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Executive Summary

The National Association of Broadcasters (“NAB”) hereby comments in response to the Commission’s *Further Notice of Proposed Rulemaking* addressing various Low Power FM (“LPFM”) issues. NAB’s comments focus on (1) the relationship between LPFM and full power FM service and (2) the relationship between LPFM and FM translators.

As NAB has previously noted, the level of interference protection between LPFM and full power FM stations – both new and existing – is governed by statute and cannot be reduced. In light of the very limited number of LPFM stations that have actually been displaced (one) to date, and the limited number of LPFM stations (40) that could be displaced by pending full power FM modification applications, wholesale changes to the Commission’s interference procedures are not warranted. Indeed, as the Commission recognizes, “experience to date confirms our belief that in most instances the interests of both full-service and LPFM stations can be accommodated.” We therefore urge the Commission to refrain from further altering its rules to reduce the LPFM interference protections in Sections 73.807 and 73.809 of its rules as proposed in the *Further Notice*. Moreover, the Commission should vacate the interim processing guidelines that, as a matter of both law and policy, should not be codified.

As detailed in our comments, further reductions in interference protection for subsequently-authorized full power FM service could deny thousands of

listeners the benefits of FM station upgrades or new FM service, including emergency information and HD Radio™ digital broadcasting. It is contrary to common sense and the laws of physics that, in leaving intact third-adjacent channel protections, the Commission contemplates a regulatory framework with elimination of second-adjacent channel protections, where even greater interference is likely to occur. Such Swiss-cheesing of interference protection is unsound policy and contrary to Congressional intent.

Moreover, the Commission's proposed regulations could deny first local service to a new community by a full service station. In this sense, the proposal to deny an application for city of license change to any full power broadcaster that would displace a LPFM station if (a): no other channel is available and (b) the LPFM station offers at least eight hours of local programming clearly runs counter to the Commission's own precedent under 307(b) of the Communications Act. The Commission has consistently interpreted Section 307(b) so as to give priority to full time FM service that can reach a wide audience over a proposed service reaching a much smaller population.

In lieu of more radical proposed measures that would allow significant interference to full power FM signals, NAB urges the Commission to focus on constructive means by which an operating LPFM station displaced by new or upgraded full power FM service can be relocated *without creating harmful interference*. Especially given the limited number of possible displacements, the continuation of voluntary engineering and/or financial assistance from full power

FM stations is entirely reasonable. NAB, however, does not support codified requirements for financial support.

Turning to the issue of FM translators, NAB submits that the Commission should not give LPFM stations greater regulatory status than FM translators. Since the Commission first authorized FM translators in 1970 as a means of providing radio service to areas and populations that were unable to receive FM signals due to distance and terrain, translators have proven to be a critical component for delivering essential news, weather, emergency information and Amber Alerts, as well as entertainment to the communities broadcasters serve.

LPFM and translators are not mutually exclusive and can be viable, compatible services. NAB recognizes that LPFM service may provide an important public service, including niche programming. That does not diminish the fact, however, that with the help of FM translators, local full power broadcasters also provide diverse, quality programming, reaching 72.4% of Americans ages twelve and older every day. As the Commission has previously recognized, translators provide an opportunity to import programming formats otherwise unavailable in local markets. In this proceeding, the Commission should again recognize the valuable service FM translators provide.

Moreover, there is no demonstrated need for a change in regulatory priority status between LPFM stations and FM translators. The Commission has no basis to conclude that the service provided to communities by LPFM is more valuable than service from full power stations through FM translators. In

addition, pending applications from the 2003 FM translator window that the Commission has not dismissed, do not in any measure impair the Commission's ability to process the few pending LPFM applications under the existing rules. Nor should a subsequently-authorized LPFM licensee displace full power FM radio service that reaches its audience through the use of FM translators. Commission policy should not result in consumers losing full power FM service they clearly value.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
Creation of Low)
Power Radio Service) MM Docket No. 99-25
)
)
To: The Commission

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking* requesting comment on various Low Power FM (“LPFM”) issues.² NAB’s comments focus on (1) the relationship between LPFM and full power FM service and (2) the relationship between LPFM and FM translators.³

¹ NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

² *Second Further Notice of Proposed Rulemaking*, MM Docket No. 99-25, 22 FCC Rcd 21912, rel. Dec. 11, 2007 (“*Further Notice*”).

³ NAB’s comments are limited to issues raised in the *Further Notice* and do not address any of the decisions contained in the accompanying *Third Report and Order*.

As we have previously noted, the level of interference protection between LPFM and full power FM stations – both new and existing – is governed by statute and cannot be reduced.⁴ In light of the very limited number of LPFM stations that have actually been displaced (one) to date, and the limited number of LPFM stations (40) that could be displaced by pending full power FM modification applications,⁵ wholesale changes to the Commission’s interference procedures are not warranted. Indeed, as the Commission recognizes, “experience to date confirms our belief that in most instances the interests of both full-service and LPFM stations can be accommodated.” *Further Notice* at ¶ 62. We therefore urge the Commission to refrain from further altering its rules to reduce the LPFM interference protections in Sections 73.807 and 73.809 of its rules as proposed in the *Further Notice*.⁶ Moreover, the Commission should vacate the interim processing guidelines that, as a matter of both law and policy, should not be codified.

It is important to note that further reductions in interference protection for subsequently-authorized full power FM service could deny thousands of listeners the benefits of FM station upgrades or new FM service, including emergency

⁴ See Comments of NAB, *In the Matter of Creation of Low Power Radio Service*, MM Docket No. 99-25 at 5 (Aug. 22, 2005).

⁵ *Further Notice* at ¶ 63.

⁶ *Further Notice* at ¶ 39.

information and HD Radio™ digital broadcasting.⁷ Indeed, it is contrary to common sense and the laws of physics that, in leaving intact third adjacent channel protections, the Commission contemplates a regulatory framework with elimination of second adjacent channel protections, where even greater interference is likely to occur. Such Swiss-cheesing of interference protection is unsound policy.

Moreover, the Commission's proposed regulations could deny first local service to a new community by a full service station. In this sense, the proposal to deny an application for city of license change to any full power broadcaster that would displace a LPFM station if (a) no other channel is available and (b) the LPFM station offers at least eight hours of local programming⁸ clearly runs counter to the Commission's own precedent under 307(b) of the Communications Act.

In lieu of more radical proposed measures that would allow significant interference to full power FM signals, NAB urges the Commission to focus on constructive means by which an operating LPFM station displaced by new or upgraded full power FM service can be relocated *without creating harmful interference*. Especially given the limited pool of possible displacements, the continuation of voluntary engineering and/or financial assistance from full power FM stations, is entirely reasonable.

