

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

In the Matter of)	
)	
Creation of a Low Power Radio Service)	MM Docket No. 99-25
)	
Amendment of Service and Eligibility Rules For FM Broadcast Translator Stations)	MB Docket No. 07-172 RM-11338

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ submits these replies to the comments filed on the Third Further Notice of Proposed Rulemaking in the above-captioned proceeding.² The comments filed in response to the Notice cover a wide range of issues, although few support or oppose the Commission’s proposals in their entirety, and some deal with questions outside the scope of the Notice.

NAB supported the Commission’s balanced approach of preserving opportunities for LPFM services, while enabling the prompt processing of many of the long-pending translator applications.³ We also suggested several ways in which the proposed approach should be modified to give effect to all the provisions of the Local Community

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

² *Creation of a Low Power Radio Service*, MM Docket No. 99-25; *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Third Further Notice of Proposed Rulemaking, MB Docket No. 07-172, RM-11338 (*rel.* July 12, 2011)(“Notice”).

³ Comments of National Association of Broadcasters, MM Docket No. 99-25, at 5-7 (filed Sept. 6, 2011). All references to comments in this Reply will, unless otherwise specified, refer to the comments filed in response to the Notice.

Radio Act (LCRA),⁴ and more accurately reflect actual market-level opportunities for both LPFM and FM translator stations while preserving opportunities for new LPFM stations. Other commenters also suggest changes in the proposal, but some of those changes seem designed less to increase the precision of the Commission’s analysis than to create a regulatory environment favoring LPFM stations.⁵ Those changes would not be consistent with Congress’ direction in the LCRA that LPFM and translators “remain equal in status.” LCRA, Sec. 5(3). However, the comments that focus on the proposed approach’s impact in specific markets all agree with NAB’s view that the process for determining markets where translator applications may be processed should be modified to predict more accurately the markets where there are sufficient opportunities for LPFM applications. The record also provides additional support for expanding the services that can be provided by FM translators by eliminating the date restriction on their use to rebroadcast signals from AM stations.

I. The Record Supports Eliminating the Date Restriction on the Use of FM Translators by AM Radio Stations

The Commission proposed in the Notice to lift the May 1, 2009 date restriction on authorized FM translators that may be used by AM radio stations to rebroadcast their service within their current coverage areas.⁶ Specifically, given the new policy framework for FM translator and LPFM licensing set forth in the LCRA, the Commission determined that it is appropriate to eliminate this restriction, at least for applications still pending from the 2003 FM translator window (or “Auction 83”), in order to improve

⁴ Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011).

⁵ See, e.g., Comments of Prometheus *et al.* at 32-33; Comments of REC Networks at 26-27.

⁶ Notice at ¶ 37; *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009).

access to FM translators for AM stations that have been unable to locate pre-2009 authorized translators in their markets. Notice at ¶ 36.

Only a few parties expressed concern over this change, and these were primarily entities seeking to impose additional constraints on the use of translators in order to dampen demand, and in turn, further tilt the scales towards LPFM use of FM frequencies.⁷ Prometheus *et al.* suggests a long list of screening qualifications for AM stations that seek to use FM translators related to the ownership and coverage of a translator, what content will be aired over a translator, and even how many journalists an AM station will hire because of a translator.⁸ However, all of these propositions are far beyond the scope of the Notice, and nothing more than artificial obstacles to AM stations' use of translators.

We agree with the impartial, credible view of the Catholic Radio Association (CRA), which consists of members that operate FM translators and others that own LPFM facilities: "Any proposal to limit the use of FM translators to rebroadcast AM signals would undermine a tremendous tool for re-invigorating AM stations and facilitating the long-term economic viability of the AM radio service. This tool should not be curtailed as a cost of invigorating the LPFM service."⁹

The record also contains specific evidence of the value of FM translators for both AM radio stations and the listening public. For example, Radio Power Inc. explains how

⁷ Comments of Prometheus *et al.* at 32-33; Comments of REC Networks at 26-27; Comments of Jeff Sibert at 5 ("[Unless the Commission adopts some procedures, every AM broadcaster in large metro areas will try to . . . choke out LPFM operators.>").

