

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Creation of a Low Power Radio Service)	MM Docket No. 99-25
)	

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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TABLE OF CONTENTS

Executive Summary	i
I. Background	1
II. Waivers of the Second-Adjacent Channel Spacing Requirements Should be Granted Only in Very Limited Circumstances.	4
A. The LCRA Generally Prohibits LPFM Operations on Second-Adjacent Channels	5
B. LPFM Operations on Second-Adjacent Channels May Degrade the Audio Quality of FM Service	8
III. Conclusion	12

EXECUTIVE SUMMARY

The Local Community Radio Act (“LCRA”) balances the dual goals of providing opportunities for low power FM (“LPFM”) services while preserving the audio quality of full-service commercial and non-commercial FM stations (“FM stations”). The LCRA reflects the work of NAB and the broadcasting industry with Congress and LPFM advocates to craft legislation that reasonably balances the needs of both LPFM and FM radio stations. It also reflects our common understanding that both LPFM and full-power FM stations serve the public interest.

While the LCRA eliminates third-adjacent channel minimum distance requirements between LPFM and FM stations, which will expand LPFM licensing, it also reaffirms the interference protections of full-power stations by prohibiting any changes to the current second-adjacent requirements. The LCRA permits waivers of these latter requirements, but only under strictly defined limited conditions. NAB submits that such waivers should be granted only under extremely limited circumstances.

Both the plain language and structure of the LCRA support a strict approach to consideration of second-adjacent channel waiver requests, especially in light of the unambiguous mandate that LPFM stations receiving such waivers “will not result in interference to any authorized radio service.” The stringent remediation and automatic shutdown procedures for interfering LPFM stations on second-adjacent channels further demonstrate Congress’ intent to protect full-power stations from undesired interference.

Second-adjacent channel waivers must be rare so as to preserve listeners’ expectations of clear, crisp sound quality from local FM radio stations. Despite an increasingly crowded market for audio services, approximately 241 million people listen

to over-the-air radio every week, and broadcast radio reaches more than 93 percent of persons aged 12+ each week.

When it opens a filing window, the Commission is likely to receive many applications for LPFM stations, with a substantial number seeking waivers of the second-adjacent channel spacing rules. Because LPFM applicants are typically small entities that may lack broadcast experience and technical expertise, the Commission may well receive a number of waiver requests that do not comply with the Commission's rules and the LCRA's standards. The Commission will need to be prepared to address waiver requests that are facially deficient as a technical matter and others that, after grant, result in LPFM interference to FM stations.

Dealing with LPFM operations on second-adjacent channels that ultimately cause interference to FM services will not be a simple task. The LCRA mandates that interfering LPFM stations must immediately cease operations upon notification from the Commission, which will cause confusion, dismay and financial concern among an LPFM station's listeners and supporters. And, given the lack of resources and limited experience of many LPFM operators, it will be challenging for LPFM stations to resume operations by making the technical modifications necessary to eliminate the harmful interference.

For all these reasons, the Commission should carefully consider all second-adjacent channel waiver requests and should grant waivers only in truly unusual circumstances.

legislation that would reasonably balance the needs of both LPFM and FM radio stations.⁴ NAB provided legislators with technical expertise and information about the impact of various legislative options on FM radio and our listeners.⁵ The provisions of the LCRA reflect that input.

The LCRA also reflects our common understanding that both LPFM and full-power FM stations serve the public interest.⁶ Many LPFM licensees are dedicated to bringing niche news or entertainment programming to their immediate neighbors. Full-power broadcasters recognize the value that LPFM can bring. Indeed, it is commonplace for full-service FM and LPFM stations to work together to resolve engineering and other operational issues.

It is important that full-service FM and LPFM stations work together since full-power FM stations are the primary audio source for local news and information, political discourse, music and other entertainment. Despite difficult economic conditions, and more alternatives for consumers' attention, FM stations produce and provide many hours of live, local programming, including news and information, every day, along with national news and public interest programming.⁷ Previous studies have shown that those who listened to news and to discussions about campaigns on the radio showed greater interest in political campaigns and were more likely to hold specific opinions on

⁴ Michi Eyre, REC Networks, *US House Passes 2010 Local Community Radio Act with NAB Compromise* (Dec. 17, 2010), available at <http://home.recnet.com/node/231>.