⁷ HD Radio is the trademark of iBiquity Digital Corporation, developers of in-band/on-channel (IBOC) digital radio technology.

⁸ *Further Notice* at ¶ 68.

Turning to the issue of FM translators, NAB submits that the Commission should not give LPFM stations greater regulatory status than FM translators. Since the Commission first authorized FM translators in 1970 as a means of providing radio service to areas and populations that were unable to receive FM signals due to distance and terrain,⁹ translators have proven to be a critical component for delivering essential news, weather, emergency information and Amber Alerts, as well as entertainment to the communities broadcasters serve. Indeed, in light of these benefits, the Commission has consistently recognized translators' value to local communities calling "translator-based delivery of broadcast programming" an "important objective" and one that the FCC continues to support.¹⁰ FM translators also service greater populations than LPFM stations.

LPFM and translators, however, are not mutually exclusive and can be viable, compatible services. NAB recognizes that LPFM service may provide an important public service, including niche programming. That does not diminish the fact, however, that with the help of FM translators, local full power

⁹ *Report and Order* in Docket No. 17159, 20 Rad. Reg. 2d (P&G) 1538 (1970); see also 47 C.F.R. § 74.1231(a).

¹⁰ In re Creation of a Low Power Radio Service, *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket No. 99-25, 20 FCC Rcd 6563 at ¶ 32 (rel. Mar. 17, 2005) ("2005 Further Notice") (citing In re Creation of a Low Power Radio Service, *Order on Reconsideration*), 15 FCC Rcd 19208, 19224 (2000) ("LPFM Order On Reconsideration"). In 1997, the FCC imposed a freeze on filing new and major change applications for non-reserved band translators in order to promote the orderly filing of applications for auction purposes. Implementation of Section 309(j) of the Communications Act, 12 FCC Rcd 226363, 22388 (1997). In 2003, the FCC opened a window to accept such FM translator applications.

broadcasters also provide diverse, quality programming, reaching 72.4% of Americans ages twelve and older every day.¹¹ As the Commission has previously recognized, translators “provide an opportunity to import programming formats otherwise unavailable” in local markets.¹² In this proceeding, the Commission should again recognize the valuable service FM translators provide.

Moreover, there is no demonstrated need for a change in regulatory priority status between LPFM stations and FM translators. First, the Commission has no basis to conclude that the service provided to communities by LPFM stations is more valuable than service from full power FM stations through the use of FM translators. It would be arbitrary and capricious to change the relationship of these two services on that basis. In addition, pending applications from the 2003 FM translator window that the Commission has not dismissed and do not in any measure impair the Commission’s ability to process the few pending LPFM applications under the existing rules. Nor should a subsequently-authorized LPFM licensee displace full power FM radio service that reaches its listeners through the use of FM translators.

II. The Commission Should Not Amend Sections 73.807 And 73.809.

The Commission queries whether it should codify, under Section 73.807 of its rules, the interim waiver and processing policies set forth in the *Third*

¹¹ <http://www.rab.com/public/MediaFacts/factbook.cfm> (last visited April 7, 2008).

¹² In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, *Report and Order*, 5 FCC Rcd 25 (1990) at ¶ 49 (in which the Commission also recognized the benefit translators have in disseminating emergency information) (“*1990 FM Translator Order*”).

Report and Order. See Further Notice at ¶ 74. Under the interim waiver standard, should the Commission receive a community of license modification for a full power station that would displace a LPFM station, the LPFM station may seek a second-adjacent channel short spacing waiver in a connection with an application proposing operations on a new channel. *Id.* The Commission also asks whether waiver requests should be expanded to include co- and first-adjacent channel situations. *Id.* Additionally, the Commission queries whether it should further modify Section 73.809 of its rules to “establish a licensing presumption that would protect certain operating LPFM stations from subsequently proposed community of license modifications.” *Further Notice* at ¶ 75. For the reasons described below, the Commission should refrain from such implementation.

A. The Commission Is Statutorily Prohibited From Relaxing Interference Channel Protections.

At this time, the Commission lacks authority to amend Section 73.807 or further amend Section 73.809. In late 2000, Congress required the FCC to maintain third adjacent channel protections for FM service, and ordered the agency to conduct field tests to determine in real world conditions whether LPFM stations would interfere with existing FM stations and FM translators if LPFM stations were not subject to third adjacent channel spacing requirements.¹³ As directed by Congress, the Commission

¹³ District of Columbia Appropriations Act, FY 2001, Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111(2000) (“*Radio Broadcast Preservation Act*” or “*RBPA*”). In early 2000, over the objections of NAB and others, the FCC had concluded that licensing LPFM stations on third adjacent channels would not result in significant interference to

revised Section 73.807 of its rules to re-establish the minimum distance separations set forth in the *Radio Broadcast Preservation Act*.¹⁴ The Commission's subsequent modification to 73.809 in its *Third Report and Order*, the *RBPA* requires all LPFM stations to protect full power FM service on co-, first-, second-, or third-adjacent channels.

The *RBPA* is unambiguous in requiring maintenance of minimum distance separations. Section 632(a) expressly states:

The Federal Communications Commission *shall* modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25 to [A] *prescribe minimum distance separations for third-adjacent channels* (as well as for co-channels and first- and second-adjacent channels)...

[2] The Federal Communications Commission may not [A] eliminate or reduce the minimum separations for third-adjacent channels required by paragraph (1)(A) ... except as expressly authorized by an Act of Congress enacted after the date of this Act.¹⁵

Because Congress has explicitly stated that the Commission "shall" prescribe minimum distance separations for LPFM stations, meaning that LPFM stations may not operate on channels co-, first-, second- and third- adjacent to full power

existing full power FM stations. *In Re Creation of Low Power Radio Service, Report and Order*, MM Docket No. 99-25, 15 FCC Rcd 2205 (2000) ("*LPFM Order*"). On reconsideration, the FCC rejected claims that it had ignored record evidence demonstrating a likelihood of interference from third adjacent LPFM stations, explaining that it had "simply found that the test data supported different conclusions than those reached by" many commenters. *LPFM Order on Reconsideration* at ¶ 9.

¹⁴ See *In the Matter of Creation of a Low Power Radio Service, Second Report and Order*, MM Docket 99-25, 16 FCC Rcd 8026 (2001) at ¶ 4 ("*LPFM Second Order*").

¹⁵ Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111 (2000) (emphasis added).

