

**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 OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

1. The LPFM Coalition (“LPFM Coalition”),¹ through counsel, hereby submits this Reply to Oppositions to Petitions for Reconsideration, filed by (a) the National Association of Broadcasters (“NAB”)² and (b) the “Joint Commenters,”³ of the Commission’s Report and Order (“Rulemaking”) in MB Docket 18-119 amending FM Translator interference rules.

2. There is little overlap between the two opposition pleadings. As a result, the LPFM Coalition will primarily discuss NAB’s Opposition, except where overlap occurs.

NAB Makes Factually Incorrect Claims and Ignores Core Statutory and Constitutional Issues.

3. NAB states that all parties seeking reconsideration (in NAB’s words, the “Petitioners”) “unfairly suggest that the Commission is somehow biased against LPFM service.”⁴ This is simply not true. The LPFM Coalition said nothing of the sort.

¹ The current members of the LPFM Coalition are listed in Att. 1, hereto.

² *Opposition to Petitions for Reconsideration*, filed by the National Association of Broadcaster in MB Docket No. 18-119, on August 15, 2019 (“NAB Opposition”).

³ *Opposition to Petitions for Reconsideration*, filed jointly by Beasley Media Group, LLC, Cox Media Group, LLC, Entercom Communications Corp., iHeart Communications, Inc., Neuhoff Corp., and Radio One Licenses, LLC/Urban One, Inc. (collectively, “Joint Commenters”) on Aug. 15, 2019 (“Joint Commenters’ Opposition”).

⁴ NAB Opposition at 1.

4. The NAB cites to one LPFM station's pleading,⁵ but improperly attributes it to the LPFM Coalition as a whole.⁶ Essentially, NAB attempts to put all filers in a single basket it dismissively labels "certain Low Power FM (LPFM) radio advocates."⁷

5. The LPFM Coalition never said anything about agency bias in any of its petitions in this proceeding. Nor would it – as it would be an illogical statement given the arguments the LPFM Coalition actually made. The LPFM Coalition argued that the Rulemaking contained certain discrete statutory and constitutional infirmities that require remediation as a matter of law. This is not a claim of bias, but an analysis showing relevant law the Commission is not free to ignore – but did, ACTUALLY, ignore in the Rulemaking.

6. The LPFM Coalition identified seven discrete areas in which the Rulemaking violated both statutes and the First Amendment. Given these serious legal issues, the Commission must revisit those parts of the Rulemaking and make it so they are neither *ultra-vires*, arbitrary and capricious nor otherwise contrary to law, as they are today.

7. The Commission would, presumably, not want such infirmities in its rules. It has power to make course corrections so its otherwise extensive and thoughtful efforts would fulfill both

⁵ *NAB Opposition* at n. 4, citing to Petition for Reconsideration filed by KGIG-LP, which actually does not accuse the FCC of bias, but says FCC actions create "perceived bias." This is an important distinction. Perceived bias means something appears to others as bias, regardless of intent. An accusation of actual bias focuses not on others' perceptions (thus the use of the word, "perceived"), but on the intent of the actor itself. No one accused the FCC of actual bias. KGIG suggested the FCC created a perception of bias – which, presumably, is something no regulator would want.

⁶ KGIG-LP is a member of the LPFM Coalition, but it is only one of 108 stations in the Coalition. Just as any NAB member is free to file on its own without implicating NAB, any LPFM Coalition member is free to file on its own without implicating the Coalition or other members. Each party's pleading stands on its own.

⁷ *NAB Opposition* at 1.

legal mandates and the agency's professed goals of regulatory improvements AND do so lawfully. No one can seriously dispute that lawful regulation is in the public interest.

8. NAB also falsely states that the LPFM Coalition ignores the Commission's statement of purpose that "because 'of the maturity of the FM Service, we must . . . balance the needs of translator, lower power FM and full service stations.'"⁸ Again, either the NAB failed to read the LPFM Coalition pleadings or intentionally ignored multiple citations noting this public interest goal.⁹ With each mistaken assertion, the NAB loses credibility.

