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## Executive Summary

The National Association of Broadcasters (“NAB”) hereby submits these reply Comments to the Commission’s *Further Notice of Proposed Rulemaking* addressing various Low Power FM (“LPFM”) issues. As discussed by NAB and others in their initial comments, the Commission is statutorily barred from altering its distance separation requirements, or from adopting a licensing presumption that would give LPFM stations priority over subsequently authorized full-power stations. NAB again urges the Commission to focus on constructive means to relocate LPFM stations *without creating harmful interference*, by continuing to encourage already-successful voluntary engineering and/or financial assistance from full-power FM stations to affected LPFM stations. In addition, a contour-based interference approach cannot be reconciled with the minimum distance separations required under the Radio Broadcasting Preservation Act.

Finally, the Commission should not alter the regulatory status between LPFM stations and FM translators. Although such changes might result in more LPFM stations being licensed, there is no evidence in the record that the changes would, in any measure, enhance the Commission’s goals of localism, diversity, and competition. Rather, as the record demonstrates, such a change could undermine the valuable service to local communities provided by full-power radio stations.



NAB submits these reply comments to address (1) further statutory and policy arguments made in the initial comments; (2) the Commission’s proposal to adopt a “contour overlap” interference methodology as an alternative to minimum distance separations, and (3) the failure of LPFM advocates to demonstrate that changing the priority between LPFM stations and FM translators would serve the Commission’s radio broadcasting goals.<sup>3</sup>

**I. The Commission’s Proposed Waiver And Displacement Policies Are Barred By Statute And Would Not Otherwise Serve The Public Interest.**

As detailed in our initial comments, the Commission is barred from reducing interference protections from LPFM stations by the Radio Broadcasting Preservation Act of 2000 (“RBPA”).<sup>4</sup> As Cox Radio states, “the Commission may not waive its spacing rules, including those for second-adjacent channels,” since to do so would create “absurd results” and violate the Commission’s obligations to “read the words of the statute ‘in their context and with a view to their place in the overall statutory scheme.’”<sup>5</sup> NAB also agrees with American Media Services and others that the “proposed elevation of LPFM stations to primary or quasi-primary status” through a

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<sup>3</sup> As with its opening comments, NAB’s reply comments are limited to issues raised in the *Second Further Notice* and do not address any of the decisions contained in the accompanying *Third Report and Order*.

<sup>4</sup> Pub. L. No. 106-553, App. B § 632, 114 Stat. 2762, 2762A-111.

<sup>5</sup> Cox Radio Comments at 8 (quoting *Teva Pharms., USA, Inc. v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999); *Sec’y of Labor, Mine Safety & Health Admin. v. Nat’l Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1076 (D.C. Cir. 2007)). NAB also believes that eliminating second-adjacent channel protections with respect to FM translators, as proposed by REC Networks (“REC”), see REC Comments at 4, would similarly violate the RBPA, as the statute required the Commission to maintain *all* of its existing rules protecting FM stations of any kind from LPFM-created interference.

licensing “presumption” would also violate the intent of Congress in enacting the RBPA.<sup>6</sup> The Commission’s proposal represents an impermissibly “radical recalibration of licensee rights and responsibilities that would essentially make provision of full service FM service more difficult, if not impossible any time a qualifying LPFM station would be displaced.”<sup>7</sup>

These statutory roadblocks are simply ignored by LPFM advocates. In fact, LPFM supporters do not even *mention* the RBPA at all,<sup>8</sup> except for Prometheus’ remarkably premature request that the Commission act (improperly) to “make clear the waiver standards and policies will extend to third-adjacent channel waivers at such time as Congress has lifted the third-adjacent restriction.”<sup>9</sup> Instead, LPFM supporters simply advance more radical – and equally impermissible – proposals, such as reducing co-channel and first-adjacent channel protections,<sup>10</sup> or even requiring full-power stations to

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<sup>6</sup> American Media Services Comments (“AMS”) at 6-7; see also National Public Radio (“NPR”) Comments at 6 n.19 (“NPR questions whether the Commission is free to make the changes it has pursued,” e.g., “alter[ing] the spectrum priority of LPFM stations.”) (citing RBPA and H.R. Rep. No. 106-567 at 7 (2000)).