FM stations, the Commission has no discretion in this matter. As numerous courts have made clear, the word “shall” is interpreted strictly as a mandatory, nondiscretionary duty.¹⁶

Significantly, Congress in the *RBPA* made no distinction between existing and subsequently-authorized full power FM stations. For this reason, it is not within the power of the Commission to further reduce interference protections either through further modifications to 73.809 or through its de-facto reduction of interference protections for full power FM stations through the use of, or in codifying, 73.807’s interim processing guidelines. Congress’ intent with regard to maintaining co-channel and first-, second-, and third-adjacent channel protections for *all* FM stations is clear, and the Commission “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984).¹⁷

Even if there were any ambiguity in the statute itself (which there is not), the legislative history demonstrates Congress’ intent to preserve “existing

¹⁶ See, e.g., *Pierce v. Underwood*, 487 U.S. 552 (1988); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (noting that “shall” is the strongest language Congress could possibly use); *AT&T v. FCC*, 978 F.2d 727, 735 (1992) (in which the court held that the term shall “is the language of command”) (*quoting Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)); *Association of Civilian Technicians v. Federal Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (stating that “[t]he word ‘shall’ generally indicates a command that admits no discretion on the part of the person instructed to carry out the directive.”).

¹⁷ See also *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“courts must presume that legislature says in a statute what it means and means in a statute what it says there”).

protections,” including second- and third-adjacent channel protections for the FM band:

Before the FCC changes existing protections, protections that are as important to radio stations, public and commercial, as they are to radio listeners across America, I think it is imperative that Congress must have the authority to review any FCC changes over existing protections.

146 Cong. Rec. H2303 (daily ed. Apr. 13, 2000) (Statement of Rep. Dingell).

Moreover, Congress specifically considered the relationship between LPFM and subsequently authorized full power FM stations.

The Commission is directed to maintain the same level of protection from interference from other stations for existing stations and *any new full-power stations* as the Commission’s rules provided for The Committee intends that this level of protection should apply at any time during the operation of an LPFM station. Thus, LPFM stations which are authorized under this section, *but cause interference* to new or modified facilities of a full-power station, would be *required to modify their facilities or cease operations*.

H.R. Rep. No. 567, 106th Cong., 2d Sess. 4 (2000) at 7-8 (emphasis added). In sum, Congress has rejected any distinctions between existing and subsequently-authorized FM stations.

The Commission itself recognizes that it is apparently “without authority to waive third-adjacent channel spacing requirements.”¹⁸

And, in the past, the Commission has acknowledged that “Congress has mandated the use of a distance separation methodology to protect FM stations from LPFM station interference by directing the Commission to prescribe co-, first-, second

¹⁸ See *Further Notice* at fn 171.

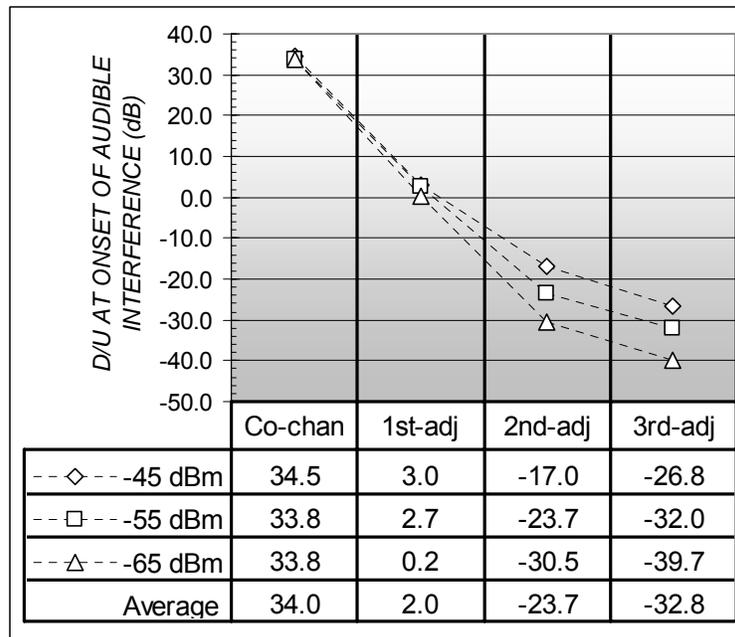
and third-adjacent channel minimum distance separations for LPFM stations.”¹⁹ Thus, it is surprising that the Commission now assumes, without explanation, that it can adopt a kind of Swiss-cheese approach and modify or eliminate second-adjacent channel protections but maintain third-adjacent, co- and first-adjacent channel protections. As the discussion above demonstrates, Congress did not sanction this approach.

It is also contrary to common sense and the laws of physics to suggest that leaving intact third adjacent channel protections, while removing second adjacent protection, can protect full power FM stations from interference consistent with the RBPA. In the regulatory framework the Commission contemplates, greater interference is likely to occur. Comprehensive receiver studies previously conducted on behalf of NAB (and previously entered into the record in this proceeding) have established the levels of third-, second-, and first-adjacent channel and co-channel interferers at which audible interference is produced on FM receivers.²⁰ These results are summarized below in Table 1 and represent median values measured on over two dozen receivers at three different received desired signal input levels. Not surprisingly, this data clearly demonstrates that receivers can tolerate more interference from interferers that are farther away (in frequency), and less interference from those that are closer.

¹⁹ *2005 Further Notice* at ¶ 34.

²⁰ *FM Receiver Interference Test Results Report*, Carl T. Jones Corporation, July 1999), submitted with Comments of the National Association of Broadcasters, MM Docket 99-25, August 2, 1999.

Table 1. Desired-to-undesired ratio (D/U) for various interferers at onset of interference, for received desired signal strengths of -45, -55, and -65 dBm. Results are median values from testing of 28 analog FM receivers of types clock (5), personal (5), portable (5), component (5) and automobile (8).²¹ In this graph, lower D/U values represent a greater tolerance to interference.



Specifically, this data shows that, on average, receivers are 9.1 dB more sensitive to second-adjacent channel interference than to third-adjacent channel interference. This means that, for example, if a receiver was receiving a certain amount of interference from a third-adjacent channel, then a second-adjacent

²¹ *Id.*, data extracted from Tables 3-5.

channel signal only *12% as strong* as that third-adjacent channel signal would produce an *equivalent* amount of interference.

Given that second-adjacent channel interferers present a greater threat to signal reception than do third-adjacent channel interferers, it makes no sense, and flies in the face of congressional intent, for the Commission to propose elimination of second-adjacent channel protection.

In sum, absent Congressional action altering the clear terms of the *RBPA*, the Commission is precluded from eliminating or reducing either second- or third-adjacent channel distance separations between the two services. It may not amend its rules to carve out an exception for existing LPFM stations, nor may it attempt to Swiss-cheese interference protections to avoid Congressional mandates.

B. Modification Of Section 73.807 And Further Modifications To Section 73.809 Would Not Further The Goals Of The Communications Act.

