it is equally true that upon opening a forum to First Amendment activity the government is constrained in the exclusions it may enforce. In the traditional public forum, the government may not enforce content based exclusions unless such enforcement is necessary to serve a compelling state interest and the regulation is narrowly drawn to achieve that end. Perry Educator's Assn. v. Perry Local Educator's Assn., 460 U.S. 37 (1983), Widmar v. Vincent, 454 U.S. 263 (1981), Carey v. Brown, 447 U.S. 455 (1980), and Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Further, while the rule of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), foreclosing regulation of editorial redeem has not been fully applied to broadcast media, nonetheless sensitivity to the First Amendment nature of the activity in the broadcast forum requires that editorial restrictions be narrowly tailored to further a substantial governmental interest," FCC v. League of Women Voters, supra, at ____.

The government must meet a high burden in justifying speech restrictions relating to traditional public fora, since the purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference. Society for Krishna Consciousness v. Lee, 1992 U.S. Lexis 4532, ___ U.S. ___ (1992)(Kennedy, concurring in part). Traditional public fora are those that "by long tradition or by government fiat have been devoted to assembly and debate," such as "streets and parks which have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Perry Ed. Assn.. v. Perry Local Educator's Assn., 460 U.S. 37, 45 (1983)(quotations and citations omitted); see also, e.g., Frisby, 108 S.Ct at 2499, Carey v. Brown, 447 U.S. 455, 460-61 (1980). The Court in Society for Krishna Consciousness v. Lee, supra, reiterated that regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny, with such regulations surviving only if they are narrowly drawn to achieve a compelling state interest. Id. at ___, citing Perry at 45. In addition, content-neutral regulations such as time, place and manner restrictions must be narrowly tailored to serve a significant government interest and must leave open alternative channels of communication. Perry, 460 U.S. at 45.

The rule that individuals have a right to use public fora such as streets and parks to communicate their views was first handed down in Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) wherein the court determined the government had a high burden in justifying any restrictions, inasmuch as these avenues of expression were held in trust for the use of the public, and "have been used for purposes of...communicating thoughts between citizens, and discussing public questions." Id. However, while the court in Hague v. Committee for Industrial Organization maintained that streets and parks "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"(Id.), in fact no right of free speech as we now know it existed in this country until a basic transformation of the law governing free speech occurred during the period in which the Hague decision was issued. See: D. Kairys, "Freedom of Speech," in Politics of Law, 237 (1990).

Prior to the decision in Hague, citizens were typically subject to arrest and incarceration for asserting their First Amendment right to speak on public streets, sidewalks, and parks. See Common wealth v. Davis, 162 Mass. 510 (1895); aff'd in Davis v. Massachusetts, 167 U.S. 43(1897). At this time, courts were more frequently of the opinion espoused earlier by Oliver Wendell Holmes that:

> For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member

> of the public than for the owner of a private house to forbid it in his house. Commonwealth v. Davis, at 511.

Rather than overruling the Court's earlier affirmation of Commonwealth v. Davis, the later Supreme Court ruling in Hague referred instead to natural law, arguing that "(s)uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." Hague at ___. Ultimately, until Hague the Supreme Court had consistently failed to make any major pronouncements repudiating the holding of Davis. In addition, the Court consistently failed to reverse any convictions occurring under the Espionage Act, which at the time violated the First Amendment rights of citizens by serving to criminalize dissent. See: Schenck v. United States, 249 U.S. 47 (1919). See also: Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). That it took until 1939 for the Supreme Court to assert its position in Hague shows the extent to which the Court's transformation reflected fundamental changes in American society; changes which included World War I, the Depression, the New Deal, and the prominent role of the Labor Movement in contesting previous restrictions on public speech. See, D. Kairys, supra, at 257.

Despite this legal fiction at the core of the public forum doctrine, the Court's reaffirmed in Society for Krishna Consciousness v. Lee, 1992 U.S. Lexis 4532, ___ U.S. ____ (1992) that streets and parks have "immemorially" been held in trust for the use of the public. This assertion was here used to justify a prohibition on the solicitation of moneys by members of the Hare Krishna religion at municipal airports. In Society for Krishna Consciousness, the court held that traditional public fora are limited to public property which have as "a principle purpose... the free exchange of ideas" (Id. at 6, quoting Cornelius v. NAACP) and that this purpose must be evidenced by a long-standing historical practice of permitting speech. Id. at 7, ante, at 1-2 (O'Connor, concurring in part). Nevertheless, the Court's strict adherence to a public forum doctrine developed over 50 years ago is no longer adequate given the social changes and technological advances which have shaped society over the intervening years. Author David Kairys writes that:

> Essentially, the law and society have frozen the scope and nature of our speech rights at levels appropriate to the 1930s, when specific audiences like factory workers were geographically centered, and speaking, gathering and distributing literature in public places were the primary means of communication. The speech rights conceived in that period do not provide access to our current means of communication. Technological, social and cultural changes have rendered the fruits of the free-speech struggle somewhat obsolete. Television, radio, newspapers (increasingly concentrated and limited in number and diversity), and direct mail now constitute the battleground, and the marketplace of ideas. In the absence of mass-based demands, we have allowed no meaningful inroads into these media for people or groups without substantial money or power.
>
> The scope and reality of our speech rights as a means of communication and persuasion are thus limited by these legal, economic and practical barriers.
>
> D. Kairys, "Freedom of Speech", The Politics of Law, p. 261-262.

Another author has suggested with respect to the regulation of television that:

> The time has come to update the public forum to the television age...television has become America's primary media language. Use of the streets and parks for expression without the assistance of telecommunications facilities is only

> partially effective and does not adequately serve the goals of the First Amendment.
>
> -M. Minninberg, "Circumstances within our Control: Promoting Freedom of Expression through Cable Television," Hastings Constitutional Law Quarterly, Vol. 11, No. 4, Summer 1984, pp. 595-596 and 598.

In his partially concurring opinion in Society for Krishna Consciousness, Justice Kennedy also recognized the static nature of the Court's public forum jurisprudence. While affirming the right of Hare Krishna members to distribute flyers and literature inside public airport terminals, Justice Kennedy observed that:

> the policies underlying the [public forum] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property. There is support in our precedents for such a view...Without this recognition our [public] forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity. Society for Krishna Consciousness v. Lee, supra at ___, (Kennedy, concurring in part).

For the public forum doctrine to become relevant to the modern world of instantaneous mass telecommunications, the Commission and the courts must recognize that AM and FM airwaves are the modern equivalent of parks, streets and sidewalks. Although technological access to the airwaves has not existed since time immemorial, the government promptly dedicated to the public trust as a medium of communications, just as "all public streets are held in the public trust and are properly considered traditional public fora." Society for Krishna Consciousness, supra, at __ (Souter, concurring in part), citing Frisby v. Schultz, 487 U.S. 474, 481 (1988). By opening the public airwaves to communication, the government sought to regulate this forum only to the extent that such regulations advanced the public interest, convenience and necessity. 47 U.S.C. §303 (1989). Furthermore, the airwaves have as a principal purpose the promotion of the free exchange of ideas. Cornelius v. NAACP Legal Defense and Educational Fund, Inc. 473 U.S. 788 (1985). "Indeed, unlike the streets, parks, public libraries, and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated specifically to communication." Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 195 (1973)(Brennan, dissenting). Certainly, the expression of ideas - whether political, commercial, musical, or otherwise - is the exclusive purpose of the broadcast spectrum. Id.

As a result, the government must establish a compelling interest to justify any regulation interfering with First Amendment activity over the public airwaves. Under such scrutiny, no compelling governmental interest supports the blanket prohibition of micro radio broadcasts which cause no significant interference with licensed broadcasts. To the extent that the Commission has been found to have the authority to regulate other "pirate" or otherwise unlicensed radio broadcasts, the operation of micro radio stations such as Black Liberation Radio may be distinguished inasmuch as this station, with a broadcast radius of only one mile, serves a compelling interest by providing political, social and cultural dialogue to the community of listeners otherwise un-served by the print and electronic media of Springfield and neighboring communities.

EVEN IF THE AIRWAVES ARE TREATED AS A DESIGNATED PUBLIC FORUM, PROHIBITION OF LOW POWER MICRO RADIO BROADCASTS DOES NOT SATISFY A COMPELLING GOVERNMENT INTEREST, NOR IS SUCH A PROHIBITION NARROWLY TAILORED TO MEET THAT INTEREST.

Even assuming that the court does not find that radio airwaves constitute a "traditional" public forum, in that the broadcast spectrum was opened by "modern" technology, these airwaves may still be properly categorized as a designated public forum. A designated public forum is created when the state opens to the public generally " a place for expressive activity." Perry, 460 U.S. at 45. Regulation of designated public fora is also subject to strict scrutiny. Id. at 46. A designated forum must be "held open to the general public" or made available "for indiscriminate use by the general public." Perry, 460 U.S. at 47. The Court has stated that the fact that some members of the public are selectively invited to use government property does not convert the property into a designated public forum. Greer v. Spock, 424 U.S. 828, 838 n.10 (1976). Nevertheless, the Commission's regulations and licensing procedures with regard to the airwaves occur within the context of a public trust. The Court has previously held that it is the people as a whole who retain their interest in free speech by radio and it is their collective right to have the medium function consistently with the ends and purposes of the First Amendment. Red Lion Broadcasting, supra, at 390.

The nature of American democracy has undergone significant transformation as this country has entered the age of information. As a result of this transformation, television and radio have become the modern-day equivalent of the printing press, with the spectrum constituting the modern-day equivalent of the street corner. Indeed, the electronic media are today the public's prime source of information. Broadcast "technology...supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news.."(cite...) Although "full and free discussion" of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the leaf letter virtually obsolete.

Because the electronic media is today the dominant means of communicating with the public, any policy that absolutely denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 196 (1973)(Brennan, dissenting)(citing Red Lion, supra, at 386 n. 15) Most Americans today rely on the electronic media almost exclusively to obtain information previously obtained through the print media or social gathering places. As a result, the airwaves must be appropriately analogized to a designated public forum, with strict scrutiny required to uphold any time/place/manner regulations impinging upon First Amendment rights. In addition, the means used in regulating micro radio must be necessary.

In fact, the airwaves are may properly be analogized to newspaper racks on public streets. In City of Lakewood v. Plain Dealer Publishing Co., 108 S.Ct. 2138(1988) the Supreme Court struck down a local ordinance which apparently gave the city's mayor discretion in issuing permits to place news racks on city streets. See Id. at 2150-52. Ultimately the Court ruled that the mayor's discretion in issuing permits was to be circumscribed by objective standards, holding that a public forum analysis applied where news rack space was needed to distribute newspapers. See Id. at 2147-49. Similarly, a public forum analysis is appropriate in regulating the distribution of space on the public airwaves. As applied to the operation of micro radio broadcasting, such an analysis would suggest that the Commission has exceeded its authority in absolutely prohibiting all micro such broadcasting pursuant to 47 C.F.R. §73.506. The Commission's decision to prohibit every micro radio broadcast must meet a compelling State need in light of such broadcasters' vital First Amendment rights.

In the case of micro radio station Black Liberation Radio, Mbanna Kantako successfully broadcast for almost two years before the FCC was notified by Springfield police, and the station was allowed to continue broadcasting to the John Hay Homes neighborhood on a daily uninterrupted basis following the April 1989 FCC intervention. In cases such as these, the Commission can show no compelling reason why 1 watt FM broadcasts must be prohibited, particularly where no alternative forum exists in the community for political and cultural viewpoints outside of the mainstream. Inasmuch as the broadcast spectrum was expanded in 1984 to allow for the allocation of nearly 700 new stations, little justification remains for excluding the poor, particularly where the only access sought is that enabling the broadcaster to reach, for instance, residents of a low income housing project living within 1 mile of the radio transmitter.

EVEN IF THE AIRWAVES ARE TREATED AS A NON-PUBLIC FORUM, PROHIBITION OF LOW POWER MICRO RADIO BROADCASTS IS UNCONSTITUTIONAL INASMUCH AS NO RATIONAL BASIS EXISTS FOR THE ELIMINATION OF SUCH BROADCASTS FROM THE AIRWAVES. THEREFORE, 47 CFR §73.506 WHICH PROHIBITS ALL LICENSED FM BROADCASTS AT LESS THAN 100 WATTS IS UNCONSTITUTIONAL ON ITS FACE AS AN UNREASONABLE EXERCISE OF AUTHORITY BY THE COMMISSION, IN THAT IT IS ARBITRARY AND CAPRICIOUS.

Even assuming the Court perceives the airwaves as a non-public forum, the Commission can show no rational basis to justify the suppression of all unlicensed 1 watt FM radio broadcasts where those broadcasts serve an important public interest. In the case of a micro station such as Black Liberation Radio, the important public interest is that of providing political and cultural programming to a disenfranchised minority community otherwise ignored by other licensed media channels within that community.

The Commission's authority for allocating spectrum space is found at 47 U.S.C. Sec. 303(c)(1989). This statutory provision allows the Commission to assign bands of frequencies and determine their power of operation. Id. Any unlicensed operation of a radio transmitter is a violation of §301 of the Communications Act of 1934, 47 USC §301(1982), and carries a maximum penalty of $10,000 or one year imprisonment. 47 USC §501 (1982).

The Commission's prohibition on the licensing of new FM stations operating at less than 100 watts ERP stems from a 1978 Commission Report and Order (Docket 20735) which attempted to eliminate most Class D FM Educational Broadcast Stations operating at a minimum of 10 watts. The Commission's rationale for mandating a minimum broadcast signal of 100 watts for most Class D educational FM radio stations is found in the FCC's 1978 Second Report and Order, entitled In The Matter of Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations 69 F.C.C. 2d 240, 44 R.R. 2d 235 (1978), amended, 70 F.C.C. 2d 972, 44 R.R. 2d 1685 (1979) (Hereafter, "Second Report and Order"). Prior to the Second Report and Order, Class D stations operated at 10 watts Effective radiated Power (ERP), the lowest FM power licensed by the Commission. Class D licenses were available only for noncommercial educational operation. These 10 watt stations were initially intended to serve limited broadcast areas such as college campuses and local communities. The Commissions Second Report and Order sought to remove all low power Class D stations from the airwaves in the United States (excepting Alaska). As a result, no new Class D applications may now be filed with the Commission. 47 CFR §73.512(c) (1989).

Although 47 U.S.C. §324 directs all broadcast stations to operate at the minimum power necessary, the Commission in their Second Report and Order raised the minimum effective radiated power of these Class D educational FM stations from 10 watts to 100 watts. The Commission cited three reasons for increasing

the minimum ERP on these Class D stations: technical efficiency, wider coverage, and better quality service. Unfortunately, the implementation of the Second Report and Order completely failed to adequately accomplish any of these primary objectives. See: Note, Educational FM Radio - the Failure of Reform, 34 Fed. Com. L.J. 432 (1982) (Hereafter, "Educational FM Radio").

The Second Report and Order largely failed in meeting the Commission's goals because the methods used were not rationally related to the Commission's objective - creating additional space on the radio spectrum for high quality, high power educational broadcast outlets. The rule change failed to achieve its goals in part because of the unrealistic approach of the proposal itself. Educational FM Radio, supra, at 453. In fact, the proposed rule changes were incapable from the start of ever attaining the goal set for them. Id. Because this rule was not narrowly tailored to allow for continued low power FM broadcasts where these broadcasts best suited the local community, it constitutes an abuse of discretion by the Commission and thus an unconstitutional abridgment of the right to communicate. Once the failure of this policy was recognized, the Commission should have modified its rules in order to achieve the important and acknowledged goal of promoting broadcast diversity. (cite Metro Broadcasting).

The goal of the Commission's 1978 rule change was to create more space on the FM spectrum, thereby paving the way for more high power "professional" educational FM stations.8 The Commission sought to achieve this goal by eliminating all low power Class D stations from the educational band. The Commission viewed these stations as an inefficient use of spectrum space because their coverage was limited to just a few miles. However, given the goal of wider coverage, the insubstantial power boost resulting from and increase to a minimum power of 100 watts failed to justify the elimination of almost all 10 watt stations within the continental United States.9

The Commission's assumption that higher power stations make more efficient use of spectrum space than do multiple low power stations was not so much a technical judgment as a value judgment. The Commission's goal of more efficient use of the radio spectrum was ostensibly to make room for "higher quality" educational FM radio, with wider coverage for noncommercial educational broadcasts. Second Report and Order, supra, at ___. However, rather than meeting these goals, the rule change instead had the opposite effect. See: Educational FM Radio, supra, at 451-52. In fact, the Commission's rule change had the effect of forcing most 10 watt FM stations to increase their minimum power to 100 watts. This mandatory power increase resulted in little or no eventual improvement in the quality of educational programming. As a result, none of the Commission's three objectives (technical efficiency, wider coverage and better quality service) was ever achieved.

First, rather than achieving greater technical efficiency by clearing up space on the FM spectrum, the Commission's Second Report and Order had the opposite effect of further crowding the spectrum. While the Commission sought to add a number of new full service stations, this was premised on the elimination of most 10 watt Class D stations. As outlined above, most of these Class D stations went on to become more powerful Class A stations. Because few alternatives were available to Class D stations except the option of becoming high power Class A stations, the Commission in effect sought to ensure more efficient use of spectrum space by actually raising the minimum power of these stations. This counterintuitive solution to the perceived problem of spectrum scarcity reveals that the Commission's ban on low power 10 watt FM stations was irrational and unreasonable given the overriding goals set forth in the Second Report and Order. The net effect of the Commission's policy was to further crowd the airwaves.