<sup>7</sup> AMS Comments at 7.

<sup>8</sup> See generally REC Comments (not mentioning RBPA); St. Michael Radio Comments (same); Stephen Gajosik Comments (same).

<sup>9</sup> Comments of Prometheus Radio *et al.* at 6. Prometheus does not explain how the Commission can justify any action taken in anticipation of legislation that may or may not ever be enacted.

<sup>10</sup> See Prometheus Comments at 7 (proposing co-channel and first-adjacent channel waivers in some circumstances); REC Comments at 2 (“such a waiver should not be limited to second adjacent but also permitted in co-channel and first adjacent channel situations”).

downgrade their service to accommodate LPFM.<sup>11</sup> These proposals for radical reductions in interference protection would violate the RBPA and are plainly unauthorized without further specific Congressional action.

Even assuming *arguendo* that the statute would permit the Commission to change the interference priorities between full-power and LPFM stations (which it does not), the comments of LPFM advocates do not advance a sufficient basis for such a decision. Prometheus, for example, suggests that it is erroneous to contend that “a full-power station with a larger coverage area provides more public service.”<sup>12</sup> Yet, as a matter of public policy, the Commission has long preferred full-power service, for it recognizes that comparing the service areas of low-power stations to the area in which they cause interference, “[i]f we treat preclusion as a cost and service as a benefit, the cost/benefit ratio improves with power, but the ratio is very poor for low powered stations.”<sup>13</sup> Prometheus’ assertion that LPFM service should be valued over full power service is thus contrary to established Commission policy.

Moreover, the grab-bag of new proposals suggested by LPFM advocates are flawed and would not serve the public interest. For example, Prometheus proposes a point system as a basis for a licensing presumption favoring LPFM.<sup>14</sup> However, the system it proposes would be administratively burdensome, if not completely

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<sup>11</sup> See REC Comments at 5 (proposing to require downgrades from Class C to C0).

<sup>12</sup> Prometheus Comments at 13.

<sup>13</sup> Memorandum Opinion and Order, *In re Stephen Paul Dunifer*, 11 FCC Rcd 718, 725 (1995).

<sup>14</sup> See Prometheus Comments at 13-15.

unworkable.<sup>15</sup> In addition, any presumption based on a point system would still elevate the status of LPFM stations over full-power stations, and it would do so on the basis of Commission judgments about the relative value of programming. This would, therefore, be no less illegal than the Commission's current proposal based on eight hours of local programming.<sup>16</sup> Neither the Commission nor LPFM proponents provide any justification for this blanket presumption; rather, they fail to take into consideration the local programming and services that the applicant full power FM service may provide to the local community. Such failures constitute arbitrary and capricious rulemaking.<sup>17</sup>

Other proposals advanced by LPFM proponents, such as requiring reimbursement for the printing of new logs and stationery, advertising expenses, out-of-pocket expenses while a station is off the air, and undocumented "miscellaneous expenses,"<sup>18</sup> are similarly misguided. Indeed, this particular proposal is yet another example of LPFM advocates' ongoing attempt to equate secondary and primary

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<sup>15</sup> Prometheus, among other things, would credit "locally produced music programming," without any requirement that the music played on such programs would be local or even reflect local tastes and interests. *Id.* at 14. Further, while Prometheus asks for flexibility for LPFM stations to establish that they provide the required amounts of programming, *see id.* at 14-15, it does not propose any process for monitoring whether an LPFM station continues to provide the requisite amount of local programs or propose any action the Commission should take if that programming is not provided.

<sup>16</sup> *See Further Notice* at ¶ 75.

<sup>17</sup> *See, e.g., ALLTELL Corp. v. FCC*, 838 F.2d 551, 560 (D.C. Circ. 1988) (court found FCC rule affecting local exchange carriers to be arbitrary and capricious due to the lack of showings by agency that the rule actually addressed a real problem.) Indeed, assuming that the programming provided by LPFM stations is inherently preferable or superior to the programming and services, including local programming, provided by full power FM stations is not only arbitrary and capricious but may also implicate First Amendment concerns.

