Confronting the FCC and Defending Your Micropower Station From Being Shut Down

Everything is going great with your micropower station, and then comes that knock on the door - an FCC agent or two demanding to inspect your station. What do you do ? In response to this Free Radio Berkeley IRATE has prepared this legal defense packet to answer that question and prepare you for that dreaded knock.

A number of stations have merely folded their tent and gone silent in response to the first visit or letter from the FCC. This is a result of folks not knowing their rights and responding from a position of fear not strength. When you know your rights, prepare ahead of time, and respond in a proactive manner you will assure the continued operation of your station for months if not years after the first FCC visit.

First, the FCC will does not do very well when it comes to public relations. Its agents are not trained to deal with the media. Anything you can do to put them in the media spotlight will usually be to your advantage. Every time the FCC makes a move against your station send a press release to the media. In this release succinctly state your case and frame it as a First Amendment issue. Highlight the ever increasing concentration of media resources into fewer and fewer hands and how this prevents all but the wealthy and powerful from having a voice.

Be certain that everyone associated with the station knows their rights and won't freak out at the presence of the FCC. Included in this packet is "What to do when the FCC Knocks". Make copies of this for everyone to read and keep. Post it in your studio. Before you even begin broadcasting find an attorney who will be on call if you need legal assistance. No one should use their real name on the air or identify themselves to the FCC. Without any legal names it is much more difficult for the FCC to proceed legally.

Usually the course of events is as follows. You will receive a letter from the FCC taking notice of your operation. Sometimes the letter will be presented as part of their visit to your station. This letter will state that if your persist in unlicensed operations you will be subject to possible fines or jail. In order to either collect a fine or begin criminal proceedings the FCC has to present their case to a Federal court. Despite fines being assessed against a number of people they have yet to go to court in order to collect the fines since this would open their process to possible Constitutional scrutiny. Likewise for the criminal proceedings as well. So far there have only been only one or two instances of actual criminal prosecution.

It is important to defend your station in a militant manner. Included in this packet is the "Pledge of Resistance Form". As a Free Speech voice your station should be serving the community in such a manner that your listeners feel it is a valuable resource worth defending. Circulate this pledge and get as many signers as possible. When you have gotten at least 100-200 signers send out a press release stating that x number of people have agreed to physically defend the station, include a copy of the form. This will put the FCC on notice that they will not have easy job. Building a sense of solidarity and creating a strong alliance with your community is very important.

Threats and intimidation are the FCC's main means of shutting down stations. If those tactics fail they may obtain a seizure order from a Federal judge. This is done in a secret hearing without any opposing counsel representing your station being present. With such an order the FCC can literally bust down the door if necessary with Federal Marshals and take your equipment. In order to counter that threat the National Lawyers Guild Committee on Democratic Communications has crafted the legal documents that will be required by your attorney to file suit against the FCC in an attempt to prevent the possible seizure of your equipment. This legal action challenges the Constitutionality of the FCC's seizure authority. Once you receive your first letter from the FCC you have legal standing to file suit in Federal District Court. It is important that as many micropower stations as possible do this. First, if accepted by the court, it will take months and months for the wheels of justice to turn - it took the FCC 4 years to finally get an injunction against Free Radio Berkeley. Secondly, it will tie up the legal resources of the FCC which is a rather small agency which must take up the time of an attorney from the local Federal Attorneys office every time they engage in a new legal case. Imagine the consequences from the FCC having to respond to dozens of these suits being filed. Winning your suit knocks out the immediate seizure authority and forces the FCC to go through a series of administrative procedures before any further legal action can be undertaken. Even not winning buys months of time. And, of course, you can appeal your case to the Federal Appeals Court adding many more months to the process.

Taken as a whole strategy these steps will greatly increase not only the survivability of your station but will also do much to further strengthen the micropower broadcasting movement. For further information check the following web sites: freeradio.org - nlgcdc.org - radio4all.org - 368hayes.com. Contact Free Radio Berkeley IRATE (International Radio Action Training Education) directly if you any have any questions: frbspd@crl.com or 510-549-0732.

Stephen Dunifer - Free Radio Berkeley IRATE, 1442 A Walnut St., PMB 406, Berkeley, CA 94709

Micropower Broadcasting Free Speech Pledge of Resistance

In defense of the Free Speech rights of micropower broadcasting, I pledge to, in a non-violent manner, use my body to block any effort by any agency to shut down a micropower broadcast station within my community. I understand that I may risk arrest and subsequent legal consequence for my defense of Free Speech Rights.

Signed:

_____

Name:

Address:

Phone:

Email:

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In defense of the Free Speech rights of micropower broadcasting, I pledge to, in a non-violent manner, use my body to block any effort by any agency to shut down a micropower broadcast station within my community. I understand that I may risk arrest and subsequent legal consequence for my defense of Free Speech Rights.

Signed:

_____

Name:

Address:

Phone:

Email:

WHAT TO DO WHEN THE FCC KNOCKS ON YOUR DOOR

Produced by the Committee on Democratic Communications — A National Committee of the National Lawyers Guild

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 supervisorial powers. With proper notice, they do have a right to inspect your communications devices. If they have given you 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 a 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 any knowledge of FCC laws or any illegal activities?

A: No. You will have plenty of time to answer their accusations after you have spoken with 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 liklihood 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 operations. 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.

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

_____	)	Case No.
	)	
Plaintiffs,	)	COMPLAINT FOR
	)	INJUNCTIVE RELIEF
• against -	)	PROHIBITING EX PARTE
	)	SEIZURE OF MICRO
FEDERAL COMMUNICATIONS COMMISSION	)	BROADCAST EQUIPMENT
	)	
Defendants.	)	Date:
	)	Time:
_____	)	Location:

Plaintiffs, by their attorneys, respectfully allege on information and belief as follows:

INTRODUCTION

1. This action is brought on behalf of persons and organizations engaged in, or seeking to engage in, "microradio" (low-power radio) broadcasting in _____ City ("City"). Plaintiff _____ is an unincorporated association of persons who have collectively operated a microradio station in the City's _____ district since _____, providing an important outlet for individuals and community groups to share their views and disseminate local news and information. Broadcasting at _____ megahertz on the FM dial with only __ watts of power, _____ has developed a significant listening audience among local residents and community groups who tune in to the station because

they cannot otherwise find local news and information on events of relevance to their daily lives on the radio dial.