⁸ Prometheus *et al.* Comments at 32-33; see *also* REC Network Comments at 27 (AM stations should not be allowed to use an FM translator if it is co-owned with a same-market FM station).

⁹ Comments of Catholic Radio Association at 8.

an FM translator allowed WAMO (AM) to expand its programming to 24 hours a day, and start coverage of high school sports among other local events that take place at night.¹⁰ Radio Power also states that its translator has enabled WAMO to bring an urban format back to Pittsburgh, and make plans to almost double its staff within the next 12 months.¹¹

Finally, no parties refuted NAB's explanation that eliminating the date restriction on AM stations' use of FM translators will not reduce potential opportunities for future LPFM stations. NAB Comments at 5. Instead, lifting the limit will merely allow AM stations (as well as FM stations) to use translators from the same pool of pending applications that will be processed pursuant to the rules adopted in this proceeding. It will have no effect on the number of FM frequencies ultimately available to LPFM. Rather, the only inevitable result of changing this rule will be the continued improvement in AM stations' ability to serve their local communities.

II. The Commission's Proposal Can be Made More Accurate

NAB generally supported the Commission's broad approach to (1) establish a "floor" for LPFM availabilities in each market, generally based on the number of full-power non-commercial educational FM stations in those markets; (2) dismiss pending translator applications in markets where processing such applications would preclude LPFM stations from reaching that floor; and (3) process the translator applications in all

¹⁰ Comments of Radio Power Inc. at 2-3. See also Comments of Mark D. Humphrey at 1 (stating that FM translators have helped locally-programmed WCJW in Warsaw, NY remain viable and even enabled the station to add some full- and part-time jobs now that it can broadcast 24 hours a day); Comments of Kevin M. Fitzgerald at 2-3 (describing how FM translators have helped WZMF in Nanticoke, Pennsylvania return to profitability only three years after entering bankruptcy).

¹¹ Radio Power Comments at 2-3.

other markets. NAB Comments at 5-8. NAB agreed that this approach sought to balance the competing interests of LPFM and translator applicants, and would likely permit both expeditious processing of long-pending translator applications and the opening of a new LPFM filing window. NAB Comments at 6-8. NAB did propose several modifications to the proposal to improve its accuracy and increase its consistency with the terms of the LCRA, including: using Arbitron Metros as the relevant market areas, rather than the one-size-fits-all grid proposed by the Commission; processing translator applications in markets where doing so would not affect LPFM opportunities; processing translator applications in markets where the number of locations available for LPFM equals or exceeds the proposed floor, even if channels may have to be reused; permitting translator applicants in “process all” markets to propose modified facilities; and updating the record by requiring translator applicants to certify their continued interest in their applications. *Id.* at 9-22.

Several commenters contend that the Commission’s proposal does not provide enough opportunities for LPFM. Jeff Sibert, for example, argues that the translator applications – all of which have been pending for eight years – should continue to be held in abeyance until the Commission opens and processes an LPFM window, in order to ensure that LPFM applicants have the first opportunity to obtain available FM frequencies.¹² Other commenters argue that LPFM would provide a more valuable local service than FM translators and should, therefore, be favored.¹³ On the other hand, some commenters oppose dismissal of any translator applications and contend that, as

¹² Comments of Jeff Sibert at 5.

¹³ See, e.g., Comments of Prometheus Radio Project *et al.* at 13-21; Comments of REC Networks at ¶¶ 22-24; Common Frequency at 9.

discussed in Paragraph 20 of the Notice, the Commission's normal "cut-off" processing rules should apply to protect all pending translator applications.¹⁴

There may be no perfect solution to the problem of accommodating both LPFM and FM translator applications in markets where FM frequencies and locations are in short supply. There is certainly no approach that will please all interested parties. The Commission should reject calls to adopt a conclusive preference for one service over another or to manipulate its proposal to favor one service over the other. Indeed, to the extent various commenters' suggestions rest on claimed inaccuracies in the Commission's proposal, they support NAB's efforts to better tailor the Commission's proposal to the actual situation in each market. We again urge the Commission to evaluate NAB's and other commenters' proposals in light of Congress' clear view that both LPFM and FM translator services are valuable and the LCRA's express language that they remain "equal in status." LCRA, Sec. 5(3).