Secondly, the goal of attaining wider coverage by providing noncommercial educational radio to a larger percentage of the population was never achieved. See: Education FM Radio, supra, at ___. While the Commission's 1978 rule change was intended to eliminate the number of 10 watt stations on the air, the

ultimate effect was that most Class D stations applied for and became Class A status stations, broadcasting at a minimum power of 100 watts. In effect, this rule change merely increased the crowding of the spectrum without providing significant additional coverage ore providing any room for newer, higher power professional stations. In fact, the predicted distance in miles to the 60 dbu 10 contour for a 10 watt stations is 12 miles, whereas the distance is only approximately 25 miles for a 100 watt station, and 40 miles for a 1,000 watt station. Likewise, the 40 dbu contour for a 10 watt station would be reached at 40 miles, while this would be 53 miles for 100 watt station and 70 miles at 1,000 watts. Thus, at the 40 dbu level, an increase in power from 10 watts to 100 watts would result in an increase in range of only 15 miles. (All figures taken from Educational FM Radio, supra, at 434n. 12). Inevitably, the Commission's elimination of Class D educational stations worked "primarily to create a new class of minimum wattage Class A stations, providing only marginally wider coverage than the Class D stations which they replaced." Educational FM Radio, supra, at 450.

Finally, the goal of attaining a higher quality and larger quantity of high power professional stations was never achieved. Former Class D stations merely became Class A stations, with the same budget problems and high staff turnaround at stations affiliated with colleges and universities. In addition, the assumption that Class D 10 watt stations failed to provide valid public service was little more than a subjective and elitist value judgment on the part of the Commission. Although the Commission sought to enhance what it termed "cultural" or "educational" programming, the programming of local news, public affairs, free-jazz, independent rock, world music and NPR newscasts typically preferred by most Corporation for Public Broadcasting (CPB) affiliates. See Educational FM Radio, supra, at 443. In addition, while larger stations may have bigger budgets, this is no guarantee that their programming is more interesting, innovative or original than that of 10 watt stations with slender budgets. In fact, "(p)rofessionally produced material may be pedantic or irrelevant while the product of less equipped but more inspired staff can be fright and vital." Id. at 444 n. 65, citing Petition of the Intercollegiate Broadcasting System, Docket 20735 (filed June 26, 1972). Indeed, the programming found on most 1 watt micro radio stations reveals that quality programming of political, cultural and educational material is possible with practically no budget whatsoever.

The Commission could have followed a more rational approach of improving programming quality on educational stations by implementing public service programming requirements. Merely requiring stations to broadcast at a power of 100 watts or more is no guarantee of improved program quality. As one commentator noted:

> The (FCC's) solution also leaves unresolved the problem of quality. Unresponsive stations will remain unresponsive regardless of power. A station which provides inadequate educational service has no incentive to do otherwise at 100 or 1,000 watts. It may also be argued that as low budget stations are forced to spend more money on their day-to-day operations, they will have even less to spend on programming. Id. at 459-60.

Indeed, some broadcasting may best performed using limited facilities. The Commission, in their Second Report and Order cited opposing arguments that maintained:

> (l)imited power...is an appropriate way to reach a small community or a neighborhood which is a part of a larger city of license. According to [these commentators], operation on a greater scale with substantial facilities could even bring about a separation of the station from its more limited community and

thereby cause a loss of effective station/community dialogue and involvement." Second Report and Order, supra, at 245.

In fact, some smaller stations had argued to the Commission they had two or three times the audience of a local 50 Kw noncommercial station. Id. at 247. Because a micro radio station is in even closer proximity to the local community, this provides further guarantees that a dialogue with that community may emerge. Such a dialogue stemming from the practice of micro radio provides greater expressive diversity and furthers the possibilities of community self-determination.

The Commission may still suggest other reasons why it supports restricting radio licenses to only those who can afford to broadcast at a minimum power of 100 watts. However, these rationales are unpersuasive. The Commission may argue it is insuring that listeners have regular and dependable radio service. The Commission could claim that "home built" radio transmitters are not sufficiently dependable to provide regular and uninterrupted service. However, as technology has improved in recent years this has become less of a concern. Indeed, Black Liberation Radio has for the past several years operated a low-cost broadcast operation which has effectively served the community on a regular and uninterrupted 24-hour basis. If the Commission were to license some form of low power FM broadcasting, it could easily insure that proper equipment be used and maintained prior to issuing a license to broadcast. A low power FM broadcasting system proposed several years ago in Canada required similar information within an uncomplicated licensing procedure. See: Report and Recommendations in the Low Power Television Inquiry, BC Docket No. 78-253, Appendix 1.

Additionally, the Commission may argue that only transmitters with closely regulated and predictable signal strength can be adequately evaluated and monitored by the FCC to avoid problems of interference. However, listeners who find a neighborhood station's broadcasts irregular or of poor technical quality can easily tune to any mainstream commercial station. Furthermore, the Commission could develop new regulations for low power radio and employ different monitoring techniques for neighborhood broadcasters. Because of the low power signal of micro radio, broadcast interference would not constitute an insurmountable problem, and a uniform set of regulations regarding the operation of micro radio could prevent such interference from occurring.

The Commission may also argue that the national defense strategy, with regard to both military action and natural disasters, depends upon timely communication of emergency information to the entire broadcast audience. The Commission might claim that a station not meeting FCC specifications cannot fulfill this role adequately. Nevertheless, in the event of an emergency, low power neighborhood stations could be required to broadcast repeated instructions for listeners to tune their radios to designated mainstream stations. Again, such a regulation could be easily administered with micro radio broadcasters put on notice of such regulations through some notice procedure. Furthermore, in an emergency, it may be necessary for members of a community to communicate on a local level. Where larger transmitters are knocked of the air, as in an earthquake, micro radio broadcasts may enable members of a local community to quickly solicit emergency assistance as needed. Precisely because of their low power requirements (micro radio signals may be broadcast using a backup battery generator) micro radio broadcasts would be especially vital in the event of such and emergency. Again, regulations promulgated by the Commission could offer guidance as to when such broadcasts would be permitted.

The nearly uninterrupted operation of Mbanna Kantako's Black Liberation Radio in Springfield, Illinois illustrates how micro radio further the public interest by enhancing media diversity. Given the broadcast history of that station and all other micro radio outlets, the rationale for reduced First Amendment protection of micro radio must fail, Because no rational basis can support the elimination of micro radio

broadcasts from the airwaves, any blanket prohibition on micro radio must be declared unconstitutional on its face.

MICRO RADIO BROADCASTS MUST BE DISTINGUISHED FROM OTHER UNLICENSED BROADCAST INVOLVING HIGH POWER TRANSMISSIONS WHICH THE COMMISSION SEEKS TO PROHIBIT.

Previous cases concerning unlicensed radio broadcasts have come before the FCC and the court. However, practically all these cases involved high power broadcasts involving little political speech. As such, these cases may be distinguished from the operation of micro radio stations such as Black Liberation Radio. One notable case, United States v. Weiner, 701 F.Supp. 14 (D.Mass. 1988), aff'd, 887 F.2d 259 (1st Cir. 1989), involved a high power unlicensed broadcaster who made and lost a First Amendment claim in federal court. [SEE APPENDIX 1]. Although the court in Weiner gave a cursory rejection to defendant's open forum and general First Amendment claims, the operation of micro radio differs substantially from the facts in that case. Most significantly, the district court in Weiner emphasized that Weiner would still "be able to apply for a broadcast license on this band," Id. at 16. The court also noted that the FCC regulations did "not necessarily permanently eliminate an opportunity for the defendants to broadcast at such time as when a license may be granted to them." Id. at 17. To the extent that FCC regulations permanently prevent micro radio operators from applying for a license because they are too poor and operate at too low an Effective Radiating Power (ERP), these broadcasters' First Amendment rights are more seriously abridged by the Commission's action.

The facts in United States v. McIntire involving the unauthorized offshore broadcasts of Reverend McIntire also resemble those in Weiner. The Reverend McIntire began transmitting radio broadcasts in September 1973 from a ship anchored three and one-half miles off the coast of New Jersey. These broadcasts were in response to FCC actions denying license renewal to WXUR-FM in Media, Pennsylvania based on fairness doctrine violations at that station. (See: United States v. McIntire, 365 F.Supp. 618, 620-21 (D. NJ 1973); United States v. McIntire 28 R.R. 2d 1000 (D. NJ 1973); United States v. McIntire, 370 F.Supp. 1301 (D. NJ 1974); and United States v. McIntire, 29 R.R. 2d 883 (D. NJ 1974).) McIntire's broadcasts operated "as a direct challenge" to the authority of the United States to restrict radio broadcasts originating beyond U.S. territorial limits. United States v. McIntire, 29 RR 2d 883 (1974). In addition, these broadcasts interfered with the frequencies of several licensed AM radio station, specifically stations located in Salt Lake City, Utah and Lakewood, New Jersey. United States v. McIntire, 365 F.Supp. 618, 621 (D. NJ 1973). Citing the International Telecommunications Convention as well as the overriding national interest in maintaining orderly use of the nation's airwaves, the court concluded that McIntire's broadcasts were adverse to the public interest. United States v. McIntire, 299 RR 2d 883, 885.

The maritime operation of unlicensed radio stations in Weiner and McIntire should be distinguished from the operation of micro radio stations such as Black Liberation Radio. First, the Weiner and McIntire cases each focused primarily on the issue of FCC authority over broadcasts originating from international waters. Micro radio broadcasts are almost always confined solely to an intrastate (indeed, intra-community) area traditionally beyond the regulatory grasp of the Commission's jurisdiction so long as no interference with interstate transmissions occurs. Furthermore, unlike those stations in McIntire or Weiner, micro radio stations do not seek out a large audience, nor do they interfere with the signals of other licensed stations. Finally, although the court in Weiner reaffirmed that defendant was still in a position to apply for a broadcast license were he to cease broadcasting, micro radio broadcasters are unable to procure a license legally. Were they to apply for a license to operate their micro transmitters, the Commission would categorically deny this request inasmuch as no provision allows for the licensing of low power one watt FM stations (See FCC Public Notice No. 14089, July 24, 1991). It is also generally impossible for micro radio

broadcasters or their audience of listeners to apply for any high power FM license inasmuch as member of these disenfranchised communities typically lack the financial resources to operate a 100 watt FM station pursuant to FCC rules.

EVEN IF THE FCC MAY HAVE AUTHORITY TO SANCTION UNLICENSED 1 WATT RADIO BROADCASTS WHICH SUBSTANTIALLY INTERFERE OR ARE LIKELY TO INTERFERE WITH INTERSTATE BROADCASTS, ANY ORDERS TO CEASE AND DESIST ISSUED BY THE COMMISSION WITH RESPECT TO MICRO RADIO STATIONS PURSUANT TO §312(B) OF THE COMMUNICATIONS ACT ARE UNCONSTITUTIONAL AS AN ABUSE OF DISCRETION WHERE THESE 1 WATT BROADCASTS SERVE A NEGLECTED COMMUNITY AND OTHER REGULATORY ALTERNATIVES ARE AVAILABLE TO THE COMMISSION.

The Commission's authority to order micro radio broadcasters to cease and desist pursuant to §312(b) of the Communications Act is unconstitutional as an abuse of discretion where these 1 watt stations serve the public interest and other regulatory alternatives are available to the Commission. Authority for this assertion is found in C.J. Community Services, Inc. v. FCC, 15 R.R. 2029 (D.C. Cir. 1957). Here the court held that the Commission was not required to issue a cease and desist order where unauthorized operation of an unlicensed booster station, which could cause interference to authorized operation, broadcast television signals to the community of Bridgeport, Washington - a community which otherwise received no useable television signals. Id. at __ (emphasis added). This unlicensed booster station transmitted "a useable signal to the town of Bridgeport, over a cone shaped area extending outward from the transmitter about 8 to 10 miles, or about 5 miles across at its widest point." Id. No application for licensing of this low power installation had been made, nor had the Commission issued a construction permit or license for the Bridgeport booster station. Id. In addition, no rules existed at the time for the licensed operation of such a booster station.

Initially, the Commission in C.J. Community Services, Inc. ordered defendants to cease and desist from operating "television broadcast stations" without a license and from carrying on such operation "without a person holding an appropriate operator's license." Id. Defendants then challenged the order, arguing that they were not subject to FCC jurisdiction, and that even if they were, the Commission, in the public interest, erred in failing to exercise discretion to permit operation. Id. On appeal, the Examiner initially held that the Commission's abatement of this unlicensed booster station was not in the public interest. Id. In his findings, the Examiner declared that:

> the utilization of radio channels...are not impaired or threatened by the television booster station herein above discussed, and no other substantial reasons support a conclusion that the public interest, convenience and necessity would be served by issuing the proposed cease and desist order. Id.

Although the Commission reversed the Examiner's conclusion that the cease and desist order "should" not issue, Id. at 2033, the D.C. Circuit court in C.J. Community Services later reversed the Commission's ruling. On the issue of jurisdiction, the court did find that the Commission had authority to regulate this unlicensed booster station. Id. at 2032. Although the unlicensed booster station in Bridgeport was found to radiate an amplified broadcast signal which did not transmit detectable energy or communications beyond the border of that State, Id. at 2030, jurisdiction was found because the booster station caused noticeable interference with the receptions of signals originating out-of-state. Id. at 2035 (Washington, concurring).

Despite finding that the FCC had jurisdiction over this booster station, the court found that the Commission had ample discretion to withhold issuing a cease and desist order given this violation of the Act. Id. at 2033. The court observed that it was possible to telecast outside television signals into Bridgeport without objectionable interference. The court then noted that with respect to §318 of the Act (requiring a licensed operator at the station), that the Commission may, in the public interest, make special regulations governing the granting of licenses for the use of automatic radio devices and for their operation. Id. Finally, the Commission was found to have ample discretion in withholding a cease and desist order under §312(c), the Commission may consider grounds offered by a "person involved" in a §312(b) complaint as to "why...a cease and desist order should not be issued." 47 U.S.C. §312(c)(1989)(cited in C.J. as prohibitively expensive at a cost of $28,000 in 1957. Id. at 2030. Similarly, the low power FM transmitter used by micro radio broadcasters is far less expensive to operate than a licensed Class D non-profit community radio station operation at a minimum 100 watts ERP. The expense of running such an authorized station would be especially prohibitive given the stark economic poverty of many communities served by micro radio, as indicated in the Statement of Facts with respect to Black Liberation Radio and the John Hay Homes and East Springfield community.

In light of the court's ruling in C.J. Community Services, Inc. it is clear that the Commission has ample discretion in determining whether or not a cease and desist order should issue with respect to the operation of micro radio. The situation facing micro radio broadcasters is analogous to the facts in that case. In. C.J. Community Services, Inc., no application for licensing of the low power Bridgeport booster station had been made, nor had the Commission issued a construction permit or license for the Bridgeport booster station. Id. Just as the Commission now prohibits all low power FM radio operation, the Rules and Standards at that time did not provide for the licensed operation of such a television booster station, nor did the rules allow for the issuance of such a license. Id. at 2030-31. Additionally, the low cost amplifier in Bridgeport, which operated on a non-profit basis, was in marked contrast with the authorized CATV system which was prohibitively expensive at a cost of $28,000 in 1957. Id. at 2030. Similarly, the low power FM transmitter used by micro radio broadcasters is far less expensive to operate than a licensed Class D non-profit community radio station operating at a minimum 100 watts ERP. The expense of running such an authorized station would be especially prohibitive given the stark economic poverty of many communities served by micro radio, as indicated in the Statement of Facts with respect to Black Liberation Radio and the John Hay Homes and East Springfield community

In C.J. Community Services, Inc. the court found that the unlicensed booster station served a compelling need in that it broadcast programming to an underrepresented, under-served community. The court's decision in C.J. Community Services, Inc. shows that when a licensing scheme egregiously fails to serve the needs of a community, it violates that law. Because the Commission currently refuses to consider the operation of micro radio within the context of an otherwise unserved community, its order that all micro radio stations cease and desist from all broadcast operations constitutes an abuse of discretion. Because the context within which micro radio operates differs significantly from the high power unlicensed broadcasts found in Weiner and McIntire, those cases are inapplicable to the operation of micro radio. Instead, C.J. Community Services, Inc. is controlling, as that case more closely parallels the facts surrounding the operation of micro stations such as Black Liberation Radio. Like Bridgeport, residents of the John Hay Homes are unable to receive radio televisions signals that directly address and serve the needs of that community. Particularly in light of the social, political and cultural information broadcast over this station, the Commission must focus upon the needs of the community and the content of stations such as Black Liberation Radio when evaluating "why a cease and desist order should not be issued." Id. 2033. As in C.J. Community Services, Inc., the court here must strive to achieve a fair and equitable result. Such a result is particularly important given the First Amendment issues raised in this case, and inasmuch as

"speech concerning public affairs...is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

Other cases involving waivers of FCC regulations are also relevant here. In one case the Commission has waived allocation rules where the waiver would further the Commission's claimed policy of encouraging minority ownership and participation in broadcasting, as well as increase minority-oriented broadcast services, especially in areas with large minority populations, In Re Application of Por Favor, Inc., 68 F.C.C.2d 73, 74 (1978). The court in Por Favor found that a waiver was consistent with the Commission's stated policy of giving waiver requests a "hard look" based upon an applicant's minority ownership, management and programming. Por Favor, supra at 74 (citing AM Station Assignment Standards (Docket No. 20265), 56 FCC 2d 6, 35 RR 2d 151 (1975). Similarly, in another case an appeal from a denial of waiver was remanded on the basis that an applicant's identification with minority listeners is a factor to be considered in acting upon requests for waivers of the Commission's technical requirements. Garrett Broadcasting Services v. F.C.C., 168 U.S. App. D.C. 266, 513 F. 2d 929 (1975). Finally, in Atlass-Communications Inc., 61 FCC 2d 995, 39 RR 2d 228 (1976), the Commission granted a request for waiver by the licensee of a daytime only Black-owned, operated and Black oriented broadcast station to permit acceptance of it application for nighttime operation.