2. Plaintiff radio station does not cause interference with any other signals.

3. Plaintiff _____ sues on their own behalf and on behalf of their members. The individually named plaintiffs either produce or present programming broadcast over _____ or listen to the broadcasts of _____.

4. Plaintiff _____ has neither applied for nor obtained a broadcast license from the FCC. An application for such a license would have been an exercise in futility, since the FCC no longer issues broadcast licenses to noncommercial, educational FM radio stations operating at less than 100 watts of power. Moreover, even if the FCC were to issue broadcast radio licenses to FM radio operating at less that 100 watts of power, Plaintiff _____ simply could no afford the enormous sums necessary to secure a broadcast license from the FCC.

5. Even though Plaintiffs lack a broadcast licenses from the Federal Communications Commission ("FCC"), they do not regard themselves as radio "pirates." Instead, they claim a First Amendment right to speak over the electromagnetic spectrum dedicated to radio broadcasting—an electronic public forum of virtually unlimited character—subject only to reasonable time, place and manner regulations that are even-handedly applied to all broadcasters, full-power and low-power alike. Plaintiffs

maintain that the present regulatory scheme for radio broadcasting, codified in Title III of the Communications Act of 1934 (the “Act”), as amended, 47 U.S.C. §§ 301 et seq., on its face and as applied to microradio stations, violates their right to freedom of speech under the First Amendment to the United States Constitution.

6. On [date], Plaintiff _____ received a letter from the FCC [or verbal warning] stating that the FCC would have Plaintiff's broadcasting equipment seized if Plaintiff did not immediately cease and desist its broadcasting.

7. In its letter [or during this visit], the FCC made no mention of Plaintiffs statutory right under Section 312(c) and (d) of the Communications Act to an oral hearing, up to 30 days’ notice, at which the FCC would have the burden of proof. 47 U.S.C. §§ 312(c), (d).

8. Accordingly, Plaintiffs seek injunctive relief enjoining the FCC and United States Government from closing their microradio station or otherwise obtaining an ex parte order permitting the seizure and confiscation of their broadcasting equipment and otherwise interfering with their microradio broadcasts without prior notice and an opportunity to be heard on the issue of why an Order permitting the seizure of their microradio station equipment should not issue.

JURISDICTION AND VENUE

9. This case arises under the First, Fourth, and Fifth Amendments to the United States Constitution, and 47 U.S.C. §§ 301, 307, 309, 312, and 510. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346(2), 2201, and 2202. The Court may grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., and Rule 57 of the Federal Rules of Civil Procedure ("FRCP"). The Court may grant injunctive relief pursuant to FRCP Rule 65.

10. Venue is proper in the Southern District of New York, the federal judicial district in which a substantial part of the events giving rise to plaintiffs' claims occurred, the organizational plaintiffs are headquartered, and the individual plaintiffs reside. 28 U.S.C. §§ 1391(e)(2) and (3), and 1402(a)(1).

PARTIES

11. Plaintiff _____ ("___") is an unincorporated association of persons who have collectively operated a noncommercial microradio station in the _____ District of _____ since _____. Plaintiff _____ is entirely supported by contributions from its members, who collectively purchased and own the station's broadcasting equipment. Plaintiff ____ receives no corporate or other private or public funding. None of _____'s members, its producers or DJs, receive any remuneration for their work with the station. _____ brings this complaint for injunctive relief on its own behalf and on

behalf of its members through the DJs named below as individual plaintiffs, each of whom is authorized to bring this lawsuit on behalf of the association and its members.

12. Plaintiff DJ _____ is a pseudonym for a citizen of the United States who resides in the _____ District of _____, is a member of Plaintiff _____, and hosts the program _____, a weekly talk, philosophy, and music show broadcast over _____'s microradio station.

13. Plaintiff _____ is a citizen of the United States who resides in the community of _____, in the _____ District of _____. Ms. _____ regularly listens to Plaintif _____'s microradio broadcasts and depends on those broadcasts for current news and information about her neighborhood and community.

14. Defendant FEDERAL COMMUNICATIONS COMMISSION (“FCC”) is the agency of the United States that has principal responsibility for administering the Act. The FCC has final authority to decide whether to bring administrative proceedings for violations of Title III of the Act. 47 U.S.C. §§ 301 et seq. The FCC may also request that the Justice Department civilly and/or criminally prosecute violations of Title III, or otherwise seek an ex parte Order from this Court permitting the seizure of Plaintiff's microbroadcasting equipment.

GENERAL ALLEGATIONS

15. The FCC has several ways in which to proceed against unlicensed radio stations, two of which are at issue in this

action. First, under Section 312(b), the FCC may order a microradio station such as STR to "cease and desist" its unlicensed broadcasts. 47 U.S.C. § 312(b). Before the FCC may issue a cease and desist order, however, the agency must serve an "order to show cause" on the station, which:

> shall contain a statement of the matters with respect to which the [FCC] is inquiring and shall call upon [said] station to appear before the [FCC] at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the [FCC] may provide in the order for a shorter period.

47 U.S.C. § 312(c). At the required hearing, the FCC has the burden of proceeding with the introduction of evidence and the burden of proof. 47 U.S.C. § 312(d).

16. Second, any broadcasting equipment knowingly used in violation of the Act may be seized by the Attorney General and forfeited to the United States upon process issued pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States having jurisdiction over the equipment. 47 U.S.C. §§ 510(a)-(b); see also Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B. As applied here, these "in rem" rules provide for seizure of a microradio station's expressive instrumentalities and materials, including broadcasting equipment, without any prior judicial determination as to whether the station was engaging in protected expression.