Modification of interference protections is not necessary to further the purposes of the Communications Act. The Commission's present proposal appears to be based on premise that new or upgraded full power FM stations cause such extensive dislocation of LPFM service as to warrant wholesale regulatory change. To date, however, only one LPFM station has actually been displaced, and a very limited number (40, representing less than 5% of the licensed and permitted LPFM stations) of LPFM stations could be displaced by pending FM applications. *Further Notice* at ¶ 63. Thus, it seems unnecessary to

adopt radical measures that would allow significant interference to full power FM signals to occur. Instead, NAB submits that constructive means by which a displaced operating LPFM station can be relocated *without creating harmful interference* would better serve the public interest. Particularly given the small number of potentially displaced LPFM stations, should be able to deal with the problem. NAB does not, however, support codified requirements for financial support. See *Further Notice* at ¶ 76. NAB urges the Commission to explore other constructive measures to afford relief to LPFM stations without creating harmful interference to full power FM stations, particularly in light of the very limited number of LPFM stations that have been or will face displacement.

And while the Commission's goal of allowing a LPFM station to "continue operating on its channel, wherever possible, as the radio environment changes around it"²² is valid, the Commission must also adhere to the goals articulated in the Communications Act. Section 307(b) of the Communications Act states:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 47 U.S.C. § 307(b) (emphasis added). Section 307(b) is particularly relevant when the Commission is devising its channel allocation and licensing policies. For example, in 1982 when the Commission revised its priorities for

²² *LPFM Order* at ¶ 62 .

allocating FM channels,²³ it concluded that Section 307(b) was best served by “assuring the availability of at least one full-time radio service *to as many people as possible.*” *Id.* at ¶ 11 (emphasis added). Moreover, in Section 307(b) proceedings when comparing the radio needs of respective communities, the Commission has expressly considered the area and population that would gain or lose service from the competing proposals and the availability of other primary service.²⁴ The Commission has also indicated that, in cases where two communities are vying for their first local transmission service, the larger community should obtain the allotment.²⁵ The Commission has consistently interpreted Section 307(b) so as to give priority to full time FM service that can reach a wide audience over a proposed service reaching a much smaller population.

Were, however, the Commission to further amend Section 73.809 and codify its interim processing guidelines under Section 73.807 of its rules, the result would be a less efficient and less equitable distribution of radio services, as populations close to LPFM transmitters could be precluded from receiving any subsequently-authorized full-time FM radio service, even from first full-time aural

²³ FM Channel Policies/Procedures, *Second Report and Order*, 90 FCC 2d 88, 90-93 (1982); *recon. denied*, 56 RR 2d 448 (1984). These priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters. Priorities two and three are co-equal.

²⁴ In the Matter of Implementation of Section 309(j) of the Communications Act, *First Report and Order*, 63 Fed. Reg. 48615 (1993) at fn. 109 (*citing Elija Broadcasting Corporation*, 2 FCC Rcd 4468 (ALJ)).

²⁵ *Id.* at 13.

or first local services. Further reductions in interference protection for subsequently-authorized full power FM service could deny thousands of listeners the benefits of FM station upgrades or new FM service, including emergency information and HD Radio™ digital broadcasting. They would also be denied access to emergency services.

Moreover, affording priority to LPFM stations over any full power FM stations is contrary to the basic characteristics of a *secondary* service. The Commission has consistently concluded that “secondary operations,” such as low power television stations, “must give way to *new* operations by primary users of the spectrum.”²⁶ The Commission carefully considered the appropriate status of LPFM when the service was established, and it cannot reverse its decision without due consideration and explanation on a full record. The *Further Notice* is an attempt, for some instances, to effectuate a de-facto primary status to LPFM stations without due consideration. The Commission simply states that “it is appropriate to apply a presumption that the public interest would be better served” by dismissing a community of license application in instances where an LPFM station, facing displacement, can demonstrate it provides at least eight hours per day of locally originated programming. *Further Notice* at ¶ 68. The Commission, however, fails to give any justification for this blanket presumption, or fails to take into consideration. The local programming and services that the applicant

²⁶ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7461 (1998) (emphasis added).

full power FM service may provide to the local community. Such failures constitute arbitrary and capricious rulemaking.²⁷

Thus, even if the Commission had the statutory authority to alter Sections 73.807 and 73.809 of its rules to eliminate second- and third-adjacent channel protections for subsequently-authorized FM services (which it does not), the elimination of these protections is contrary to the goals of the Communications Act and well-established Commission policy.

C. Reducing Second And Third Adjacent Channel Protections Would Harm Full Power FM Listeners And Is Contrary To FCC Policy And Precedent.

Not only would granting LPFM priority status be contrary to well-established policy regarding secondary services, it is also contrary to the Commission's goal of maintaining the integrity of the FM radio service. Here, the Commission has noted that that actual interference to new FM stations from existing LPFM stations is predicted to occur, particularly "in the immediate vicinity of the LPFM station transmitter site." *Further Notice* at ¶ 63. That interference, moreover, could be significant.

Pursuant to the passage of the *RBPA*, the FCC commissioned MITRE to study the effects of relaxing third adjacent channel protections.²⁸ MITRE

²⁷ See, e.g., *ALLTELL Corp. v. FCC*, 838 F.2d 551, 560 (D.C. Circ. 1988) (court found FCC rule affecting local exchange carriers to be arbitrary and capricious due to the lack of showings by agency that the rule actually addressed a real problem.) Indeed, assuming that the programming provided by LPFM stations is inherently preferable or superior to the programming and services, including local programming, provided by full power FM stations is not only arbitrary and capricious but may also implicate First Amendment concerns.

specifically found that “[n]umerous significant degradation cases were identified at distances less than 240 meters [from the LPFM transmitter site], and especially at distances less than 100 meters and that significant degradation could occur at *somewhat larger distances in certain unfavorable circumstances.* .

. .”²⁹ With due caution noting that MITRE’s interference testing was incomplete,³⁰ the FCC-commissioned field test nevertheless demonstrates that LPFM service without adequate third-adjacent channel protection will create new and actual interference to full power FM stations.

Full power FM listeners located within these distances to the LPFM transmitter will experience harmful interference. And because the *MITRE Report* did not even contemplate relaxing second-adjacent channel protections, additional listeners and full power FM stations could also be adversely affected. Adoption of the Commission’s proposal to allow short-spacing between full power FM and LPFM stations would therefore mean that subsequently-authorized full power FM radio service would receive harmful interference within

²⁸ MITRE Corporation’s Technical Report, Experimental Measurements of the Third-Adjacent-Channel Impacts of Low-Power FM Stations, *Public Notice*, MM Docket No. 99-25, rel. July 11, 2003 (“*Mitre Report*”).

