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

In the Matter of	)
Amendment of Part 74 of the Commission's Rules	) MB Docket No. 18-119
Regarding FM Translator Interference	) FCC 19-40

PETITION FOR RECONSIDERATION

KGIG-LP Salida, California/Fellowship of the Earth, "Petitioner", here timely files Petition for Reconsideration concerning the above-captioned rule-making.[1] Petitioner has standing to file Reconsideration because (1) Petitioner is a licensed low power broadcast station, (2) through Sec. 405(a) of the Communications Act, as the R&O affects the rights of LPFM facilities, (3) and Petitioner has previously participated with comments and replies within this specific rulemaking (co-signed comments and replies under LPFM Coalition). This Reconsideration is being filed because specific conclusions reached within the rulemaking conflict with precedent and fact, and could contravene the Administrative Procedure Act.

First, Petitioner believes allowing translator licensees the ability to make channel changes filed outside of a major change window is in conflict with *Ashbacker,*[2] the precedent that requires the FCC to give all potential mutually exclusive applicants the

[1] *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, Report and Order, MB Docket No. 18-119, May 9, 2019 ("R&O"). R&O was published in the Federal Register on June 14, 2019, which 30 days fell upon a weekend, allowing filing July 15, 2019.

[2] *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945) ("Ashbacker").

ability to have an equal opportunity to file for a new frequency. The FCC encountered this same exact consideration concerning a translator application within the *Tell City* decision ("We have held that the doctrine does apply where, as here, prospective mutually exclusive applications would have been timely but for the window filing restriction on FM translator major changes.")[3] In specific, the Tell City judgement relayed the problem with these type of major change translator applications (channel change proposals) outside of filing windows:

> In this case, potentially competing applicants were not in a position to compete on an equal basis with the Application. First, the "set of procedures" suggested by the Parties would apply in the first instance to the Application alone—not to potentially competing applicants, who would not have either notice or the opportunity of a filing window. Neither the filing of the Application nor the Public Notice constitutes such notice, for several reasons. First, pursuant to the "application purpose" selection chosen by Way, the Public Notice listed the Application as a "minor change" application,without any mention of the Waiver Request. Therefore, even a vigilant competitor would not be alerted by the Public Notice alone to the possibility of the Parties' proposed long-distance, one-step move. Second, and more importantly, the Parties' proposal was not adopted or approved by the Commission. In the absence of Commission action establishing a new procedural rule, other licensees are restricted by—and entitled to rely upon—the existing rules, including the geographic limitations on minor modifications set forth in Section 74.1233(a)(1). There is no merit to NAB's argument that prospective applicants in this case could "assure timely filing—and, thus, comparative consideration" if they filed within 30 days of the Public Notice. If the Application were treated as a minor change (as requested), Section 74.1233(d)(1) of the Rules mandates that it receive protection from subsequent, conflicting applications on a first-come, first-served basis. Competing applications filed within 30 days of the Public Notice (or at any other time after the Application was filed) would not receive comparative consideration but would be placed in a queue pending action on the Application. For these reasons, we find that grant of the Waiver Request would be inconsistent with the requirement of Ashbacker and its progeny to provide potentially competing applicants the opportunity to compete on an equal basis under procedures applicable to all similarly-situated applicants.[4]

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[3] *Letter to Robert D. Augsberg from Peter H. Doyle "In re: W218CR, Central City, Kentucky."* DA 14-1365. Media Bureau. September 19, 2014.
[4] *Ibid*, page 4.

The argument in particular, is the lack of local public notice, or the ability to compete. This would neglect competitors to the new channels translators. This directly implicates future new or modified LPFM facilities.

Second, the Commission used require a "LPFM preclusion showing," per the Local Community Radio Act ("LCRA") Section 5, for every non-adjacent channel change or non-touching 60 dBu application proposal.[5] This is clearly demonstrated within the requirement of the Mattoon Waiver[6] -- where translator applicants are allowed to file major changes with a minor change application. The Mattoon waiver is for **existing, licensed translators** proposing to move longer distances (non-overlapping 60 dBu contours) so that the newly proposed facility occupies new airspace, **thus requiring a LPFM preclusion study**. Hence, the FCC required preclusion showings **not only for new translators from filing windows, but from those <u>currently licensed</u> and asking to occupy new, possibly LPFM-preclusive, airspace.** This is because LCRA ensures protection for new (LPFM) stations to be licensed in the future, **by definition.** This is the Commission's original interpretation of "ensuring

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[5] In other words, "major change" proposals -- as minor changes are limited to the proposed 60 dBu contour overlapping the licensed contour, or -/+2 adjacent-channel moves.