9. The NAB might have more credibility if it actually responded to the LPFM Coalition's statutory and constitutional claims. Instead, NAB says not a word about the all-important Administrative Procedure Act ("APA") and First Amendment issues the LPFM Coalition discussed at great length.

10. The NAB has skilled lawyers able to argue the nuances of such law and how they apply to the issues at hand. But they did not do so. This speaks volumes; if the NAB had creditable counter-arguments, it would have made them. Instead, the NAB Opposition relies on insults, insinuations, and false claims to spin a narrative that (a) attributes all petitioners' pleadings, interchangeably, to one another (as "certain LPFM advocates") and (b) portrays them, collectively, as unreasonable and unappreciative of the hard work the FCC performed in balancing competing interests.

11. To make such false claims, NAB ignores the tailored nature of LPFM Coalition Petition to Deny. This is evident in the fact that the LPFM Coalition did not seek reconsideration of some

⁸ *NAB Opposition* at 2, citing Rulemaking at para. 4.

⁹ *E.g. LPFM Coalition Petition for Reconsideration* at paras 4, 5 and 34.

provisions in the Rulemaking that it opposed during the notice and comment period. Examples include: the establishment of (a) contour limits for *bona fide* interference complaints and (b) a required minimum number of complaints before mandatory remediation.

12. The LPFM Coalition DOES NOT “repeat arguments that were previously raised . . .”, as NAB claims.¹⁰ The LPFM Coalition only appeals certain statutory and constitutional violations. These violations could not have been raised until they actually existed, which was upon release of the Rulemaking.

13. The LPFM Coalition argues the FCC has no authority to jettison constitutional rights, as in the One Building/One Complaint Procedure, by officially ignoring petitions for redress from all but the first person in a large and expansive building regardless of how far apart listening takes place. Nor is the Commission free to impose rule making provisions absent adequate explanation or impose them retroactively absent specific statutory authority for such retroactivity. The APA bars it. “If the intent of Congress is clear, that is the end of the matter;”¹¹ “The legislature says what it means and means what it says.”¹²

14. In sum, The LPFM Coalition raised the following seven legal issues:

- (a) Rulemaking provisions violate APA requirements that all rule making have only “future effect designed to implement, interpret, or prescribe law or policy;”¹³ As a result, the FCC violates this fundamental APA requirement in its decision to

¹⁰ *NAB Opposition* at 3.

¹¹ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

¹² *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20, 199 L. Ed. 2d 249 (2017).

¹³ 5 U.S.C. Sec. 551(4).

adjudicate even very old interference complaints under new Rulemaking provisions;

- (b) The Commission failed to provide adequate APA-required explanation for provisions that officially ignore multiple listener interference complaints from a single building, no matter how expansive the building is¹⁴ through implementation of the One Building, One Complaint Procedure;
- (c) The One Building, One Complaint Procedure violates the First Amendment rights of listeners in large or expansive buildings by effectively depriving each successive person, after the first to complain, of their individual rights to petition for redress to the government, as interference complaints to the FCC clearly qualify as constitutionally-protected petitioning to a government agency.
- (d) The Rulemaking contains self-contradictory statements that, by their own illogic, fail to provide required APA justification for the Commission's rejection of preclusion studies for FM Translator relocation applications;¹⁵
- (e) The Rulemaking irrationally requires Interference Complaints to contain U/D Data, which measures underlying interference, using a calculation rubric that explicitly excludes any measure of interference.¹⁶ This requirement to measure interference without regard to interference is a self-negating provision. Such self-

¹⁴ *Rulemaking* at para. 15.

¹⁵ *Rulemaking* at para. 9.

¹⁶ *Rulemaking* at para. 23.

negation makes the U/D regime irrational and, therefore, violates APA provisions barring “arbitrary and capricious” rule making;

(f) The Rulemaking contains misstatements of fact and mistaken attributions. Their presence in the Rulemaking evince a lack of due care, thus rendering the Rulemaking arbitrary and capricious under the APA.