The Decline in Local Radio Programming

17. Over the last decade, a number of factors have contributed to a significant decline in local radio programming heard on licensed broadcast radio stations. They include the FCC's deregulation of licensed broadcast radio stations in the 1980's; the increased concentration of radio station ownership in recent years; the decline in the already abysmally low levels of minority ownership of radio stations; the resurgence of nationally delivered network radio programming; and, of course, the FCC's rule requiring new noncommercial educational FM radio stations to operate with at least 100 watts of power.

18. In 1996, Congress lifted the nationwide ceiling on the number of radio stations which any single person or entity could own. Since then, roughly 4,000 of the nation's 11,000 radio stations have been traded, with the largest station group owners being the most aggressive buyers. As a result, the radio industry has become significantly more concentrated over the past two years. The 10 largest group owners today control 1,134 radio stations, up from 652 in 1996.

19. The recent wave of mergers in the radio industry has been accompanied by a marked decline in the already abysmally low minority ownership of broadcast stations. The United States Department of Commerce recently reported that only 2.8% of all commercial radio and TV stations were owned by minorities in 1997, down from 3.1% in 1996.

20. Even though African Americans today comprise more than 10% of the population in the United States, only 42 of the roughly 1,600 public radio stations in the United States are run by African Americans, just seven of which had qualified for community service grants from the Corporation for Public Broadcasting to buy and upgrade equipment and facilities, as of several years ago.'

21. Beginning in 1978, the FCC has required all new educational, noncommercial FM radio stations to operate with at least 100 watts of power and relegated existing 10-watt stations to "secondary" status, forcing them to relocate to other frequencies and/or locations if they interfere with full-power broadcast station signals. See 47 C.F.R. §§ 73.209, 73.211 (1998); Changes in Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C.2d 240 (1978) ("Second Report and Order"), modified, 70 F.C.C.2d 972 (1979). The 100watt requirement for new educational, noncommercial stations was adopted by the FCC under its "public interest, convenience and necessity" mandate, ostensibly to ensure more "efficient" and "effective" educational, noncommercial FM radio service. See, e.g., Second Report and Order, 69 F.C.C.2d at 248.

22. The FCC’s rule requiring new noncommercial, educational FM radio stations to operate with at least 100 watts of power, adopted in 1978 (see ¶ 21 supra), has been a significant contributing factor to the decline in local radio programming by community radio stations.

The Growth of Microradio Stations and the FCC's Crackdown

23. Microradio developed in response to the dearth of community programming on licensed radio stations in the 1990's. There are today perhaps 1,000 microradio stations operating well below 100 watts of power in the United States. None of these stations have broadcast licenses from the FCC, nor can they obtain such licenses. (See ¶ 21 supra.) The great majority of these microradio stations currently operate without interfering with the broadcasts of licensed radio stations or posing a threat to public safety. Most of these unlicensed microradio stations provide community programming, including core political speech, thus restoring localism to the medium of radio. (Attached as Exhibit A are copies of recent articles on the nationwide emergence of microradio stations over the past decade.)

24. Rather than expeditiously acting to license microradio stations so that the "public convenience, interest, [and] necessity" will be better served, 47 U.S.C. § 307(a), the FCC has instead intensified its efforts to shut down such stations, at the urging of the National Association of Broadcasters ("NAB"), the commercial broadcast industry's trade association, which has lobbied the FCC "to rid the airwaves of radio pirates."

25. To shut down microradio stations, the FCC has increasingly relied on the "in rem" procedures available under Section 510 of the Act, 47 U.S.C. § 510 and Rule B of the Supplemental Rules, allowing for seizure of a microradio

station's broadcasting equipment without affording the station a hearing on its First Amendment defense either before or after the seizure. *See, e.g.*, United States v. Any and All Radio Station Transmission Equipment, Etc., 976 F. Supp. 1255 (D. Minn. 1997).

26. The FCC has also demanded—orally and in writing—that microradio stations cease and desist from broadcasting, without first affording them an oral hearing, upon 30 days' notice, at which the FCC has the burden of proceeding with introduction of evidence and burden of proof, as required by Sections 312(c) and (d) of the Act. 47 U.S.C. §§ 312(c)(d). (Attached as Exhibit __ is a copy of one such "cease and desist" letter.)

27 Finally, some FCC officials have acted to shut down microradio stations by any means necessary to accomplish the task, regardless of their basis in law. (See Exhibit __ detailing recent seizures, including 1998 Florida seizures of microbroadcasting equipment by FCC accompanied by heavily armed SWAT Teams).

SPECIFIC ALLEGATIONS CONCERNING PLAINTIFFS

28. The trend toward consolidation of radio station ownership is also apparent in [community] where an increasing number of local radio outlets are now owned by a few only specific broadcast owners. [CITE EXAMPLES WHERE POSSIBLE]

29. It is in this tightly controlled radio environment that Plaintiff _____ was formed in approximately [date] by a group

of community activists who were dissatisfied with mainstream media coverage of important issues facing their local community.

30. From the outset, Plaintiff 's goal was not only to fill the void in media coverage on local community issues, but also to provide an outlet for other local news, information, and music of interest to community residents who have long been ignored by mainstream media in the City. The moniker "_____" was selected to signify that Plaintiff operates a community based, local microradio station using a portion of the spectrum dedicated to radio broadcasting—spectrum that had been off-limits to new community radio stations since 1978. (See ¶ 21 supra.)

31. Plaintiff _____ began broadcasting in the _____ community on [date] over the frequency ____ Mhz on the FM dial, selected by Plaintiff because it was a vacant channel with no FM radio station in _____ broadcasting on a frequency any closer than .2 Mhz on either side. Plaintiff broadcasts at ____ watts of power, allowing its signal to be heard by approximately _____ people, who live or work within a radius of ____ mile of Plaintiff's transmitter.

32. Plaintiff's microradio station quickly developed a significant listening audience, largely comprised of community residents who tuned in to hear news and information about their neighborhood or to listen to music not played anywhere else on the radio dial.

33. Plaintiff has neither applied for nor obtained a broadcast license from the FCC. An application for such a license would have been an exercise in futility, since the FCC no longer issues broadcast licenses to noncommercial, educational FM radio stations operating at less than 100 watts of power. (See ¶ 21 supra). Moreover, even if the FCC were to issue broadcast radio licenses to FM radio stations operating at less than 100 watts of power, Plaintiff, like virtually every other microradio station across the country, simply could not afford the enormous sums necessary to secure a broadcast radio license from the FCC.