In each of the above cases, waivers of the Commission's licensing rules was granted in light of the minority-oriented services provided by the broadcaster. In these cases, the Commission determined that the public interest would best be served by the grant of a waiver. Given such precedent, a waiver of the existing FCC prohibition on 1 watt FM stations is also appropriate. Such a waiver would be in the public interest, particularly in light of the minority communities served by micro stations such as Black Liberation Radio. In that case, other stations in the Springfield area refused to broadcast similar political and cultural information, fearing that such strident programming would alienate their mainstream listening audience, thereby lowering advertising revenues and causing a loss of station income. Furthermore, although the information broadcast over micro radio may be unpopular with some segments of the listener community, it is forbidden to discriminate against any broadcast outlet merely because of their unpopular content. (cite early 1960s Supreme Court Pacifica case). Given the facts herein described, §318 of the Communications Act and the court's previous rulings as described above, the FCC has clearly abused its discretion in not issuing a waiver of rules prohibiting the unlicensed broadcasting of 1 watt FM stations where these low power broadcasts serve the public interest and little objectionable signal interference results.

THE COMMISSION'S PROHIBITION ON LICENSING OF LOW POWER FM MICRO RADIO BROADCASTS, AS APPLIED, CONSTITUTES A FORM OF PRIOR RESTRAINT AND THEREFORE IS AN UNCONSTITUTIONAL ABRIDGMENT OF FIRST AMENDMENT PROTECTIONS.

Restrictions on micro radio violate First Amendment principals where there is no valid justification for treating low power micro radio broadcasts differently from print media. Thus, failure to license or otherwise permit micro radio broadcasts is unconstitutional where there is unused space on the radio spectrum and low power access to the airwaves produces no objectionable interferes with other radio signals.

Generally, any attempt to license a newspaper or magazine would violate the Constitution. In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) the Court overturned a statute requiring a special use tax for paper and ink. Id. at 577-78. The court overturned this statute in part because it targeted the print media and raised the specter of licensing. Id. at 582-83. Additionally, only an extraordinary government interest may be used to justify any prior restraint on the publication of any print

media. See New York Times v. Unites States (Pentagon Papers case), 403 U.S. 713 (1971) (per curiam). However, because the airwaves are historically claimed to be a "scarce" resource, broadcast media are generally accorded less protection from government regulation than print media. Section 301 of the Communications Act of 1934 expressly states that "...No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio...except under and in accordance with this Act and with a license in that behalf granted under provision of this Act." 47 U.S.C. §301 (1989). In addition, Justice Frankfurter has stated in National Broadcasting Co. v. United States, 319 US 190, (1943) that, "The right of free speech does not include, however, the right to use the facilities of radio without a license." Id. at 227.

In National Broadcasting Co., the Court held that the licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. Id. Historically, the Court has justified FCC jurisdiction over the airwaves by focusing upon the need to regulate scarce broadcast frequencies. In National Broadcasting Co., the Court noted that "(u)nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation." Id. at 226. Twenty-six years later, the Court again used the scarcity rationale, noting that even with advances in radio technology, demand for space on the spectrum had grown to the point where not all demands on the spectrum could ever be satisfied. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-90 (1969).

Typically, those alleging a scarcity of available radio frequencies point to the "chaos" that reigned over the airwaves prior to the passage of the Federal Radio Act of 1927. During this unregulated era, radio broadcasts frequently intruded upon the signals of other stations, producing interference and static over the airwaves. See, e.g. Nation Broadcasting Co. v. Untied States, 319 U.S 190, 212 (1943); Red Lion, supra, at 375-86; FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940). However, the justification for regulating airwave broadcasts based upon this scarcity theory has recently undergone significant criticism. See, e.g., Spitzer, The Constitutionality of Licensing Broadcaster, 64 NYU LR 990 (1989). Former FCC chairman Mark Fowler also rejected scarcity justifications for regulating broadcasting as the FCC pursued a policy of deregulation under his tenure. See: Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex.L. Rev. 207 (1982). Furthermore, the Supreme Court observed that the prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. F.C.C. v. League of Women Voters, 468 U.S. 364, 376 n. 11 (1984). In League of Women Voters, the Supreme Court explicitly invited Congress of the FCC to rule that technological developments have advanced so far that some revision of the system of broadcast regulation may be required. Id. Indeed, other nations have developed successful alternative methods of broadcast spectrum allocation which successfully permit low power micro radio broadcasts. These methods include Canada's experiments with 1 watt low power FM broadcasts and the results of an early 1980s Italian Supreme Court decision holding regulation of local broadcasting by the national government to be unconstitutional. In both instances, low power FM broadcasts were permitted with little resulting chaos or interference with emergency or other governmental services. Nevertheless, the Commission still maintains that spectrum scarcity should be irrelevant for First Amendment purposes does not affect its relevance to the Commissions allocation and licensing function. The Commission, of necessity, considers spectrum scarcity in making its allocation and licensing decisions. Syracuse Peace Counsel, 2 F.C.C. Rec. 5043, 5069 n. 204 (1987).

Today even the Commission acknowledges that the spectrum scarcity rationale has lost much of its credence and viability as justification for FCC regulation of broadcasting content. See, Id. As a consequence, the FCC should be estopped from justifying its failure to license low power radio broadcasts with these same spectrum scarcity justifications. Micro radio broadcasters use only a fraction of the radio

spectrum to transmit a high quality signal heard within a distance of approximately one mile from the transmitter. An appendix to the Commission's own Report and Recommendations in the Low Power Television Inquiry (BC Docket No. 78-253) focused upon Canada's experiments with low power FM transmitters. This study indicated that these very low power systems do not create interference or spectrum crowding problems, provided they are operated with certain basic safeguards against interference to other services and that they provide a valuable local service. The major quality limitation is in the "programming itself", not the transmitter...We recommend that the transmitter power of such VLPT's [very low power transmitters] be limited to one watt. This power level is capable of providing an adequate service to the small, remote communities in which such service applications are likely to arise. Id. (Executive Summary and Recommendations).

Broadcasters who transmit micro radio signals within their respective communities do not lay claim to a broad section of radio frequency. The communicative intent of micro radio broadcasters like Mbanna Kantako and others is to maintain a dialogue with those in the immediate community; listeners located approximately one mile from the micro radio broadcaster's signal. As the appendix to the FCC's Report and Recommendations indicated, "Some communities are not satisfied with local rebroadcast of programs originating outside the community and want the technical means to originate programming locally according to local determination of need and interest." Id. In the case of Mbanna Kantako's Black Liberation Radio, this community constitutes 98% of the African-American population in the extremely segregated capital of Springfield, Illinois.

Again□ it should be noted that micro radio broadcasts will not interfere with other radio signals, nor do these broadcasts impair any governmental functions. However, while the technological feasibility of micro radio allows for low cost instant communication involving important First Amendment issues, the FCC makes no provision for the utilization of this technology, thereby ignoring the potential of micro radio in advancing the public interest, the Commission's public mandate under the Communications Act. This is in contrast to the Commission's own policy statements. The Commission has previously stated "(t)hat principles applicable to the government's regulation of a rapidly changing industry such as telecommunications should be revisited and revised in light of technological advances is not an unusual proposition." Syracuse Peace Council, 2 FCC Rec. 5043, 5052 (1987). In Red Lion Broadcasting the Supreme Court agreed, noting that advances in technology could have an effect on the judicial analysis of the constitutional principles applicable to the electronic media. Red Lion Broadcasting, at ____. In addition, the Court of Appeals in Meredith v. FCC noted that the Red Lion decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of commercially available technology' as of 1969." (cite). And yet, the Commission itself later allocated almost 700 additional stations to the FM band since that time. See: Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, 53 RR 2d 1550 (1983). In addition, a recent bill passed by Congress would have increased the amount of electromagnetic spectrum available to broadcasters. This bill, H.R. 2965, would have reallocated a portion of the spectrum previously reserved for government use.

Appendix 1 of the FCC's Report and Recommendations in the Low Power Television Inquiry (BC Docket No. 78-253)(1980?) contains comparative documents detailing Canada's positive experiences with low power broadcasting. In a report entitled "A Study of Very Low Power TV and FM Transmitters for Remote Communities" the authors suggest that rules be amended to allow for a subclass of very low power FM broadcasting stations with Effective Radiating Power (ERP) up to 10 watts, which would typically use a transmitter power of about 1 watt. To avoid interference, the report suggests that:

the principle technical limitation on such operations should be a requirement

that a suitable channelizing or low pass filter be used to limit radiation of harmonics which could be harmful to nearby television or other telecommunication services...We would recommend limitation of harmonic radiation because of the possibility of interference to television services in the same or nearby communities. It is likely that CATV class FM modulators and power amplifiers would be used in such service. Id. at 21.

The report goes on to state that:

[Very low power transmitters] for FM radio should have effective means of reliably maintaining frequency stability. This stability need not be the 1 Khz required [in Canada] of full scale FM broadcast transmitters but could be relaxed to as much as 100 Khz without any harm being done, so long as there is assurance of effective limitation of radiation that might affect other services. Id. at 49.

Furthermore, the report adds that:

We expect few problems with the quality of the overall service in locally originated very low power FM radio services. Audio equipment of good quality is not expensive and the licensees of such stations should not have the kind of problems which face TV operations in similar circumstances. Good quality microphones are substantially less than $100 in cost. Good quality audio tape recorders can be purchased for a very few hundred dollars. Monitoring and audio control equipment is similarly reasonably priced. Acceptable quality is so much easier and cheaper to achieve in radio than in television we expect the [Canadian Radio and Television Commission] may wish to consider encouragement of local community radio as a precursor to [low power] television in communities in which expression of local interest is the principle reason for new low power broadcast services. Radio is very cost effective - "more bang for the buck." Id. at 22.

The FCC would have little trouble regulating micro radio broadcasting stations. Appendix 1 to the Commission's Report and Recommendations focusing on low power television contains a Canadian Department of Communications' study of very low power FM transmitters. This study recommends that application forms and information requirements be simple enough to allow for easy application by potential low power licensees. Id. at 50. This Report included samples of such applications, along with rules governing broadcasts on low power micro radio stations. This information is contained herein as Exhibit 1 (see attached). These forms request operational information (name of licensee, address, etc.) technical information (frequency/channel, antenna location, type of equipment, etc.) information concerning the community being served, and statements as to how operation of a low power transmitter will serve the needs of this community. A cursory examination of exhibit 1 indicates that the licensing and administrative requirements necessary to oversee operation of micro radio stations are not burdensome. Indeed, these licensing forms reveal that micro radio can easily be regulated so as to prevent signal interference, and that rules which prohibit the operation of micro radio where there is a compelling need are an arbitrary exercise of the Commission's powers which fail to advance the public interest.

Given the limited broadcast radius of micro radio and the fact that this technology enables citizens to broadcast over open radio frequencies with no objectionable interference with licensed broadcast signals, the FCC should adopt policies that will foster such use. Because it is in the larger public interest to permit access to politically and culturally informative micro radio broadcasts, and because the Court has

emphasized that it is the right of the viewers and listeners that is paramount, FCC rules prohibiting access to micro radio are unconstitutional in that they impair the First Amendment rights of listeners to receive micro radio broadcasts which contain substantive political and cultural programming.

IV. FINANCIAL QUALIFICATIONS WHICH COMPLETELY EXCLUDE THE POOR FROM THE USE OF THE FM BAND OF THE ELECTROMAGNETIC SPECTRUM ARE UNCONSTITUTIONAL; THEREFORE FCC ACTIONS TAKEN PURSUANT TO §308(b) OF THE COMMUNICATIONS ACT WHICH EXCLUDE THE POOR ARE UNCONSTITUTIONAL ON THEIR FACE.

The Commission requires that applicants for new radio broadcast stations demonstrate the ability to construct and operate the station for three months, without relying upon advertising or other revenue to meet these costs. Financial Qualifications standards of aural broadcast applicants, 69 F.C.C> 2d 407 (1978). The Commission has alleged that this policy would specifically benefit minority applicants seeking entry into the radio broadcast service inasmuch as station financing has been a principal barrier to minority broadcast ownership. Id. Nevertheless, the Commission's financial requirements are discriminatory on their face because they prevents the poor from exercising a fundamental right - the right to freedom of expression as guaranteed by the First Amendment. Furthermore, the application of this financial barrier works to discriminate against minorities who lack the $50,000 to $100,000 necessary to operate a station at a loss for three consecutive months. This is particularly true of micro radio broadcasters who are denied access to the airwaves despite their ability to engage in effective low cost radio programming. As a result, the Commission's rule denies underrepresented poor and minority communities any effective voice over the broadcast media, thereby violating their right to impart and receive communication over the public airwaves.

In a variety of contexts the Supreme Court has made clear that the disabilities of indigency need not be overcome by government, see e.g. Harris v. McRae, 448 U.S. 297 (1980)(abortion funding), Ross v. Moffit, 417 U.S. 600 (1974)(criminal justice). Thus, neither the right to welfare, Dandridge v. Williams, 397 U.S. 471 (1970), housing, Lindsey v. Normet, 405 U.S. 56 (1972), or education, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), constitutes a fundamental constitutional right. But it is equally true that it is forbidden for government to exclude a person because of indigency from the exercise of a fundamental constitutional right. Thus while a person's lack of resources may limit a person's ability to travel interstate, it cannot limit the right to travel, Edwards v. California, 314 U.S. 160 (1941), or the right to vote, Kramer v. Union Free School District, 395 U.S. 621 (1969), or to be a candidate in an election to public office, Bullock v. Carter, 405 U.S. 134 (1972), Lubin v. Panish, 415 U.S. 709 (1974).

Moreover dignity for the common person today depends on his or her ability to decide for him or herself the merits fo every public issue, and there can be no deliberation or judgement without freedom of communication. Governmental exclusion of the poor from a forum as decisive as radio because of indigency constitutes an official assault on their social and political worth as members of the community and on their dignity as citizens.

Historically the First Amendment was adopted to eliminate financial qualifications for speech. John Adams wrote that the Stamp Act imposed on the American colonies by Britain showed "a design...to strip us, in a great measure, of the means of knowledge, by loading the press, the colleges, and even an almanac and a newspaper, with restraints and duties." (quoted from "Our Blood-Bought Liberty" in Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Georgetown L.J. 257 (198_). In fact the Stamp Act was first introduced in England in the early 17th century after Parliament refused to

renew the Licensing Act to serve a similar purpose. The Crown frankly acknowledged that the purpose of the Licensing Act was not to raise revenue but to suppress writings critical of the government. The Anti-Federalist challenge to the ratification of the Constitution was conscious of this history and insisted on a Bill of Rights to prevent government from "imposing duties on every instrument of writing." Neisser concludes:

> English suppression of religious, political, and literary dissidents evolved from book-burning, to licensing, to taxing. Taxes on paper, publications, and advertisements were intended as a means of suppressing critics once licensing was no longer politically acceptable, and these taxes effectively suppressed the inexpensive mass circulation publications. The Framers were acutely aware of the risks of taxation of expression....Furthermore, the Founders did not enact such taxes after the First Amendment was adopted.

The current Court has confirmed this heritage in Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 103 U.S. 1365 (1983), invalidating a Minnesota use tax on the press. This case reaffirms the principle that financial burdens cannot be made a governmentally imposed prerequisite to the exercise of First Amendment rights. The potential for abuse, the Court reasoned, was too severe.

In spite of this history, §308(b) of the Communications Act of 1934 provides that:

> All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and any other qualifications of the applicant to operate the station...

Given the nature of any public forum, perhaps those with financial ability may be subject to fees to a limited extent. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941). However, financial qualifications can no more be made a governmental precondition to the use of a First Amendment forum than they can be made a precondition to candidacy for public office. See, Lubin v. Panish, [cite...] and Bullock v. Carter, [cite...]. For this reason ordinances requiring a threshold percentage of contribution to be used for charitable purposes as a precondition to solicitation in the public forum, has been invalidated. See, Village of Schamburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munson, Co., 467 U.S. ___(1984), and Riley v. National Association for the Blind, 487 U.S. 781 (1988). Such provisions may foreclose solicitation by those without funds to defray the administrative cost of the activity. Similarly rules and regulations imposed under §308(b) of the Communications Act foreclose the possibility of any applicant receiving a license without tens of thousands of dollars of capital as an absolute minimum, and station licenses are commonly marketed for millions. Yet broadcasters like Mbanna Kantako have shown that effective use of the spectrum can be made without an eye for profit and as a form of community expression for as little as a few hundred dollars. Government forbids this, not because of interference with existing users or because spectrum space is unavailable, but because micro radio broadcasters lack sufficient capital to meet the FCC's threshold requirements.

On need not be as sensitive as the Founding Fathers to the conditions underpinning the struggle for liberty to suspect that communication mergers priced at $370 million (Gannet-Combined), $3.5 billion (Capital Cities-ABC), and $6 billion (GE-RCA) (see, Carter, Franklin and Wright, The First Amendment and the Fifth Estate, p. 176-78) generate broadcasters with a stake in the established order, in its assumptions and

values, and in its distribution of wealth and power. See also, Bagdikian, "Lords of the Global Village," The Nation, June 12, 1989 at ___. As Justice Brennan once noted:

> [I]n light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and in the commercial world of mass communications, it is simply "bad business" to espouse-or even to allow others to espouse-the heterodox or the controversial. As a result, even under the [now disregarded] Fairness Doctrine, broadcasters generally tend to permit only established-or at least moderated-views to enter the broadcast world's "marketplace of ideas." Columbia Broadcasting Sys., Inc. v. Democratic National Committee, 412 U.S. 94, 187-88 (1973) (Brennan, dissenting).