<sup>18</sup> *See Prometheus Comments* at 16-17.

services. Although the FCC does require stations proposing changes in community of license that displace full-power stations to pay the resulting costs, it has never extended that requirement to translators, boosters, or any other secondary service like LPFM. One of the key attributes of a secondary service is that licensees must be willing to accept any interference from existing or new primary services.<sup>19</sup> Both the Commission's proposal to require engineering assistance and the proposals in the comments to require broad expense reimbursement, would turn the status of secondary services upside down. Indeed, no basis for this fundamental change been advanced by either the Commission or LPFM advocates.<sup>20</sup> Again, given the limited number of possible displacements, the continuation of *voluntary* engineering and/or financial assistance from full power FM stations is entirely reasonable; however, codification is not warranted by the record.

Prometheus further requests that LPFM stations that move as a result of a full-power station's change of community should be afforded an additional period of time to determine whether the substitute channel would provide "equal coverage and quality."<sup>21</sup> Again, this proposal seeks to give a special privilege to the secondary LPFM station without any clear public policy justification.<sup>22</sup>

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<sup>19</sup> See 47 C.F.R. § 2.104(d)(3)(ii).

<sup>20</sup> REC's argument for imposing such requirements based on a theory of eminent domain cites no basis in law or Commission precedent. See REC Comments at 3 ("REC views encroachment by [full-power] stations as a form of *eminent domain* in a way.") (emphasis in original).

<sup>21</sup> Prometheus Comments at 9.

<sup>22</sup> Prometheus (Comments at 11) and REC (Comments at 3) appear to argue that the Commission should favor LPFM over full-power operations because the latter "are

## **II. Contour Protection-Based Licensing Standards Are Impermissible Under the RBPA And Would Be Difficult For LPFM Stations To Properly Implement.**

As an alternative to minimum distance separations, the Commission proposed that LPFM stations can opt to use the “contour” methodology, rather than distance separations, to establish that they will not cause interference.<sup>23</sup> Such an approach would be based on the specific signal strength contours of the affected full-power station, rather than the fixed distance separations prescribed by Section 73.807 of the rules. As the Commission notes, FM translators are currently licensed using this contour-based methodology.<sup>24</sup>

Extending this approach to LPFM stations, however, is barred by the RBPA. Indeed, in 2005, the Commission itself recognized that “[a]doption of a contour overlap approach is statutorily barred” since “Congress has mandated the use of a distance separation methodology to protect FM stations....”<sup>25</sup> Even the adoption of a stricter

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mainly motivated by profit.” *Id.* As the comments filed by NPR, Educational Media Foundation (“EMF”) and the Public Radio Regional Organizations demonstrate, the concerns about diminishing the interference protections for FM stations are not limited to commercial broadcasters. Further, the attempt by the LPFM advocates to have the Commission value their needs over those of commercial broadcasters cannot be reconciled with the Supreme Court’s recognition in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940), that Congress intended to establish a system of private broadcasting.

<sup>23</sup> See *Further Notice* at ¶¶ 78-83.

<sup>24</sup> *Id.* at ¶ 79 (discussing Section 74.1204 of the Rules).

<sup>25</sup> *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket No. 99-25, 20 FCC Rcd 6563, rel. Mar. 17, 2005 at ¶ 34.

cease-operations rule, while a commendable part of the Commission's proposal,<sup>26</sup> still cannot justify a violation of Congress' specific command. Moreover, although the Commission may be motivated by a goal of placing "LPFM stations and FM translators on essentially equal footing in providing reciprocal interference protection," it has previously concluded that "we do not feel it is necessary for both services to have *identical* interference protection requirements."<sup>27</sup> None of the parties supporting the use of contour methodology attempt to explain how that rule could be consistent with the statutory command that it "prescribe *minimum distance separations*" between LPFM and full-power stations.<sup>28</sup>