(g) The Rulemaking explicitly states it is designed to provide improvements important only for full-service stations and FM translator operators, but not for LPFM stations.¹⁷ This statement of purpose violates LCRA Section 5(3).¹⁸

15. The NAB fails to offer arguments to counter any of the APA and First Amendment issues. As noted, the NAB has good lawyers. So, its silence suggests they have nothing to counter the LPFM Coalition’s arguments regarding the APA and the First Amendment. As statutes and constitutional provisions trump agency regulations, the Commission must grant the LPFM Coalition Petition for Reconsideration so that the new translator interference regime – as a whole – complies with the APA and the First Amendment.

16. The NAB does make one statutory argument about the Local Community Radio Act of 2010, (“LCRA”).¹⁹ But, in that instance, NAB engages in a game of hide-and-seek with the Commission. It argues against the LPFM Coalition’s Reconsideration Petition by citing to one snippet of LCRA rather than the entire inter-related set of provisions, which encompass three inter-related subsections, not just the one that NAB cites.

¹⁷ *Rulemaking* at para. 4.

¹⁸ “FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations.”

¹⁹ 111 P.L. 371, 124 Stat. 4072 (2011).

17. To eliminate any confusion the NAB created with its attempts to edit the law to meet its desired outcome, The LPFM Coalition submits, here, the actual text of LCRA's Section 5:

SEC. 5. ENSURING AVAILABILITY OF SPECTRUM FOR LOW-POWER FM STATIONS. The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that— (1) licenses are available to FM translator stations, FM booster stations, and low-power FM stations; (2) such decisions are made based on the needs of the local community; and (3) FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations.

18. The NAB Opposition mentions only Section 5(1) which requires license availability for all secondary services (LPFM, FM Boosters and FM Translators). In its citation only to that one dismembered section of an inter-related three part regime, the NAB hides the fact that Section 5(2) clearly instructs the FCC to make decisions about the way to distribute such licenses based “based on the needs of the local community.” The Commission must, as a result, provide a means to assess such local community needs – because LCRA requires it. The only way it has ever done that, since the establishment of the LPFM service (and in the face of diminishing spectrum availability in urban areas) has been through preclusion studies. Absent any alternative mechanism (which the Rulemaking fails to provide), the LPFM Coalition argues that preclusion studies are a proven means to ensure availability according to community needs,²⁰ and the Commission is wrong to reject them absent an alternative because LCRA demands it.

²⁰ The Joint Commenters also oppose preclusion studies, albeit without submitting partial and misleading citations, as NAB did. The Joint Commenters do, however, oppose reconsideration of the preclusion study issue without reference to any applicable statute. Instead, the Joint Commenters shed no light on the legal issues underpinning the LPFM Coalition's Petition for Reconsideration. Rather than shed any legal light on the matter, The Joint Commenters merely report what the Commission said in the Rulemaking. While it is a good synopsis of the Commission's own statements, it does not provide any legal basis to deny the LPFM Coalition's Petition for Reconsideration.

Essentially, the Commission must either have preclusion studies or an alternative mechanism to comply with LCRA Sec. 5(2). It cannot have absolutely nothing – as the Rulemaking would have it.

19. The NAB also offers no rebuttal to the LPFM Coalition’s APA-based argument concerning preclusion studies. The LPFM Coalition noted that the Rulemaking provided a self-contradictory justification for its refusal to impose preclusion studies. A self-contradictory justification would violate the APA’s rationality requirements, even absent the statutory command discussed above.

20. Specifically, the Rulemaking states LCRA Sec. 5 “only pertains to the licensing of new rather than existing stations.”²¹ But the LPFM Petition for Reconsideration points out that the Commission’s total rejection of preclusion studies in all situations²² imposes no mechanism at all (whether preclusion studies or an alternative) to meet its legal obligations vis-à-vis new stations.