Under the First Amendment existing broadcast licensees have a right to turn wealth into speech. But the same First Amendment must assure popular critics of government without such resources a place in the forum also. It cannot add to the influence of wealth the trump of official exclusion. Micro radio practitioner are today's popular pamphleteers, 20th century dissidents whose imaginative and resourceful use of small means is suppressed by government imposition of financial qualifications. General Electric could buy this equipment for one ten-millionth of the cost of RCA 12 and still overpay. Must the Commission and the Department of Justice also prevent this speech? Congress and the FCC may make reasonable rules to govern the FM band just as government may do with any First Amendment forum for which it has responsibility, but it may not exclude micro radio broadcasters from that forum by making financial qualifications a precondition to access.

V. WHERE UNUSED SPECTRUM SPACE EXISTS, FCC RULES WHICH EXCLUDE A BROADCASTER WITHOUT FUNDS ARE UNCONSTITUTIONAL IN THAT THEY ARE NEITHER NARROWLY DRAWN NOR GROUNDED IN A COMPELLING GOVERNMENTAL INTEREST.

Because broadcast frequencies are considered a scarce resource, the Supreme Court in 1983 did not apply a "compelling governmental interest" standard to government regulation of the editorial content of a licensed broadcaster. Nevertheless, the Court applied a scrutiny only marginally less exacting and found a Congressional prohibition on editorializing by noncommercial broadcast licensees to violate the First Amendment, FCC v. League of Women Voters, [cite...]. But because the Constitution does not permit the total exclusion of the poor from the exercise of a fundamental constitutional right because of indigency, the highest standard of strict scrutiny must be applied to test any such restrictions, as Kramer v. United Free School District, supra and Carey v. Brown, supra, for example, require. The standard to strict judicial scrutiny of governmental activity requires that governmental action be designed to accomplish a compelling governmental interest and that the means chosen to accomplish that interest be narrowly drawn for that purpose.

By any standard the government can demonstrate neither a compelling interest nor a carefully chosen means to justify the total exclusion of the poor from the FM band of the electromagnetic spectrum. The justification for regulation of the First Amendment fora created by the broadcast spectrum is the potential for broadcast interference and the scarcity of broadcast frequencies, National Broadcasting Company v. Untied States, 319 U.S. 190 (1943), Red Lion Broadcasting Co. v. FCC, supra, FCC v. League of Women Voters, supra. Yet a one watt micro radio station interferes with no broadcast use. The FCC does not take action against micro radio operators like Mbanna Kantako due to interference with other broadcasts. These broadcasts displace no licensee, and cause no cacophony or anarchy. While a small potential for

interference may exist, micro radio broadcasters are by definition those who broadcast with very meager resources, and with broadcast capabilities quite limited in their ability to intrude on broadcast space. In addition, there are vast regions of the United States where for mile after mile substantial portions of the FM band are unused, yet the poor are denied access to these frequencies also. There can be no justification for such exclusions.

Nor are such exclusions narrowly drawn. In any consideration of the relationship of means to ends, there must inevitably be an evaluation of alternatives. Narrow is a relative term and depends on available comparisons. Here, penalties may be imposed for actual interference, or in the alternative, and under the compulsa of the Constitution, a portion of the forum may be set aside for the indigent, thereby avoiding all possibility of interference with other licensees. Such space exists. In 1984 the FM band was expanded with nearly 700 new stations added. See: Modification of FM Broadcast Station Rules to increase the Availability of Commercial Fm Broadcast Assignments, 53 RR 2d 1550 (1983). A portion of such space might be made available to the poor. These are matters readily within the discretion and expertise of the Commission once Constitutional guidelines prohibiting government exclusion because of indigency have been unambiguously announced.

The Court in Red Lion stated over 20 years ago that 'if experience with the administration of these doctrines [the fairness doctrine] indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." Red Lion, supra, at __. But there has been time enough to know that the poor are excluded from the spectrum. As a result a portion of the radio spectrum must be set aside to allow this class to engage in meaningful dialogue over the airwaves. Only in this way can the First Amendment rights of this class of persons be properly protected.

VI. THE CIVIL RIGHTS OF RACIAL AND ETHNIC MINORITIES IN THE UNITED STATES ARE UNCONSTITUTIONALLY VIOLATED BY FINANCIAL QUALIFICATIONS WHICH COMPLETELY EXCLUDE THE POOR FROM THE USE OF THE FM BAND OF THE ELECTROMAGNETIC SPECTRUM PURSUANT TO SECTION 308(B) OF THE COMMUNICATIONS ACT. IN PARTICULAR, BECAUSE THEY ARE PART OF HISTORICAL PATTERNS AND PRACTICES OF THE FCC WHICH DISCRIMINATE AGAINST MINORITIES.

Besides discriminating against the poor, the Commission's suppression of micro radio discriminates against minority broadcasters and listener. Because FCC regulations prohibiting the operation of micro radio have a disproportionately adverse affect on broadcasting diversity, these provisions unconstitutionally impair the rights of minorities to engage in their fundamental rights of free expression.

The Supreme Court now proclaims that the applicable test for constitutionality under the equal protection clause is as follows:

> (O)fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact...Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause...Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.

Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)). However, even under this more stringent test, the

Commission's behavior with respect to minority broadcasters has consistently reflected the "substantial" goal of racial discrimination. In particular, the Commission's policy towards micro radio ratifies previous discriminatory behavior by the Commission, and prevents African American broadcasters such as Mbanna Kantako from communicating with their respective communities. See, L. Rodriguez, "Rappin' in the Hood." The Nation, 193, Aug. 12/19, 1991 (detailing harassment of other African-American micro radio broadcasters). A brief history of the Commission's pattern and practice of discriminatory behavior is described here in order to provide the context within which FCC prohibitions against micro radio operated.

FCC AND RACISM IN BROADCAST REGULATION

[SEGMENTS OF TEXT COPIED FROM "COMMENTS OF NAACP AND LULAC," GC DOCKET NO. 92-52]

In perhaps no other task is the Commission's public interest mandate more fundamental than in the issuance of new broadcast licenses. This is the means by which non-minorities, exclusively, won the right s to the most valuable licenses essentially without cost at a time when legal segregation still reigned. During that time, it would have been unthinkable for minorities to have had the temerity even to apply for a broadcast permit. To understand why, some historical context is necessary. The NAACP and LULAC have previously observed that:

Until about the mid-1970s, the FCC openly tolerated and ratified discriminatory action by it licensees. It routinely provided broadcast licenses to colleges and universities which were totally segregated (e.g.., WBKY-FM, University of Kentucky, licensed in 1941; WUNC-FM, University of North Carolina, licensed in 1952; KUT-FM, University of Texas, licensed in 1957, among many others). In this way, the FCC endorsed and facilitated segregated broadcast education, thereby giving Whites a substantial head start in access to broadcast employment.

Southland Television Co., 10 RR 699 (decided 1955, reported 1957), recon. denied, 20 FCC 159 (1955) illustrates the Commission's racial policies at mid-century. The FCC had before it a Shreveport TV station applicant who segregated movie theatres. This man had built his movie theatres without balconies to circumvent a Louisiana law which allowed the admission of Blacks as long as they sat in the balconies. He even owned a segregated drive-in theater; all the other drive-ins were integrated (at least to admission, although not as to the occupants of the automobiles).

The FCC held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theatres, nor any evidence that "such admission would be legal under the laws of the state." Id., 10 RR2d at 750. Thus, the FCC gave full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state laws permitting some integration.

Comments of NAACP and LULAC, 6-7, GC Docket No. 92-52, dated June 2, 1992.

When faced with broadcast cases arising out of the civil rights movement, the FCC's decisions also reflected a continuing pattern of discriminatory policies and practices:

In Broward County Broadcasting, 1 RR2d 294, 296 (1963), the Commission set for hearing the license of a small Florida station which proposed to address a small portion (17%) of its programming to the Black community. The reason: local White citizens had complained that the station was licensed to an all-White town which didn't need that type of music. When the station dropped the programming, the FCC quietly dropped the charges.

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965), the Commission was faced with a radio licensee who had used his station to help incite the riot which took place at the University of Mississippi when James Meredith attempted to enroll. The Commission merely admonished the station.

The Federal courts soon became impatient with the FCC's racist policies. In the landmark case of Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)("UCC I") the Court of Appeals ordered the FCC to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council/Ku Klux Klan viewpoint on racial matters, and went so far as to censor its own NBC network news feeds with a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed. This case was highly significant because it upheld, for the first time, the principle that individual citizens, because of their investment in television and radio receivers, have standing to challenge television and radio licenses.

After a very one-sided hearing in which the FCC renewed WLBT-TVs license again, the Court ordered the FCC to deny the license renewal. The Court has never before or since taken such an action, but this time it held the administrative record to be "beyond repair." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969)("UCC II"). Only after a further hearing lasting eleven more years, a company headed by Aaron Henry, President of the Mississippi State Conference of [NAACP?] Branches, won the license.

Comments of NAACP and LULAC, 7-8, GC Docket No. 92-52, dated June 2, 1992.

The NAACP and LULAC have observed that in spite of an anit-discrimination policy adopted by the FCC, the Commission applied this policy only haltingly and sporadically:

In Chapman Television and Radio Co., 24 FCC 2d 282 (1970), the FCC had before it an applicant for Birmingham, Alabama TV Channel 21. That applicant, a man who owned part of the stock in a Birmingham cemetery, had participated in the cemetery's 1954 decision to exclude Blacks. The cemetery's policy came to light when the cemetery turned away the body of a Black war hero. Yet the Commission found "extenuating circumstances" in the applicant's claim that the cemetery would have been sued by White cemetery plot owners.13 The FCC ordered hearing only into why the applicant had covered the matter up, not into whether a practicing segregationist had the moral character to be a federal licensee. Even the cover-up allegations were thrown out by the Hearing Examiner, who held that "in today's climate it is nota al all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges." Chapman Radio and Television Co., 21 RR 2d 887, 895 (Examiner 1971).

Chapman was not an anachronism. Long before minorities owned or applied for broadcast licenses, the FCC openly discriminated on the basis of national origin. In 1938, in what would now be seen as a clear violation of the First Amendment, the Commission rejected the only applicant for a radio license, holding that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group [of speakers of foreign languages]...the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938). See also Chicago Broadcasting Ass'n, 3 FCC 277, 280 (1936), Voice of Brooklyn, 8 FCC 230, 248 (1940).

These pre-World War II cases involving, inter alia, Yiddish language programming probably reflect anti-Semitism. The programming was largely intended for Jewish immigrants who had fled Germany and

Poland. It surely reflected a climate in which none but WASPs could hope for access to the airwaves. In this atmosphere, it would have been unthinkable for Blacks or Hispanics to seek broadcast licenses.

Indeed, the Commission later directly imposed its Voice of Detroit regime on those seeking to serve Black audiences. In 1360 Broadcasting Company, 36 FCC 2d 1478 (Rev. Bd. 1968), the Commission refused to waive a minor technical rule to allow a first nighttime radio service to 98.1% of Baltimore's Black community. Review Board Member Joseph Nelson dissented, pointing out that the Commission "has granted waivers or found substantial compliance with the rule where coverage was less than 100%" (citing cases, all involving new service to Whites, where proposed coverage would have been 90.2%, 95%, and 90.6%). Yet the Commission persisted in this deliberately discriminating licensing policy. See Mel-Lin, Inc., 22 FCC 2d 165 (1970), (Jacksonville, Florida); Champaign National Bank, 22 FCC 2d 790 (1970) (Champaign, Illinois).14

Comments of NAACP and LULAC, 8-11, GC Docket No. 92-52, dated June 2, 1992. The NAACP and LULAC have also noted that:

In United Steel Workers v. Weber, 443 U.S. 193 (1979), the Supreme Court held that exclusion of minorities from crafts on racial grounds was so well known it could be judicially noticed. While broadcasting is a much smaller industry than steel making, the history of minority exclusion from broadcast employment has been so well known that it hardly bears repeating. See U.S. Commission on Civil Rights, Window Dressing on the Set (1977); Report of the National Advisory Commission on Civil Disorders, supra, at 383-84 (finding that in journalism in 1968, fewer than 1% of management employees were Black, and most of these worked in Black owned organizations). Nonetheless, despite hundreds of EEO complaints, only once, in Catoctin Broadcasting of New York, 4 FCC Rcd 2553, 2558 (subsequent history omitted) has the FCC found that a licensee engaged in discrimination. The D.C. Circuit has repeatedly been critical of the FCC's failure to enforce its EEO Rule. Beaumont Branch of the NAACP v. FCC, 854 F. 2d 342 (D.C. Cir. 1986); Bilingual Bicultural Coalition on the Mass Media v. FCC, 556 F. 2d 59 (D.C. Cir. 1977). Indeed, minority representation in broadcast employment remains...far [below] parity with the representation of minorities in the population. See FCC Broadcast EEO Trend Reports, 1975-90.

Comments of NAACP and LULAC, 18, N. 6, GC Docket No. 92-52, dated June 2, 1992.

Additionally, in 1977 a legal study found that the Commission's EEO requirements were "vague, variable, evasive and easily met, even by broadcasters who actively discriminate," and that FCC regulations fell below the standards set by federal courts that deal with the legislation governing EEO. N.A. Bowie and J.W. Whitehead, "The Federal Communications Commission's Equal Employment Opportunity Regulation - An agency in Search of a Standard," 5 Black Law Journal 313 (1977). Furthermore, statistics complied by the National Association of Black Owned Broadcasters (NABOB) show that in 1980 African Americans owned 1.57% of all radio stations. In 1991, that percentage had grown to only 1.64%. In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2814, N. 12 (1992) (Statement of Commissioner Andrew C. Barrett dissenting in part and concurring in part).

The above history illustrates that current FCC policies actively reinforce a long history of past discriminatory behavior. By institutionalizing past discriminatory behavior which resulted in the current paucity of stations owned by minorities, the Commission has engaged in unconstitutional behavior. See Columbia Board of Education v. Denick, 443 U.S. 449, 458-59 (1979) (14th Amendment requires abandonment of policies which reinforce present effects of past discrimination).

CURRENT FCC POLICY REGARDING MINORITIES, BROADCASTING AND DIVERSITY IN PROGRAMMING.

The FCC's minority policies were initially conceived with the claimed objective of fostering broadcast content diversity, rather than remedying any past discrimination suffered by minorities. See, Kleiman, "Content Diversity and the FCC's Minority and Gender Licensing Policies," 35 J. of Broadcasting & Electronic Media, 411, 413 (Fall 1991). In 1971, the court noted the need for diversity of ownership, asserting that diversity of ownership was directly related to program content. Citizens Communication Center v. FCC, 447 F. 2d 1201 (DC Cir. 1971). The court noted that "as new interest groups and hitherto silent minorities emerge in our society they should be given some stake in and chance to broadcast on our radio and television frequencies." Id. at 1213. The Commission later released its Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978) which claimed to find no overt discrimination, but cited significant barriers to minority entry into broadcasting.

The Commission's current policy towards achieve programming diversification is to foster its minority ownership policies and Equal Employment Opportunity (EEO) rules rather than through direct regulation of programming. Deregulation of Radio, 84 FCC 2d 968, 977, recon. granted in part, 87 FCC 2d 797 (1981) aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F. 2d 1413 (D.C. Cir. 1983). The House Conference Committee Report adopted in 1982, when Congress affirmed its support for the distress sale policy 15, stated that:

An important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities - groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982). See also S. Rep. 182, 100th Con., 1st Sess. 76 (1987)("Diversity of ownership results in diversity of programming and improved service to minority and woman audiences."). And in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) the Supreme Court, in upholding the Commission's policy permitting distress sales to minority broadcasters, held that the promotion of minority ownership and implementation of the FCC minority ownership policies serves an important national interest. In upholding this regulation, the Court noted that Congress had mandated that the FCC pursue these policies. The Court also noted that the benefit of increased minority ownership rebounds to all Americans, not just minorities. Id.

Thus, the Commission claims that it promotes minority ownership by allowing preferences for minorities in lottery licensing, Amendment of the Commission's Rules to Allow the Selection from among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 91 FCC 2d 74 (1982) and by allowing minority-controlled stations to be excepted in the Commission's multiple ownership rules. Amendment to Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 74 (1985). Yet these policies have produced little improvement, and some policies, such as the minority exception with regard to multiple ownership, are in the process of being repealed. Thus, while the Commission asserts that "[e]fforts to promote minority ownership [citing Statement of Policy on Minority Ownership of Broadcast Facilities, supra] and EEO are underway and promise to bring about a more demographically representative radio industry," little programming or ownership diversification has actually resulted from these policies. In fact, current FCC regulations promoting broadcast diversity differ significantly from those which previously

served the broadcast industry through an earlier era of rapid broadcast development. Compare En Banc Programming Inquiry 44 FCC 2303, 2314 (1960) and Public Service Responsibility of Broadcast Licensees 15 (March 7, 1946)(the "Blue Book")(claiming each station is expected to serve minority groups).

While the Commission claims that it has sought to enhance programming diversity by promoting minority ownership, studies reflecting minority ownership in radio and TV reveal that these policies have been a dismal failure. As Commissioner Barrett has himself noted, no distress sales have been granted to minorities since 1988, and only 38 have been granted since the inception of the policy. In re Revision of Radio Rules and Policies, supra, 2815 (Statement of Commissioner Andrew C. Barrett dissenting in part and concurring in part). In addition, the issuance of tax certificates has decreased dramatically since 1990. Id., at Appendix 2.