²⁹ *Mitre Report*, Vol. 1 at 5-1. Also, when MITRE tested an FM translator, it concluded that “where undesired LPFM signals were broadcast from a point within the main beam of the Owatonna translator receiver and 447 meters away, numerous cases of significant degradation were noted when the LPFM ERP was 7 dBu or more.” *Id.* at 5-2.

³⁰ For a full discussion of the *Mitre Report* see Comments of NAB, MM Docket No. 99-25, filed Oct. 14, 2003.

its protected contours, affecting potentially thousands of listeners within well-populated or growing-populated areas.

In fact, when initially authorizing LPFM service, the Commission “retain[ed] 2nd-adjacent channel protection requirements” due to this higher “risk of interference from LPFM signals on 2nd adjacent channels.”³¹ Now, the Commission is changing course, cutting back on these very same second-adjacent channel protections despite the risks of interference and damage to the integrity of the FM band. The Commission has not shown the requisite reasoned basis for this change in policy.³²

Indeed, in authorizing LPFM service, the Commission articulated an additional and sound policy for retaining these distance separations, including second channel adjacent protections: “LPFM stations, with their much smaller service areas and fewer service regulations, should not prevent FM stations from modifying or upgrading their facilities, nor should they preclude opportunities for new full-service stations.”³³ The Commission has thus explicitly recognized that the public benefits from the licensing of full power FM stations capable of serving a much wider audience. Similarly, the Commission has recognized the balance between fostering LPFM service and “our responsibility both to maintain the

³¹ *LPFM Order* at ¶ 104.

³² See, e.g., *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). See also *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that the FCC had failed to establish “the requisite ‘reasoned basis’ for altering its long-established policy” on certain television commercial limits).

³³ *LPFM Order* at ¶ 62.

integrity of existing FM service and to allow for its expansion to better serve the public.”³⁴ And in its 2006 FM Allocation Order, the Commission facilitated this expansion by amending its regulations to allow a change of community of license to be filed as a minor modification.³⁵ In that proceeding the Commission explicitly recognized the value of full service FM radio, noting “local radio transmission service retains an important role in the lives of many communities, especially smaller and more isolated communities.” *Id.* at ¶ 32. NAB agrees and urges the Commission to refrain from departing from prior Commission precedent by disfavoring full service FM as proposed in this proceeding.³⁶

III. There Is No Demonstrated Need For A Change In Priority Status Between LPFM Stations And FM Translators

The *Further Notice* requests comment on “whether, and if so, under what conditions LPFM applications should be treated as having ‘primary’ status to prior-filed FM translator applications.” *Further Notice* at ¶ 84. As discussed below, the current balance between these two secondary services is appropriate. There is no basis for any presumption that LPFM stations better serve their communities and therefore are entitled to greater status over any class of FM translators. Rather, affording greater regulatory status to LPFM stations will

³⁴ *LPFM Order On Reconsideration* at ¶ 28.

³⁵ See *In the Matter of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, Report and Order*, MB Docket No. 05-210 (rel. Nov. 29, 2006).

³⁶ For these same reasons, we respectfully disagree with the Commission’s proposal to use contour methodology for LPFM stations. See *Further Notice* at ¶ 82.

greatly harm full power FM radio service, particularly for those stations that rely on a series of translators to deliver programming.

A. The Commission Has Already Struck An Appropriate Balance Between FM Translators And LPFM Stations.

The Commission's rules state that both FM translators and LPFM stations have a secondary status to existing full power stations.³⁷ There are, however, differences as to how FM translators and LPFM stations are required to protect full power FM stations. For example, translators licensed before June 1, 1991, that would cause predicted interference are not required to cease operation unless actual interference is found.³⁸ FM translators also have an exception so that if the licensee can demonstrate any overlap in protected contours covers unpopulated areas or "white areas," the translator is permitted to continue operating.³⁹ Yet FM translators are required to protect a "regularly used" full service signal, which may extend beyond a full power FM station's protected contour.⁴⁰

³⁷ See *LPFM Order* at ¶ 61. See also 47 C.F.R. §§ 73.809 and 74.1203.

³⁸ See 47 C.F.R. § 74.1204(j).

³⁹ *1990 FM Translator Order* at ¶ 128; In Re Application of Living Way Ministries, Inc., for a Construction Permit for a New Noncommercial Educational FM Translator Station on Channel 220 at Sun Valley, California, *Memorandum Opinion and Order*, 17 FCC Rcd 17054 (2002).

⁴⁰ *Id.*; FM Translator Stations, *Memorandum Opinion and Order*, MM Docket No. 88-140 (1993) at ¶ 41.

Conversely, LPFM stations are only required to protect full-service stations if interference is within the full service station's 70 dBu principal community contour and not beyond it.⁴¹ And whereas a translator must go dark if it interferes with a subsequent modification of a full power station,⁴² an LPFM station is allowed to remain on the air as long as it is not interfering with the full-service station's community of license and merely accepts interference from the full power station.⁴³

The Commission has stated "we do not feel it is necessary for both services to have identical interference protection requirements," and has concluded that its "rules place LPFM stations and FM translators on essentially equal footing in providing reciprocal interference protection."⁴⁴ NAB agrees. Although the Commission has previously solicited comment on the relationship between translators and LPFM,⁴⁵ it has thus far declined to grant priority status to one service over the other,⁴⁶ and has requested further information in the instant proceeding.

⁴¹ *LPFM Order on Reconsideration* at ¶ 30.

⁴² *1990 FM Translator Order* at ¶ 130.

⁴³ *LPFM Order* at ¶ 66.

⁴⁴ *LPFM Order on Reconsideration* at ¶¶ 30, 39.

⁴⁵ In the Matter of Creation of Low Power Radio Service, *Notice of Proposed Rulemaking*, MM Docket No. 99-25, 14 FCC Rcd 2471, ¶ 33 (1999); In the Matter of Broadcast Localism, *Notice of Inquiry*, MM Docket No. 04-233, 19 FCC Rcd 12425 (2004) at ¶ 45 ("*Localism NOI*").

⁴⁶ *LPFM Report and Order* at ¶ 62; *LPFM Order on Reconsideration* at ¶ 30.

The rules currently provide that both translator and LPFM applications are required to protect translator and LPFM authorizations and prior-filed translator and LPFM applications.⁴⁷ The current rules also comport with the Commission's long-standing practice across various services of "first come, first served" application processing.⁴⁸ In fact, the Commission expressly declined to depart from "first come, first serve" in the LPTV and TV translator context, concluding "that the public interest will be served by the processing of all applications and not choosing one group of applicants to favor over another."⁴⁹

In accordance with well-established "first come, first served" procedures, FM translator applications filed pursuant to the 2003 window must protect LPFM applications filed pursuant to the 2000-2001 windows. NAB submits that this is a reasonable and appropriate balance between the two secondary services and without a specific public interest reason for altering the relationship, the Commission should not change it.