Even if a contour-based approach would not be statutorily barred, the Commission should still reject such an approach in this context. As the Commission itself recognizes, the "simplicity" of the minimum distance separation methodology has afforded all parties, including the Commission itself, "a straight-forward standard for determining technical acceptability."<sup>29</sup> In fact, as Ace Radio points out, permitting a contour-based approach could result in an "influx of technically flawed contour-based applications [that] would place additional and unnecessary strains on Commission staff," which could "turn the application process into chaos."<sup>30</sup> As Ace Radio further notes, the

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<sup>26</sup> *Further Notice* at ¶¶ 82-83 (proposing that LPFM stations adopting the contour-based approach would be required to resolve all *bona fide* actual interference complaints).

<sup>27</sup> In re Creation of a Low Power Radio Service, *Order on Reconsideration*, 15 FCC Rcd 19208, 19224 (2000) at ¶¶ 30, 39 (emphasis added).

<sup>28</sup> Pub. L. No. 106-553, App. B. § 632(a)(1)(A).

<sup>29</sup> *Further Notice* at ¶ 78.

<sup>30</sup> Ace Radio Comments at 11-12.

Commission has dismissed one-third of LPFM applications to date for technical and legal deficiencies.<sup>31</sup> Thus, the Commission should not implement regulations that are impractical to implement.

### **III. The Record Does Not Support Any Change In Priorities Between LPFM Stations And FM Translators.**

Under the current interference rules, LPFM stations and FM translators “operate on a substantially co-equal basis,” with an earlier-filed application having “priority” over any later-filed application.<sup>32</sup> Since the 2008 Order finds that “LPFM and FM translator services are each valuable components of the nation’s radio infrastructure,”<sup>33</sup> the Commission “remains unable to justify altering the status quo.”<sup>34</sup> In the *Second Further Notice*, the Commission seeks “to develop a better record” on whether its goals of localism, diversity and competition would be advanced by altering the priorities between LPFM and FM stations.<sup>35</sup> As commenters point out, the Commission has sought comment on this subject before, both in this proceeding and in its broadcast localism proceeding.<sup>36</sup> NAB’s initial comments explained extensively why the Commission has

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<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Third Report and Order*, MM Docket No. 99-25, 22 FCC Rcd 21912 (rel. Dec. 11, 2007) at ¶ 43.

<sup>33</sup> *Id.* at ¶ 49.

<sup>34</sup> NPR Comments at 11.

<sup>35</sup> *Further Notice* at ¶ 84.

<sup>36</sup> See NPR Comments at 10 (*citing* the 2005 FNPRM, 20 FCC Rcd at 6777-78 and the [Notice of Proposed Rulemaking], *Broadcast Localism*, 19 FCC Rcd. 12425, 12443 (2004); EMF Comments at 2 (*citing* the 2005 FNPRM).

already struck an appropriate balance,<sup>37</sup> and nothing offered by Prometheus or other LPFM supporters offers any record support for altering course.

Indeed, the comments confirm that the Commission's existing balance is the correct one. As the EMF states, "[p]ublic and nonprofit entities ... as well as state and local public radio entities ... utilize FM translators as an important means of serving diverse communities, which often cannot support a full power station, or where one cannot be operated."<sup>38</sup> Moreover, "LPFM stations can and do acquire programming from national networks," while sometimes running "shoestring" operations unable to provide the type of content provided by, *inter alia*, public state and regional networks.<sup>39</sup> The comments also agree with NAB that downgrading FM translator stations could harm established translator signal delivery systems: as NPR states, "public radio stations rely on extensive 'daisy chains' of translators, particularly in rural areas," and "[a] single LPFM station could disrupt an entire translator network merely by displacing one link in a translator daisy chain."<sup>40</sup>

Rather than addressing the Commission's policy goals, Prometheus devotes its comments, and an accompanying study, simply to the mathematics of getting more LPFM stations on the air.<sup>41</sup> Prometheus goes beyond the 25-translator limit per station

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<sup>37</sup> See NAB Comments at 19-32.