Almost all relevant statistical indexes reveal that the Commission has failed to promote broadcast diversity through its minority ownership policies. In 1972, African American ownership of stations was less than 20 of the 7,000 licensed radio stations, and no TV stations. "Coming Through the Front Door of Ownership: A New Direction for Blacks in Broadcasting," Broadcasting, 35-8, Oct. 25, 1972. From 1976 to 1981, when the FCC claimed to be seriously committed to increasing minority ownership, the number of African American owned radio stations grew from 30 to 141. However, from 1981 to 1991 when the Commission pursued its policy of deregulation, the number of radio stations owned by African Americans rose from a figure of 141 to only 182. In re: Revision of Radio Rules and Policies, supra, 2769[?], N. 63. When looked at as a percentage of all radio station ownership, these figures reveal that only 2% of all FM stations are owned by African Americans.

From 1990 to 1991...the percentage of minority owned broadcast stations has actually declined from its already inconsequential level. The decline was particularly serious with respect to radio broadcasting. The gross number of minority owned stations declined from 173 to 165 for AM, and from 99 to 91 for FM. Expressed as a percentage of all stations, minority ownership declined from 3.5% to 3.3% for AM, and from 2.3% to 2.0% for FM. The figures for Hispanic ownership are equally discouraging, dropping from 1.3% to 1.2% for AM, and from .6% to .5% for FM. A Statistical Analysis of Minority-Owned Commercial Broadcast Stations Licensed in the United States in 1991, prepared by the U.S. NTIA.

Petition for Reconsideration of the League of United Latin American Cities (LULAC), 20, MM Docket No. 91-140, May 29, 1992. In fact, while the broadcasting industry increased in size, the number of minority owned commercial broadcast stations declined in 1991 from 301 to 287, a drop of 4.7% See Report on Minority Broadcasting Trends, NTIA (November 1991).

Minority owned stations are predominately among the smaller stations in their markets, in terms of ratings and profits. As a result, the numbers of minority owned stations will likely decreased significantly once the Commission implements its current Report and Order raising ownership limits to 60. See infra at...The outlook for minority broadcasters appears particularly bleak in light of previous Commission practices reaffirming discriminatory patterns in the broadcasting industry, and in light of the Commission's current approach towards broadcast deregulation. Given all of the above, it is not surprising that the Commission's halfhearted attempts at promoting minority diversification in broadcasting over the last several years have failed.

DEREGULATION OF BROADCASTING

In 1981, the Commission began the process of broadcast deregulation. Deregulation of Radio, supra, at __. Broadcast deregulation continued throughout the 1980s, and the policy goals of deregulation inform the Commission's current policies. The practice of micro radio became widespread during this period of rapid deregulation. The response of micro radio broadcasters such as Mbanna Kantako are significant, in that broadcast deregulation has increased the need for programming diversity in communities like Springfield, where minority needs are otherwise unmet by the mainstream media.

Deregulation of the broadcast industry has resulted in a stark reversal of previous Commission policy. Because deregulation has decreased minority representation in the broadcast industry, it has had a discriminatory impact on minority groups. As the above statistics indicate, the impact of deregulation has seriously damaged the interest of minority broadcasters and their audience. In spite of FCC assurances, programming diversity has suffered. This reversal has occurred for many reasons. By assuming the marketplace would respond to needs of the community of listeners, the Commission ignored commentators who argued that advertisers do not value all listeners equally. Deregulation of Radio, supra, at 1033. These commentators noted that broadcasters program for audiences likely to purchase advertised goods, and that these demographic groups seldom represent the wants and needs of racial and ethnic minorities and the elderly. Id. These commentators also noted that licensees responding to market place forces would not respond to low income listeners because advertisers consider them commercially insignificant. Id. The Commission's response to these arguments was merely to cite studies showing that low income families and African Americans are more name-brand conscious in their buying habits. Id. at 1033-35. The Commission asserted these finding showed that Black formatted stations would have an incentive to broadcast to this minority community. Id. Because the Commission eliminated long form license renewal requirements which could provide important information as the short and long-term effects of deregulation, no data has ever been provided to support the Commission's above assertion.

Under earlier Commission regulations, each station was "expected" to serve minority groups. Public Service Responsibility of Broadcast Licensees, supra. The above history of FCC actions reflects that this was not always the case. Yet under radio deregulation, the Commission has further eroded the power of the broadcast media to serve minority interest. In their Report and Order, the Commission ruled that if only one station in a market is "serving" minorities, no other station in the market need be required to do so. Deregulation of Radio, supra, at 991. In addition, the implementation of radio deregulation eliminated important broadcast rules which previously insured that media outlets addressed the needs of minority communities. These rule changes are briefly examined in the sections below.

1. ELIMINATION OF REQUIREMENTS REGARDING FORMAL ASCERTAINMENT OF COMMUNITY NEEDS

In their order implementing broadcast deregulation, the Commission repealed regulations requiring the formal ascertainment of community problems and needs, along with the expectation that radio stations would contact minority groups within the community. See, First Report and Order, 84 FCC 2d 968, 49 RR 2d 1 (1981); Second Report and Order, 96 FCC 2d 930, 55 RR 2s 1401 (1984). The Commission attempted to justify this decision by focusing on the growing number of radio stations in the United States. The Commission argued "[i]t is not that each station attempt to provide service to all segments of the community." First Report and Order, 84 FCC 2d 968, 997 (1981). Using a cost/benefit analysis, the Commission ruled that these logs would not necessarily provide any information relative to the specific content of programming, Report and Order, Deregulation of Radio, 84 FCC 2d 1008-09, and stated that more relevant information could be provided through compiling simple "issue/programs" lists that would provide illustrative information on 5 to 10 issues covered by the station during any broadcast year. United Church of Christ [III], 707 F. 2d at 1439.

However, this cost/benefit analysis has been criticized as focusing more heavily on industry costs than regulatory benefits. See, Hagelin and Wimmer, Broadcast Deregulation and the Administrative Responsiblity to Monitor Policy Change: An Empirical Study of the Elimination of Logging Requirements, 38 (No. 2) Federal Communications Law Journal 201 (date?)...

2. ELIMINATION OF LONG-FORM LICENSE RENEWAL

The elimination of logging requirements must also be seen in light of the Commission's other deregulatory actions. One such action, the elimination of long-form license renewal, further reduced the amount of information available to the public and the Commission as to whether broadcasters adequately serve minority communities. Both the elimination of community ascertainment requirements and long form licensing renewal show that the Commission does not want to be bothered with information which may help ascertain the actual impact of deregulation on minority broadcasters and the listening and viewing public.

3. ELIMINATION OF THE FAIRNESS DOCTRINE

In addition to past discriminatory policies, the Commission's efforts at deregulating the broadcast industry have set into play broad forces which contradict the important policy goals of broadcast diversity mandated by Congress and the Supreme Court. See, Metro Broadcasting, supra, at ___. The Commission's decision to eliminate the fairness doctrine was one action which significantly reduced the diversity of programming content within the electronic media. The fairness doctrine required stations to broadcast information about controversial issues of public importance and to cover significant views concerning those issues. The Commission sought to eliminate the fairness doctrine during the earliest stages of deregulation, but Congressional pressure kept this doctrine in place for several more years. Nevertheless, citing the increased number of existing broadcast stations, the Commission argued that "the growth in both radio and television broadcasting provides reasonable assurance that a sufficient diversity of opinion in controversial issues of public importance will be provided in each broadcast market." Fairness Doctrine, 102 FCC 2d 143, 208 (1985), subsequent history omitted.

In light of the elimination of the Fairness Doctrine, micro radio is essential if the airwaves are to provide much needed media diversity at the local level. The Commission itself has acknowledged that diversity of perspectives is most important at the local level. In re: Revision of Radio Rules and Policies, supra, paragraph 20. Because repeal of the Fairness Doctrine has further narrowed the number of viewpoints available over the broadcast media, micro radio remains one of the few vehicles by which voices outside the narrow mainstream of media "consensus" can make themselves heard.

4. INCREASE IN CORPORATE OWNERSHIP LIMITS OF AM AND FM COMMERCIAL RADIO

Most recently, the Commission has sought to further deregulate the broadcast industry, with potentially disastrous consequences for minority broadcasters and the listening audience. In their Report and Order entitled In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), the Commission seeks to increase the number of radio stations one corporate entity can own. However, such an increase would lead to further concentration of ownership in the broadcast industry, significantly reducing opportunities for increased minority ownership of broadcast facilities.

When the Commission previously increased ownership limits in the early 1980s, numerous mergers resulted: NBC was purchased by General Electric, Capital Cities bought ABC and several other owners merged into larger groups. Because the change in rules drove up station prices as competition for these

stations became more intense, minority station owners were further precluded from bidding for these radio outlets. As major AM and FM radio stations consolidate their resources to dominate local markets, minority broadcasters are prevented from effectively competing for audiences, and are driven from the market.

The League of United Latin American Citizens has recently noted the effects this rule will have on concentration of ownership. LULAC observed that:

In 1984, 4,733 AM stations and 4,649 FM stations were on the air. Broadcasting and Cable Marketplace, 1992, p. E-15. In 1991, these numbers were 4,894 and 5,810 respectively. Id. Thus, the number of all radio stations grew between 1984 and the present from 9,382 to 10,794, an increase of precisely 15%. The Commission's action [raising ownership limits] will increase concentration from a total of 24 stations a single owner can hold to a total of 60. That represents a concentration increase of precisely 150%. The increase in concentration, in sum, will be fully 1,000% of, or ten times as great as, the growth in the number of radio stations in the same time period.

Petition for Reconsideration of the League of United Latin American Cities (LULAC), 11, MM Docket No. 91-140, May 29, 1992. Additionally, while the gross number of radio stations has increased since 1950, the increased ownership limits currently promulgated by the Commission will permit concentration of radio ownership to return to a level equal to or exceeding that which existed in 1950.16 LULAC has argued:

There is no sound justification for returning to the level of diversity that existed in 1950. Since that year, the number of radio households in the United States has more than doubled, increasing from 42.1 million to 94.4 million in 1991. Broadcast & Cable Marketplace, 1992, p. E-16. At the same time, the complexity of our dynamic society has grown enormously. These changes rationally require an increase in the number of perspectives. And that increased diversity must be achieved through broadcasting. Broadcasting is in fact even more important today as a medium of mass communication than it was in 1950. Although a few cable news services have appeared since then, that increase in news media is more than offset by the vast decline in the number of daily newspapers since 1950.

Petition for Reconsideration of the League of United Latin American Cities (LULAC), 16-17, MM Docket No. 91-140, May 29, 1992. LULAC has observed with respect to the above that:

The Commission has, in effect, mortgaged the same asset twice. On the one hand, growth in stations since 1950 justifies abolishing requirements that promote diversity of perspectives by single stations. On the other hand, the same growth justifies increasing concentration of ownership, and concomitant reduction of diversity, to the 1950 level. The final result is that the public is actually worse off than it was in 1950. Now it will have the 1950 level of ownership diversity. But it will not have the diversity it had in 1950 that was promoted by the radio's former public interest obligations. Id. at 19.

5. ELIMINATION OF THE MINORITY OWNERSHIP INCENTIVE RULE.

The Commission in its recent Report and Order also seeks to eliminate the minority incentive rule for radio station ownership. Report and Order, supra, at ___. In his dissent, Commissioner Barrett argues that this Order dismisses the minority ownership incentive without sufficient consideration for the current state of minority ownership, the Commission's own precedents, and Congressional concerns. This action appears to contravene the Commission's previous claimed policy, and may in fact violate the law. See Multiple Ownership Rules, 100 FCC 2d 75, 94 (1985). See also Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3010-11 (1990); TV 9, Inc. v. FCC, 495 F. 2d 929, 938 (D.C. Cir. 1973), cert. denied, 419 U.S. 986

(1974). The elimination of this incentive rule also goes against the mandate of Congress. See Pub. L. 102-140, 105 Stat. 782, October 28, 1991 [FCC Appropriation Legislation].

Commissioner Barrett argues that the Commission's decision to eliminate the minority ownership incentive is "contrary to the FCC's public interest goals." In Re: Revision of Radio Rules and Policies, supra, at 2813 (Statement of Commissioner Andrew C. Barrett dissenting in part and concurring in part). However, viewed in light of the Commission's policies over the last 11 years, it appears that this decision is consistent with the Commission's undeclared war on poor and minority broadcasters.

6. ELIMINATION OF DUOPOLY RULE.

The most serious potential injury to minority broadcasters is the repeal of the duopoly rule,17 such that a single corporation may own as many as 3 AM stations and 3 FM stations in the largest radio markets. See in re: Revision of Radio Rules and Policies, supra, 2816-18 (Barrett, dissenting in part). Again, this proposal encourages the increased consolidation of radio ownership, further squeezing those broadcasters owning the smallest stations. Because FCC policies prevented minority broadcasters from entering the radio industry at its earliest stages, most minority broadcasters today entered the business at a later date and consequently own many of these smaller stations. As a result, it is the minority broadcasters and their audience who are most negatively affected by the Commission's encouragement of further radio consolidation18. "Clearly diversity will suffer within radio markets as large station groups grow and wipe out smaller players." In re: Revision of Radio Rules and Policies, supra, 2818 (Statement of Commissioner Andrew C. Barrett dissenting in part). FCC policies promoting common ownership will ultimately squeeze minority stations and decrease programming diversity. Because minorities have been frozen out by the Commission's policies, removing the prohibition on micro radio broadcasts is one small but necessary step in rectifying this historic imbalance.

CONCLUSION

Others have previously noted that the Commission's interpretation of diversity in broadcasting does not constitute "cultural pluralism" but rather "business pluralism"; that is, the Commission believes that diversity of business enterprises with broadcast licenses constitutes and adequate expression of communications diversity. See, R. Bunce, Television in the Corporate Interest, 13-39 (1976). The "business" concept of pluralism is seriously flawed. True broadcast diversity cannot occur when social, cultural and political viewpoints diverging from the status quo of mainstream commercial broadcasting are excluded from the public airwaves. Because of the profit-oriented nature of commercial broadcasting and the corporate funded context within which most public broadcasting occurs, true broadcast diversity is unavailable under current FCC policies.

Today more than ever, true diversity of opinion and expression is required over the public airwaves. The growing economic disparity between the White majority and the underclass of minority citizens in this country has added to the deteriorating social health of the country. One means of addressing this disparity is through the media, particularly the electronic broadcast media. However, today minorities are nowhere to be found in these media. Broadcast media are vital in reaching minorities, yet minority ownership of broadcast stations remains at 2.7%. See A Statistical Analysis of Minority-Owned Commercial Broadcast Stations Licensed in the Untied States, U.S. National Telecommunications & Information Administration, October, 1991. Nevertheless, the Commission maintains that a strong relationship exists between diversity of station ownership and the diversity of perspectives available on the air. See, e.g., Multiple Ownership, 63 FCC 2d 824, 829 (1977). Although there may be some truth to this , the Commission's policies have nevertheless failed in establishing either diversity of ownership or diversity of perspectives. Given the state

of race relations in the United States today, this is especially unfortunate. As the Kerner Report (1968) recognized, the mass media has failed to enhance interracial communications. This report noted that racism in the media was in part responsible for civil unrest in the 1960s.

The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slights and indignities are part of the Negro's daily life, and many of them come from what he calls the "white press" - a press that repeatedly if unconsciously reflects the biases, paternalism, the indifference of White America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society.

Kerner Report at 203. Today the situation is no better. Large segments of the American population have been left unrepresented by the media, as confirmed in the aftermath of the Los Angeles riots. Increasingly, issues regarding literacy and the ability to structurally analyze a variety of injustices must be addressed. Such an analysis requires a divers flow of information from all segments of the media - not just those media owned by corporate America. In our current age of extreme media imbalance, where there is little hope this imbalance will be addressed soon, an important method of achieving some form of communications diversity is through the operation of micro radio broadcasts in those communities where an extreme informational imbalance exists.

In their recent Report and Order (In re: Revision of Radio Rules and Policies, supra) the Commission noted that diversity of perspectives is most important at the local level. The Commission reiterated that "for an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are within his local market." Report and Order, paragraph 20. Further, the Commission has previously held that.

[a] proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee...would become the communication channel for a solution to a severe social crisis. No one can say that the present licensees are broadcasting everything worthwhile that can be communicated.

Multiple Ownership of Broadcast Stations, 22 FCC 2d 306, 311 (1970). Nevertheless, despite the lip service the Commission currently pays to ownership and broadcast "diversity," it is clear that the Commission has failed to promulgate regulations promoting free and vigorous debate over the airwaves. Those who are now excluded are those who have always been excluded in America - this country's racial and ethnic minorities along with the poor. Empirical evidence demonstrates that a market failure in minority-oriented programming has occurred. See: Wimmer, The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to Urge Policy Change, 41 Fed. Com. LJ, 133 (1989)[Citing numerous studies detailing how minority interests have ill-served in the wake of broadcast deregulation]. Significantly, FCC prohibition of micro radio broadcasts occurs within the context of the Commission's continued elimination of safeguards designed to protect minority broadcasters.

As Commissioner Barrett recently observed, whenever the Commission relaxes it ownership rules, it points to a "safeguard" which is later abandoned. In re: Revision of Radio Rules and Policies, supra, 2818-19, N. 21 (Statement of Commissioner Andrew C. Barrett dissenting in part and concurring in part). Each time the Commission weakened national ownership rules, regional concentration rules, duopoly rules and one-to

market rules, the Commission pointed to the existence of one of these as a safeguard. Id. Today, it now appears that all of these rules are essentially gone and there are no more safeguards. Id. Yet, although the Supreme Court in FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) approved the Commission's decision to allow market forces to promote diversity in entertainment formats, the Court warned "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." Id. at 603. The Court reiterated its language from NBC v. United States that "If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." Id. at 225.