⁴⁷ *Id.*

⁴⁸ In 1985, the Commission moved from a "cutoff date" policy to the application of a filing window and subsequent "first-come, first-serve" process. See *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). The Commission subsequently extended "first come, first serve" processing to improve the efficiency of processing minor change broadcast applications. See *In the Matter of 1998 Biennial Regulatory Review, First Report and Order*, MM Docket No. 98-93, 14 FCC Rcd 5272 (1999). "First come, first served" was recently reaffirmed in the satellite context. See *2000 Biennial Regulatory Review for Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network*, 17 FCC Rcd 3847 (2002) (adopting first-come, first-serve process without a filing window because of a lack of a satellite Table of Allotments).

⁴⁹ *In the Matter of Low Power Television And Television Translator Service, Report and Order*, MM Docket No. 83-1350, 102 FCC 2d 295, 303 (1984).

B. Full Power FM Broadcasters Provide Community-Responsive Programming.

Were the Commission to alter this carefully crafted balance, it must provide a reasoned analysis for doing so. Although NAB recognizes that “[r]egulatory agencies do not establish rules . . . to last forever,”⁵⁰ the courts have required “an agency changing its course . . . to supply a reasoned analysis for the change beyond that which may required when an agency does not act in the first instance.”⁵¹

The Commission has posited that a change in status between FM translators and LPFM applications may be warranted because such a measure could advance the goals of “[l]ocalism, diversity and competition.” *Further Notice* at ¶ 84.⁵² There is no specific evidence, however, that granting priority status to LPFM applications over FM translators will, in any measure, enhance localism or better serve communities, let alone promote competition. It is axiomatic that any Commission policy must be supported by a sufficient factual record.⁵³ And while it may be true that many LPFM stations provide good service to their communities, as noted herein, FM translators also bring important information to

⁵⁰ *American Trucking Association v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967).

⁵¹ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). See also *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

⁵² See also *Localism NOI*, 19 FCC Rcd at 12442.

⁵³ See, e.g., *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (court rejected restrictions on cellular providers’ participation in certain auctions as arbitrary because Commission failed to factually support the rules).

underserved areas. The Commission may not properly ignore this fact, or arbitrarily favor the programming offered by LPFM stations to the diverse programming and services offered via FM translators.

The Commission has ample evidence of the importance of FM translators in both the above captioned-docket and the Commission's localism proceeding.⁵⁴ This broad array of programming meeting the needs of communities, when carried over FM translators, also "enhances" localism, diversity and competition for rural and terrain-challenged communities with limited radio service offerings. Indeed, all radio stations must study and react to the needs and interests of their local communities as a matter of survival in a competitive marketplace.⁵⁵

Beyond providing a wide array of programming, full power radio broadcasters are committed to serving their local communities in other tangible ways. In 2005, the average radio station aired 169 Public Service Announcements ("PSAs"), and combined value with television stations of over \$10.3 billion in donated airtime. 61% of these PSAs pertained to local

⁵⁴ See In the Matter of Broadcast Localism, *Reply Comments of NAB*, MM Docket No. 04-233 (Jan. 3, 2005). In that proceeding, parties representing at least 2,254 radio licensees submitted information on the amount and variety of locally-relevant programming they deliver, the valuable coverage that broadcasters devote to politics and civic discourse, as well as their efforts to ascertain the needs and interests of their local communities.

⁵⁵ As the Commission recognized over a quarter century ago, radio stations present programming that serves "the wants and needs of the public," including news and other informational programming, in "response to market forces." *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 978, 1023 (1981) ("*Radio Deregulation Order*"). In fact, the Commission determined that "marketplace and competitive forces are *more likely* to [result in community-responsive programming] than are regulatory guidelines and procedures." *Id.* at 1023 (emphasis added).

community issues.⁵⁶ Among radio stations that raise funds for charities, charitable causes and needy individuals, the average raised per station was \$94,299, totaling over \$959 million.⁵⁷

Moreover, full power broadcasters' support of community organizations is unique. When a radio station partners with a charitable or community organization, the station not only provides dollars (like other corporate partners), but also a public voice for those organizations. Through their on-air and off-air efforts, a broadcaster can help organizations present themselves directly to local citizens, to raise their public profile in a unique way, and to cement their connections within local communities, thereby "enhancing localism." A broadcaster can help community and non-profit organizations better leverage their fund raising resources and expertise, their public awareness and their educational efforts.⁵⁸ As explained by one radio broadcaster at the FCC's localism hearing in San Antonio:

⁵⁶ See *National Report on Local Broadcasters' Community Service*, found at http://www.broadcastpublicservice.org/Reports/2006_Report.pdf. These figures do not include a wide variety of off-air community service of broadcasters (such as time value of station personnel's participation in community events) or the investments that stations make in producing PSAs, radiothons and telethons, the production costs of news and public affairs programming, or the value of airtime donated for coverage of breaking emergencies. *Id.* at 2 and 5.

⁵⁷ *Id.* at 7.

⁵⁸ In this light, NAB strongly disagrees with those who dismiss a broadcaster's involvement with a local charity or organization as no more valuable than the contributions of other types of corporations. See, e.g., Harry A. Jessell, *Stations' Good Deeds Worth \$9.6 Billion*, *Broadcasting & Cable* (June 14, 2004) (quoting Andrew Schwartzman of the Media Access Project: "It's no different than what Giant supermarket does in conjunction with Toys for Tots").

The most important contributions that broadcasters make to their community has very little to do with money. We raise the level of awareness, discussion and education in our communities. And we give a voice to the local organizations, groups and individual citizens.⁵⁹

Radio broadcasters are also directly involved in their local communities' efforts relating to abducted children and emergency preparedness. The AMBER Plan is a voluntary partnership between law-enforcement agencies and broadcasters to activate an urgent bulletin in the most serious child-abduction cases. Today there are 120 local, regional and statewide AMBER Plans across the nation. Since the program began in 1997 in the Dallas, Texas area, the AMBER Plan has been credited with successfully returning 393 children.⁶⁰ NAB and its member stations have also partnered with the American Legacy Foundation on lung cancer detection and prevention, including distributions of guidebooks, billboards, documentaries, earned media placement and PSAs.⁶¹ Additionally, broadcasters have partnered with the U.S. Substance Abuse and Mental Health Services Administration to help broadcasters address alcohol and drug addiction in their local communities.⁶² These are just a sample of the numerous, on-going efforts that all broadcasters make to produce and deliver

⁵⁹ FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry T. Hanszen at 3 (Jan. 28, 2004).