LPFM parties argue that the proposed 30-by-30 grid is too large and, in some markets, encompasses areas outside of a market, or more particularly areas outside of a core population center of a market where they believe more LPFM stations should be placed.¹⁵ Instead, they propose a smaller, 20-by-20 grid.¹⁶ Their proposal, however,

¹⁴ See, e.g., Comments of National Public Radio at 2-4; Comments of Hope Christian Church of Marlton at 2-3.

¹⁵ Prometheus *et al.* Comments at 9-11; REC Networks Comment at ¶¶ 12-14.

¹⁶ They also propose that the Commission increase the LPFM market floors. They offer no reason for their proposed modification beyond their desire for more opportunities for LPFM. The Commission, however, cannot simply favor one service over another. The Notice (¶ 26) indicates that the proposed floors were based on the number of noncommercial FM stations in typical markets. These stations are located across markets and not necessarily (or even likely) in core areas of a city. Thus, changing the size of the grid or replacing the grid altogether would not be a reason to change the proposed market floors. Other commenters also complained that the proposed floors

would not improve the Commission's approach, and in many situations, would exacerbate the inaccuracies that NAB identified with the use of the grid.¹⁷

The core difficulty with the Commission's proposal and Prometheus *et al.*'s suggested modification is that both would employ a grid of fixed size across all markets, while the sizes of radio markets in fact vary widely. Thus, Prometheus *et al.* are technically correct that, in smaller markets, the 30-by-30 grid may encompass some areas where few listeners reside and where no one is likely to locate a radio station. However, in larger markets, as NAB pointed out,¹⁸ even the 30-by-30 grid excludes large and populated areas of those markets. A 20-by-20 grid would be much more preclusive. Further, in multi-city markets, where the grid is centered on one city, reducing the size of the grid would exclude even more of the other cities in those markets.¹⁹

Yet, as NAB pointed out,²⁰ Appendix A of the Notice reveals that there are a substantial number of LPFM stations now located outside of the proposed grid in many markets. If the grid were reduced as proposed by Prometheus, *et al.*, no doubt there would be many more such existing LPFM stations outside the revised grid (but within

are arbitrary. See Comments of Edgewater Broadcasting at 6; Comments of Educational Media Foundation (EMF) at 10. Any move to raise the floors simply to increase opportunities for potential LPFM applications while dismissing long-pending translator applications would aggravate those concerns.

¹⁷ NAB Comments at 9-14.

¹⁸ *Id.*

¹⁹ Prometheus and its supporters also make much of markets where the grid encompasses areas over water or where there is no population. In some markets, even their proposed smaller grid would also suffer from that supposed defect. But most of the markets where they identified this circumstance are "process all" markets where frequencies for both translators and LPFM stations are available. Thus, this concern is largely a "red herring," and – to the extent that it might be an issue in a few markets – is one that affects translators and LPFM applicants alike.

²⁰ NAB Comments at 9-14.

the radio market), and the potential for many more in the future. Prometheus, *et al.* offer no reason why those currently operating LPFM stations and opportunities should be ignored, other than their apparent belief that the Commission should tilt the balance in favor of more LPFM stations located in central areas of cities.²¹ The existence of LPFM stations in other parts of markets, however, demonstrates that demand for LPFM stations is not limited to the areas that Prometheus, *et al.* favor. Also, to the extent that their licensing preference rests on favoring LPFM content of a particular type, the First Amendment bars the Commission from tailoring its licensing standards to promote particular types of content.²²

Further, adoption of the 20-by-20 grid would require dismissal of all translator applications in almost all large and medium markets. Specifically, under the approach espoused by Prometheus *et al.*, all FM translator applications would be dismissed in each of the top 40 markets, and in 86 of the top 100 markets.²³ Certainly, such a result would violate Congress' directive that LPFM and FM translators remain equal in status, and upend the balance sought in the Notice. Instead, the LPFM interests would have the Commission use a mechanism designed to favor LPFM applications in any market in which they might conflict with translators, even in markets where there would remain many opportunities for LPFM stations outside of the proposed narrow grid.