Empirical research has found that economic competition works in a manner inconsistent with racial equality (Wimmer and Wright, 1985 - LOCATE). Nevertheless, the Commission argues that broadcast deregulation is in the best interest of minority broadcasters and minority audiences. After many years of pursuing its policy of minority ownership, the number of minority owned broadcast outlets remains outrageously disproportionate to this country's minority population. While African-Americans comprise approximately 12% of the U.S. population, as of 1990 they owned only about 1.5% of the nation's 1,100 television stations and 1.7% of the 10,600 radio stations. Viewpoint: Fix Broadcasting's Imbalance,. Electronic Media, 14, Jul. 16 1990, col. (?). The Commission has done away with requirements such as logging and long-form license renewal which would otherwise reveal whether or not deregulation has failed. Furthermore, the FCC acknowledges it has conducted no studies of the mass media marketplace at all. See: Request for Information Concerning Broadcast Deregulation 11-15, attached to Letter from Alex D. Felker, Chief, Mass Media Bureau, FCC, to the Hon. William H. Gray III, Chairman, Committee on the Budget, U.S. House of Representatives (May 24, 1988). In fact, the Commission has made no good faith inquiry into the negative effects of deregulation, particularly with regard to minority interests. As it now stands, minority broadcasters do not have the capital necessary to compete in the high-priced world of electronic telecommunications.

Ultimately, minority broadcasting in the United States is intrinsically tied to previous trends in mass communications history. This history reveals that:

[t]he early development of heavily capitalized monopolistic and oligopolisitic control in twentieth-centruy mass communication eliminated undercapitalized minorities who tried to develop ownership of dominant mass media institutions. Any exceptions to this pattern...occur because "White corporations allow these Black companies to exist for symbolic value alone," as part of the mythology that black Americans can also have power in the Capitalist system.

Fife, Racial Diversity in U.S. Broadcasting, 9 Media, Culture and Society 496 (citing Fife, "FCC Policy on Minority Ownership in Broadcasting: A Political Systems Analysis of Regulatory Policy making", Doctoral dissertation, Stanford University (1984) AND M. Marable, How Capitalism Underdeveloped Black America, 158 (1983)). Those FCC policies that have been formulated in response to black media activists do not challenge the essential business pluralism that characterizes the US broadcasting industry and represent symbolic acknowledgments by the FCC and the broadcasting industry of black concerns about racial and cultural diversity. At the same time, these policies are consistent with mainstream majority cultural understanding about race and minority status in US society. This understanding is fundamentally one of a monocultural society that see Afro-American values and expressions as strictly sub cultural, and not appropriate for dissemination though dominant mass communications institutions.

Id. (?) These policies have subsequently led to decreased diversity of programming in our print and electronic media which fail to reach out towards the melting pot (or perhaps more accurately, boiling pot)

which comprises contemporary American society. As Commissioner Barrett has stated, Americans do not live in a color blind society, and it is presumptuous to think that the unregulated marketplace will operate as if society were color blind. Barrett Cites Minority Gains in Ownership, Broadcasting, 53, Apr. 30, 1990, col. (?).

Given all of the above, micro broadcasting is perfectly suited to addressing imbalance over the airwaves by promoting broadcast diversity. Stations like Black Liberation Radio are "part of a larger history of using low powered media to reach ethnic audiences." See, Shields & Ogles, "Black Liberation Radio: A case study of the micro radio movement," supra, at 14. Micro radio may thus be viewed as a supplemental media tool operating at the local level. Appendix 1 to the Commissions own Report and Recommendations in the Low Power Television Inquiry states:

We may consider [very low power transmitters] as solutions to two problems. They serve to "extend" service to areas that presently have no service at all. They also serve to "expand" service by increasing the variety of services available in a community.

Id., supra, at 24. Commissioner Andrew Barrett has stated that minority entrepreneurs should look to alternative media, rather than limited available opportunities in traditional broadcast in cable. Communications Daily, 6, Apr. 25, 1990, col. (?). Barrett has noted that the increased trend towards concentration (of ownership) in traditional media means there are fewer opportunities for newcomers, and that concentration has put increased pressure on the FCC's minority ownership policies. Id.

Current regulations prohibiting the operation and utilization of micro radio should be eliminated in light of the Commission's mandate to serve the public interest (including the mandate to promote broadcast diversity), in light of the history of institutionalized racism perpetuated by the Commission, and in light of the Commission's recent acknowledgment that competition and diversity are relevant at the local level, In re: Revision of Radio Rules and Polices, supra, at 11. These prohibitions, where a need for micro radio undoubtedly exists, unconstitutionally interfere with the rights of minority broadcasters and their community to access their fundamental First Amendment rights.

VII. INTERNATIONAL LAW, AND IN PARTICULAR, THE U.N. DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, PROHIBIT THE COMMISSION'S INTERFERENCE WITH THE RIGHTS OF MICRO RADIO PRACTITIONERS, THEREBY VIOLATING THE RIGHT OF MICRO RADIO BROADCASTERS TO COMMUNICATE WITH THEIR COMMUNITY.

Given the above facts surrounding the operation of micro radio, any absolute prohibition of micro radio broadcasts violates the right to freedom of expression under international law. The Declaration of Human Rights and International Covenant on Civil and Political Rights establish the principle under International law that every person is entitled to participate in and develop the cultural life of his or her community.

The long standing rule of construction first enunciated by Chief Justice Marshall is that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains..." The Charming Betsy, 6 U.S. (2 Cranch) 34, 67 (1804), quoted in Lauritzen v. Larsen, 345 U.S. 571, 578. Thus, in the Nereide, 13 U.S. (9 Cranch) 388, 422 (1815) Chief Justice Marshall found that in the absence of congressional enactment, United States courts are "bound by the law of the nations, which is part of the law of the land." Id. Similarly, in The Paquete Habana, 175 U.S. 677 (1900) the Court stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of

appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Id. at 299.

International law with regard to this right is set forth as follows:

A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: ARTICLE 19

The International Covenant on Civil and Political Rights was ratified by the United States Senate on April 2, 1992. This document was deposited at the United Nations by President Bush on June 8, 1992, and becomes effective on September 8, 1992. As of this date, this Human Rights document will have the force of law in the United States. Article 19 of the Covenant was based on Article 19 of the Universal Declaration of Human Rights.19 Article 19 states that

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

a. For respect of the rights or reputations of others;

b. For the protection of national security or of public order, or of public health and morals.

In the relatively few opinions that it has rendered on Article 19 interpretation, the Human Rights Committee has somewhat inconsistently applied its provisions.20 In one case involving the arrest of an individual for his political activities, the Committee determined that the,

"bare information from the State party that he was charged with subversive association and an attempt to undermine the morale of the armed forces is not in itself sufficient, without details of the alleged charges and copies of the court proceedings...[to support a defense] that the arrest, detention and trial of Grille Motta was justified on any of the grounds mentioned in Article 19(3) of the Covenant."

U.N. Human Rights Committee, Communication No. 11/1977, paragraph 17.

This appears to indicate that Article 19 requires the government to establish, and substantiate if necessary, its justification for restricting the right to freedom of expression.

However, in another opinion, the deference afforded a national government's restriction is self-evident. In that case, the Committee decided that the Finnish Broadcasting Corporation was well within its rights to disallow the broadcasting of a television program concerning homosexuality.21 The Committee stated that "a certain margin of discretion must be accorded to the responsible national authorities."22 The restriction was permitted based on the rationale that, "[a]s far as radio and TV programs are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded."23

These cases indicate that the scope of the "margin of discretion" accorded states under Article 19 is still uncertain. Therefore, analogy to the jurisprudence of other tribunals is required to determine if the right to freedom of expression of micro broadcasters has been violated.

Significantly, Article 27 of the International Covenant on Civil and Political Rights also adds the following:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

B. AMERICAN CONVENTION ON HUMAN RIGHTS: ARTICLE 13

Besides Article 19 from the International Convenant on Civil and Political Rights, Article 13 of the American Convention on Human Rights states24 that,

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law and be necessary in order to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or implements or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainment's may be subject by law to prior censorship, for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 13 of the American Convention on Human Rights, entered into force July 18, 1978, has been interpreted by the Inter-American Court as follows:

A comparison of Article 13 with the relevant provisions of the European Conventio (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.

See Advisory Opinion of 13 November 1985 on Compulsory Membership of Journalists' Association, 8 EHRR 165, paragraph 50. Another difference between the European and American Conventions is the list of valid exceptions which allow a government to interfere with the right to freedom of expression. The Inter-American convention lists only two: "those that are necessary to ensure: a. respect for the rights and reputation of others; or b. the protection of national security, public order, or public health and morals."25

Nevertheless, interpretation of the two Articles is relatively similar. Like the European Court's interpretation of the right to freedom of expression, the Inter-American Court has stated:

The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.

Advisory Opinion of 13 November 1985 on Compulsory Membership of Journalists' Association, 8 EHRR 165, paragraph 44.

Although there are no cases directly on point, Article 13 can best be understood in the Court's application of its provisions as they relate to the factual setting presented in its Advisory Opinion on Compulsory Membership of Journalists' Association. Advisory Opinion of 13 November 1985, 8 EHRR 165. In that case, a foreign journalist was prohibited and indeed fined under a local criminal statute in Costa Rica for his professional activities. The government regulation required that journalists become members of a professional organization in order to perform certain activities associated with the media. Certain criteria were required to become a member of the organization including graduation from a state university with a particular type of degree. The Court found this to be a violation of Article 13 because it "denie[d] any person access to the full use of the news media as a means of expressing opinions or imparting information." Id.

The Court made this final determination after several findings regarding the interpretation of Article 13. Among these is the conclusion that freedom of expression "includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible." Id., paragraph 31.

Furthermore, the Inter-American Court requires that any governmental "restrictions imposed under Article 13(2) on freedom of expression depend upon a showing that the restrictions are required by a compelling state interest" and that if there exist "various options to achieve this objective, that which least restricts the right protected must be selected." Id., paragraph 46 (emphasis added); Note that the Inter-American Court likened certain language in the Sunday Times case of the European Court to this same principle.

In the case involving compulsory membership of journalists, the Court determined that the ends which the government sought to achieve through its regulation, namely the encouragement of professional ethics and responsiblity, and the maintenance of journalists independence in relation to their employer, simply did not fall within those authorized by the Convention.

In determining whether there has been an interference with the right to freedom of expression, the Court has concluded that the broad scope of the language of the Convention does not necessitate that there be actual governmental intervention. An example of this principle was given by the Court:

This might be the case...when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice means tending to impede the communication and circulation of ideas and opinions. Id., paragraph 56.

FCC regulations prohibiting all micro radio activity guarantee that the radio communications media is not available to all citizens who wish to express their ideas, but only to those who can afford it. The justification for such regulation is outdated and unnecessary, and not the "least restrictive means" to reach the government's objective. Further, these regulations directly impede the dissemination of information and expression of ideas of an entire class of society -- the poor. This issue must also be examined through the eyes of exposing racism, as the net effect of such wealth-based classification is to limit drastically the number of media outlets owned by non-whites. Such a wealth and race-based impact demonstrates that the U.S. government's implementation of the FCC regulations, lacking as they do the necessary rationale and narrowly tailored means, constitutes a violation of the right to freedom of expression as interpreted by the Inter-American Court.

C. EUROPEAN CONVENTION ON HUMAN RIGHTS: ARTICLE 10

Article 10 of the European Convention on Human Rights26 states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights stated in its Handyside judgment that freedom of expression constitutes on of the essential foundations of a democratic society. Handyside case, Judgment of 7 December, 1976, Series A No. 24, paragraph 49.27 Furthermore, it was noted that the application of Article 10 should extend to information which "offend[s], shock[s], or disturb[s] the State or any other sector of the population." Id. In essence, this case provides the basis from which all future cases involving freedom of expression must be interpreted. Freedom of expression remains at the very core of democratic societies.

As is the case in U.S. Constitutional Law, political speech is provided with the greatest amount of protection under Article 10 of the Convention. The Sunday Times v. The United Kingdom, Judgment of 26 April 1979, Series A No. 30, paragraph 65. This principle was enunciated in the case of The Sunday Times v. The United Kingdom in which the Court stated that it is essential for the mass media to impart information and ideas concerning matters...of public interest. Not only do the media have the task of imparting such information and ideas: the public also has the right to receive them. Id.

The Court continued by stating that its supervision was not limited "to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith." Id., paragraph 59.

The Court held that it is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions that must be narrowly interpreted. Id., paragraph 65.

The Sunday Times case declared that the House of Lords was in violation of Article 10 of the Convention when it attempted to restrain the newspaper from reporting a story regarding the drug, "thalidomide". The Sunday Times wished to publish articles which detailed the history of the drug, its testing, its marketing and its manufacture. The interest in the story developed because the drug was found to have caused severe birth defects in the children of mothers who had taken the drug during their pregnancies. At the time of publication, litigation was pending against the distributors and manufactures of the drug. A violation of Article 10 was found to exist because the Court felt that the matter was of "public interest".

Although The Sunday Times case involves the print media, certain parallels can be drawn to micro radio outlets such as Black Liberation Radio. As stated earlier, Black Liberation Radio (then WTRA) was initially formed to fill the void which Mbanna Kantako felt existed in local media broadcast as it related to the reporting of matters of "public interest" to his community. Any regulation of his activities which might fall within one of the enumerated exceptions should be narrowly construed in light of the protection afforded the right to freedom of expression by international law, especially because the speech at issue was "political speech," e.g., the broadcast which motivated the FCC action criticized police behavior.

International case law which applies directly to radio broadcasting is very limited. Therefore, it is necessary to analyze the principles of the other cases in light of this consideration.

In the Autronic AG case, Judgment of 22 May 1990, Series A No. 178, involving the retransmission of television signals from a Soviet satellite, the Court maintained that the application of Article 10 could not be confined to the content of information. It stated that the protection of Article 10 must necessarily extend to the means of transmission or reception because "any interference with the means necessarily interferes with the right to receive and impart information." Id. at paragraph 47.

In this particular case, the Swiss government was found to be in violation of Article 10 in its attempt to regulate retransmission. Autronic AG clearly demonstrates the notion that the "margin of appreciation" extended to a State's decision-making entities must be considered on a case by case basis. Here, The Swiss Government's characterization of the retransmission as a telecommunication as opposed to a broadcast was deemed an ineffective and unacceptable as a means of prohibiting the project. The Court stated that:

Where, as in the instant case, there has been interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established. Id., paragraph 61. Thus, absolute deference is not accorded to the Contracting States.

The Court did overrule the Commission's finding of an Article 10 violation in Radio Groppera v. Switzerland, Judgment of 28 March 1990, Series A No. 173. However, the facts in Radio Groppera may be distinguished from those surrounding the operation of Black Liberation Radio. The case of Radio Groppera involved the cable retransmission of radio signals from an unlicensed station in Italy. The programming content consisted predominately of popular music. The Court arrived at its decision by balancing the interest of protecting the international communication order against the rights of the Italian broadcaster.

Ultimately, it was decided that the Swiss government had not overstepped the "margin of appreciation." The Court characterized the Italian applicant as a Swiss station operating from outside the borders. This was done, according to the Court, in an effort to bypass the statutory requirements regulating Swiss radio stations. In arriving at this determination, the Court did make an important declaration about the interpretation of Article 10 as a whole and the third sentence of paragraph one of Article 10 in particular. The Court stated that the intended purpose of the third sentence was:

"to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole." Id., paragraph 62.

This statement solidifies the principle that the "margin of appreciation" afforded the Contracting States is not absolute. It would seem that a state must have a valid reason for restricting the right to freedom of expression; on that is "necessary in a democratic society" in light of the conditions set forth in paragraph 2.

This interpretation of Article 10(2) is extremely relevant to the operation of micro stations such as Black Liberation Radio. In light of this interpretation, the validity of prohibiting radio stations with less than 100 watts must be seriously questioned. This is particularly true when considering the significant technological advancements made in satellite and cable in recent years. Many of the FCC regulations were instituted due to the finite number of frequencies which once existed. Here, the governments interest in Black Liberation Radio's activities appears more closely linked to the content of pervious broadcasts and the remarks made regarding police brutality than to any legitimate interest set forth in Article 10.

In sum, a Contracting State must satisfy the following test in order to justify their interference with the right to freedom of expression:

- it is "prescribed by law"'

- it is in pursuance of one of the legitimate aims listed in Article 10(2);

- it is "necessary in a democratic society", having regard to the "duties and responsibilities"

Anthony Lester, Freedom of Expression, p 38-39 (unpublished article), (date unknown)

LOW POWER FM TRANSMITTERS

THE FOLLOWING IS A LIST OF COMPONENTS YOU WILL NEED TO START YOUR OWN LOW POWER FM BROADCAST STATION:

FM100 (super-pro FM stereo radio station kit)	$249.95
LPA1 (Linear Power Amplifier Kit)	$ 39.95
AC12-5 (12 volt DC wall plug adapter)	$ 9.95
CLPA (case for amplifier)	$ 14.95
TM-100 (tru-match FM broadcast antenna kit)	$ 39.95

The Above are kits and must be assembled by purchaser.

Some of these kits may be purchased pre-assembled please see RAMSEY ELECTRONICS catalog for info on pre-assembled kits. To place an order with RAMSEY or order catalog call 1-800-446-2295.