[6] A preclusion showing was required by the Commission for any translator licensee wanting to use a Mattoon Waiver to obtain another license. See *John F. Garziglia, Letter*, 26 FCC Rcd 12686 (MB 2011) ("Mattoon Waivers"). It is worth noting, <u>even after the 2013 LPFM filing window a LPFM preclusion study was still required with the Matton Waiver</u>, meaning, <u>it was not just for preclusion protection up to the 2013 LPFM filing window</u>. In a December 2014 MO&O, the FCC underscored the stipulation **<u>over a year after the LPFM filing window</u>**: "...the Bureau found that waiver of Section 74.1233(a)(1) was in the public interest because... the proposed move was not in an LPFM spectrum-limited market." See *Application for a Construction Permit for a Minor Change to a Licensed Facility, Station W267AT, Sherburne, New York*. Memorandum Opinion and Order. FCC 14-193. December 10, 2014.

availability" when "licensing new… stations."[7] FCC appears to have deviated from this precedent. The Commission now insinuates LCRA Section 5 only pertains to the licensing of new translators.[8] But "the licensing of new rather than existing stations" is consistent with the position of protecting future new LPFM stations, as the Commission previously used grids to ensure hypothetical LPFM facilities in the LPFM Fourth Report and Order and Third Order.[9] But even by the R&O's own stipulated definition, the Commission did not require any preclusive showings for the hundreds of new translators licensed from the last two cross-service translator filing windows. By any definition, the FCC appears either inconsistent or self-conflicted.

Petitioner believes new rules from Docket 19-118 cannot move forward without cogent reasoning from the Commission concerning LCRA Section 5 precedent and its apparent requirement of LPFM preclusion studies for non-adjacent channel changes. The chief concern, in the big picture, is there is a perceived bias amounting to unequal treatment of LPFM service compared to translator service. Examples include: (1) Docket 19-118 has liberalized interference mediation for translators with new rules, expedited over one year. Yet during the same time, FCC has not taken any action on RM-11810 to permit LP-250, which would still be smaller coverage compared to translators (translators can cover up to 40x the area of a LPFM). (2) The Commission

[7] As quoted from LCRA Section 5.
[8] Paragraph 9, Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference, Report and Order. FCC 19-40. May 9, 2019.
[9] *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3382.

delayed review on a time-contingent Petition for Reconsider/Freeze/Stay on *Second Report and Order on AM Revitalization*[10] filed by Prometheus Radio Project on April 3, 2017 until after the translator filing windows finished (over a year later),[11] making their petition "moot."[12] (3) The FCC has been sitting on a pivotal petition concerning implementation of the LCRA from Prometheus Radio Project[13] for over a year, while it fast-tracks construction permits and licenses for new translators for which **all these application are contingent upon**. (4) The Commission had opened three consecutive filing windows to cater toward major changes and/or new translator facilities, while permitting one filing window for LPFM. (5) The Commission's interpretation of LCRA Section 5(2) ("such decisions [between LPFM and translator] are made based on the needs of the local community") set that "translators are inexpensive to construct and operate, and can effectively bring service to rural and underserved areas" and "LPFM stations, with limited coverage and other resource constraints, are better suited to serve more densely populated areas."[14] Yet the FCC has licensed, by measure of coverage, translators in all areas greater than LPFM,[15] disregarding their

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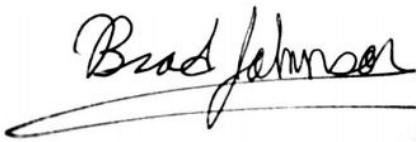
[10] *Revitalization of the AM Radio Service, Second Report and Order*, 32 FCC Rcd 1724 (2017).
[11] *In the Matter of Revitalization of the AM Radio Service*, Order on Reconsideration, MB Docket No 13-249. May 22, 2018.
[12] *Ibid*, Paragraph 16, "Prometheus's Stay Petition is moot and we dismiss it."
[13] See *In re: "All Pending Translator Applications" Petition for Reconsideration"*: "For the foregoing reasons, Objectors' Petitions for Reconsideration ARE DISMISSED, except for Prometheus Radio Project's Petition for Reconsideration with regard to the Camden Application, File No. BNPFT-20180508ABL. We will address the merits of the Petition for Reconsideration as to that application at a future date." DA 18-729. July 13, 2018.
[14] *See In re: "All Pending Translator Applications" Informal Objection* p 3-4, DA 18-597, June 8, 2018, referencing Paragraphs 18 and 30 of *Creation of a Low Power Radio Service,* Fourth Report and Order and Third Order on Reconsideration*,* MM Docket No. 99-25. March 19, 2012.
[15] See data within *Center for International Media Action, et. al, Informal Objection of ~1000 translators.*

previous definitions of “needs of the local community” -- hence disregarding LCRA Section 5(2).

All these actions, collectively, demonstrate a perceived lack upholding of LCRA Section 5, in which LPFM and translator should be co-equal services. But for the rulemaking in specific, Petitioner objects to the conclusion within the R&O that the LCRA only pertains to the licensing of new translators because that is not the case, as demonstrated in the past with the requirement within Mattoon Waivers for LPFM protection within minor change applications. This appears to be a mistake within the R&O reasoning. Furthermore, there is no justification within the R&O that the Commission’s proposal does not conflict with *Ashbacker*. It is requested that the Commission re-examine their proposed rule-making to accommodate/explain the LCRA Section 5 and Ashbacker discrepancies.

Respectfully Submitted By,



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