⁵ Representative Mike Doyle, lead co-sponsor of the LCRA, stated: "I would defend the National Association of Broadcasters because during this process they did have some very technical concerns." 157 Cong. Rec. H8622 (daily ed. Dec. 17, 2010) (Statement of Rep. Doyle).

⁶ See, e.g., Comments of the National Association of Broadcasters, Creation of Low Power Radio Service, MM Docket No. 99-02, at 3 (Apr. 22, 2005).

⁷ See, e.g., NAB Reply Comments in MB Docket No. 04-233, at 7-27 (filed June 11, 2008) (summarizing record in the Commission's localism proceeding).

political issues and to be more aware of candidates' positions on policy issues.⁸ And, as the Commission's Future of Media Report recognized, the importance of radio to the public discourse has heightened even more in recent years with the rise of all news/talk formats.⁹

Moreover, FM radio has a long history of involvement in their local communities' efforts relating to emergency preparedness. Radio stations frequently help to protect lives and property during severe weather conditions and other natural disasters. Broadcasters embrace their role as "first informers" during times of emergency. Federal Emergency Management Agency Chief Administrator Craig Fugate recognized broadcasters' unique role when he instructed Americans to turn to their local radio stations for critical information as Hurricane Irene approached the East Coast last year.¹⁰ Radio stations took similar measures to assist listeners during the rash of tornadoes that have devastated the nation's mid-section the past few years, the floods in North Dakota in 2011, storms in Massachusetts also in 2011, and numerous other emergency situations.¹¹ In addition, radio stations are active partners with law-

⁸ D. Drew and D. Weaver, "Voter Learning in the 2004 Presidential Election: Did the Media Matter?," 83 *Journalism & Mass Communication Quarterly* 25, 38 (Spring 2006); S. Kim, D. Scheufele and J. Shanahan, "Who Cares About the Issues? Issue Voting and the Role of News Media During the 2000 U.S. Presidential Election," *Journal of Communication* 103, 11-12 (March 2005).

⁹ *The Information Needs of Communities*, Report, Federal Communications Commission, at 66 (July 2011), available at <http://www.fcc.gov/info-needs-communities#download> ("Future of Media Report") (noting that news/talk radio serves an important function in a democracy by giving voice to millions who use the medium to express their opinions).

¹⁰ See <http://www.cnn.com/video/#/video/bestoftv/2011/08/25/exp.am.craig.fugate.cnn>.

¹¹ Ann Marie Cummings, *Broadcasters: America's "First Informers,"* National Association of Broadcasters (Jan. 31, 2012), available at <http://nabroadcasters.wordpress.com/2012/01/31/broadcasters-americas-first-informers/>.

enforcement agencies in the more than 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 572 abducted children.¹²

Beyond providing a wide array of programming, radio stations are committed to serving their local communities in other tangible ways. The average radio station airs hundreds of Public Service Announcements each year, the majority of which pertain to local community issues, and provide critical support for the fundraising efforts of local charities, emergency recovery projects, and other community organizations.¹³

II. Waivers of the Second-Adjacent Channel Spacing Requirements Should be Granted Only in Very Limited Circumstances

In the LCRA, Congress took a balanced approach, providing opportunities for LPFM services while safeguarding FM services from interference. While the Act eliminated third-adjacent minimum distance separations between LPFM and FM stations,¹⁴ which will allow the licensing of numerous new LPFM stations,¹⁵ it also reaffirmed the interference protections of full-power stations by prohibiting any changes to the current second-adjacent channel minimum distance separation requirements.¹⁶

¹² <http://www.ncmec.org/missingkids> (last visited May 1, 2012).

¹³ See, e.g., Comments of Cox Radio, Inc., MM Docket No. 99-25, 3 (Apr. 7, 2008) (Cox stations supports local hospitals, and work with local emergency operation centers during weather emergencies); Comments of NAB, Creation of Low Power Radio Service, MM Docket No. 99-25, at 22-25 (Apr. 7, 2008).

¹⁴ LCRA, § 3(a).

¹⁵ See Timothy Karr, Campaign Director, Free Press, *The Little Bill That Could* (Dec. 19, 2010), available at http://www.huffingtonpost.com/timothy-karr/the-little-bill-that-coul_b_798768.html.

