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

REPLY TO NATIONAL ASSOCIATION OF BROADCASTERS' OPPOSITION TO REQUEST FOR STAY

1. The LPFM Coalition ("LPFM Coalition"), through counsel, hereby submits this Reply to the National Association of Broadcasters' ("NAB") Opposition to the LPFM Coalition's Request for Stay ("Stay Request") of the Commission's Report and Order ("Rulemaking") amending of the Commission's Rules Regarding FM Translator Interference in FCC 19-40 ("Stay Opposition"). NAB filed its Stay Opposition on July 22, 2019.

NAB Is Wrong on the Law; No Mandatory "Stringent Four Prong Test" Applies.

2. NAB bases its Stay Opposition on what it falsely characterizes as a "STRINGENT four prong test"[1] for all stay requests, pursuant to *Tennis Channel, Inc. v. Comcast Cable Commu'ns., LLC*, 27 FCC Rcd 5613 (2012) ("Tennis Channel"). But *Tennis Channel* DOES NOT, in fact, mandate the aforementioned four prong test – either stringently or loosely.

3. *Tennis Channel*, instead, notes that the "Commission and courts TRADITIONALLY EXAMINE"[2] stay requests under a four-part rubric. TRADITION is not the same as a "STRINGENT" REQUIREMENT.

[1] *Stay Opposition* at 1 (emphasis added).

[2] *Tennis Channel* at n.12 (emphasis added).

4. Stringent requirements are mandatory. Traditions, while likely and habitual, are voluntary and customary rather than mandatory. For example: food safety laws require poultry, such as turkeys, to be sold under certain sanitary conditions. That's a stringent requirement. But, it is merely a tradition to eat Turkey on Thanksgiving. While a victualer may be sanctioned if it ignores stringent sanitary codes when selling turkey dinners, there is no state sanction against someone who eats pizza instead of turkey on Thanksgiving; Thanksgiving turkey-eating, although nearly ubiquitous, is only a tradition and not a requirement. The NAB is, therefore, as wrong about stringent application of *Tennis Channel's* four prong analysis as a horrified traditionalist would be in swearing out warrants for arrest of Thanksgiving pizza-eaters.

5. A full reading of *Tennis Channel,* together the controlling legal precedents underlying the case, demonstrates how wrong NAB is. Two such underlying judicial cases recognize clearly that: "Parties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review. As it is principally the protection of the public interest with which we are here concerned . . . ."[3] Thus, a correct distillation of *Tennis Channel* would state that when the Commission reviews a stay request, the public interest "factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes."[4]

6. The LPFM Coalition requests a stay based on such public interest considerations. The four-prong rubric may help inform a public interest analysis, but the public interest must ultimately guide the Commission's decision-making.[5]

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[3] *Scripps-Howard Radio, Inc. v. FCC,* 316 U.S. 4 (1942) (cited by *Virginia Petroleum Jobbers Asso. v. Federal Power Com*., 259 F.2d 921, 924 (D.C. Cir. 1958)). *Virginia Petroleum Jobbers* is cited in *Tennis Channel* at n. 12.

[4] *Tennis Channel* at n. 23 (citing *Virginia Petroleum Jobbers Asso. v. Federal Power Com*., 259 F.2d 921, 925 (D.C. Cir. 1958)).

[5] 47 U.S.C. Sec. 303(f)

The Public Interest Factor is Crucial

7. Under the applicable analytic rubric (rather than the inapt one the NAB suggests), the Commission granted a stay in *Tennis Channel* after applying such public interest analysis, as follows:

(1) "Without examining the record in detail, it is not possible to determine at this point whether . . . [the requestor] is likely to succeed on the merits, but upon further examination of the record, the Commission may reverse or modify specific rulings."[6]

(2) "Harms to both parties may result from either compelling immediate compliance or granting a stay, but the balance of harms does not tilt sharply in favor of either party."[7]

(3) "A stay will preserve the status quo while the Commission has an adequate opportunity to examine the record and the . . . disposition of each issue closely, and it will avoid potential disruption . . . in the event that the Commission subsequently reverses or modifies. . . ."[8]

(4) "A stay pending Commission review . . . . will not unduly delay the grant of any relief . . . ."[9]

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[6] *Tennis Channel* at 5615.

[7] *Id.*

[8] *Id.*

[9] *Id.*

8. This analysis from *Tennis Channel* cleanly fits the situation at hand. Thus, while NAB was wrong in how it characterized the case holding, it was right to cite *Tennis Channel* as an apt analogy providing controlling case law for the Stay Request.

9. As in *Tennis Channel,* the LPFM Coalition seeks a stay while the Commission properly examines a focused set of legally problematic regulations imposed by the Rulemaking. This is not a re-litigation of settled policy debates, as NAB claims,[10] but a genuinely justiciable complaint about serious statutory and Constitutional issues.[11] As these issues arose wholly from the Rulemaking in final form, the issues could not possibly have been raised earlier. The APA and First Amendment issues simply did not exist until the Commission released the Rulemaking.[12]

10. The NAB ignores both the APA and the First Amendment issues in its Stay Opposition. It argues policy. Other than offering a misleading analysis under *Tennis Channel,* NAB mainly argues that the Rulemaking provides the fairest policy.[13] NAB avoids discussion of the serious legal and constitutional issues the LPFM Coalition raises and their effect on the public interest.

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[10] *E.g.,* Stay Opposition at 2("the Recon Petition simply rehashes previously rejected arguments…").