The better way to address the apparent inconsistencies that commenters identified between market sizes and a fixed grid is to adopt Arbitron Metros to evaluate

²¹ As we noted above, however, in multi-city markets, the effect of the Prometheus proposal would be to favor LPFM in only one city core.

²² EMF Comments at 9. See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (any "content-based" definition of "diverse programming" may "well give rise to enormous tension with the First Amendment").

²³ Comments of Prometheus *et al.* at Appendix A.

the opportunities for LPFM stations, instead of any arbitrarily-sized fixed grid.²⁴ Metros vary in size along with each market, so that the Metro for Atlanta is very large, while the Metro for Lafayette, Indiana is much smaller. For multi-city markets, the Metro encompasses all of the communities in the market, not excluding some as any grid proposal would. Rather than use a one-size-fits-all measure for markets of any size, the use of Metros would tailor the Commission's procedures to the actual characteristics of radio listening patterns in each market. Moreover, since the Commission uses Metros to define radio markets generally, using Metro definitions to determine LPFM licensing opportunities would avoid the confusion that employing multiple market definitions would engender.

The record also supports other NAB proposals. Both EMF (Comments at 7) and Hope Christian Church (Comments at 3) agree with NAB that, since LPFM channels can be reused – particularly in large markets – the Commission should dismiss translator applications only if the number of *locations* available for LPFM after processing the translator applications is below the market floor. See NAB Comments at 17-20. Similarly, a number of parties agreed with NAB that the Commission should not dismiss translator applications in markets where, even without those applications, there would be no potential for LPFM stations without application-specific waivers.²⁵ Neither of these modifications would necessarily hinder opportunities for future LPFM stations and the Commission should not preclude valuable service from translators because of

²⁴ EMF also supported using Metro definitions. EMF Comments at 7.

²⁵ NAB Comments at 15-17; Comments of CircuitWerkes, Inc. at 3; Comments of Edgewater at 2-5; Comments of WUSB at 2-3; [others].

the possibility that it could at some time in the future grant a waiver to an LPFM applicant.

Moreover, Sacred Heart demonstrated that in one market there are more places available for LPFM than the Commission assumed, which further supports NAB's proposals for a more granular analysis in each market before translator applications are dismissed.²⁶ Comments filed by Edgewater and Alan W. Jurison make similar points and also support NAB's efforts to modify the Commission's balanced proposal to increase its accuracy.²⁷

National Public Radio agrees with NAB's proposal that the Commission refresh the record to make sure that translator applicants remain interested in their proposals since, if some translator applications were dismissed as abandoned, there may be more opportunities for both LPFM and translators in markets that now do not seem to have sufficient room for both.²⁸

Thus, while the proposed solutions may vary, the record largely endorses NAB's general agreement with the Commission's overall approach, subject to certain modifications designed to more accurately identify the market-based opportunities for LPFM and the markets where dismissal of translator applications is actually required to make LPFM licensing opportunities available.

²⁶ Comments of Sacred Heart University, Inc. at Appendix.

²⁷ Edgewater Comments at 5-6; Comments of Alan W. Jurison at 2-3.

²⁸ Comments of NPR at 3. Several comments proposed that the Commission allow a settlement window for translator applicants before determining whether processing the remaining applications would be possible while preserving opportunities for LPFM. See Comments of NPR at 7; Comments of Kevin M. Fitzgerald at 2; Comments of Jerry Isenhart at 1-2; Comments of William Doerner at 1. NAB does not oppose that proposal, but is uncertain whether the dismissal of some mutually exclusive applications would actually increase the opportunities for LPFM stations.