¹⁶ LCRA, § 3(b)(1) (also barring the Commission from reducing the minimum distance separation requirements for co-channel and first-adjacent channels).

These third- and second- adjacent channel provisions are closely linked¹⁷ and must be implemented consistent with both the letter and spirit of the statute.

A. The LCRA Generally Prohibits LPFM Operations on Second-Adjacent Channels

The Commission seeks comment on how to implement Section 3(b)(2)(A) of the LCRA, which permits the Commission to waive the second-adjacent channel spacing requirements under certain conditions.¹⁸ NAB submits that such waivers should be granted only under extremely limited circumstances and in very rare instances.¹⁹

The plain language and structure of the LCRA demonstrate that Congress intended to allow LPFM stations to operate on third-adjacent channels, but in general, no closer on the dial to full-service FM stations. The same section of the Act contains both the provision eliminating the third-adjacent spacing requirements and the prohibition against any future reduction in the co-channel and first- and second-adjacent channel separation standards. The statutory language is clear and mandatory for both provisions.²⁰ The Commission therefore must give full effect to Congress' directive not to reduce the minimum second-adjacent channel distance separations, by waiver or

¹⁷ See Cecilia Kang, *Washington Post*, *Advocates Rejoice as Obama Signs Local Community Radio Act* (Jan. 7, 2011), available at http://voices.washingtonpost.com/posttech/2011/01/advocates_rejoice_as_obama_sig.html.

¹⁸ Notice, at ¶¶ 17-19.

¹⁹ See *Ex Parte* Letter from Rishi Hingoraney, Director of Public Policy & Legislation, NPR, to Marlene H. Dortch, Secretary, Federal Communications Commission, MM Docket No. 99-25 (Feb. 27, 2012).

²⁰ LCRA, § 3 (FCC “shall” eliminate third-adjacent separation requirements and “shall not” reduce minimum co-channel and first- and second-adjacent channel separation requirements).

otherwise.²¹ This approach also is consistent with common sense and the laws of physics, given the much higher risk of interference between services on second-adjacent channels.²²

Given the clarity of the congressional directive to maintain second-adjacent channel separation requirements, the Commission should grant waivers only under truly unusual circumstances.²³ The statutory language supports this narrow reading of the waiver provision, which requires LPFM stations seeking a waiver to establish that their proposed operations “will not result in interference to any authorized radio service.” LCRA, § 3(b)(2). In making this showing, the Act requires LPFM applicants to “tak[e] into account all relevant factors,” including specifically the local terrain. *Id.* The waiver provision uses the unambiguous term “will,” as opposed to some other less precise term, thereby requiring LPFM applicants for second-adjacent channel waivers to provide a clear showing of no interference to other radio services.

²¹ See, e.g., *Connecticut Nat. Bank v. Germain*, 503 U.S. 247, 253-54 (1992) (in interpreting a statute, one “must presume that a legislature says in a statute what it means and means in a statute what it says there”).

²² *Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2209 (2000) (LPFM First R&O).

²³ The Commission has stated that “special circumstances” must be present to demonstrate “good cause” and warrant a waiver of the Commission’s rules; otherwise, the resulting waivers “would swallow the applicable rules.” *Access Charge Reform, Prairiewave Telecommunications, Inc., Petition for Waiver of Sections 61.26(b) or in the Alternative Section 61.26(a)(6) of the Commission’s Rules*, Order, 23 FCC Rcd 2556, 2560-61 (2008). See also *Policarpio & Lourdes Medios, Petition for Waiver & Declaratory Ruling Under 47 C.F.R. § 1.400*, Memorandum Opinion and Order, 25 FCC Rcd 15870, 15872 (2010) (denying request for waiver of the Commission’s Over-the-Air Reception Devices rule because the Petition did “not specify any unusual circumstances as required to justify a waiver,” and grant of the waiver “could lead to piecemeal enforcement of the OTARD rule, thus leading to a situation where waivers would swallow the applicable rule”).