34. From its initial broadcast through the present, Plaintiff has not received any complaints that its broadcasts were interfering with reception with any other radio station in the community. To the best of Plaintiffs' knowledge, there has never been a formal complaint of radio interference filed with the FCC or any other administrative entity against Plaintiff.

35. Although Plaintiff openly broadcast almost daily from its fixed studio in a building in [location] from [date] through [date], the FCC never once contacted Plaintiff prior to [date] to discuss either Plaintiff's unlicensed broadcasts or any alleged interference those broadcasts posed to other radio stations.

36. However, on [date], an FCC official [name] visited the building from which Plaintiff _____ broadcast. When a member of Plaintiff _____ asked the FCC official as to the purpose of his visit, he replied that _____. At that time, the FCC

official stated that he would returnMarshals to seize Plaintiff's radio broadcasting equipment if Plaintiff did not immediately cease and desist its broadcasting.

37. Although warning Plaintiff to immediately cease and desist its broadcasts on [date], the FCC official made no mention of Plaintiff's statutory right under Section 312(c) and (d) of the Communications Act to an oral hearing, upon at least 30 days' notice, at which the FCC would have the burden of proof. 47 U.S.C. §§ 312(c), (d). Indeed, the FCC official implied that Plaintiff had no rights at all. [The FCC official left nothing in writing during his visit.]

IRREPARABLE INJURY

38 All of the plaintiffs engaged or seeking to engage in microbroadcasting are suffering ongoing irreparable injury to their First Amendment rights because the Act's broadcast license scheme and the FCC's enforcement of that scheme have deterred them from engaging in speech activity that is protected by the First Amendment.

39 Plaintiffs _____ are suffering ongoing irreparable injury to their First Amendment rights because the Act's broadcast license scheme and the FCC's enforcement of that scheme, have interfered with their right to receive information and ideas and be informed about public issues.

40 Absent interim injunctive relief, there is an imminent threat that the FCC will seek an ex parte order from this Court to shut down Plaintiff _____'s microradio station, confiscate its radio equipment, and prosecute Plaintiff's members civilly or criminally.

41 Plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

(System of Formal Prior Restraints)

42. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

43. Section 510 of the Act, 47 U.S.C. § 510, as applied by defendants to microradio stations, violates plaintiff’s rights to freedom of speech, security from unreasonable searches and seizures, and due process of law under the First, Fourth, and Fifth Amendments to the United States Constitution to the extent that it provides for the seizure and forfeiture of expressive instrumentalities and materials, including radio broadcasting equipment, without the rigorous procedural safeguards constitutionally mandated to minimize the risk of prior restraint on protected expression, prevent unreasonable searches and seizures, and ensure due process of law.

SECOND CLAIM FOR RELIEF

(System of Informal Prior Restraints)

44. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

45. The FCC's enforcement policy and practice of demanding—orally and/or in writing—that microbroadcasters immediately cease and desist all broadcasting activities, without complying with the rigorous procedural safeguards constitutionally mandated to minimize the risk of prior restraint on protected expression, prevent unreasonable searches and seizures, and ensure due process of law violates plaintiffs' rights under the First, Fourth, and Fifth Amendments to the United States Constitution.

THIRD CLAIM FOR RELIEF

(Violation of Section 312)

46. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if restated herein.

47. The FCC's enforcement policy and practice of demanding—orally or in writing—that microradio stations immediately cease and desist all broadcasting activities, without first affording them an administrative hearing, upon at least 30 days' notice, at which the burden of proceeding with the introduction of evidence and burden of proof are on the FCC, violate Sections 312(c) and (d) of the Act. 47 U.S.C. §§ 312(c), (d).

WHEREFORE, plaintiffs respectfully request that the Court enter a judgment:

A. Declaring that, on its face and as applied to microradio stations, Section 510 of the Communications Act, as amended, 47 U.S.C. § 510, violates plaintiffs' rights under the First, Fourth, and Fifth Amendments to the United States Constitution and Section 312(c) and (d) of the Communications Act, 47 U.S.C. § 312(c), (d);

B. Preliminarily and permanently enjoining and restraining defendants, and their officers, agents, employees and successors, from obtaining an Ex Parte Order authorizing the seizure of Plaintiffs' microradio stations, confiscating their broadcast equipment, or otherwise interfering with their microradio broadcasts without prior notice and an opportunity to be heard on the issue of why an Order permitting the seizure of their microradio station equipment should not issue.

C. Awarding plaintiffs their costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §§2412 et seq. ; and

D. Granting such other and further relief as to the Court seems just and proper.

Dated:

_____

(Signature of Attorney)

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STATUTES

PRELIMINARY STATEMENT

Plaintiffs _____ respectfully submit this memorandum of law in support of their motion for a temporary and preliminary injunction. The court should issue a temporary and preliminary injunction against an ex parte application for seizure of Plaintiffs broadcasting equipment by the Federal Communications Commission [hereinafter "FCC"]. The FCC has threatened to seize Plaintiffs broadcasting equipment without affording them prior hearing to challenge the seizure. Such seizure will violate Plaintiffs rights under the First, Fourth, and Fifth Amendments and Section 312 of the Communications Act [hereinafter "Act"]. 47 U.S.C §312 (**date**).

Plaintiffs seek injunctive relief enjoining the government from closing their microradio station, confiscating their broadcasting equipment, and otherwise interfering with their microradio broadcasts unless and until a pre-deprivation hearing is granted.

Further, Plaintiff's request that the Court issue an order refusing application for ex parte hearing by the FCC unless and until the Plaintiffs are provided with an equal opportunity to be heard.