<sup>38</sup> EMF Comments at 6.

<sup>39</sup> *Id.* at 12.

<sup>40</sup> NPR Comments at 13.

<sup>41</sup> See Prometheus Comments at Attachment A ("Prometheus Study").

it had previously supported<sup>42</sup> – itself a figure NPR describes as “without any apparent policy rationale” and “too low to accommodate the needs of licensees challenged with serving large rural areas.”<sup>43</sup> Now, Prometheus proposes an even tighter limit of ten translators per station, and tosses in for good measure a proposal for a new national ownership restriction, from which LPFM stations that “pledge[] to provide locally originated programming” would be the beneficiaries.<sup>44</sup>

But while Prometheus offers up these draconian proposals to show how the Commission *could* potentially open the door to more LPFM stations, it still offers no evidence why the Commission *should*. In fact, the only policy argument from Prometheus is reducible to this: LPFM stations and translators are currently “co-equal” in status; the number of translators presently exceeds the number of LPFM stations; therefore the current system is unfair.<sup>45</sup> But this improper reasoning, even if accepted, still does not explain why LPFM serves the Commission’s goals of localism, diversity, and competition any more than FM translators. As EMF states, “[w]ithout empirical evidence LPFM stations provide more valued service than translators, any decision to

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<sup>42</sup> See Letter from Prometheus Radio Project to Chairman Kevin Martin, Nov. 13, 2007, filed in MM Docket No. 99-25, at 2.

<sup>43</sup> NPR Comments at 14.

<sup>44</sup> See Prometheus Comments at 21-22.

<sup>45</sup> See Prometheus Study at 3 (translators “vastly outnumber” LPFM stations); *id.* at 4 (“the allocation system has resulted in a dramatically skewed distribution of available spectrum.... A fair outcome to this proceeding would be one in which there is greater parity between the number of LPFM stations and translator repeating operations.”).

prefer the LPFM service over FM translators would be arbitrary.”<sup>46</sup> Moreover, NAB agrees with EMF that any changes in licensing priorities based on the *content* of broadcasts, as the Commission appears to be contemplating and Prometheus explicitly advocates, would violate the First Amendment.<sup>47</sup>

St. Michael Radio contends that the Commission should reverse the priorities between LPFM and FM translator stations because of geographic conditions in the West where there are great distances between communities.<sup>48</sup> Instead, it is precisely in areas where populations are spread out over great distances, or where terrain interferes with FM transmissions, that translators are most needed to ensure that the public receives radio service.

#### **IV. Conclusion.**

As discussed by NAB and others in their initial comments, the Commission is statutorily barred from altering its distance separation requirements, or from adopting a licensing presumption that would give LPFM stations priority over subsequently authorized full-power stations. NAB again urges the Commission to focus on constructive means to relocate LPFM stations *without creating harmful interference*, by

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<sup>46</sup> EMF Comments at 14; see, e.g., *LaRouche’s Committee for a New Bretton Woods v. FEC*, 439 F.3d 733, 737 (D.C. Cir. 2006) (under the APA, courts must hold unlawful any agency action that is “unsupported by substantial evidence,”); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 422-23 (D.C. Cir. 1983) (agency’s decision must be “rational, ha[ve] support in the record, and [be] based on a consideration of relevant factors”); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (when agency reverses course, it must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

<sup>47</sup> See EMF Comments at 15.

<sup>48</sup> See St. Michael Radio Comments at 2-4.

continuing to encourage already-successful voluntary engineering and/or financial assistance from full-power FM stations to affected LPFM stations. In addition, a contour-based interference approach cannot be reconciled with the minimum distance separations required under the Radio Broadcasting Preservation Act.

Finally, the Commission should not alter the regulatory status between LPFM stations and FM translators. Although such changes might result in more LPFM stations being licensed, there is no evidence in the record that the changes would, in any measure, enhance the Commission's goals of localism, diversity, and competition. Rather, as the record demonstrates, such a change could undermine the valuable service to local communities provided by full-power radio stations

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