[11] Notably, *inter alia,* the Administrative Procedure Act ("APA") and the First Amendment's guarantee of a right to petition the government for redress. ("'The First Amendment's Petition Clause protects 'the right of the people . . . to petition the Government for a redress of grievances." *Venetian Casino Resort, L.L.C. v. NLRB,* 793 F.3d 85, 89 (D.C. Cir. 2015) (internal citations omitted).

[12] Similarly, while the Coalition and some of its members have taken positions in policy debates over the correct interpretation of the Community Radio Act of 2010 ("LCRA"), until the Rulemaking issued, no one could have known about the self-contradictory rationale the Commission would provide for the interpretation it provided therein, which is also subject to reconsideration.

[13] *See, e.g.,* Stay Opposition at 6 ("this was a consensus approach that reflected the broader interests of the radio industry.")

11. NAB has capable lawyers. So, its silence here speaks loudly. If NAB had serious grounds to oppose the stay based on public interest criteria, it would have done so. Instead, it simply argues that the Rulemaking is fine policy that should not be subject to a stay.

12. This does not conform to *Tennis Channel's* logic. Such logic, when applied to the Stay Request, actually militates for a stay for the following reasons:

(a) Absent detailed examination of the record, *Tennis Channel* instructs, "it is not possible to determine at this point"[14] the likelihood of success on the merits. This is also true of the Stay Request. Such a determination requires analysis of the discrete statutory and constitutional issues the LPFM Coalition raised that could not have been analyzed during the Rulemaking's comment and reply period, because they did not exist until the Rulemaking finally issued.

(b) In *Tennis Channel,* "[h]arms to both parties may result from either compelling immediate compliance or granting a stay, but the balance of harms does not tilt sharply in favor of either party."[15] This also describes the situation at hand. NAB wants to create facts on the ground by mid-August so its constituency can benefit sooner, while the LPFM Coalition's members seek to prevent harms such facts on the ground would create, in the interim, while the Commission reviews the Petition to Deny. Both sides have something to lose and gain in any potential scenario. Thus, the balance of harms does not tilt sharply one way or another. It is shared – thus making the issuance of a stay the right outcome, as it was in *Tennis Channel.*

[14] *Tennis Channel, supra,* n.5.

[15] *Id.*

(c) "A stay will preserve the status quo while the Commission has an adequate opportunity to examine the record and the . . . disposition of each issue closely, and it will avoid potential disruption . . . in the event that the Commission subsequently reverses or modifies. . . ,"[16] *Tennis Channel* states. This is exactly what the LPFM Coalition seeks – the avoidance of disruptions (administrative certainty) and wasted efforts and resources (administrative efficiency) while the Commission reviews the substantive issues raised.

(d) As in *Tennis Channel,* a stay here does not unduly delay any relief. The Commission can choose whether to stay the Rulemaking in its entirety or simply the particular aspects of the Rulemaking implicated by the LPFM Coalition's statutory and constitutional claims. Non-controversial aspects can go forward in the public interest, unless the Commission itself determines that it needs a pause to review the entire structure of the Rulemaking. The LPFM Coalition clearly stated that either option is appropriate.[17]

13. Thus, the *Tennis Channel* roadmap wholly supports the LPFM Coalition's stay request, as a stay would support the public interest "in administrative certainty and administrative efficiency."[18] Indeed, the Commission itself and all regulated parties would, with a stay, "conserve resources" that would otherwise be diverted "'to deal with "fluctuating compliance standards until'" the issues under appeal in the Rulemaking are finally resolved. That is all the LPFM Coalition seeks. It correctly fits the conditions for stay *Tennis Channel* established.

14. Moreover, all direct parties, as well as the public at large, would benefit from constitutional analysis missing from the Commission's decision-making and, the violation of which the LPFM

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[16] *Id.*

[17] Request for Stay at para. 3.

[18] Request for Stay at 1-2.

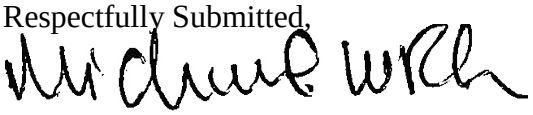
Coalition seeks to vindicate. It is odd indeed that the National Association of Broadcasters filed a pleading that completely ignores an important First Amendment right. NAB normally takes legitimate pride in its strong advocacy of "broadcasters vital role in protecting the First Amendment,"[19] rather than direct its considerable resources to prevent FCC reconsideration of a rule making in which significant First Amendment principles were ignored.

Conclusion

15. NAB was wrong to present dismembered fragments of *Tennis Channel* to argue that the case says something that it does not actually state. But, NAB was still right to cite *Tennis Channel* insofar as it provides both a good analogy and controlling case law to decide the Stay Request. By focusing, as *Tennis Channel* does, on public interest factors, and applying such factors in the same manner, it is clear that a stay is in the public interest and must be granted.

16. The Commission should grant a stay quickly – and do so before the Rulemaking's rapidly approaching mid-August effective-date arrives. Delay in issuing a stay to maintain the status quo would fail to meet the public interest – which is, after all, the touchstone for broadcast regulation.

Respectfully Submitted,



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July 29, 2019

[19] Speech by NAB President Gordon Smith, before the Media Institute, July 23, 2019, available at https://www.mediainstitute.org/wp-content/uploads/2019/07/Comm-Forum-Gordon-Smith-Speech-7-23-19_revised.pdf (visited Jul 27, 2019).

CERTIFICATE OF SERVICE

I, Michael W. Richards, counsel for The LPFM Coalition, hereby states that a true copy of the **REPLY TO NATIONAL ASSOCIATION OF BROADCASTERS' OPPOSITION TO REQUEST FOR STAY** was mailed first class, postage prepaid, this 29th day of July, 2019 to:

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