STATEMENT OF THE CASE

Plaintiffs operates {x radio station}, an unlicensed microradio station at x watts of power. The FCC regulatory scheme currently precludes the licensing of stations that operate under a radiated power of 100 watts i.e. microradio. 47 C.F.R. @ 73.211(a). Even though Plaintiffs lack a broadcast license from the FCC, Plaintiffs claim a First Amendment right to speak over the electromagnetic spectrum dedicated to radio broadcasting. [1]

X Radio Station was formed to provide the community with an outlet for (local news, information, music) that was ignored by mainstream media in the city. (Here, describe the radio station's programming, and how and why it came on the air and its value to the community)

FCC's present enforcement procedures in regard to unlicensed microradio stations will deny Plaintiffs a pre-deprivation hearing to determine whether they are engaging in protected speech, thus violating Plaintiffs rights under the First, Fourth and Fifth Amendment and Section 312 of the Act. 47 U.S.C. §312.

[1] Plaintiffs maintain that the present regulatory scheme for radio broadcasting on its face and as applied to microradio stations violates their rights to freedom of speech under the First Amendment of the United States Constitution. Further, the FCC's regulations and rules which do not allow a party to apply for a license to operate a low power radio station violates the FCC's statutory mandate to regulate the airwaves in the public interest.

{Here, detail FCC's contact with x radio station and what attempts it has made so far in attempting to shut it down}

ARGUMENT

PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF FROM AN EX PARTE SEIZURE OF BROADCASTING EQUIPMENT BY THE FCC

To obtain a preliminary injunction, the moving party must demonstrate "(1) that it is subject to irreparable harm; and (2) either (a) that it will likely succeed on the merits or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation and that a balance of the hardships tips 'decidedly' in favor of the moving party." Genesee Brewing Co. v. Stroh Brewing Co., 124 F.3d 137, 142 (2d Cir. 1997).

{(Most Circuits use some version of this test):

DC CIR: (1) that there will be a likelihood of success on the merits; (2) that it will suffer irreparable harm if the relief is denied; (3) that other interested parties will not suffer substantial harm if the injunction is granted; and (4) that the public interest favors granting relief. Barnstead Broadcasting Corp v. Offshore Broadcasting Corp., 865 F. Supp. 2, 5 (D.C. Cir. 1994).}

7Th CIR: In order to obtain a preliminary injunction, the movant must show: (1) that the case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) that the movant will suffer irreparable harm if the injunction is not granted. Storck USA, L.P. v. Farley Candy Co., 14 F.3d 311, 313-14 (7th Cir. 1994). Only if these three conditions are met must the Court proceed to balance the harm to the movant if the injunction is not issued against the harm to the defendant if it is issued improvidently. Id. at 314. In addition, the court must consider the public interest in its decision. Id.

9Th CIR: To obtain a preliminary injunction, the moving party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor. Apple Computer,Inc. v. Formula Int'l, Inc., 725 F.2d 521, 523 (9th Cir. 1984). These two tests represent points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits

decreases. Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376 (9th Cir. 1985). "Under any formulation of the test, the plaintiff must demonstrate that there exists a significant threat of irreparable injury." Id. Speculative injury does not constitute irreparable injury. Goldie's Bookstore v.Superior Ct., 739 F.2d 466, 472 (9th Cir. 1984).

A. The Plaintiffs Engaging In Microradio Broadcasting Will Suffer Irreparable Injury Absent A Temporary and Preliminary Injunction.

The showing of irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction." Bell & Howard v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983) (internal quotations omitted). Irreparable harm is "injury for which a monetary award cannot be adequate compensation." See Jackson Dairy, Inc., 596 F.2d 70, 71 (2d Cir. 1979).

"[A] showing of a possible violation of constitutional rights constitutes irreparable harm justifying a preliminary injunction." Able v. United States, 847 F. Supp. 1038, 1043 (E.D.N.Y. 1994) (citing Corvino v. Patrissi, 967 F. 2d 73, 77 (2d Cir. 1992)). Plaintiff has a likelihood of succeeding in establishing serious irreparable injuries through the FCC's use of unconstitutional seizures. The procedures employed by the FCC for seizure of a microradio station's expressive instrumentalities and materials preclude any prior judicial determination as to whether the station is engaging in protected speech. Such procedures sanction prior restraint on speech by allowing the government to seize plaintiffs expressive

instrumentalities without the constitutionally mandated procedural safeguards to minimize the risk of self censorship of protected expression, prevent unreasonable searches and seizures, and ensure due process of the law.

"[O]ur historical commitment to expressive liberties dictates that '[t]he loss of Fist Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" Paulson v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)); see also Fortune Society v. McGinnis, 319 F. Supp. 901, 903 (S.D.N.Y 1970) ("To deprive one of his constitutional rights under the First Amendment . . . is in this Court's view irreparable and immediate injury."). Plaintiffs provide a variety of programming, including core political speech, which fall under the protection of the First Amendment. {Here, be very specific as to the types of programming Plaintiffs provide, and why depriving plaintiff the right to broadcast will constitute irreparable injury}.

At issue here is not only the First Amendment right to engage in speech, but also the right to receive speech. It is well established in Supreme Courts jurisprudence that the First Amendment protects the publics' right to receive information as well as the speaker's freedom to express herself. See e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer

Council, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.") (footnote omitted); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (listeners' right to receive information and advise from willing speakers is well established"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("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.") Moreover, the right to "receiv[e] information from willing speakers" is an enforceable one, for its violation constitutes an injury "sufficient to support [a plaintiff's] standing to bring a constitutional challenge." Taylor v. Resolution Trust Corp., 56 F.3d 1497, 1508 (D.C. Cir. 1995).

Those who listen to the broadcasts of {x radio station} thus have a First Amendment right to receive information from those individuals who provide it through this medium. By seeking to squelch those broadcasts, the FCC's scheme violates both Plaintiffs' right to speak and their listeners' equally important right to hear political, cultural and educational information conveyed to their community.

Apart from a violation of Plaintiffs' First Amendment rights, there is an imminent risk that the United States will attempt to shut {the station} down, confiscate the stations

radio broadcasting equipment, and assess civil fines against, if not criminally prosecute {the stations} members.

B. Plaintiffs Are Likely To Succeed On The Merits Of Their Constitutional Challenges To Defendants' Enforcement Procedures of the Communications Act.