21. New stations are licensed in the FUTURE. As a result, the LPFM Coalition noted: “If, as the Rulemaking says, the LCRA Sec. 5 mandate “only pertains to the licensing of new rather than existing stations,”²³ how could LCRA Sec. 5 not apply to a proposal that effects future LPFM licensing? The Rulemaking essentially negates the legislative principle it purports to uphold.”²⁴ Such negation is irrational and, therefore, not permitted under the APA’s bar on arbitrary and capricious rule making.

²¹ *Rulemaking* at para. 9.

²² *LPFM Coalition Reconsideration Petition* at para. 45.

²³ *Rulemaking* at para. 9.

²⁴ *LPFM Coalition Reconsideration Petition* at para. 46.

22. In sum, the NAB wants the Commission to ignore controlling law and make itself the law-giver rather than a dutiful regulator. This is both unconstitutional and contrary to statute. Moreover, the NAB seems, surprisingly, not to care about the First Amendment at all in this proceeding, as it makes no mention of the First Amendment problem posed by effectively shutting down the constitutional right of all but the first person filing to seek redress from a government agency.

23. Rather than acknowledge the First Amendment's importance, the NAB argues that "industry-wide fairness"²⁵ is the most significant factor. This view makes regulation nothing more than a gentlemen's agreement among those in the industry, without regard to statutes and constitutional protections implicating the public interest.²⁶

24. Indeed, the NAB even wants the Commission to ignore the Communications Act most fundamental statement of jurisdiction when, in its defense of the One Building/One Complaint Procedure, it characterizes interference to multiple parties in a large or expansive building as merely "inconvenient to listeners,"²⁷ and not "worthy of Commission involvement."²⁸ This is wrong. The Communications Act requires Commission regulation in the "public convenience, interest, or necessity."²⁹ Inconvenience, as the opposite of convenience, is barred. Congress specifically told the Commission to get involved.

²⁵ *NAB Opposition* at 9.

²⁶ See discussion of One Building, Once Complaint Procedure in *NAB Opposition* at 8-9.

²⁷ *NAB Opposition* at 8.

²⁸ *Id.*

²⁹ 47 U.S.C. Sec. 303 (emphasis added).

Conclusion

25. Neither NAB nor any other party argues against the LPFM Coalition legal analysis demonstrating the Rulemaking failed to meet APA and Constitutional requirements. The NAB also failed to argue fully and candidly with regard to LCRA. The NAB even wants the Commission to ignore the most basic regulatory principles in the Communications Act – that FCC regulation must serve the “public convenience, interest, or necessity.” Despite NAB’s demands, the Commission must follow the law. To achieve that, it must now grant reconsideration, at least in the seven areas the LPFM Coalition identifies. The FCC has many tools with which to accomplish this, including a Notice of Further Rulemaking or, where appropriate, policy statements. But stubborn refusal to remedy the Rulemaking’s legal infirmities would be beneath the dignity of agency imbued with and required to abide by the rule of law. This case is not about a majority of an industry’s desires, but about the public interest in regulation of an increasingly scarce public good. The Commission must act lawfully to apportion that resource.