We have tried several antennas (not all antennas) so far we have found the TM-100 is the very best with Ramsey products.

We are not connected in anyway with Ramsey Electronics and **do not** receive any monies from them if you decide to purchase from them.

We recommend Ramsey products through personal experience with their products.

BRIEF OF AMICUS CURIAE

IN SUPPORT OF PETITIONER WILLIAM LEIGH DOUGAN

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 92-70734

WILLIAM LEIGH DOUGAN,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and UNITED STATES OF AMERICA,

Respondents

ON PETITION FOR REVIEW OF AN ORDER

OF THE FEDERAL COMMUNICATIONS COMMISSION

LOUIS N. HIKEN, SBN 45337

One Sansome Street, Suite 900

San Francisco, California 94104

Telephone: (415) 705-6460

PETER FRANCK, SBN 34402

One Sansome Street, Suite 900

San Francisco, California 94104

Telephone: (415) 705-6464

NATIONAL LAWYERS GUILD

COMMITTEE ON DEMOCRATIC COMMUNICATIONS

One Sansome Street, Suite 900

San Francisco, California 94104

Telephone: (415) 705-6464

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Other:

TABLE OF CONTENTS

I. INTRODUCTION1

This honorable Court has asked the Government to file special briefs specifically addressing the issue of the way in which the Federal Communication Commission's regulations banning micro power broadcasting serve the public convenience, interest and necessity, and has asked the government to explain its interest in precluding micro power broadcasts.

Micro radio is a method by which ordinary people can communicate with one another over the airwaves without having to invest huge sums of money, and without interfering with the rights of large-scale, F.C.C. licensed commercial stations or their listeners. The F.C.C., however, has not provided a means by which persons wishing to avail themselves of this technological opportunity can legally do so, and has, in fact moved vigorously to suppress it.

The National Lawyers Guild's Committee on Democratic Communications contends that Federal Communications Commission (F.C.C.) policies with regard to micro radio broadcasting have failed to keep pace with the rapid proliferation of technological advances in the field of communication, by completely prohibiting micro radio broadcasters and their listeners from making this use of the public

airwaves.2

To enforce this absolute prohibition, the F.C.C. relies upon regulations which were intended solely for application to large-scale, commercial broadcasters, and which were promulgated long before the advent of the technology that makes possible micro radio. As a result, the F.C.C.'s application of these regulations violates the First Amendment rights of individuals seeking to exercise those rights via methods and mediums that were technologically impossible when the regulations were created.

The cost of owning and operating a radio station has skyrocketed into the hundreds of thousands and even million dollar range, and participation in the broadcast media has thereby become limited only to large corporations. The individual seeking to communicate and listen to others over the airwaves in his or her local community is completely left out of the licensing scheme if he or she cannot afford the expenses entailed in purchasing, obtaining a license for and operating a commercial broadcast station with at least 100 watts of power.3

It is the obligation of the F.C.C. to create a "safe harbor" for non-licensed very low power broadcasting, or, in the alternative, to amend and apply its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low-power micro radio, the F.C.C. 1) fails to comply with its congressional mandate to regulate the airwaves in the public convenience, interest and necessity, 2) exceeds the limits of the power conferred upon it by Congress, and 3) violates the constitutional rights of micro radio broadcasters and their listeners.

II. THE F.C.C.'s COMPLETE AND ABSOLUTE PROHIBITION OF MICRO RADIO BROADCASTS VIOLATES THE FIRST AMENDMENT AND IS AN ABUSE OF THE F.C.C.'s STATUTORY AUTHORITY.

The F.C.C. must uphold the First Amendment rights of micro radio broadcasters and their audience as part of their mandate to regulate the airwaves in the public interest, convenience and necessity. That is, the F.C.C. may not outlaw this media under the constitution, although the Commission may develop a regulatory procedure appropriate to this media if such is found necessary. Currently, F.C.C. policy constitutes a prior restraint of free speech in violation of the First Amendment.

The people of the United States have a constitutionally protected interest in free speech by means of radio and other forms of broadcast media. The Supreme Court has previously recognized the supremacy of the rights of the people as a whole to have the medium of radio function consistently with the ends and purposes of the First Amendment. Red Lion Broadcasting, 395 U.S. 367, 390 (1969). Given the Supreme Court's recognition of the supremacy of these public rights, the F.C.C.'s assertion of an, at best, remote, and as yet undocumented possibility that micro radio may interfere with the broadcasts of licensed, commercial stations is simply inadequate to overcome the right of radio listeners to receive the broad variety of viewpoints, perspectives, and programming formats which micro radio offers. The advent of micro radio not only gives radio listeners a low-cost alternative to the perspectives presented on mainstream, commercial radio, but it furthermore allows members of the public the opportunity to participate and present their own personal and local community interests in a direct and effective way, making the public airwaves truly public for the first time.

The foremost purpose set forth for requiring radio broadcasters to obtain licenses from the F.C.C. is to prevent interference with other radio broadcasts. The F.C.C. claims that due to the finite size of the radio spectrum, i.e. "spectrum scarcity", only a limited number of radio frequencies are capable of

broadcasting at the same time in the same space without undue interference from neighboring signals. The F.C.C. argues that this so-called spectrum scarcity somehow justifies the application of a lower level of First Amendment protection for persons utilizing the air-waves as compared to other forums. See, e.g., F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940).

The F.C.C. itself, however, has found the concept of "spectrum scarcity" to be an improper basis for applying a different constitutional standard to broadcast media than to other forms of media. In re Syracuse Peace Council, 2 F.C.C. Rcd 5043 (1987). As the Commission pointed out in Syracuse Peace Council, while it may be true that there are only a finite number of broadcast frequencies, this is no less true of the computers, delivery trucks, ink and newsprint which are used in the production of printed speech:

. . .[W]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity -- be it spectrum or numerical -- is irrelevant. As Judge Bork said in Trac v. F.C.C. [801 F.2d at 508], 'Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.' 2 F.C.C. Rcd 5043, 5055.

The Commission went on to state that:

[The] First Amendment was adopted to protect the people not from journalists, but from the government. It gives people the right to receive ideas that are unfettered by government interference. We fail to see how this right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. (Id. at 5057.)

III. THE FCC VIOLATES ITS STATUTORY MANDATE TO SERVE THE PUBLIC CONVENIENCE, INTEREST AND NECESSITY BY ITS FAILURE TO ALLOW MICRO POWER RADIO BROADCASTING WHICH RESULTS IN THE COMPLETE PROHIBITION ALL MICRO RADIO BROADCASTS.

It is the obligation of the F.C.C. to construct and enforce its regulatory framework in such a way as to safeguard, and indeed strengthen, the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low-power micro radio, the Commission has failed to carry out its congressional mandate to regulate the airwaves in the public interest, has exceeded the limits of the power conferred on it by Congress, and is violating the constitutional rights of micro radio broadcasters and their listeners.

The problem is not that micro radio broadcasters are refusing to comply with F.C.C. licensing procedures. Rather, the fundamental problem is that the F.C.C. has not provided procedures by which micro radio broadcasters can become licensed or authorized. Instead, the F.C.C. is applying severe administrative and criminal sanctions, intended for application to large-scale, commercial operators, to micro radio broadcasters with the goal of completely precluding all such broadcasts. These F.C.C. policies are consistently violative of Due Process and Equal Protection guarantees in that they discriminate against the poor and minorities, and do not provide for adequate representation by counsel or opportunity for a hearing or administrative review. Furthermore, by assessing forfeitures of as much as $20,000 against individuals with no prior F.C.C. violations, accused of transmitting a brief, low-power, non-commercial broadcast, the F.C.C. violates the statutory authority upon which

its forfeiture policies are based.

The Commission has recently gone to great lengths to argue that its regulations do not in fact completely prohibit micro radio. In its "Forfeiture Order" in a case very similar to Mr. Dougan's, the Commission stated that there "is clear indication that there is no 'complete and absolute prohibition'" against micro power radio broadcasting. In the Matter of Steven P. Dunifer, NAL/Acct. No. 315SF0050; SF-93-1355, Forfeiture Order at 6 (Appendix A). The Commission here cites four methods by which it alleges that micro radio broadcasting may be permitted pursuant to its current regulatory framework. These methods may be summarized as follows:

1) Petition the Commission to change the current regulatory framework that prohibits non-commercial broadcasts of less than 100 watts

2) Apply for a license to operate a 10 watt station above 92 MHz on the FM band;

3) Broadcast as permitted under 47 C.F.R. ¤ 15.239(b);

4) Apply for a license to operate a Non-Commercial Educational FM Broadcast station under 47 C.F.R. ¤¤ 73.501 et. seq. See id. at 3, 6.

However, an analysis of the claimed opportunities for micro radio broadcasting within the F.C.C.'s current regulatory framework reveals that there is, in fact, a complete prohibition of micro radio broadcasting. Number 1 would requires micro radio broadcasters (or anyone else) to petition to change a rule that is unconstitutional on its face. Such a principle would completely deprive the courts of the right (and duty) to declare laws conflicting with the constitution unconstitutional, since (the argument would go) an aggrieved party could petition congress to change such a law. Number 2, above is, in effect, the same as petitioning for a rule change, since the minimum power requirements for acquiring a license to operate above 92 MHz are 100 watts or a six kilometer reference distance.4 47 C.F.R. ¤¤ 73.211 et. seq., 73.511. Number 3 above is meaningless, since the maximum field strength permitted by ¤15.239(b) is so low as to preclude any micro radio broadcast from being received more than a few hundred feet from the transmitter. Any suggestion by the Commission that a 10 watt broadcast could comply with the field strength limitations imposed by ¤15.239(b) is misleading, at best.

Number 4 comes very close to being disingenuous. 47 C.F.R. ¤73.511(a) explicitly provides that "No new Non-Commercial Educational station will be authorized with less power than minimum power requirements for commercial Class A facilities," that is, less than 100 watts. While it may be true that no one is precluded under the current regulatory framework from applying for a license, as the Commission suggests in number 4 above, it is also true that no such application can be approved by the Commission under its current regulations.

Although the F.C.C. states that micro power radio broadcasters should ask the agency to establish rules that would permit them to operate, this does not alter the fact that existing F.C.C. regulations governing micro power radio are unconstitutional.

IV. TO THE EXTENT THAT THERE IS A LEGITIMATE GOVERNMENTAL INTEREST IN REGULATING MICRO RADIO THE FIRST AMENDMENT REQUIRES THAT IT USE THE NARROWEST POSSIBLE MEASURES TO ACCOMPLISH THAT OBJECTIVE.

Although the Commission retains regulatory authority over micro radio, no compelling interest supports the blanket prohibition of very low power community radio broadcasts. The

Communications Act of 1934 states that the Commission may assign bands of frequencies to the various classes of stations, assign frequencies for each individual station and determine the power which each station shall use. 47 U.S.C. ¤ 303(c). However, while the Commission serves the role of "traffic cop" with regard to spectrum allocation, a blanket refusal to permit low power FM broadcasts is an arbitrary and capricious abuse of Congressional authority, and is therefore an unconstitutional violation of the First Amendment rights of micro radio broadcasters.

The FM band of the electromagnetic spectrum is a place where speakers communicate messages to an audience, and, like any other forum where First Amendment activity is subject to interference, government may make reasonable rules for its use, FCC v. League of Women Voters, 468 U.S. 364 (1984). While the government may regulate activity in a First Amendment forum so long as reasonable rules are adopted to regulate the time, place and manner of protected speech, it is equally true that upon opening a forum to First Amendment activity the government is constrained in the exclusions it may enforce. A designated public forum is created when the state opens to the public generally "a place for expressive activity." Perry Ed. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983). Regulation of designated public fora is subject to strict scrutiny. Id. at 46. A designated public forum must be "held open to the general public" or made available "for indiscriminate use by the general public." Id. at 47.

Because the electronic media is today the dominant means of communicating with the public, any policy that absolutely denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 196 (1973) (Brennan, dissenting) (citing Red Lion, supra, at 386 n. 15) Most Americans today rely on the electronic media almost exclusively to obtain information previously obtained through the print media or social gathering places. As a result, the airwaves must be appropriately analogized to a designated public forum, with strict scrutiny required to uphold any time/place/manner regulations impinging upon First Amendment rights, and the means used narrowly drawn to accomplish the Commission's regulatory objective.

V. THE GOVERNMENT ACTION IN COMPLETELY PROHIBITING MICRO POWER RADIO CANNOT PASS CONSTITUTIONAL MUSTER WHERE NEIGHBORING COUNTRIES WITH LESS STRINGENT FREE SPEECH GUARANTEES PROVIDE A SIMPLE AND APPROPRIATE REGULATORY STRUCTURE FOR MICRO RADIO.

While the Commission cites the risk of cacophony over the airwaves, as well as public safety and aviation concerns, such concerns have not stopped the Canadian Radio-television and Telecommunications Commission (CRTC) from adopting policies with respect to micro power radio broadcasting. In June of 1993 the CRTC established a priority system allowing Very Low Power FM (VLPFM) radio operators to obtain broadcast licenses in urban areas. Public Notice CRTC 1993-95, CRTC (1993) (see Appendix B). VLPFM has been defined as an FM broadcaster having transmitting power of one watt or less. Broadcast Procedure BP-15, Canada Department of Communications, p.1 (1978). Since 1978 Canada has licensed VLPFM broadcasters in remote communities with a simple 3 page application form (see Appendix C). BP-15. Canada presently allows VLPFM broadcasts in urban areas where frequencies are scarce, including the metropolitan areas of Toronto, Montreal and Vancouver.

In their notice Broadcast Procedure BP-15, the Canadian Department of Communications recommends that application forms and required information for the operation of very low power FM transmitters be simple enough to allow for easy application by potential low power licensees. Id. at

50. A sample of such an application, along with rules governing broadcasts on low power micro radio stations, is included here as Appendix C. These forms request operational information (name of licensee, address, etc.), technical information (frequency/channel, antenna location, type of equipment, etc.) information concerning the community being served, and statements as to how operation of a low power transmitter will serve the needs of the community. A cursory examination of Appendix C indicates that the licensing and administrative requirements necessary to oversee operation of micro radio stations are not burdensome. Indeed, these licensing forms reveal that micro radio can be easily regulated so as to prevent any risk of signal interference. It is therefore obvious that FCC regulations prohibiting the operation of micro power radio unduly burden First Amendment rights, inasmuch as there exist obviously less restrictive means of furthering the government's interest in regulating the airwaves.

VI. CONCLUSION

FCC policies prohibiting all operation of micro radio broadcasting clearly violate the First Amendment, freedom of expression and the right of citizens to communicate. Furthermore, the F.C.C.'s failure to comply with its own procedures when issuing forfeitures, the grossly disproportionate amounts of the forfeitures levied, and the fact that the forfeitures are based upon unsubstantiated accusations with insufficient evidentiary support, all illustrate the fundamental problem in these cases: The F.C.C. is attempting to apply its regulatory framework to a new situation, micro power radio, that was never meant to be encompassed by these regulations.

Based on the foregoing, the National Lawyers Guild Committee on Democratic Communications urges the Court to hold that the present Regulations imposing a complete ban on micro radio broadcasting are in violation of the Constitution. If the F.C.C. finds a need to assert authority over micro radio, it must develop regulations and procedures in accord with the First Amendment. If micro broadcasting is to be regulated at all, it must be done in a manner that is least restrictive pursuant to First Amendment principles, and in accord with the F.C.C.'s statutory mandate to serve the public interest, convenience and necessity.

Dated: Respectfully submitted,

NATIONAL LAWYERS GUILD

COMMITTEE ON DEMOCRATIC COMMUNICATIONS

_____

LOUIS N. HIKEN

Attorney

_____

PETER FRANCK

Attorney

1This amicus brief was drafted with the assistance of Alan Korn. Mr. Korn has been admitted to the California Bar, and will be sworn in before this honorable Court on December 14, 1993. 2The F.C.C. has refused to license all FM stations (except some in Alaska) that operate with less than a minimum

effective radiated power of 100 watts since their 1978 Second Report and Order, In the Matter of Changes in the Rules Relating to Commercial Educational FM Broadcast Stations, 69 F.C.C. 2d 240, 44 R.R. 2d 235 (1978), amended, 70 F.C.C. 2d 972, 44 R.R. 2d 1685 (1979). 3It is important to note that the 100 watt minimum is a regulatory creation of the F.C.C. The F.C.C.'s imposition of this restriction was justifiably criticized shortly after implementation in Note, Educational FM Radio - the Failure of Reform, 34 Fed. Com. L.J. 432 (1982). Nothing in the Communications Act (47 U.S.C. 151 et seq.), on its face, prohibits micro radio broadcasting. To the extent that the F.C.C.'s regulations have effectively banned micro radio, the regulations are in conflict with the statutory framework and must be set aside. 4"Reference distance" is a technical concept defined at 47 C.F.R. ¤ 73.211(b)(1)(i) [--- Unable To Translate Graphic ---] [--- Unable To Translate Graphic ---] [--- Unable To Translate Graphic ---] 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 '&

)
Defendant-Appellant.)
_____)

INTRODUCTION

The National Lawyers Guild's Committee on Democratic Communications contends that Federal Communications Commission (F.C.C.) policies with regard to micro radio broadcasting have failed to keep pace with the rapid proliferation of technological advances in the field of communication. The F.C.C.'s current regulatory scheme completely prohibits micro radio broadcasters and their listeners from accessing the public airwaves. To enforce this absolute prohibition, the F.C.C. relies upon regulations, and case law applying the regulations, which were intended solely for application to large-scale, commercial broadcasters, and which were promulgated long before the advent of the technology that makes possible micro radio; indeed, even before the advent of FM broadcasting. As a result, the F.C.C.'s application of these regulations violates the First Amendment rights of individuals seeking to exercise those rights via methods and mediums that were technologically impossible when the regulations were created.