Section 510 (a) of the Act provides, in relevant part, that:

> Any electronic . . . device . . . used . . . with willful and knowing intent to violate section 301 or 302, or rules prescribed by the [FCC] under such sections, may be seized and forfeited to the United States.

47 U.S.C. §510(a). Section 510(b), in turn, provides, in relevant part, that:

> [a]ny property subject to forfeiture to the United States under this section may be seized by the Attorney General of the United States upon process issued pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States having jurisdiction over the property.

47 U.S.C. §510(b). These "in rem" procedures authorize the issuance of a warrant of seizure upon an ex parte application by the government. Fed. R. Civ. P. C, E(4). While any person whose "electronic device" is seized under Section 510(b) may thereafter petition for its return, there is no statutory right to a pre-seizure hearing, or a prompt post-seizure hearing, on a First Amendment defense. United States v. Any and All Radio Station Transmission Equipment, Etc., 976 F. Supp. 1255, pin (D.Minn. 1997). Both on its face and as applied by the FCC to

microradio stations, Section 510 fails to comport with the First, Fourth, and Fifth Amendment standards governing seizures of expressive instrumentalities.

The Constitution protects freedom of expression by ensuring that the freedoms included within the First Amendment's core of protections are "ringed about with adequate bulwarks," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963), in the form of "special Fourth Amendment protections accorded . . . seizures of First Amendment materials." See Maryland v. Macon, 472 U.S. 463, 470 (1985). Likewise, the rights of free speech and press are embodied in the concept of "liberty" which is safeguarded from deprivations without due process of the law. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500 (1952). The underlying basis for these special protections is the policy of thwarting "the risk of prior restraint." Maryland, 472 U.S. at 470.

1. Ex parte seizure of plaintiff's expressive instrumentalities is prohibited under the Fourth Amendment.

"[W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved." Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63

(1989) (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5 (1979)). The pretrial seizure of expressive materials may be undertaken only pursuant to "rigorous procedural safeguards" that minimize the risk of prior restraint on protected expression. Fort Wayne Book, 489 U.S. at 62, 64. "'Any system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity.'". New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc., 372 U.S. at 70). Thus, in A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964), the large-scale confiscation of allegedly obscene books and films can only be undertaken pursuant to a pre-seizure "procedure 'designed to focus searchingly on the question of obscenity.'" 378 U.S. at 210 (quoting Marcus v. Search Warrant, 367 U.S. 717, 732 (1961).

These same procedural protections extend to the pretrial seizure of expressive instrumentalities. See, e.g., Fort Wayne Books, 489 U.S. at 65 (seizure of bookstores as well as books sold therein declared unlawful). The historical origins of prior restraint doctrine lies in the 15th and 16th century "struggle in England" against government licensing of the printing press -- the most powerful instrumentality of the day. Near v. Minnesota, 283 U.S. 697, 713 (1931). Loud speakers, characterized by the Supreme Court as expressive instruments indispensable to effective public speech, are similarly

protected by the prior restraint doctrine. See Saia v. New York, 334 U.S. 558, 561 (1948).

The transmitter used by {x radio station} plainly qualifies as an expressive instrumentality, since it facilitates, and indeed is essential to, microbroadcasting. Equally plainly, Section 510 lacks the "rigorous procedural safeguards" necessary to minimize the risk of prior restraint on protected expression, Fort Wayne Books, 489 U.S. at 62, 64, by failing to provide a "prompt judicial determination" of the First Amendment rights of whose expressive intrumentalities have been seized by the government pursuant to that statute. Heller v. New York, 413 U.S. 483, 492 (1973). "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected speech." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations et al, 413 U.S. 376, 390 (1973). Clearly, an ex parte proceeding will deny Plaintiff the ability to raise First Amendment defenses to the FCC's regulation of microradio, as well as to any allegation that Plaintiff's operation is causing harmful interference with other licensed radio stations.

Most certainly, seizure constitutes the most intrusive and overly drawn mechanism that the agency could take to silence plaintiffs. The starkness of the mechanism is highlighted by the fact that the Act itself provides enforcement tools to

address unlicensed broadcasting far less invasive of speech and expression. For example, section 401 of the Act establishes a procedure by which the FCC can apply for and obtain an injunction against unlicensed broadcasting. 47 U.S.C. §401 Under this provision, the alleged violator is entitled to a hearing in federal court, and is permitted an opportunity to raise pertinent defenses, including the unconstitutionality of the statute itself. Given the availability of this less intrusive process, the current preferred method of enforcement cannot meet the Fourth Amendment's reasonableness test. As the Supreme Court noted, the more limited mechanism, which provides for safeguards against censorship is constitutionally appropriate:

> The difference in the procedures . . . amount to the distinction between, a limited injunctive remedy, under closely defined procedural safeguards . . . and a scheme which [operates] . . . indiscriminately because of the absence of any such safeguards.

Marcus et. al. v. Search Warrant of Property at 104 East Tenth Street, 367 U.S. 717, 734-35 (1961).

However, given the constitutional requirement that, even when some infringement of speech may be necessary in the face of a substantial governmental interest, any such infringement must be "narrowly tailored" to accomplish the articulated regulatory goals "without unnecessarily interfering with First Amendment freedoms." Village of Schaumberg v. Citizens for a Better

Environment, 444 U.S. 618, 637 (1980), see also Sect'y of State of Maryland v. Munson Co., Inc., 465 U.S. 947, 961 (1984). The only mechanism consonant with this mandate is an adversarial hearing prior to seizure, at which an independent, neutral magistrate is required to consider at least two issues bearing on the determination of reasonableness: (i) whether there exists a less intrusive mechanism whereby the FCC can achieve its regulatory purpose without imposing a prior restraint on plaintiffs' speech; and (ii) whether, given the agency's stated purpose in enforcing its licensing requirements--namely to prevent interference--there is a real danger of such interference. Unfortunately, Section 510 does not provide for such a hearing, and thus falls outside the parameters of the constitutionally mandated procedures; it silences first and asks questions later.