⁶⁰ <http://www.ncmec.org/missingkids> (last visited April 7, 2008).

⁶¹ See Code Blue for Lung Cancer, A Broadcaster's Guide To Help Prevent the nation's Number-One Cancer Killer, at www.nab.org/publicservice/CodeBlueforLungCancer.

⁶² See Join the Voices for Recover, A Broadcaster's Guide to Address Alcohol & Drug Additions, at www.nab.org/publicservice/JointheVoices.

informational, community-responsive programming and other services that meet the needs and interests of their local audiences. Full power FM broadcasters, by the very terms of their licenses, “enhance localism.” FM translators are an integral part to delivering this community-responsive programming, including emergency information.

C. FM Translators Are Critical For The Delivery Of Community-Responsive Programming.

In rural and terrain-challenged areas, fill-in translators are crucial for delivering community-responsive programming to listeners. High mountainous terrain, particularly in the West, blocks radio signals within the 60 dBu contour. Moreover, short-spacing rules prohibit the grant of additional FM allotments in mountainous areas. Thus, without fill-in FM translators, many small towns would not receive any broadcast signals at all. For example:

- KOZT-FM 95.3 MHz, Fort Bragg, CA, uses two translators to reach its community. For seventeen years, KOZT-FM has prided itself on being local. Locally owned, locally programmed, KOZT-FM focuses on community service and programming of interest and value to Mendocino County. KOZT-FM is the only coastal station offering daily local newscasts, critical in this rural area without daily newspapers or local television news.

In 2007, KOZT-FM helped local nonprofit organizations raise over \$1,500,000 through donated airtime, sponsorships and remote broadcasts. KOZT-FM also spearheaded dozens of community service efforts, including disaster preparedness events throughout their service area. Their interactive ‘800-39-COAST’ line was used over 57,000 times for community information and their community service Web site was accessed 3,635,276 times as well. KOZT-FM stayed on the air throughout 2007’s intense winter storms in the area, broadcasting regular updates from emergency crews and city and county officials on floods, road closures, and power outages affecting thousands for days at a time.

KOZT-FM is a five time NAB Crystal Radio Award and six time NAB Marconi Radio Award finalist. KOZT-FM also received the coveted *Rock Station of the Year* award in 2002 and an NAM Crystal in 2003 and 2006.

- KRSP-FM, 103.5 MHz, Salt Lake City, UT. KRSP-FM also broadcasts from three FM translators. KRSP-FM has been playing great rock and roll in Utah for 39 years and is an important part of the community. In 2007, KRSP-FM staff donated 1,248 volunteer hours to the community. 5,000 Harley riders joined the “KRSP/MDA Ride for a Cure,” raising \$195,000 for local MDA chapters. Because of the efforts, Utah kids with muscular dystrophy were able to go to camp. For 17 years, KRSP-FM and M.A.D.D. have worked together to put a cork in impaired driving. At the KRSP’s 13th annual holiday broadcast at the Road Home Homeless Shelter, listeners donated \$54,405 giving a “hand up” to families in need. On air and online, KRSP-FM donated \$1,852,895 in airtime.
- KSFI-FM, 100.3 MHz, Salt Lake City, UT, relies on a series of 26 FM translators to serve communities in Utah, Idaho and Nevada. In 2007, KSFI-FM continued its dominance as Utah’s #1 adult music station. KSFI-FM also stood steadfastly to this line from their mission statement: “Our communities are better because we get involved and make a difference.”

Last year, KSFI-FM allocated more than \$2.5 million worth of programming to public affairs content and sponsored over 18 community events. They were proud to once again be the exclusive radio partner for many civic events including the Susan G. Kormen Race for the Cure, resulting in over 16,000 participants. Together, KSFI-FM teammates donated more than 1,609 personal hours of community service.

- WGIR-FM 100.7 MHz, Manchester, NH, also uses an FM translator to reach its listeners. WGIR-FM spent 2007, as it does every year, focused on community involvement. The station raised a record breaking \$225,000+ through its fund raising efforts and live broadcasts. Its 17th *Annual Lend-A-Helping-Can Radiothon* is of particular community interest, as the promotion itself serves 11 different charities in New Hampshire. WGIR-FM is also part of *The New Hampshire Walk for Autism Research*, *United We Stand*, *Together We Ride* benefiting Cystic Fibrosis, as well as many other charitable events.

WGIR-FM’s dedication to the community has also brought a new level of service to their weekly program, “Rock 101 Local Access.” This program broadcasts what is happening in the local area ranging in topics from the political realm to local charities and pledge drives. “Rock 101 Local Access,” focused largely on the New Hampshire Presidential Primary in 2007, devoting 440 minutes to the race alone. Finally of note, long-time program director Chris “Doc” Garnett, was

honored in 2007 by the New England Chapter of The Cystic Fibrosis Foundation for his outstanding dedication since 1992.⁶³

Beyond adversely affecting an FM station's ability to reach listeners in many parts of the country, a change in priority status could be disruptive to the goal of allowing AM stations use of FM translators to better serve their local communities. Indeed, in recognizing the valuable community-responsive service provided by AM radio stations, the Commission has wisely proposed to grant AM stations the right to operate FM translators. See *In the Matter of Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, Notice of Proposed Rulemaking*, MB Docket No. 07-172 (rel. Aug. 15, 2007). In fact, the Commission's limited granting (via the waiver process) of AM station's request to use FM translators has *increased local programming* offered to listeners. For example:

- WHVO-AM in Hopkinsville, KY was recently granted an FM translator, and it has provided the station numerous additional opportunities to serve their community.

Having the ability to broadcast at night and on the FM dial led the station's management team to commit to broadcasting a MINIMUM of 100 ADDITIONAL local programs this year. In addition to the local events carried by the station, it will double the number of baseball and softball games carried in 2007. It is because of the FM translator that the station has night time power to cover the entire listening area. Prior to the translator, the station was very hesitant to carry night time programming because it would not even cover the city limits of its city of license.

Last year, WVHO broadcast the Fort Campbell High School football games. Fort Campbell is the home of the 101st Airborne Division and so the broadcasts, which were tailored for on-line streaming, were important for soldiers serving our country away from home. Thousands of soldiers gathered around computers in Iraq (and other countries) to listen to the games although it was 4 a.m. when their

⁶³ These examples are in addition to those previously included in the record. See, *In the Matter of Creation of a Low Power Radio Service, Comments of NAB*, MM Docket No. 99-25, at pp. 22-24 (Aug. 22, 2005).

home team played. The Falcons won the 2A State Tournament as a Cinderella team. Their coach gives credit to the fact that the players were on the air and supported by friends and family from all over the world. This year, the defending State Champions can be heard by their friends and neighbors at home too with the night time power provided via the translator. Prior to this past season, Fort Campbell's games were not broadcast on a local radio station for more than a decade.