The cost of owning and operating a radio station has skyrocketed into the hundreds of thousands and even million dollar range, and participation in the broadcast media has thereby become limited only to large corporations. The individual seeking to communicate and listen to others over the airwaves in his or her local community is completely left out of the licensing scheme if he or she cannot afford the expenses entailed in purchasing, obtaining a license for and operating a commercial broadcast station with at least 100 watts of power.

The National Lawyers Guild Committee on Democratic Communications recognizes micro radio as a method by which ordinary people can communicate with one another over the airwaves without interfering with the rights of large-scale, F.C.C. licensed commercial stations or their listeners. The F.C.C., however, has not provided a means by which persons wishing to avail themselves of this new technological opportunity can legally do so. The problem is not that micro radio broadcasters are refusing to comply with F.C.C. licensing procedures. Rather, the fundamental problem is that the F.C.C. has not provided procedures by which micro radio broadcasters can become licensed or authorized. Instead, the F.C.C. is applying severe administrative and criminal sanctions, intended for application to large-scale, commercial operators, to micro radio broadcasters with the goal of completely precluding all such broadcasts. When viewed in this light, the very notion of assessing substantial forfeitures of as much as $20,000 against individuals with no prior F.C.C. violations, accused of transmitting a brief, low-power, non-commercial broadcast, is ludicrous indeed.

It is the obligation of the F.C.C. to construct and enforce its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low-power micro radio, the F.C.C. 1) fails to comply with its congressional mandate to regulate the airwaves in the public convenience, interest and necessity, 2) exceeds the limits of the power conferred upon it by Congress, and 3) violates the constitutional rights of micro radio broadcasters and their listeners.

II. THE COMPLETE AND ABSOLUTE PROHIBITION OF MICRO RADIO

BROADCASTS RESULTING FROM THE F.C.C.'S IMPROPER IMPLEMENTATION OF THEIR STATUTORY AUTHORITY VIOLATES THE FIRST AMENDMENT.

The foremost purpose of requiring radio broadcasters to obtain licenses from the F.C.C. is to prevent interference from other radio broadcasts. The F.C.C. maintains that due to the finite size of the radio spectrum, or "spectrum scarcity", only a limited number of radio frequencies are capable of broadcasting at the same time in the same space without undue interference from neighboring signals. The F.C.C. argues that this so-called spectrum scarcity somehow justifies the application of a lower level of First Amendment protection for persons utilizing the air-waves as compared to other forums.

The F.C.C. itself, however, has found the concept of "spectrum scarcity" to be an improper basis for applying a different constitutional standard to broadcast media than to other forms of media. In re Syracuse Peace Council, 2 F.C.C. Rcd 5043 (1987). As the Commission pointed out in Syracuse Peace Council, while it may be true that there are only a finite number of broadcast frequencies, this is no less true of the computers, delivery trucks, ink and newsprint which are used in the production of printed speech:

. . .[W]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity -- be it spectrum or numerical-- is irrelevant. As Judge Bork said in Trac v. F.C.C. [801 F.2d at 508], 'Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.' 2 F.C.C. Rcd 5043, 5055.

The Commission went on to state that:

[The] First Amendment was adopted to protect the people not from journalists, but from the government. It gives people the right to receive ideas that are unfettered by government interference. We fail to see how this right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. (Id. at 5057.)

The F.C.C. must ensure that their regulations provide micro radio broadcasters the same constitutional protections that have been established for more traditional means of expression. The F.C.C. is constitutionally required to develop a regulatory procedure appropriate to this media rather than simply creating and enforcing a complete and absolute prohibition of micro radio. This current F.C.C. policy constitutes a prior restraint of free speech in violation of the First Amendment.

The people of the United States have a constitutionally protected interest in free speech by means of radio and other forms of broadcast media. The Supreme Court has previously recognized the supremacy of the rights of the people as a whole to have the medium of radio function consistently with the ends and purposes of the First Amendment. Red Lion Broadcasting,

395 U.S. 367, 390 (1969). Given the Supreme Court's recognition of the supremacy of these public rights, the F.C.C.'s assertion of an, at best, remote, and as yet undocumented possibility that micro radio may interfere with the broadcasts of licensed, commercial stations is simply inadequate to overcome the right of radio listeners to receive the broad variety of view-points, perspectives, and programming formats which micro radio offers. The advent of micro radio not only gives radio listeners a low-cost alternative to the perspectives presented on mainstream, commercial radio, but it furthermore allows members of the public the opportunity to participate and present their own personal and local community interests in a direct and effective way, making the public airwaves truly public for the first time.

[COMMUNICATIONS SYSTEMS IN OTHER COUNTRIES. . .]

In Appendix 1 of the F.C.C.'s Report and Recommendations in the Low Power Television Inquiry (BC Docket No. 78-253)(1980???) the study of very low power FM transmitters conducted on behalf of the Canadian Department of Communications recommended that application forms and required information be simple enough to allow for easy application by potential low power licensees. Id. at 50. Such an application, along with rules governing broadcasts on low power micro radio stations, is included here as Exhibit 1??? (see attached). These forms request operational information (name of licensee, address, etc.), technical information (frequency/channel, antenna location, type of equipment, etc.) information concerning the community being served, and statements as to how operation of a low power transmitter will serve the needs of the community. A cursory examination of Exhibit 1 indicates that the licensing and administrative requirements necessary to oversee operation of micro radio stations are not burdensome. Indeed, these licensing forms reveal that micro radio can be easily regulated so as to prevent any risk of signal interference, and that rules which prohibit the operation of micro radio where there is a compelling need are an arbitrary exercise of the Commission's powers which fail to advance the public interest.

Safety concerns/Planes falling from sky.

III. THE FCC's FAILURE TO PROVIDE FOR MICRO RADIO BROADCASTING RESULTS IN THE COMPLETE PROHIBITION ALL MICRO RADIO BROADCASTING, IN VIOLATION OF 47 CFR § 73.201 ET SEQ.

The Commission has recently gone to great lengths to argue that its regulations do not in fact completely prohibit micro radio. In its "Forfeiture Order" in a case very similar to Mr. Dougan's , the Commission stated the following:

[The alleged offender] could have, in fact, petitioned the Commission to amend its rules in Part 73 to once again allow operation at the 10 watt level in the reserved Non-Commercial Educational FM band between 88 and 92 MHz, or he could have applied for a station license (authorization) to operate a 10-watt station on a channel above 92 MHz, or he could have petitioned the Commission to amend its rules to allow non-licensed operation under Part 15 of the rules with signal strengths in excess of that currently permitted. . . . The reply fails to note that non-licensed operation of radio transmitters as "micro radio broadcasts" on any frequency of the operator's choosing within the FM broadcast band is in fact provided for in a blanket

authorization per 47 CFR §15.239(b). Operation in excess of the field strength limits so provided constitutes activity for which a specific authorization - a radio station license - is required. If [the alleged offender] wished to have these limits raised, he could have petitioned the Commission to institute a rulemaking procedure to that end.

In addition, were [the alleged offender] or his colleagues affiliated with a non-profit educational organization intending to use the station in the advancement of an educational program (however loosely defined), the organization would be eligible for licensing a Non-Commercial Educational FM Broadcast station, on available frequencies and on a non-interference basis, as detailed in 47 CFR §§ 73.501 et. seq. Provisions are made for operation at the power level of 10 watts - the general power level which [the alleged offender] appears to be using - on available channels above 92 MHz.
The above is clear indication that there is no "complete and absolute prohibition" against what the reply continues to call "micro radio broadcasts."

A careful analysis of the above listed opportunities for micro radio broadcasting within the F.C.C.'s current regulatory framework reveals that there is, in fact, a complete prohibition of micro radio broadcasting. The suggestions offered by the Commission break down to the following:

1) Petition the Commission to change the current regulatory framework;

2) Apply for a license to operate a 10 watt station above 92 MHz;

3) Broadcast as permitted under 47 CFR 15.239(b);

4) Apply for a license to operate a Non-Commercial Educational FM Broadcast station under 47 CFR §§ 73.501 et. seq.

Number 2 above is, in effect, the same as petitioning for a rule change, since the minimum power requirements for acquiring a license to operate above 92 MHz are 100 watts or a six kilometer reference distance. Number 3 above is meaningless, since the field strength permitted by §15.239(b) is so low as to preclude any micro radio broadcast capable of being received beyond 1 or 2 blocks away from the transmitter. The Commission's suggestion that a 10 watt broadcast could comply with the field strength limitations imposed by §15.239(b) is misleading, at best.

Number 4 above is similarly misleading. 47 CFR §73.511(a) explicitly provides that "No new Non-Commercial Educational station will be authorized with less power than minimum power requirements for commercial Class A facilities," that is, less than 100 watts. While it may be true that no one is precluded under the current regulatory framework from applying for a license as the Commission suggests in number 4 above, it is also true that no such application can possibly be approved by the Commission under its current regulations.

The deceptively long list provided by the Commission, then, boils down to "ask us to change our rules." Given that there are absolutely no standards or limitations governing the

Commission's discretion in considering an application for a rule change or waiver, this "option" is meaningless. It is well established in First Amendment jurisprudence that regulations which vest absolute or near absolute discretion in an agency to approve or deny exceptions to a generally applicable rule are unconstitutional. It is the obligation of the F.C.C. to construct and enforce its regulatory framework in such a way as to safeguard the First Amendment right of free speech for all persons, regardless of their economic power. By totally prohibiting low-power micro radio, the Commission has failed to comply with its congressional mandate to regulate the airwaves in the public interest, has exceeded the limits of the power conferred upon it by Congress, and is violating the constitutional rights of micro radio broadcasters and their listeners.

~~III.~~ IV. THE F.C.C.'s ARBITRARY, CAPRICIOUS AND SELECTIVE METHOD OF ENFORCING RESTRICTIONS AGAINST MICRO RADIO WHERE SUCH BROADCASTS SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY PURSUANT TO 47 CFR §73.201 ET SEQ VIOLATES THE FIRST AMENDMENT INTERESTS OF MICRO BROADCASTERS AND THEIR LISTENERS.

The F.C.C., in issuing Notices of Apparent Liability (N.A.L.) to micro radio broadcasters, regularly indicate that the forfeiture amount is determined pursuant to the F.C.C.'s Policy Statement, Standards for Assessing Forfeitures, (hereinafter "Policy Statement") and that according to the standards therein, "the base forfeiture amount for operation without authorization in broadcast services is $20,000.00." The F.C.C.'s Policy Statement, however, was never meant to be applied to unlicensed low power micro radio broadcasters. This is readily apparent from an analysis of the legislative history of the Policy Statement, and from the fact that such application in this case results in a base forfeiture amount that violates 47 CFR § 1.80(b)(3) and 47 U.S.C. § 503(b) , the statutory authority upon which the Policy Statement is based.

The Policy Statement was adopted by the F.C.C. in July, 1991, and was released August, 1991. In June, 1992, the F.C.C. issued a Memorandum Opinion and Order denying several petitions for reconsideration of the Policy Statement (Memorandum Opinion and Order, 70 RR 2d 1207), wherein the F.C.C. explained the background of the Policy Statement:

In 1989, Congress amended the Communications Act of 1934 to increase substantially the maximum dollar amounts of forfeitures the Commission could impose under Section 503(b) and under other sections of the Act. Previously, Section 503(b) limited the Commission's forfeiture authority to $20,000 for broadcasters and common carriers and to $5,000 for all other services. The amended section 503(b) now provides the Commission with authority to assess forfeitures of up to $25,000 against broadcasters, cable operators, or applicants for such facilities, $100,000 against common carriers or applicants for such facilities, and $10,000 against others. . . . The Commission's forfeiture rule [47 CFR § 1.80(b)(1)-(3)] has been amended to reflect the higher forfeiture amounts. . . . On August 1, 1991, the Commission released the Policy Statement to assist both the Commission and licensees in adjusting to the statutory increases. The Policy Statement provides base forfeiture amounts for a wide range of generic violations

. . . . The base forfeiture amount for each type of violation is a percentage of the statutory maximum for the service involved for each violation. . . . The base forfeiture amount may be increased or decreased by applying adjustment criteria as relevant to the facts of any particular case." Memorandum Opinion and Order, 70 RR 2d 1207 [emphasis added] .

The Memorandum Opinion and Order specifically states that the Policy Statement was released to assist "the Commission and licensees," and both the Memorandum Opinion and Order and the Policy Statement itself refer numerous times to the effect of the Policy Statement on licensees, but neither make any mention whatsoever of non-licensees. Moreover, the standards set forth in the Policy Statement list thirty-eight categories of violations to which the new standards are to be applied. None of these categories refers to unlicensed radio broadcasts.

The F.C.C. apparently bases the determination of micro radio forfeiture amounts on the standards set forth in the Policy Statement for violations within the category listed as "Construction and/or Operation Without an Instrument of Authorization for the Service." (Policy Statement, Standards for Assessing Forfeitures, appearing in the Appendix to the Memorandum Opinion and Order, 70 RR at p. 1211). The F.C.C., apparently interprets this category to include unlicensed micro radio broadcasting. Such an interpretation of the Policy Statement is, at best, strained.

When the F.C.C. has, in the past, instructed its agents and the public as to the forfeiture amounts to be assessed for unlicensed radio operations, it has stated its intention plainly and clearly. Public Notice 2049, promulgated March 5, 1990, and published at 67 RR 2d 619, stated:
FCC TO INCREASE FINES FOR UNLICENSED RADIO OPERATIONS
Unauthorized Radio Operations; Forfeitures.

The Amount of the routine administrative monetary forfeiture for unauthorized operation of a radio station is increased from $750 to $1000. The routine forfeiture amount for first violations of the proscription of unauthorized operation in the aviation, maritime, public safety and special emergency radio services is increased from $1000 to $1,250. These increases are prompted by increasing complaints of interference stemming from illegal pirate operations and other unauthorized activities. Unlicensed Radio Operations (Routine Fines). 67 RR 2d 619 [1990] .

The Commission is increasing the amount of a routine administrative monetary forfeiture for the unauthorized operation of a radio station. The usual amount for a first time violation will be changed from $750 to $1000.
. . .

The increases were prompted by numerous complaints of interference resulting from "piracy" of the airwaves. FCC licensees, broadcast associations and radio listeners have reported increased illegal operations and a proliferation of abusive activities. Such malicious practices violate FCC's Rules, impede efficient management of the spectrum and frustrate spectrum users." 67 RR 2d 619

The F.C.C. has issued no subsequent Public Notice indicating any further change in F.C.C. policy or guidelines

with respect to unlicensed micro radio broadcasting. The Policy Statement that was issued in 1991 cannot, under any reasonable interpretation of its language or history, be held to supersede Public Notice 2049. The Policy Statement, as discussed above, was issued in response to, and in keeping with, the statutory increases contained in the 1989 amendments to 47 U.S.C. § 503(b)., Those increases were, as the F.C.C. has noted, "substantial." (Memorandum Opinion and Order, 70 RR 1207). The maximum forfeiture amounts for the various categories of violators were increased, respectively, as follows: Licensed broadcasters, cable operators, or applicants for such facilities, increase of 25%, from $20,000 to $25,000; Common carriers or applicants for such facilities, increase of 500%, from $20,000 to $100,000; All others, increase of 100%, from $5000 to $10,000. However, the F.C.C.'s attempt with respect to micro radio broadcasters to apply the policy statement to unlicensed micro radio broadcasts results in an increase of as much as 2000%, from the $1000 indicated in Public Notice 2049 to the "base forfeiture" of $20,000 alleged in the recent N.A.L. filed against micro radio broadcaster Steven Dunifer. Such a result was plainly not contemplated by the authors of the Policy Statement.

If the F.C.C. meant to change its procedures so drastically with regard to so-called "pirate" radio operations, it was required to so indicate in a manner that could be understood as clearly as Public Notice 2049. After such a clear and unambiguous statement of policy as that contained in Public Notice 2049, the Policy Statement of 1991 cannot be said to provide reasonable or adequate notice that the policy was being changed. There is a simple explanation: The F.C.C. obviously did not intend the Policy Statement to supersede Public Notice 2049 with regard to unlicensed radio operation.

Furthermore, it is arbitrary and capricious for the F.C.C. to levy any fine against micro radio broadcasters with no opportunity for a hearing, no opportunity to meet with the F.C.C., no explanation of how one might legally continue broadcasting, and without proper consideration of the statutorily mandated factors for determining the amount of the fine. The alleged micro radio transmissions at 1/10th or less of the power emitted by the smallest licensed commercial broadcast, without commercial profit or motive, causing no interference whatsoever, by a private individual interested only in exercising his constitutional rights cannot logically warrant the type of penalty assessed against Dougan and other micro radio
broadcasters by the F.C.C.

In issuing their Notice of Apparent Liability (N.A.L.) to micro radio broadcasters, the F.C.C. has also recently relied upon the Policy Statement, Standards for Assessing Forfeitures category "Failure to permit inspection." 47 CFR §15.29(a) provides that:

Any equipment or device subject to the provisions of this part, together with any certificate, notice of registration or any technical data required to be kept on file by the operator, supplier or party responsible for compliance of the device shall be made available for inspection by a Commission Representative upon reasonable request.

However, micro radio broadcasters are not permitted to hold an F.C.C. license which would subject them to any inspection requirements imposed by the Communications Act. Furthermore, the language of §15.29(a) is extremely broad. The section applies to "any equipment or device subject to the

provisions of this part." With respect to which equipment or devices are "subject to the provisions" of Part 15, §15.1 states the following:

Scope of this part.

(a) This part sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license."

Thus