2. Section 510 of the Act deprives plaintiffs of their liberty and property interest without due process of the law.

The Due Process Clause within the Fifth and Fourteenth Amendments requires, as a general principle, that individuals must receive notice and an opportunity to be heard before the government deprives them of property or liberty interests. See Mathews v. Eldridge, 424 U.S. 319, 332-333 (1975). An exception to the general rule requiring pre-deprivation notice and hearing is justified only in extraordinary circumstances. See Id. In

order to determine whether the procedures are constitutionally sufficient, the court considers three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Governments interest including . . . the administrative burdens that the additional . . . procedural requirement would entail.

Id. at 335.

The private interest affected by defendants' actions is the plaintiffs' ability to exercise their First Amendment rights. See United States Labor Party v. Village of Bridgeview, No. 78 C 953, 1979 U.S. Dist. LEXIS 12864 (N.D.Ill. April 23, 1979). "[F]reedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause . . ." Gitlow v. New York, 268 U.S. 652, 666 (1925). The right to broadcast implicates the First Amendment, United States v. Dunifer, 997 F. Supp. 1235, 1243 (1998) (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969), and is thus within the scope of the Due Process Clause; as is the use of instrumentalities of expression. Jacobson v. Peterson, 728 F. Supp. 1415 (District of South Dakota, Central Division 1990) (deprivation of a newsrack without the opportunity for an adversarial hearing violates due process). Therefore, procedures that inhibit expression as a result of a judicial

decision, without the opportunity to participate in an adversary hearing on the merits, violate the Due Process Clause. Grove Press Inc. v. City of Philadelphia, 418 F.2d 82, 90 (3d Cir. 1969).

Furthermore, broadcasting equipment, because of its use as an instrument of expression, is a significant property interest implicating a "private interest of historic and continuing importance", and as such, should weigh heavily on the Mathews balance. See e.g. United States v. James Daniel Good Real Property et al., 510 U.S. 43, 53-54 (1993) (due process prohibits seizures of real property without a prior hearing). Seizure of property affected by the First Amendment is a significant property interest that requires some kind of pre-deprivation hearing. Miller Newspapers, Inc v. City of Keene, 546 F. Supp. 831, 836 (Dist. NH 1982) (newsracks).

Plaintiffs {x radio station} have a substantial private interest in continuing to provide the community which they serve issues, issues, viewpoints, music {etc} that have largely been ignored by licensed broadcast stations. {Here, detail the types of programming that is offered, and its importance, and emphasize the fact that this type of material is not provided anywhere else. Also discuss ramifications of seizure.}

An additional factor to be considered is the risk of erroneous deprivation of the plaintiff's private interests and

the probable value, if any of additional procedural safeguards. Mathews, 424 U.S. at 343. The type of deprivation involved here is quite serious as it constitutes an outright taking of plaintiff's property, and thereby a complete denial of their rights to engage in constitutionally protected speech. See International Caucus of Labor Comm. v. Maryland Dep't Transp., 745 F. Supp. 323, 330 (D.Md. 1990). Plaintiffs have no alternative areas in which they can engage in their speech activities. Id.

The FCC has failed to follow the pre-seizure procedural safeguards offered to plaintiffs under the Act and thus created a risk of erroneous deprivation. See generally United States v. Any and All Radio Station Transmissn, et. al., No. 97-CV-73527 (E.D.Mich. Aug. 2, 1998) (government prohibited from bringing in rem forfeiture action until the FCC exhausted its administrative remedies); United States v. Dunifer, 997 F. Supp. 1235, 1236 (1998) (FCC's motion for preliminary injunction against microradio station denied until FCC first addressed the issues of the constitutionality of Class D regulations). Given the importance of the interests at stake, an ex parte determination that there is a danger of interference or that Plaintiffs do not have a First Amendment right to broadcast, without the benefit of Plaintiffs' defenses, increases the likelihood of an erroneous deprivation.

Furthermore, as already stated, Section 401 of the Act establishes a less intrusive procedure by which the FCC can apply for and obtain an injunction against unlicensed broadcasting. 47 U.S.C. §401. Under this provision, the alleged violator is entitled to a hearing in federal court, and is permitted an opportunity to raise pertinent defenses, including the unconstitutionality of the statute itself.

Exceptions to the general rule requiring pre-deprivation notice and hearing is only tolerated in extraordinary situations where some valid government interest is at stake. See Good Real Property, 510 U.S. at 53. In assessing the strength of the government's interest in obtaining an ex parte seizure, exigent circumstances are present where: "(1) seizure is necessary to secure an important governmental or public interest, (2) very prompt action is necessary, and (3) a government official initiated the seizure by applying the standards of a narrowly-drawn statute". Fuentes v. Shevin, 407, U.S. 67 (1972).

Ex parte seizures of property used for illicit purposes have been permitted to prevent plaintiffs from removing, concealing, or destroying the property, and to allow the enforcement of criminal sanctions by forfeitures of the property. Calero-Toledo et al. v. Pearson Yacht Leasing Co., 416 U.S. 663, pin (1974), see also Neapolitian Navigation, Ltd v. Tracor Marine, Inc., 777 F.2d 1427, 1430 (1985) (actions

pursuant to Rule C, ex parte seizures and attachments of maritime vessels are allowed because the defendant can easily remove his property from the jurisdiction of the court). Summary seizures have also been authorized when property was a threat to public health, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), highway safety, Dixon v. Love, 431 U.S. 105 (1977) and, to a lesser extent, in the interest in administrative efficiency. Mathews v. Eldridge, 424 U.S. 319(1975).

There is no government interest that justifies an ex parte seizure by the FCC of plaintiff's microradio station. Plaintiff's activities pose no danger or threat to public safety that is similar to that of persons involved in illicit drug activities. Plaintiff's broadcasting does not interfere with broadcasts of other licensed radio stations in any way. Plaintiffs have no intention of removing, concealing, or destroying their equipment in any manner. As community broadcasters, plaintiffs must remain within the community that they serve. Their intent, and practice, is to remain on the air as long as possible in order to provide community broadcasting. It would be contrary to the purpose of microradio broadcasting to dismantle their equipment in order to avoid jurisdiction. The line is drawn not in the characterization of property as movable or immovable, but on whether a "significant property

interest" is at stake. Fuentes, 407 U.S. at pin. Here, there are no exigent circumstances that outweigh the need of procedural safeguards to prevent a violation of due process.