On February 5th, a tornado struck Christian County. WVHO's sister station, WKDZ-FM, which also serves that county but is not licensed to it, lost power. WKDZ-AM signs off at night. WHVO was at reduced power because it was at night, limiting its coverage to less than the city limits of Hopkinsville. WVHO broadcast continuously for 5 ½ hours at 24 watts, trying to provide extensive weather warnings and information. With the FM translator, the station will be able to provide listeners with continuous, in-depth weather coverage at night just as it does in the middle of the day. In 2 years, the station has had 3 tornadoes in its listening area, all at night.

Thus, as a matter of policy, the ability to use FM translators enhance local service for both FM and AM stations, should not be impeded.

Beyond the examples above, many translators are also owned by local municipalities, which select the FM stations that best serve their communities. This use of FM translators by municipalities is inherently local. For instance, numerous communities in rural Utah are served by FM translators owned by counties or other local entities. At the request of their residents, a number of municipalities have brought in FM service from the state capital of Salt Lake City. Thus, FM translators are a lifeline for delivering free-over-the-air broadcast signals to many communities that might not otherwise receive full power FM broadcast service.

Programming aired via FM translators need not be locally produced to be highly relevant to a broadcaster's local community. The Commission itself has long held that programming does not have to be originated locally to qualify as "issue-responsive" for

purposes of a licensee's public service obligations⁶⁴ 'The D.C. Circuit endorsed this view when it decided, over the specific objections of several parties, that Section 307(b) requires only that the Commission act to ensure a fair, efficient, and equitable distribution of radio service throughout the country," and that "as long as the Commission requires licensees to provide programming – *whatever its source* – that is responsive to their communities, § 307(b) is satisfied."⁶⁵ In sum, the "premise that local needs can only be met through local programming produced by a local station has not only been rejected" in numerous FCC decisions, the Commission has unequivocally declared that "it lacks presumptive validity."⁶⁶

It is, moreover, both realistic and appropriate to treat programming as locally relevant, even though it may be produced elsewhere. News and public affairs programming of importance to the entire nation also can be important to the citizens of a

⁶⁴. See, e.g., *Localism Notice of Inquiry* at 12431 (*citing* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Memorandum Opinion and Order*, 104 FCC 2d 357, 366 (1986)).

⁶⁵ *Office of Communications of the United Church of Christ v. FCC, et al.*, 707 F.2d 1413, 1430 n.54 (D.C. Cir. 1983) *citing* *Loyola University v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982).

⁶⁶ See *In re Application of WPIX, Inc. For Renewal of License*, 68 FCC 2d 381, 402-03 (1978). Prior FCC precedent cited in this decision included: *In re Application of WHEC, Inc. For Renewal of License*, 52 FCC 2d 1079, 1085 (1978) (in which the FCC rejected allegation that network programming is unresponsive to local community needs, stating that the "key is responsiveness to those needs and not necessarily the original source of the broadcast matter") and *In re Application of Westinghouse Broadcasting, Inc. For Renewal of License*, 48 FCC Rcd 1123, 1131 (1974) (in which the FCC rejected arguments that "minority needs can only be served by locally produced programming.").

particular community. For example, one cannot contend that programming concerning terrorism or the war in Iraq is unimportant to local communities. Given all these and additional types of community-responsive programming provided to listeners by full power FM stations via translators, NAB submits that it would be arbitrary and capricious for the Commission to establish rules favoring LPFM stations over FM translators based on a premise that is neither consistent with reality or agency policy.

D. Granting Primary Status To LPFM Stations Will Greatly Harm Full Power FM Radio Service, Particularly For Series Translators.

Allowing LPFM stations primary status could greatly harm existing service to areas that may otherwise be unserved. In particular, should an LPFM station be allowed to displace one translator that operates as one station in a series, as is the case with many public radio networks and western areas, such as KSFI-FM, in Salt Lake, the entire series can be wiped out in one swoop. Existing stations must rely on translators, including series of translators, in rocky terrains and sparsely populated areas, to serve not only their communities, but underserved populations.

Individuals in these areas depend on these translators and should not be deprived of service either by an LPFM station being allocated to that same frequency or by a translator being knocked out near the beginning of a chain, resulting in no service down the line. As the Commission has recognized, “the rules permit translators to rebroadcast any programming broadcast by a primary FM station, thereby affording translators an opportunity to import programming

formats otherwise unavailable”⁶⁷ and increasing diversity and competition in local radio markets. Thus, *at a minimum*, existing translators (including construction permit authorizations) must be protected to ensure that vital service is not interfered with, interrupted or eliminated. This would be wholly consistent with Commission precedent recognizing that “the public has a legitimate expectation that existing service will continue.”⁶⁸

IV. Conclusion.

As explained above, the Commission is statutorily prohibited from further altering the FM distance separation requirements set forth by Congress in 2000. Thus, it may not modify its rules to eliminate channel interference protection requirements for existing LPFM stations, including the waiver of co-adjacent, first-adjacent or second-adjacent channel protections.

In lieu of more radical proposed measures that would allow significant interference to full power FM signals, NAB urges Commission to focus on constructive means by which an operating LPFM station displaced by new or upgraded full power FM service can be relocated *without creating harmful*

⁶⁷ In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, *Memorandum Opinion and Order*, 8 FCC Rcd 16 (1993) at ¶ 28; *see also 1990 FM Translator Order* at ¶ 49.

⁶⁸ In the Matter of Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify A New Community of License, *Memorandum Opinion and Order*, 5 FCC Rcd 24 (1993) at ¶ 19. The FCC went onto state that “the potential for future service at some unspecified future date is a poor substitute for the signal of an operating station that can accessed today by simply turning on ...a radio set.” *Id.* *See also In re Application of Huron Shores Broadcasting Corp.*, 53 FCC 2d 216, 217 (1975) (in which the FCC stated it would disfavor modifications to a broadcast station facility where the population presently served would lose service).

interference. Given the limited number of potentially displaced LPFM stations, it is appropriate the continuation of voluntary engineering and/or financial assistance from full power FM stations is entirely appropriate. Finally, the Commission also should not alter the regulatory priority status between LPFM stations and FM translators, because it has not demonstrated that LPFM stations enhance localism, diversity and competition more effectively, and therefore, as a matter of policy, are entitled to primary status. Rather, granting primary status to LPFM stations over FM translators could lead to serious disruption of full power FM service, particularly to populations that rely on a relay of FM translators to receive their FM programming.

Respectfully submitted,

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