Respectfully Submitted,



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ATTACHMENT 1

MEMBERS OF THE LPFM COALITION

LPFM Coalition Members

Call Sign / Name (as applicable)	Facility ID	City of License
Common Frequency		
Prometheus Radio Project www.prometheusradio.org		
KAKU-LP Maui Community Television, Inc.	132284	Kahului, HI
KALY-LP Somali American Community	196857	Minneapolis, MN
KBOG-LP Bandon Community Radio	197186	Bandon, OR
KCIW-LP Curry Coast Community Radio	195257	Brookings, OR
KCLA-LP Civic Light Opera	197367	San Pedro, CA
KCMU-LP JEAN ARNOLD GROUP FOUNDATION	194626	Napa, CA
KCPK-LP Center of the World Festival	192696	Pine Mountain Club, CA
KCXU-LP Center for Careers and Training	192235	San Jose, CA
KUAK-LP Dakota Media Access	196087	Bismarck, ND
KDIF-LP Arizona Interfaith Alliance For Worker Justice	195405	Phoenix, AZ
KDLB-LP Future Roots, Inc.	196172	Los Angeles, CA
KDLZ-LP Verge Center for the Arts	197548	Sacramento, CA
KDOO Cascade Community Radio	196380	Portland, OR
KDRT-LP Davis Community Television	123794	Davis, CA
KEBX-LP Golden Gate Society For Coatings Technology	193167	Pacheco, CA
KEPW-LP Eugene Peaceworks	196953	Eugene, OR
KEXU-LP Poor Magazine	194853	Oakland, CA
KFFD-LP Freeform Portland	196609	Beaverton, OR
KFFP-LP Radio 23	195263	Portland, OR
KFQM-LP Craft & Folk Art Museum	196468	Los Angeles, CA
KGAP-LP Materials & Applications	196198	Los Angeles, CA
KGCE-LP Grace Orthodox Presbyterian Church of Modesto, Ca	194780	Modesto, CA
KGIG-LP Fellowship of The Earth	123802	Modesto, CA
KHBG-LP National Hispanic Media Coalition	192043	Pasadena, CA
KHUG-LP Sloan Canyon Communications	196070	Castaic, CA
KIEV-LP The Way to Salvation Community Church	196496	Camas, WA
KISJ-LP Borderlands Community Media Foundation, Inc.	194977	Bisbee, AZ
KISN-LP Western Oregon Radio Club	195134	Portland, OR

KJJG-LP Iglesia Centro De Liberacion	191681	South Houston, TX
KJMR-LP Ntrepid Group	196626	Chattaroy, WA
KJSO-LP North Omaha Loves Jazz Center	196809	Omaha, NE
KJZX-LP Third Coast Activist Resource Center	195044	Austin, TX
KLEK-LP The Voice of Arkansas Minority Advocacy Council	196022	Jonesboro, AR
KLLG-LP Little Lake Grange #670	197092	Willits, CA
KMRD-LP Madrid Community Radio	194010	Madrid, NM
KODX-LP Earth On-the-Air Independent Media	192326	Seattle, WA
KOUV-LP Recording NW	196567	Vancouver, WA
KPCA-LP Petaluma Community Access	194773	Petaluma, CA
KPPQ-LP Community Access Partners of San Buenaventura	195141	VENTURA, CA
KPSQ-LP Omni Center For Peace Justice & Ecology	191871	Fayetteville, AR
KPYT-LP Pascua Yaqui Tribe	134640	Tucson, AZ
KQRZ-LP Oregon Amateur Radio Club	134266	Hillsboro, OR
KQUA-LP Umpqua Watersheds	196467	Roseburg, OR
KRSM-LP Pillsbury United Communities	196844	Minneapolis, MN
KSFP-LP San Francisco Public Press	195885	San Francisco, CA
KROJ-LP Ballet Folklorico Ollin	196858	Panorama City, CA
KTAL-LP Southwest Environmental Center	195571	Las Cruces, NM
KTWH-LP Two Harbors Community Radio	192672	Two Harbors, MN
KUBU-LP Access Sacramento	192473	Sacramento, CA
KUHS-LP Low Key Arts Incorporated	196928	Hot Springs, AR
KUPR-LP Las Placitas Association	192359	Placitas, NM
KUTZ-LP Midtown Radio	196604	Sacramento, CA
KVIB-LP Positive Hope Inc.	197704	San Diego, CA
KVSH-LP Voice of Vashon	194123	Vashon Island, WA
KWUS-LP Radio-4-Us	193011	Clarksville, TN
KXRW-LP Media Institute for Social Change	197004	Vancouver, WA
KXVY-LP Wllsonville Radio Project	196592	Wilsonville, OR
KYWS-LP West Sacramento Neighbors Fair, Inc.	194136	West Sacramento, CA
KZNQ-LP Santa Clarita Public Broadcasters Corporation	196311	Santa Clarita, CA
KZZH-LP Access Humboldt	195765	Eureka, CA
WAMF-LP Voice of the People	195905	New Orleans, LA