III. Many Comments Raise Issues Beyond the Scope of This Proceeding or the Commission's Authority

The Commission's objective in this proceeding is limited: to identify a means to process both FM translator and LPFM applications expeditiously in compliance with the LCRA. Many comments raised issues that are far beyond that limited scope and should not be addressed by the Commission now.

For example, the Broadcast Maximization Committee (BMC) proposed, as it has previously, to move LPFM service to a channel now used for television service, and thus to preserve all pending translator applications.²⁹ NAB has previously opposed BMC's proposal, explaining why channels 5 and 6 should remain available for television service.³⁰ In any event, their proposal, which would take years to implement, would be inconsistent with the Commission's desire to open a new LPFM window in the near future.

Several LPFM advocates complain that LPFM stations are treated inequitably under the Commission's rules. For example, several commenters argued that the spacing rules are less flexible for LPFM stations than for translators, and either argue that the Commission should equalize those rules or otherwise give a preference to LPFM applications.³¹ These comments fail to recognize that Congress, in Section 3(b)(1) of the LCRA, required the Commission to maintain its rules requiring distance separations between LPFM and full-service stations. While Section 3(b)(2) permits

²⁹ Comments of Broadcast Maximization Committee at 2-4.

³⁰ Reply Comments of the National Association of Broadcasters in MB Docket Nos. 07-294 *et al.*, at 3-6 (filed Aug. 29, 2008).

³¹ See Comments of Common Frequency at 4-5; Comments of Charles Keiler at 3-4; Comments of Prometheus *et al.* at 9-12; Comments of REC Networks at 11-14.

waivers of those separations, those waivers must be application-specific. Thus, the Commission lacks the authority to change the basic licensing rules for LPFM.

Common Frequency and others propose that the Commission restrict the use or sale of translators,³² presumably with the intent of suppressing demand for translators. Apart from lifting the date restriction for use of FM translators to rebroadcast AM signals, the Commission did not propose any changes in its translator ownership and service rules, and these proposals go far beyond the scope of the Notice. First Amendment concerns also bar the Commission from considering Common Frequency's proposal that the translators be prevented from carrying multicast streams from full-service stations.³³

Finally, Common Frequency asks the Commission to conduct full analyses under Section 307(b) of the Act, 47 CFR § 307(b), before deciding whether to license an LPFM station or a translator in a community. Common Frequency Comments at 3-4. Section 307(b) has never been used in licensing secondary services.³⁴ The expense and delay inherent in conducting a full Section 307(b) proceeding for every market where both LPFM and translator applications may be filed would be inconsistent with the objective of developing rules that permit licensing of stations in both services expeditiously and inexpensively. The Commission's balanced proposal to process translator applications where they will not bar reasonable amounts LPFM service, and then to open an LPFM window would achieve the goal of distributing both services

³² See Comments of Common Frequency at 13-15; Comments of Prometheus *et al.* at 30-32; Comments of REC Networks at 18-20.

³³ Comments of Common Frequency at 14-15; see *supra* note 25.

³⁴ Notice at ¶¶ 16-17.

across markets – the objective of Section 307(b) – with far lower burdens to the Commission and to applicants.

IV. Conclusion

Although the Commission received a wide range of ideas for changes in its proposal, many comments agreed with NAB that the Commission's proposed approach could be a reasonable step, if it is modified in certain respect to more accurately determine the markets where translator applications need to be dismissed. Some of their specific proposals, unfortunately, seem to be intended less to add to the accuracy of the Commission's process than to favor one service over another. The Commission should reject those proposals and focus on steps, such as those proposed by NAB, that maintain a Commission's balanced approach, pursuant to the terms of the LCRA.

Many comments also supported the Commission's conclusion that the use of FM translators for AM stations has been a great success and, with the enactment of the LCRA, there is no longer any reason to keep in place the date restriction on such use.

Respectfully submitted,



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