NAB also notes that, rather than permitting the Commission to grant waivers in its discretion under its existing general waiver rule,²⁴ the LCRA set forth the explicit, stringent conditions discussed above for granting a second-adjacent waiver to a prospective LPFM station. Congress could have opted to permit the Commission to grant waivers pursuant to its own discretion, but instead specifically chose to impose a stricter standard. The Commission “must give effect to the unambiguously expressed intent of Congress”²⁵ to maintain the minimum second-adjacent channel distance separation requirements and grant waivers of these requirements only in strictly defined circumstances.²⁶

Finally, NAB observes that even those LPFM stations that are granted a waiver to operate on second-adjacent channels have further obligations to protect FM stations. The LCRA requires that, in the event of a complaint of interference, the Commission must notify the relevant LPFM station within one business day, and the LPFM station must cease operations immediately upon receiving that notification. Complaints of interference may be lodged by any FM station, regardless of their location, and the LPFM station may not resume operations until the interference has been resolved (if it

²⁴ The Commission may waive specific requirements of its rules if it is shown that (a) the underlying purpose of the rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (b) in view of unique or unusual factual circumstances, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

²⁵ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

²⁶ LCRA, § 3(b)(2). The Commission also seeks comment on whether to permit LPFM applicants for a waiver of the second-adjacent channel spacing rules to submit the sort of showing that FM translator applicants submit to establish that no actual interference will occur. Notice, at ¶ 18. NAB submits that this is not a prudent course. Use of the translator standard, as opposed to strict spacing requirements, can lead to over-packing of the FM band, unwanted interference, and the degradation of listeners' experience.

can be). LCRA, § 3(b)(2). These strict remediation requirements further demonstrate Congress' concern that LPFM stations located on second-adjacent channels may cause unacceptable interference to FM stations and that such interference warrants the most stringent remediation remedies.²⁷

B. LPFM Operations on Second-Adjacent Channels May Degrade the Audio Quality of FM Service

The LCRA's lead co-sponsor, Representative Doyle, explicitly recognized that licensees of FM stations had "legitimate concern[s]" that "low power stations might interfere."²⁸ These concerns are valid and reflect Commission precedent. When first authorizing the LPFM service, the Commission repeatedly expressed its determination to preserve the integrity and audio quality of existing FM radio service.²⁹ The Commission retained the second-adjacent channel protection requirements specifically due to the higher risk of interference from LPFM signals on such channels.³⁰ The Commission also stressed that LPFM services should not prevent FM stations from upgrading their facilities or preclude opportunities for new full-power services.³¹ LCRA expressly reaffirmed that "low-power FM stations remain . . . secondary to existing and modified full-power service FM stations." LCRA § 5(3).

²⁷ The Commission additionally seeks comment on its interpretation of the LCRA provisions governing the remediation of interference complaints against LPFM stations on third-adjacent channels. Notice, at ¶¶ 25-39. NAB supports the Commission's view that the LCRA creates two different interference protection and remediation schemes, depending on whether an LPFM station would be short-spaced under the current rules. *Id.* at ¶ 25. The Commission has proposed a reasonable, practical approach to resolving these third-adjacent channel interference complaints.

²⁸ 157 Cong. Rec. H8622 (daily ed. Dec. 17, 2010) (Statement of Rep. Doyle).

²⁹ 47 C.F.R. § 73.809; LPFM First R&O, 15 FCC Rcd at 2229-2233. LPFM stations were designated as secondary because of their much smaller service areas, and also because they are not subject to many of the public interest obligations of FM stations, such as the main studio and public inspection rules. *Id.* at 2231.

³⁰ LPFM First R&O, 15 FCC Rcd at 2246.

³¹ *Id.*, at 2230.

Granting waivers of the second-adjacent channel distance separation rules too freely would undermine the technical integrity of FM service. Most importantly, a more congested FM band would harm audio quality and potentially disrupt the expectations of listeners. According to Arbitron, approximately 241 million persons aged 12 and over listen to radio each week, a number that continues to increase.³² Despite the rise of MP3 players and Internet-only services, broadcast radio reaches more than 93 percent of persons aged 12+ each week and about 91 percent of young listeners aged 12-17, even though teens in this age group are the most accustomed to using new technologies and media platforms. And radio has universal appeal, with more than 93 percent of African Americans and 95 percent of Hispanic persons tuning in to radio each week.³³ Most Americans are in the habit of tuning to their favorite radio station(s) everyday, for national and local news and information, weather, traffic, sports, talk and a wide variety of music.

Interference from LPFM stations on second-adjacent channels could adversely impact many of these radio services listeners enjoy and rely upon during emergencies. To protect the public's interest in interference-free full-service FM radio, the Commission should fully implement the LCRA's general prohibition against introducing new LPFM stations on second-adjacent channels, and only grant waivers of the second-adjacent spacing requirements in very rare situations.

³² *The Infinite Dial 2012, Navigating Digital Platforms*, Study, Arbitron Inc. and Edison Research, available at http://www.arbitron.com/study/digital_radio_study.asp.

³³ *More Than 239 Million Listen to Radio Every Week According to the Arbitron Radar 105 Report*, News Release, Arbitron Inc. (June 15, 2010), available at <http://arbitron.mediaroom.com/index.php?s=43&item=693>.

Press reports indicate that the Commission is likely to receive many applications for LPFM stations.³⁴ Many of those applications likely will include requests for waiver of the second-adjacent channel spacing requirements, including a number that do not comply with the Commission's rules and LCRA's standards. It is important that these waivers be granted only in accordance with the strict statutory standards. LPFM applicants are typically small entities, many of which lack experience in broadcasting and technical expertise. The Commission thus should be prepared to address waiver requests that are facially insufficient as a technical matter and others that, after grant, result in LPFM stations interfering with full service FM stations.

Indeed, Educational Media Foundation ("EMF") has explained that, despite its sophisticated and experienced engineering staff that evaluates translator placements on second-adjacent channels, a significant percentage of EMF's translators must still cease operations because they cannot resolve interference complaints, and even more must modify their service to resolve such complaints.³⁵ In all likelihood, relatively inexperienced LPFM operators will have greater difficulties predicting and/or resolving interference problems. For example, LPFM operators are more likely to rely on automated engineering programs to inform them where an LPFM station may be placed. However, such programs are inexact concerning local terrain conditions (which LCRA directs LPFM stations to take into account). See EMF Letter at 3. As a general matter, real-world conditions often differ from the results of computer modeling and lab

³⁴ See Randy J. Stine, *LPFM: So What Happens Now?*, RadioWorld (Feb. 14, 2011), available at <http://www.rwonline.com/article/lpfm-so-what-happens-now/22838>.

³⁵ Ex Parte Letter from David Oxenford, David Wright Tremaine, LLP to Marlene H. Dortch, MM Docket Nos. 99-25, 07-172 and 09-52, at 3 (Jan. 30, 2012) ("EMF Letter").

calculations. Consequently, it is highly likely that some granted second-adjacent waivers will ultimately produce interference to FM service.

As discussed above, the LCRA establishes a strict process for resolving the interference complaints arising from second-adjacent channel waivers. LCRA, § 3(b)(2). However, effectively implementing those procedures will not be a simple task. For example, when a translator must cease operations due to interference to a full service FM station, listeners that receive the full service station via that translator may lose service, but the station itself continues to serve the rest of its area, producing and airing programming for its audience and earning advertising revenues to maintain operations. Compare that to an LPFM station, which may well be operated by an organization that has raised or received funds from a certain community or church or educational entity (which itself has limited funds). In such circumstances, an FCC notification informing an LPFM station that it must “suspend operation immediately” due to interference to an “existing or modified full-service FM station”³⁶ will cause confusion, dismay and financial concern among all the LPFM station’s listeners and those providing support to the station. And, given the lack of resources and limited experience of many LPFM operators, it will be challenging for LPFM stations to resume operations by making the technical modifications necessary to eliminate the harmful interference.

Such factors should be taken into account upfront, during the Commission’s consideration of requests for waivers of the second-adjacent channel spacing rules. Correcting interference after-the-fact will likely prove difficult in the LPFM context. To reduce the number of these challenging interference remediation cases, the

³⁶ LCRA § 3(b)(2)(B).

Commission should be prepared to examine all requests for second adjacent channel waivers very carefully, especially the applicants' technical showings, and should implement LCRA's waiver provision strictly in accordance with Congressional intent.

III. Conclusion

For the reasons stated above, the Commission must be circumspect in granting waivers of the second-adjacent channel spacing requirements. Waivers should only be permitted in very rare instances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago".

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