WAYO-LP Muccc, Inc.	192365	Rochester, NY
WBPU-LP African People's Education and Defense Fund, Inc.	196389	St. Petersburg, FL
WBTV-LP Vermont Community Access Media	192571	Burlington, VT
WCIW-LP Coalition of Immokalee Workers	133832	Immokalee, FL
WCXP-LP Chicago Independent Radio Project	192383	Chicago, IL
WDYO-LP Workers' Dignity	192437	Nashville, TN
WDYX-LP Woods and Waters Land Trust	195375	Frankfort, KY
WEQY-LP Dayton's Bluff	194073	St. Paul, MN
WFNU-LP Frogtown Community Radio	195511	St. Paul, MN
WFPR-LP Franklin Public Radio	194829	Franklin, MA
WHGE-LP Afro-American Historical Society of Delaware	196732	Wilmington, DE
WHIV-LP New Orleans Society of Infectious Disease Awareness	193392	New Orleans, LA
WHNH-LP Associated Churches Of Fort Wayne And Allen County, Inc	194699	New Haven, IN
WHPB-LP Howell Family Consultant Inc	195882	Orlando, FL
WJOP-LP Newburyport Community Media Center	191764	Newburyport, MA
WKCG-LP The Ordinary People Society	195954	Dothan, AL
WLGM-LP Edgewater Alliance Church	134638	Edgewater, FL
WLSP-LP Sun Prairie Media Center	193367	Sun Prairie, WI
WLWR-LP Marinette Radio Association	131536	Marinette, WI
WNJI-LP Gospel Light Prayer Church	197099	Kearney, NJ
WNRC-LP Nichols College	133676	Dudley, MA
WOHM-LP Media Reform SC	195374	Charleston, SC
WOMM-LP The Big Heavy World Foundation	135702	Burlington, VT
WONH-LP Pequeñas Ligas Hispanas de New Haven Inc	196790	New Haven, CT
WOOC-LP Media Alliance	194800	Troy, NY
WOWD-LP Historic Takoma Inc.	195180	Takoma Park, MD
WOZO-LP The Neighborhood Center	195161	Knoxville, TN
WPPM-LP Philadelphia Public Access Corporation	191989	Philadelphia, PA
WQNB-LP Beware, Inc.	196346	Miami, FL
WQRT-LP Big Car Media	193037	Indianapolis, IN
WRBG-LP Rhythm and Blues Group Harmony Association	131943	Millsboro, DE
WRFN-LP Radio Free Nashville	135643	Nashville, TN

WSPV-LP Valley Community Baptist Church	195475	Avon, CT
WSVQ-LP Partnership of African American Chuches	196359	Charleston, WV
WSYP-LP Sankofa Youth Development Program Inc	193924	Birmingham, AL
WTPA-LP WLRI Incorporated	135143	Gap, PA
WUBP-LP All African People's Development and Empowerment Project	194143	St. Petersburg, FL
WUGM-LP West Michigan Community Help Network	126334	Muskegon, MI
WUJM-LP Caribbean Festival Association	192829	St. Petersburg, FL
WUMO-LP Aframsouth	196044	Montgomery, AL
WUVS-LP West Michigan Community Help Network	125796	Muskegon, MI
WVAO-LP Athol-Orange Community TV	191917	Athol, MA
WWPP-LP WeCount!	196349	Homestead, FL
Awakening Art & Culture	192636	Orlando, FL
WXHR-LP Hillman Community Radio	194356	Hillman, MI
WZMR-LP Zumix, Inc.	194385	East Boston, MA
WZPH-LP Pasco County Educational Corporation	133204	Dade City, FL

CERTIFICATE OF SERVICE

I, Michael W. Richards, counsel for The LPFM Coalition, hereby states that a true copy of the **REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION** was mailed first class, postage prepaid, this 25th day of August, 2019 to:

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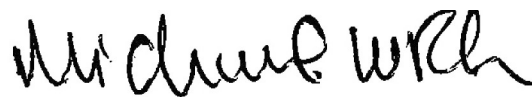
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