On the other hand, there is a strong public interest in preserving the status quo until the FCC's licensing scheme can be challenged on its merits. Universal Amusement Co., Inc., v. Vance, 587 F.2d 159, 169 (5th Cir. 1978) ("any restraint prior to judicial review can be imposed . . . only for the purpose of preserving the status quo") (quoting Southeastern Promotions, Ltd. V. Conrad, 420 U.S. 546, 560 (1975).

{x radio station's} audience has a strong First Amendment right to continue to receive information until an adversarial hearing on the merits occurs. Time and again, the Supreme Court has recognized the First Amendment right of the public to receive an array of perspectives, opinions, and ideas through radio and television. Red Lion, 389 U.S. at 390. {x radio station's} broadcasts provide news and information to the community, foster communication among local residents and neighbors, assist in the development of political, educational, and cultural groups and associations, and contribute to the market place of ideas. By seeking to squelch those broadcasts without affording procedural protections, the FCC violates the right of the public to hear political, cultural and educational information conveyed to their community. "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." Id.

3. The Doctrine of Primary Jurisdiction Precludes the FCC from Bringing a Motion For Ex Parte Seizure Without First Issuing a Cease and Desist Order under §312 of the Act.

Under the doctrine of primary jurisdiction the FCC is prohibited from requesting an ex parte judicial inquiry into whether the microradio station operated in violation of the Communications act, thus necessitating seizure, without first issuing a final administrative decision on that issue. See United States v. Any and All Radio Station Transmission Equip., et. al., No. 97-CV-73527 (E.D.Mich.S.D. Aug. 2, 1998); see also United States v. Dunifer, 997 F. Supp. 1235, 1236 (1998) (under the doctrine of primary jurisdiction, the court stayed the case so that the issue of the constitutionality of Class D regulations could first be addressed by the FCC); United States v. Neset, 10 F. Supp. 2d 1113 (N.D. June 24, 1998) (under the doctrine of primary jurisdiction, whether or not the FCC application practice violated the Administrative Procedure Act is a question best left to the expertise of the FCC).

The primary jurisdiction doctrine, relied upon by the Any and All Radio court to deny to government's request for forfeiture, provides that:

> in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.

Far East Conference v. United States, 342 U.S. 570, 574 (1952); FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 n.5 (1984).

"Thus, 'where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, *those procedures are to be exclusive*.'" Any and All Radio, No. 97-CV-73527 (E.D.Mich.S.D. Aug. 2, 1998) (quoting Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 420 (1965)) (emphasis added). "This precise situation exists here because the scope and design of the review procedures provided for in the Communications Act imply that the FCC is to be charged with governance over the extremely technical and complex area of radio broadcasting." See Id. Therefore, under the primary jurisdiction doctrine, the FCC must first issue an order as to whether the plaintiffs are violating Act prior to an application for ex parte seizure under section 510. In Any and All Radio, the document served to the microradio station did not constitute an "order" by the FCC within the meaning of §312(c) since it did not provide for a hearing or its waiver as required by the Act. See Id.

Section 312(b) of the Act authorizes the FCC to issue a "cease and desist" order to "any person who has violated or failed to observe any rule or regulation of the [FCC] authorized by this Act." 47 U.S.C. § 312(b). Prior to issuance, however, the FCC *must* first serve an "order to show cause" upon that person, which

> shall contain a statement of the matter with respect to which the [FCC] is inquiring and shall call upon said . . . person to appear before the [FCC] at a time and place stated in the order . . . but in no such event less than thirty days after the receipt of such an order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the [FCC] may provide in the order for a shorter period.

47 U.S.C. § 312(c). At that hearing, the FCC has both the burden of proceeding with the introduction of evidence and the burden of proof. 47 U.S.C. § 312(d). A cease and desist order is thus "proper *only* after hearing or waiver of the right to a hearing." United States v. Southwestern Cable Co., 392 U.S. 157, 179 (1986) (emphasis added).

The oral and written warnings given by the FCC to {x radio station}, were not true cease and desist orders because FCC issued those orders without following the statutorily mandated procedures. No order to show cause was served, no one was informed of a rights to a hearing, no one was provided with the requisite thirty days notice, no FCC hearings were held, no written findings made, and no orders issued. Thus, under the

doctrine of primary jurisdiction, the FCC has no authority to file an ex parte motion, and the court has not jurisdiction to hear such a motion, until a hearing and final agency order is issued.

C. Plaintiffs Claims Present Fair Grounds For Litigation And the Balance of Equities Is Decidedly In Their Favor.

Plaintiffs have demonstrated "sufficiently serious questions going to the merits of [their] claims to make them fair ground for litigation, plus a balance of hardships tipping decidedly in [their] favor." Plaza Health, 878 F.2d at 580. At the very least, they have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953). Plaintiffs have also shown that, absent interim relief, they cannot engage in expressive activities over the electronic public forum dedicated to radio broadcasting except at the risk of fines, prosecution, and seizure of their expressive instrumentalities and materials.

In addition, "the risks of substantial constitutional harm" to plaintiffs clearly tips the equitable balance in their favor, outweighing the "administrative concerns" that underlie the restrictions on plaintiffs' expressive activities. Mitchell v. Cuomo, 748 F.2d 804, 808 (2d Cir. 1984). In sum, the harm that

plaintiffs will suffer if their motion is denied--loss of freedom of speech, fines, prosecution, confiscation of their expressive intrumentalities and materials—is ‘decidedly’ greater than the harm that defendants will suffer if the motion is granted. Buffalo Forge Co. v. Ampco-Pittsburg Corp., 638 F.2d 568, 569 (2d Cir. 1981).

CONCLUSION

For the foregoing reasons, plaintiffs’ motion for a preliminary injunction should be granted.

Dated: