

**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)	MB Docket No. 07-172
For FM Broadcast Translator Stations)	RM-11338

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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September 6, 2011

Summary

The National Association of Broadcasters (NAB) submits comments on the Third Further Notice of Proposed Rulemaking (Notice), which proposes an approach for implementing provisions of the Local Community Radio Act of 2010 (LCRA) governing the processing of FM translator and low power FM (LPFM) applications.

NAB first commends and supports the Commission's proposal to eliminate the restriction on the use of FM translators by AM stations to translators that were authorized as of May 1, 2009. FM translators enable AM stations to overcome inherent technical disadvantages that limit audio quality compared to other services, thus limiting their service to the public and even threatening their economic viability. Under the current rule, approximately 500 AM stations have used translators to better serve their listeners by initiating or expanding live coverage of local news, rush hour traffic, local election returns, high school sports, and other events that take place during nighttime and early morning hours.

The existing date restriction has prevented a substantial number of AM stations and their listeners from benefiting from improved services because pre-2009 translators are unavailable in their markets. We agree with the Commission that, with the passage of the LCRA, the time is right to amend this policy. We note in particular that eliminating the date restriction will not reduce potential opportunities for future LPFM stations.

NAB also recognizes the challenges the Commission faces in implementing the LCRA, and commends the Commission's effort to ensure the availability of licenses for LPFM stations as well as FM translators. We respectfully submit, however, that to give effect to all the provisions of the LCRA, the approach proposed in the Notice should be

revised to fully reflect actual market-level opportunities for LPFM and FM translator stations, and to process long-pending FM translator applications to the maximum extent possible.

The proposed approach apparently rests on a premise that the LCRA requires that a particular level of availability be preserved for new LPFM stations in every market. We appreciate that the proposal seeks to fulfill this goal while also facilitating the processing of some pending FM translator applications. Nevertheless, NAB believes the proposal jumps too quickly to dismiss pending applications for FM translators, which are often integral to the ability of many FM licensees (and AM as well) to serve their local audiences and fulfill their public interest commitments. We emphasize, however, that the proposed approach could be a reasonable first step, if it is improved to more precisely limit the adverse effects on broadcasters with long-pending FM translator applications to situations where grant of those applications would not preclude LPFM applications.

First, the proposal should rely on Arbitron Metro Markets to assess the market-based availability of LPFM opportunities, instead of the center-city grids set forth in the Notice. Use of the grid is needlessly preclusive in many markets as it ignores both currently licensed LPFM stations located within a radio market but outside the grid, and future LPFM opportunities outside the grid. As a result, the mechanism increases the number of markets where all pending translator applications will be dismissed. The Arbitron Metro more accurately reflects the actual radio marketplace than does the newly-created “grid,” and is the long-standing, Commission-endorsed regulatory benchmark for radio market definition. Use of Arbitron Metros, rather than the grid,

would improve the precision of any determination about the balance between LPFM and FM translator opportunities in a market, consistent with the LCRA.

Second, pending translator applications should not be dismissed in markets where, following dismissal, there would not be any opportunities for future LPFM stations. NAB used the Commission's LPFM software and database to determine that, even without protecting pending translator applications, there would be no channels or locations available for LPFM stations in a significant number of markets. In keeping with Section 5 of the LCRA, which requires the Commission to ensure that licenses are available for both LPFM stations as well as FM translators, FM translators should not be dismissed unnecessarily.

Third, in many markets, the proposal would dismiss pending translator applications if the number of available LPFM channels is less than the proposed LPFM channel floor, even if the number of available LPFM locations exceeds the proposed LPFM channel floors. This approach ignores the fact that channels within a market can often be reused for multiple LPFM stations. The proposal should be amended to allow LPFM applicants to coordinate maximum LPFM licensing opportunities in a market, which in turn would result in more appropriate determinations as to whether pending translator applications should be dismissed. This modification is consistent with LCRA's obligation to ensure that licenses are available to both translator and LPFM stations, as well as LCRA's prohibition against giving LPFM service a higher priority than translator service.

Fourth, the Notice proposes to needlessly forbid settlements among mutually exclusive translator applicants even in the numerous markets where a settlement

process would not reduce opportunities for future LPFM stations below the LPFM channel floor. Indeed, in many of these markets, the number of available LPFM channels is so large that half of all pending translator applicants could choose another channel as part of a process to settle all mutually exclusive applications, and still leave sufficient available channels for LPFM stations. The proposal should be amended to allow translator applicants to specify different channels as part of settlement agreements so long as the availability of LPFM opportunities is not reduced below the LPFM channel floor for that market.

Fifth, the proposal presumes that all of the parties with pending translator applications remain interested in constructing a new translator. During the eight years since Auction 83, some of the applicants may have gone out of business or otherwise lost interest in pursuing their applications. If some of the applications could be dismissed, that could enable the processing of the remaining applications in some markets, without reducing LPFM opportunities. It could also speed up the licensing of new LPFM stations and the processing of the remaining translator applications. NAB thus suggests a simple requirement that pending translator applicants certify that they continue to seek authority to construct their proposed translator station(s). Refreshing the record will clean up the database of pending applications, facilitate settlements, and prevent resources from being wasted on defunct applications.

Full-power broadcasters use FM translators to enhance service to their local communities, and in many cases, translators are the only vehicle for listeners to receive FM service. NAB believes that the proposal for implementing the LCRA set forth in the Notice could be a reasonable step forward if it is modified as suggested above to more

precisely reflect the terms of the LCRA, and actual market-level opportunities for LPFM and FM translator stations.

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Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,¹ the National Association of Broadcasters (NAB)² submits these comments on the above-captioned Third Further Notice of Proposed Rulemaking.³ In the Notice, the Commission seeks comment on how to implement provisions of the Local Community Radio Act of 2010 (LCRA or Act)⁴ governing processing of FM translator and low power FM (LPFM) applications. Notice at ¶ 1. NAB first commends and supports the Commission’s proposal regarding AM service on FM translators. As explained herein, increasing AM stations’ access to FM translators is clearly in the public interest.

NAB also recognizes the challenges the Commission’s faces in implementing the LCRA, and commends the Commission’s effort to ensure the availability of licenses for

¹ 47 C.F.R. §§ 1.415, 1.419.

² 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.

³ *Creation of a Low Power Radio Service*, MB Docket No. 99-25; *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Third Further Notice of Proposed Rulemaking, MM Docket No. 07-172; RM-11338 (*rel.* July 12, 2011) (“Notice”).

⁴ Pub. L. No. 111-371, 124 Stat. 4072 (2011).

LPFM stations as well as FM translators. NAB respectfully submits, however, that to effectuate all the provisions of the LCRA, the FCC must revise the proposal to fully reflect actual market-level opportunities for licensing LPFM stations and process long-pending FM translator applications to the maximum extent possible.

I. The Universe of FM Translators Available to AM Radio Stations Should be Expanded

In 2009, the Commission amended its FM translator rules to permit local AM radio stations to rebroadcast their AM service on FM translators within their current coverage areas.⁵ The Commission found that doing so would enable AM stations to “better serve their local communities and thus promote the Commission’s bedrock goals of localism, competition, and diversity in the broadcast media.”⁶ At the same time, the Commission expressed concern that increasing demand for future FM translators by allowing their use by AM stations could hinder opportunities for future LPFM services. The Commission therefore restricted the universe of FM translators available for use by AM stations to translators that were already authorized as of May 1, 2009.⁷

Now, given the new policy framework for FM translator and LPFM licensing established in the LCRA, the Commission has concluded that it is appropriate to lift the May 1, 2009 date restriction, at least with respect to applications still pending from the 2003 FM translator window (or “Auction 83”). Notice, at ¶ 37. NAB strongly supports extension of this policy. Experience since the rule change took effect two years ago

⁵ *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009) (2009 Translator Order).

⁶ *Id.* 24 FCC Rcd at 9642.

⁷ *Id.* 24 FCC Rcd at 9650.

demonstrates that permitting AM stations to use FM translators has been a resounding success for communities across America.

Approximately 500 local AM radio stations currently use translators to provide enhanced service, and the public interest benefits are obvious. For example, WHCU 870AM is the “heritage” station in Ithaca, New York, and a primary source for local news, weather, talk and public affairs programming in that community. In July 2010, WHCU received authorization to rebroadcast its signal on FM translator W240CB, broadcasting on 95.9 MHz. The translator has improved WHCU’s service by enabling it to better reach parts of Tomkins and Tioga counties, and for the first time, penetrate the dormitory and office buildings on the campuses of Cornell University and Ithaca College. The translator has also allowed WHCU to cover Cornell football, hockey and lacrosse games that take place at night to an audience that previously could not listen because of the station’s restricted nighttime power. Importantly, the station has witnessed a surge in audience diversity to include more students and other young people tuning into its local news, weather and other coverage.

WTRN-AM (Tyrone, PA) has also improved its local public service through the use of an FM translator. WTRN is located in a commuter community, with thousands of residents heading out early in the morning for work in State College and other locations. Before WTRN deployed an FM translator, its morning signal would be overcome by interference after about five miles from the station’s transmitter. With the translator, many listeners can now enjoy WTRN all the way to work. The station airs the news headlines every 15 minutes, plus additional “flesh out” three-minute news reports. The

station has received positive feedback from listeners that live up to 30 miles away whose commutes take them past Tyrone.

Other AM stations report that FM translators enable them to initiate or expand live coverage of high school and college sports,⁸ local election returns,⁹ nighttime weather emergencies and Emergency Alert System alerts, new formats,¹⁰ morning school closing announcements, church events, and other public affairs programming.¹¹

As the Commission observed in the 2009 Translator Order, AM radio stations' ability to serve the local needs of their community is often constrained by inherent technical characteristics that limit audio quality compared to other services. 2009 Translator Order, 24 FCC Rcd at 9643. These factors threaten the viability of many AM radio stations, and were an important factor in the Commission's decision to allow AM stations to use FM translators to enhance their service. *Id.* at 9650-52.

To date, use of FM translators has helped many AM stations improve their service, retain or even build their audiences in the face of intense competition from competing media outlets, and thus improve their economic viability. However, a

⁸ WNZF (Flagler, FL) states that many high school football fans in Florida enjoy listening to its coverage while at the games. The station's translator allows it to serve this community need. WCRA (Effingham, IL) changed its format to 24 hours a day of sports, including local college sports the station could not previously cover because of nighttime power limits. For Mid-State Multimedia Group's WMFD, the audience reached by its translator made it possible to cover over 30 local high school football and basketball games a season, plus local baseball and softball coverage.

⁹ WNZF also reports that its FM translator now allows it to cover local political debates and elections.

¹⁰ WQZQ (Nashville, TN) leveraged an FM translator to launch a new urban gospel station, serving a loyal audience consisting of a large minority population. Similarly, WACV (Williamsburg, FL) took advantage of its translator to switch to a program format not previously offered in the community.

¹¹ WSWW (Charleston, WV) states that its FM translator helped it afford the cost of adding a local afternoon talk show, and rebrand its station.

substantial number of AM stations have been unable to benefit because pre-2009 translators are unavailable in their markets.

NAB agrees with the Commission that, given the likely positive impact of the LCRA on LPFM licensing, the time is right to expand the universe of FM translators available for use by AM stations. Notice at ¶ 36. Eliminating the date restriction on AM stations' use of FM translators will not reduce potential opportunities for future LPFM stations. Rather, lifting the date restriction will merely permit AM stations as well as FM stations to use translators from the same pool of pending applications to be granted under the ultimate process the Commission adopts. The clear result of the Commission's proposal will be continued improvement in AM radio stations' ability to fully serve their communities.

II. The Commission's Proposal for Implementing the LCRA Could be a Reasonable Course If Certain Aspects of the Proposal are Modified

Section 5 of the LCRA requires the Commission, "when licensing new FM translator stations, FM booster stations, and low-power FM stations," to ensure that - (1) "licenses are available to" FM translator, booster and LPFM stations, (2) "such decisions are based on the needs of the local community," and (3) translators, boosters and LPFM stations "remain equal in status and secondary to existing and modified FM stations."¹² The Commission must now implement these requirements in the licensing of new LPFM stations and in the resolution of the approximately 6,500 applications still pending from the 2003 FM translator window.

The proposal in the Notice apparently rests on the premise that LCRA requires the agency to ensure a particular level of availability for new LPFM stations in every

¹² LCRA, Sec. 5.

market regardless of whether there is a known demand for licensing opportunities. For instance, it interprets the LCRA as requiring the agency to ensure LPFM opportunities on a local, rather than nationwide basis.¹³ And, the Notice proposes to dismiss long pending FM translator applications to preserve “sufficient” room for future LPFM stations in larger, more spectrum-congested markets.¹⁴

NAB appreciates the Commission’s effort to develop a guidepost for LPFM opportunities that will facilitate the processing of LPFM licenses and some pending FM translator applications. We respectfully submit, however, that the proposed approach jumps too quickly to dismiss FM translator applications. In crafting its policies for implementing the LCRA, the Commission must be mindful of all three aspects of Section 5. That is, the Commission’s decisions must not focus only on ensuring that licenses are available for one particular service, but also consider the needs of the community and how to ensure that the services remain equal in status. To balance these provisions, the Commission should recognize the many public interest benefits provided by FM translators as well as the benefits of LPFM. To be clear, NAB does not dispute that licensing of LPFM stations may benefit communities. It would be wrong, however, to assume that LPFM services are superior to FM translators in serving the needs of the community on an across-the-board basis.¹⁵

¹³ Notice, at ¶¶ 7-11. The Commission’s proposal also contradicts the long-standing “cut-off” policy in which a prior filed application in one service “cuts off” a subsequently filed application in another service. *Id.* at ¶¶ 19-20.

¹⁴ *Id.* at ¶ 25.

¹⁵ The Commission would be required to provide empirical evidence to justify automatically prioritizing LPFM over FM translator services in larger markets. See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). NAB has previously refuted in detail the erroneous assumption that licensing of LPFM stations somehow automatically serves local communities better than expanding FM service through translators. Comments of

Translators are integral to the ability of many FM licensees (and AM as well) to serve their local audiences and to fulfill their public interest mandate. Translators help full-power stations serve “areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions.”¹⁶ As NAB has shown in numerous earlier submissions,¹⁷ many full-power stations provide hours of local news and public affairs programming on a daily basis, and voluntarily provide extensive emergency information when their communities face crises. Stations also support their local communities by giving a voice to local organizations, raising funds for charity and relief efforts, and donating substantial airtime for public service announcements, among other efforts.¹⁸

FM translators are used by both commercial and NCE stations to provide listeners with programming options not otherwise available to them.¹⁹ For instance, NRC Broadcasting has explained that translators offer a “critical vehicle with which broadcasters can reach listeners who would otherwise not be able to receive local full-power FM stations.”²⁰ NRC’s stations serve mountainous areas in Central Colorado where the majority of the population lives in valleys, beneath the reach of signals from

National Association of Broadcasters, MM Docket No. 99-25, at 29-32 (filed Apr. 7, 2008).

¹⁶ *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7219, (1990) *recon. denied and clarified*, 8 FCC Rcd 5093 (1993).

¹⁷ See, e.g., Reply Comments of the National Association of Broadcasters, MB Docket No. 04-233, at 5-18 (filed Jan. 3, 2008).

¹⁸ Reply Comments of Cox Radio, Inc., MB Docket No. 99-25, at 2 (filed Apr. 21, 2008).

¹⁹ Petition for Reconsideration of Educational Media Foundation, *et al.*, MB Docket No. 99-25, at 5 (filed Feb. 19, 2008).

²⁰ Comments of NRC Broadcasting, Inc., MB Docket No. 99-25, at 2 (filed Aug. 16, 2005).

NRC's main transmitters. In fact, there is "terrain shielding" from three sides in many of NRC's markets. NRC states that vast populations in Colorado receive FM service "only because translators are available to relay the signal of their local NRC main stations."²¹

The benefits of FM translators are not confined to small markets. Temple University Public Radio, for example, holds licenses for FM translators to enhance the service of its six NCE stations, as well as pending applications for additional FM translators for the same purpose. Temple has explained that "translators have long served as a means by which Temple's unique programming and public service has been extended into neighboring communities in which signal delivery from full-service stations was not possible."²² Temple noted that its unique programming of Jazz and Classical music is not offered by other stations in many areas served by Temple's stations. Temple also described the locally-produced "news and coverage of cultural, political, and general interest topics and events by Temple's team of fifteen reporters and producers results in programming" that would not otherwise be available to the public. Temple Comments at 2-3. FM translators are critical to the services of broadcasters like Temple. We note that most of Temple's stations are located in and around Philadelphia, one of the markets where all pending FM translator applications will be dismissed under the proposed approach.

These are only a few examples of the public interest benefits of FM translators that could be undermined by unnecessary dismissal of pending translator applications. NAB appreciates the difficult task of implementing the LCRA and believes that the

²¹ *Id.* at 2-3.

²² Comments of Temple University Public Radio, MB Docket No. 99-25, at 2 (filed Aug. 22, 2005).

Notice's approach could be a reasonable first step, if the proposal is improved to more precisely limit the adverse effects on broadcasters with long-pending applications. As discussed below, NAB suggests that modifying the proposed approach would give meaning to all three provisions of Section 5 and better serve the public interest.

A. *Arbitron Metro Markets Assess the Availability of LPFM Opportunities More Accurately than the Center-City Grid Employed in the Proposal*

All administrative decisions must be grounded in the most reliable, accurate data available.²³ That axiom is even more critical here, where the proposal is essentially an “all-or-nothing” proposition for many pending FM translator applicants. NAB submits that the plan to assess the availability of LPFM opportunities based on a geographic grid placed over the center-city coordinates of each market is needlessly preclusive, particularly when compared to Arbitron Metro radio markets (hereinafter “Metros” and “radio markets” are used interchangeably).

To measure the sufficiency of future LPFM opportunities, the Notice examines a 30-minute longitude by 30-minute latitude grid generally placed over the center-city coordinates of a market, and totals the number of existing LPFM stations plus the

²³ “As the nation's expert agency on communications, the FCC must have access to, and base its decisions on data that are robust, reliable, and relevant.” Written Statement of Julius Genachowski, Chairman, Federal Communications Commission, before the Committee on Energy and Commerce, Subcommittee on Communications, Technology and the Internet, U.S. House of Representatives, 2009 WL 2972965, at 4 (Sep. 17, 2009). Courts have not hesitated to vacate agency decisions lacking reliable factual data. See, e.g., *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (court found Commission rules restricting certain cellular interests from obtaining new wireless licenses to be arbitrary because they lacked factual support); *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1305 (D.C. Cir. 1988) (Commission decision about nondiscriminatory nature of certain tariffs found to be arbitrary and capricious because agency lacked sufficient evidence on which to ground its conclusions.).

number of vacant channels available for LPFM in that grid. If the result is below the LPFM channel floor assigned to that market, all pending FM translator applications for that market would be dismissed. *Id.* at ¶ 27. Thereafter, processing of translator applications in the remaining markets will resume, followed by a nationwide LPFM-only window, to be then followed by a translator-only window. *Id.* at ¶ 30.

As currently constructed, this approach essentially eliminates opportunities for licensing translators for the foreseeable future in larger markets. All pending FM translator applications will be dismissed in 92% of the top 50 Arbitron ranked markets, in favor of future LPFM licensees that may not be able to take advantage of the reserved frequencies in a particular market.²⁴ Notice, at Appendix A. On its face, such an outcome is inequitable and seemingly inconsistent with the LCRA's mandate that translators and LPFM stations must remain equal in status.²⁵

The proposed approach also constitutes a complete reversal of the Commission's reasoning four years ago, when it established a limit of ten on the

²⁴ We note that a substantial number of LPFM stations have run sponsorship messages that are virtually identical to commercials aired on same-market full-power stations. This may show at least some LPFM stations may not be viable going-concerns, particularly as the nonprofit, community entities the Commission envisioned when it created the service. See, e.g., *Enid Public Radio Association*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 10-1293 (*rel.* July 13, 2010) (increased forfeiture for repeated violations of advertising restrictions); *American Heritage Media, Inc.*, 20 FCC Rcd 17147 (2005) (admonishment of LPFM station for broadcasting commercial announcements); *Technology Information Foundation, Ltd.*, Memorandum Opinion and Order, 19 FCC Rcd 22191 (2004) (admonishment of LPFM station for broadcasting commercial advertisements); *Enid Public Radio Association*, Memorandum Opinion and Order, 19 FCC Rcd 16324 (2004) (admonishment of LPFM station for broadcasting commercial advertisements).

²⁵ LCRA, Sec. 5(3). The words "equal in status" seem clear. The Commission must give effect to these words and cannot construe the LCRA in a way that renders these words meaningless, redundant, or superfluous. *Bridges Coal Co./Pacific Minerals, Inc. v. Director, Office of Workers' Compensation Programs*, 927 F.2d 2d 1150, 1153 (10th Cir. 1991); *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991).

number of pending translator applications each applicant could retain from Auction 83. The Commission's primary goal in that decision was to avoid any negative impact on "the approximately 80 percent of filers who filed ten or fewer applications,"²⁶ including the approximately half of all filers who submitted only one or two applications,²⁷ in order to improve their FM service. The approach set forth in the Notice, on the other hand, will upend the long-pending business plans of almost every translator applicant in the top 50 markets.²⁸

It is readily apparent that reliance on the arbitrary grid ignores both the currently licensed LPFM stations located within a radio market but outside the grid, and future LPFM opportunities outside the grid in many markets. As a result, the approach underestimates the sufficiency of LPFM opportunities in a market, and in turn, increases the number of markets where all pending translator applications will be dismissed. NAB submits that the Arbitron Metro is a more reasonable, accurate measure than the grid.

The Commission itself has endorsed Arbitron's radio market definitions as a reasonable market delineation within which radio stations compete.²⁹ In the 2002 Ownership Report, the Commission replaced the previously used contour method for

²⁶ Third Report and Order, 22 FCC Rcd at 21935.

²⁷ *Id.* at 21934.

²⁸ See, e.g., *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, WT Docket No. 97-82, 13 FCC Rcd 374, 383 (amending rules in a way that serves the best interests of prospective auction applicants who may have relied upon previously adopted rules in formulating business plans and obtaining financing).

²⁹ *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13724-26 (2003) (2002 Ownership Report), *aff'd in part and remanded in part sub nom. Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

defining markets with Arbitron Metros because the latter is commercially accepted and recognized as an industry standard.³⁰ The Commission also noted that Arbitron Metros are typically used as the relevant geographic market for antitrust purposes.³¹ The Commission further observed that relevant data concerning Metros are readily available from BIA's Media Access Pro database.³² Since adoption of that decision, Arbitron Metros have been the regulatory benchmark for radio market definitions.

Given that LPFM stations and full-power stations using FM translators may be located in and compete for audiences across entire markets,³³ and not just within the designated grid area, it is unclear why the Notice proposes to rely on the grid rather than the Commission's standard Arbitron radio market definition.³⁴ The Commission states that the grid is not intended to approximate radio market boundaries, but instead designed to identify "core" market locations that could serve significant populations. Notice, at n.20. However, the Commission's own data belies this emphasis on core locations, as Appendix A shows numerous LPFM stations located within a market but

³⁰ *Id.* at 13725.

³¹ *Id.*

³² *Id.* at 13727.

³³ Media Bureau Seeks Comment on the Economic Impact of Low-Power FM Stations on Full-Service Commercial FM Stations, Public Notice, MB Docket No. 11-83, 26 FCC Rcd 6565 (2011).

³⁴ Indeed, we also note that use of the grid conflicts with other concepts in the Notice itself. In creating the LPFM channel floors for each market, the Commission states that it is principally guided by the number of NCE FM full-power stations in an entire radio market (not the grid), so that radio markets with more NCE stations are assigned a higher LPFM floor. Notice, at ¶ 26. However, the Notice does not explain why use of Metros is appropriate in this context, but not in identifying existing LPFM stations and vacant channels, especially when both calculations are part of the same formula for determining whether "sufficient" LPFM opportunities are available in a market.

outside the grid.³⁵ For instance, Chicago and Portland each have six licensed LPFM stations outside the grid, while Sacramento and Gainesville-Ocala each have five, among other examples. *Id.* at Appendix A.

LPFM stations would not exist in these locations that the proposal ignores if their services were not reaching and serving listeners. To the contrary, existing LPFM stations located within a market but outside the grid likely serve some of the most attractive locations in a market. Such an LPFM station might serve a suburban pocket of foreign language speakers, or parishioners who reside nearby a religious institution, or students and faculty of a university-run LPFM station. Given the limited reach of LPFM signals, nonprofit organizations are most likely to place LPFM stations in neighborhoods where their service is most wanted by listeners. Given all these factors, it makes little sense to exclude these existing stations and the opportunities for more LPFM stations in these areas outside the proposed grid from the determination of whether there are sufficient LPFM opportunities in a market. Use of Arbitron Metros, instead of the grid, is a more accurate foundation for determining LPFM opportunities in a radio market.

NAB has identified at least seven markets where relying on the industry standard of Arbitron Metros rather than the grid would allow the pending translator applications to be processed, while still providing opportunities for new LPFM stations: Portland (Arbitron Rank # 23), Riverside-San Bernadino (#26), Cincinnati (#28), Columbus (#36),

³⁵ Use of the grid seems even more arbitrary in multi-city markets, where the Commission apparently locates the grid over the center-city coordinates of the first city listed in a market definition title. There is absolutely no evidence to suggest that this is an accurate reflection of the core population of the market, and certainly no evidence that such a method even approaches the level of precision provided by Arbitron Metros.

Austin (#37), Hartford (#50), and Charleston (#81). For example, Appendix A indicates that Austin has three licensed LPFM stations in the market, zero within the grid, and according to the Commission's analysis, six vacant channels within the grid available for LPFM. The proposal assigns an LPFM channel floor of seven to Austin. Thus, under the Notice's approach, the combined total of six vacant channels plus zero existing LPFM stations within the grid is less than the channel floor, meaning that all pending FM translator applications in Austin will be dismissed.

However, NAB submits that there is no reason to exclude the three existing LPFM stations already serving the Austin market from these calculations. These stations undoubtedly contribute to LPFM service in Austin and should be counted, as they would be under a mechanism that relied on the Arbitron metro market definition. Indeed, excluding these LPFM services in such an arbitrary manner may lead to questions surrounding the soundness and impartiality of the Notice's entire methodology. Conversely, using Arbitron Metros, the combination of existing LPFM licensees plus vacant channels within the grid would satisfy the suggested LPFM channel floor, and there would be no need to dismiss any pending FM translator applications in Austin.³⁶ Similar reasoning holds true for the other markets listed above.

It is also clear that examining Arbitron Metros instead of the grid would reveal more vacant channels within a market that could be used for LPFM services. Although the Notice does not provide this particular data, it is safe to assume that using a more

³⁶ We note that the proposed approach does not confine its impact to applications for translators to be located within the grid. The proposal provides unequal treatment because it dismisses all the pending FM translator applications in an entire market based on analysis of LPFM status in a grid area that is much smaller than the entire market, in numerous instances.

appropriate radio market definition would result in more channels becoming available for LPFM. This, in turn, will improve the precision of any determination about the balance between LPFM and FM translator opportunities in a market, and allow both LPFM and translator applications to go forward, consistent with the LCRA's directive that the services be treated on an equal basis.

In its current form, the proposal is a blunt instrument that will harm many full-power stations with pending FM translator applications. In crafting the proposal, the Commission stresses that the next LPFM window may represent "the last meaningful opportunity" for LPFM entities to obtain frequencies in larger markets. Notice, at ¶ 4. NAB respectfully submits that, for a significant percentage of full-power stations, Auction 83 may have represented their last meaningful opportunity to obtain and deploy FM translators for purposes of enhancing their service, and remaining viable in an increasingly competitive media marketplace. Dismissing such applications based on an approach relying on an arbitrarily-sized grid rather than the actual radio marketplace would be contrary to the Commission's long-standing processes and disserve radio broadcasters who have waited for eight long years to finally obtain translators that can improve their service.

B. *The Commission Should Not Dismiss Pending Translator Applications in Markets Where, Following Dismissal, There Would Be No Opportunities for LPFM Stations*

In eighteen markets where the Commission proposes to dismiss all pending translator applications,³⁷ Appendix A of the Notice reveals that there would be no

³⁷ New York (Market #1), Los Angeles (#2), Chicago (#3), San Francisco (#4), Philadelphia (#8), Washington, DC (#9), Boston (#10), Detroit (#11), Miami-Ft. Lauderdale-Hollywood (#12), Seattle-Tacoma (#13), Puerto Rico (#14), Baltimore (#22),

channels or locations available within the grid for new LPFM stations. Using the Commission's LPFM6 software and database,³⁸ NAB examined whether, even without protecting the pending translator applications, there would be channels or locations available for LPFM stations. NAB has established that, in all but five of these markets,³⁹ there would be no available channels for LPFM stations. Since dismissing the pending translator applications would not result in the licensing of any LPFM stations in those markets, translator applications in those markets should continue to be processed.

To the same extent that Section 5 of the LCRA requires the Commission to ensure that licenses are available for LPFM stations, it requires the Commission to provide licensing opportunities for FM translators. LCRA, Sec. 5(1). Where LPFM stations cannot be licensed under the standards established by Congress, but FM translators could be located, dismissing translator applications is not consistent with Congress' directive in the LCRA.

The fact that an LPFM applicant might seek a second-adjacent channel distance separation waiver in these markets sometime in the future is not a reason to prevent processing of translator applications that do comply with the Commission's rules. The Commission has not begun a proceeding to consider waiver standards for LPFM under

Salt Lake City-Ogden-Provo (#30), Honolulu (#64), Akron (#76), Trenton (#143), Stamford-Norwalk (#147), and Danbury (#203).

³⁸ *Media Bureau Announces Comment Deadlines in Low Power FM - FM Translator Rule Making and Release of Spectrum Availability Program*; Public Notice, DA 11-1328 (Aug. 1, 2011). The code, center-city coordinates for each market, and other related files are available at:

http://www.fcc.gov/Bureaus/MB/Databases/source_code/lpfm/lpfm6.zip

³⁹ The LPFM6 software determined that there would be three channels available for LPFM within the grid in Miami-Ft. Lauderdale-Hollywood, and one available channel in Seattle-Tacoma, Akron, Trenton, and Danbury, CT. The LPFM6 software was not able to make a determination about Puerto Rico or Honolulu. The results of NAB's study are attached as Attachment A.

Section 3(b)(2), and the public interest would not be served by further delaying service to the public from FM translators while the Commission considers the standards for granting LPFM waivers. LCRA, Sec. 3(b)(2). Further, to the extent that Section 3(b)(2) permits second-adjacent channel separation waivers in certain circumstances, such waivers apply to the channel distance separations between LPFM stations and full-service FM stations. Thus, the licensing of an FM translator in these markets would not prevent a future LPFM applicant from seeking a waiver. Although those LPFM waiver applicants would have to protect FM translators from interference, LPFM proposals could be designed to protect any granted translator applications. Dismissing all pending translator applications because they *might* at some point in the future make it more difficult for an LPFM applicant seeking a waiver under Section 3(b)(2) would be inconsistent with Congress' directive to treat both services equally. Thus, the Commission should process translator applications where no LPFM channels are now available, whether or not the translator applications are protected.

C. *The Commission Should Process Pending Translator Applications if the Number of Locations "Available" for LPFM Exceed the Proposed Floor*

As described above, the Notice proposes to dismiss all pending translator applications in a radio market if the number of "channels" available for LPFM in the study area⁴⁰ is less than the LPFM Channel Floor in that market. Because LPFM stations operate at low power and their service area is much smaller than a radio market, more than one LPFM station may be licensed on a particular channel in a

⁴⁰ The proposed modification to the FCC's plan discussed in this section would be appropriate whether the Commission accepts NAB's suggestion of using Metro boundaries to determine LPFM opportunities or continues to examine them only within a specified grid.

market.⁴¹ Appendix A to the Notice separately sets forth the number of LPFM “locations” and the number of LPFM “channels” that would be available in a market after processing all pending translator applications, implicitly recognizing that some channels could be used at more than one location.

In at least ten markets, although the number of available locations for LPFM stations exceeds the LPFM Channel Floor, the Notice proposes to dismiss all pending translator applications. In the St. Louis, Missouri market, for example, even after protecting all pending translator applications, there would be 11 locations within the grid available for a new LPFM station, far greater than the seven LPFM opportunities the Notice proposes to reserve in St. Louis. However, since there would only be five LPFM channels available in the grid, the Notice proposes to dismiss all of the pending translator applications.

Doing so is not necessary to ensure that opportunities for LPFM licensing remain in St. Louis. Some of the five available channels could be licensed to more than one new LPFM station. Even if technical limitations precluded LPFM stations from being licensed at all 11 available locations, there are sufficient LPFM opportunities in the market to reach the proposed Channel Floor, particularly since only two channels might need to be reused.

NAB used the Commission’s LPFM6 software to determine whether channels could be reused. In St. Louis, even looking at the “most preclusive” results for LPFM licensing opportunities, there would be opportunities for 11 new LPFM stations within the St. Louis grid; using the “least preclusive” standard, after processing all pending

⁴¹ 47 C.F.R. § 73.807 (requiring 24 km spacing between LPFM stations on the same channel).

translator applications, there would be sixteen opportunities for LPFM stations. Thus, it is not necessary to dismiss all pending translator applications in order to preserve licensing opportunities in St. Louis for LPFM.⁴²

To be sure, under this approach, LPFM applications would have to be coordinated to make the maximum use of the licensing opportunities in a market. After the next round of LPFM applications are filed, the Commission should allow applicants whose proposals may conflict with another application the opportunity to amend their applications to remove the conflict by changing frequencies or locations, so that channels can be reused and the maximum number of LPFM applications can be granted. As discussed above, it is incumbent upon the Commission to design an approach for implementing the LCRA that complies with the terms of the statute and is based on realities of the radio marketplace. Further analysis and coordination of LPFM applications would improve the balance and precision of the Commission's decision-making in this area, and help to maximize the benefits that translator service can provide, while also ensuring licensing opportunities for LPFM.

Under the LCRA, the Commission is required to ensure that licenses are available to both translators and LPFM stations. LCRA, Sec. 5(1). Dismissing all pending FM translator applications in markets where there would be adequate locations for LPFM service if all pending translator applications are processed would give a higher

⁴² For the same reasons, the pending translator applications should not be dismissed in at least the Minneapolis-St. Paul, Tampa-St. Petersburg-Clearwater, Kansas City, Jacksonville, Milwaukee-Racine, Hartford-New Britain-Middletown, New Orleans, Spokane, and Colorado Springs markets. The results of NAB's study of these markets using the Commission's own software are attached to these Comments as Attachment B.

priority to LPFM service than to translator service, in violation of Congress' directive that the services "remain equal in status." LCRA, Sec. 5(3).

The Commission, therefore, should process the pending translator applications in markets where the number of available locations for new LPFM stations, added to the number of existing LPFM stations, equals or exceeds the LPFM Channel Floor.⁴³

D. The Commission Should Permit Settlements in "Process All" Markets to Propose Modified Facilities

The Notice asks whether it should restrict the scope of settlements among mutually exclusive translator applicants in markets where the Commission intends to process the pending translator applications. Notice, at ¶ 28. The Notice suggests that, if translator applicants are allowed to specify different channels or transmitter locations, the availability of those channels or locations for LPFM stations could be limited. In response to this concern, the Commission proposes to bar all amendments in those markets that would use changes to channels or transmitter locations to permit grant of applications that are now mutually exclusive. *Id.*

The Notice's proposed remedy is much broader than necessary to address the problem it sees. Even assuming that the Commission may restrict settlement agreements among translator applicants that would, if implemented, reduce the number of potential sites for LPFM stations below the proposed LPFM Channel Floor, that would not allow the Commission to put the translator settlement process in every "process all" market into the straightjacket proposed in the Notice. In many "process all" markets, the

⁴³ For the same reasons, the Commission should modify the direction in Paragraph 31 of the Notice to permit processing of translator modification applications where the total of the number of available locations for new LPFM stations and the number of existing LPFM stations is equal to or exceeds the LPFM Channel Floor for that market.

number of available LPFM channels and locations identified by the Commission far exceeds the LPFM Channel Floor. In the Charlotte-Gastonia-Rock Hill market, for example, the Notice proposes to reserve seven locations for LPFM stations. There is one LPFM station currently operating within the grid,⁴⁴ and Appendix A lists 16 locations and 12 channels available within the grid for new LPFM facilities. As a result, the Commission plans to process the pending translator applications.

There are only ten pending translator applications in the market. Even if half of these applicants specified a channel otherwise available for LPFM as part of a settlement agreement, there would still be seven channels available for LPFM within the grid (and no doubt more in the overall market and even more if channels are reused). There is no need, therefore, to deprive translator applicants of the normal tools used to settle mutual exclusivity in markets where, even after settlement, the level of opportunities for LPFM will equal or exceed the Commission's channel floor.

The Charlotte-Gastonia-Rock Hill market is hardly unique. By NAB's calculations, at least 59 of the "process all" markets identified in Appendix A of the Notice have far more channels and locations available for LPFM than specified in the proposed LPFM Channel Floor.⁴⁵ Indeed, in many of these markets, the number of

⁴⁴ There are three additional LPFM stations operating in the market but located outside of the grid.

⁴⁵ In addition to Charlotte-Gastonia-Rock Hill, these markets include Sacramento, San Antonio, Raleigh-Durham, Greensboro- Winston-Salem- High Point, Oklahoma City, Louisville, Birmingham, Greeneville-Spartanburg, McAllen-Brownsville-Harlingen, Tucson, Albany-Schenectady-Troy, Knoxville, Omaha-Council Bluffs, Sarasota-Bradenton, El Paso, Bakersfield, Baton Rouge, Gainesville-Ocala, Stockton, Little Rock, Syracuse, Greenville-New Bern-Jacksonville, Columbia, SC, Daytona Beach, Des Moines, Lakeland-Winter Haven, Ft. Pierce-Stuart-Vero Beach, Madison, Melbourne-Titusville-Cocoa, Visalia-Tulare-Hanford, Johnson City-Kingsport-Bristol, Lafayette, LA, Chattanooga, Ft. Wayne, Augusta, GA, Roanoke-Lynchburg, Victor Valley, Lansing-

available LPFM channels is so large that half of all pending translator applicants could choose another channel – likely enabling a settlement among all mutually exclusive applications – and there would still be enough available *channels* (without even attempting to analyze available locations) to license sufficient LPFM facilities. In Knoxville, for example, where the proposed channel floor is six, there are already two LPFM stations licensed within the grid. Appendix A of the Notice shows that, even protecting the eight pending translator applications, there would be 30 locations and 20 channels within the grid suitable for an LPFM station. Thus, even if four of the eight translator applicants chose another channel as part of a settlement, 16 channels would remain available in the grid, of which only four would be needed to reach the proposed floor.⁴⁶

Barring settling translator applicants from amending their applications to specify different channels or transmitter locations in these markets, where those changes would not preclude granting the requisite number of LPFM applications, would needlessly preclude translator service in those markets. The Commission should thus allow applicants for translators in “process all” markets to amend their applications in the usual course to specify different channels or locations as part of a settlement

East Lansing, Fayetteville, NC, Fayetteville, AR, Palm Springs, Shreveport, Saginaw-Bay City-Midland, Appleton-Oshkosh, Springfield, MO, Corpus Christi, Beaumont-Port Arthur, TX, Burlington-Plattsburgh, Salisbury-Ocean City, Tyler-Longview, Eugene-Springfield, Flagstaff-Prescott, AZ, Quad Cities, Fredericksburg, Peoria, Asheville, NC, San Luis Obispo, CA, and Sheboygan, WI.

⁴⁶ Markets like this include at least Baton Rouge, Greenville-New Bern-Jacksonville, Columbia, SC, Madison, Melbourne-Titusville-Cocoa, Johnson City-Kingsport-Bristol, Chattanooga, Augusta, GA, Roanoke-Lynchburg, Lansing-East Lansing, Fayetteville, NC, Fayetteville, AR, Palm Springs, Shreveport, Saginaw-Bay City-Midland, Springfield, MO, Beaumont-Port Arthur, TX, Salisbury-Ocean City, Tyler-Longview, Eugene-Springfield, Fredericksburg, Peoria, San Luis Obispo, CA, and Sheboygan, WI.

agreement, so long as the effect of the settlement does not reduce the availability of LPFM licensing opportunities below the LPFM Channel Floor for that market.⁴⁷

E. *The Commission Should Refresh the Record Before Deciding to Dismiss Translator Applications*

As the Commission recognizes, the applications for translators now under consideration have been pending since 2003. Notice, at ¶ 2. The analysis reflected in Appendix A of the Notice assumed that all of these applicants continue to be interested in constructing a new translator. During the eight years that these applications have been pending, however, some of the applicants may have gone out of business, and others may no longer be interested in pursuing their applications or in constructing a translator station. If some translator applications were dismissed, that could in some markets permit the Commission to process the remaining translator applications while still ensuring LPFM licensing opportunities.

NAB, therefore, suggests that – as a first step – the Commission require the pending translator applicants to certify that they remain in existence and continue to seek authority to construct their proposed translator station(s). The Commission previously has recognized the value of requiring certification of continuing interest before it considers licensing decisions. When it began to develop the post-DTV transition table of allotments, the Commission required all television stations to certify

⁴⁷ NAB recognizes that, where there are several groups of settling translator applicants, the combined effect of separate settlement agreements might reduce the number of LPFM licensing opportunities below the floor. Of course, separate settlement agreements could also create new areas of mutual exclusivity, and in both cases, the Commission should inform the parties that their agreements are not acceptable and permit them to explore other settlement options.

whether they intended to maximize or replicate their analog service areas.⁴⁸ The requirement of certification permitted the Commission to clean up its database and to protect only proposals that DTV stations in fact wanted to construct. Stations that failed to certify were presumed to have abandoned their earlier-expressed interest in replication or maximization.⁴⁹ The Commission asked for the certifications in about 60 days.

Requiring translator applicants to certify their continuing interest in their long-pending applications would provide similar benefits as the DTV certifications. If an applicant fails to file the certification of continued interest, their application(s) would then be dismissed. The Commission would then examine the remaining active translator applications to determine the markets where they could be processed. In some markets where all translator applications are currently proposed to be dismissed, reducing the number of active applications might permit the remaining applications to be processed. And even in “process all” markets, cleaning up the database of pending applications will facilitate settlements since time will not be wasted in locating defunct applications. As with the DTV process, the certifications could be filed electronically. The burden on translator applicants would be minimal. The benefits of addressing only translator applications that remain viable will speed up the process of licensing translators and LPFM stations.

Finally, in fairness to applicants for FM translators that have been waiting for their long-pending applications to be processed, the Commission should not dismiss such

⁴⁸ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 19296 ¶ 41 (2004).

⁴⁹ *Id.*

applications without first assessing the level of demand for LPFM stations that may conflict with pending translator applications in a particular market. Rather than dismiss such applications, the Commission could hold the applications pending an LPFM window, then establish processing rules that would allow potentially conflicting LPFM and translator applicants to work together to determine whether all the applications could be accommodated. Such an approach would be consistent with the LCRA's directive to ensure opportunities for all services. LCRA, Sec 5(1).

III. Conclusion

As discussed above, full-power broadcasters utilize FM translators to enhance their service to their local communities. In many instances, a translator is the only vehicle for some listeners to receive FM services. NAB believes that the proposed approach, as currently constructed, does not appropriately reflect the terms of the LCRA, or the actual market-level opportunities for licensing LPFM stations. However, the proposed approach to implementing the LCRA could be a reasonable step, if the proposal is modified in certain important ways to more accurately reflect the radio

marketplace and equitably preserve licensing opportunities for long-pending FM translator applicants.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago". The signature is fluid and cursive, with the first name being the most prominent.

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September 6, 2011

Attachment A

From FCC study								NAB results using LPMF6		
Arb# Rank	CF# Rank	Fall 2010 Arbitron Rankings - Market	Coordinates		LPMF Available in Grid (from FNPRM)			LPMF6 results		
			Latitude	Longitude	Locations	Channels	Licensed	Channels	Most Preclusive	Least Preclusive
1	1	New York	40-42-51	74-00-23	0	0	0	0	0	0
2	2	Los Angeles	34-03-08	118-14-34	0	0	0	0	0	0
3	3	Chicago	41-51-00	87-39-00	0	0	0	0	0	0
4	4	San Francisco	37-46-30	122-25-06	0	0	0	0	0	0
8	8	Philadelphia	39-57-08	75-09-51	0	0	0	0	0	0
9	9	Washington, DC	38-53-42	77-02-12	0	0	0	0	0	0
10	10	Boston	42-21-30	71-03-37	0	0	0	0	0	0
11	11	Detroit	42-20-32	83-03-39	0	0	0	0	0	0
14	14	Puerto Rico	18-28-06	66-06-22	0	0	0	<i>(note 1)</i>		
22	22	Baltimore	39-17-25	76-36-45	0	0	0	0	0	0
30	30	Salt Lake City-Ogden-Provo	40-45-39	111-53-25	0	0	0	0	0	0
64	64	Honolulu	21-18-25	157-51-31	0	0	0	<i>(note 1)</i>		
147	148	Stamford-Norwalk, CT	41-3-12	73-32-21	0	0	0	0	0	0

NOTE 1 - LPMF6 cannot run Puerto Rico or Honolulu - error message says "Latitude cannot be more than 50 or less than 22"

Attachment B

From FCC study							NAB results using LPFM6			
Arb# Rank	CF# Rank	Fall 2010 Arbitron Rankings - Market	Coordinates		LPFM Available in Grid (from FNPRM)			LPFM6 results		
			Latitude	Longitude	Locations	Channels	Licensed	Channels	Most Preclusive	Least Preclusive
16	16	Minneapolis-St. Paul	44-58-48	93-15-49	13	6	0	6	12	16
20	19	Tampa-St. Petersburg-Clearwater	27-56-50	82-27-31	8	5	0	5	8	13
21	21	St. Louis	38-37-38	90-11-52	11	5	0	5	11	16
32	32	Kansas City	39-05-59	94-34-42	8	3	0	4	9	13
38	37	Milwaukee-Racine	43-2-20	87-54-23	7	6	0	8	15	16
46	46	Jacksonville	30-19-55	81-39-21	8	5	0	6	14	18
50	50	Hartford-New Britain-Middletown	41-45-49	72-41-08	8	5	1	5	9	9
52	52	New Orleans	29-57-16	90-4-30	6	3	0	8	15	17
92	91	Spokane	47-39-32	117-25-30	6	4	1	4	6	7
93	93	Colorado Springs	38-50-2	104-49-15	7	4	1	3	6	7