



status of the LPFM service, it should, at the very least protect the licensed service of locally (non-alternatively) fed NCE translators.

1. In these *Comments*, Sacred Heart urges the Commission to protect the FM translator service under certain circumstances. Sacred Heart proposes that the Commission protect (1) all locally (non-alternatively) fed NCE translators from LPFM stations (Section II.A.) or (2) those NCE translators that are operating pursuant to a waiver of the Commission's Rules (Section II.B.) or (3) certain translators on a case by case waiver basis (Section II.C.). Sacred Heart believes that each of these categories of service strikes a balance between the FM translator service and the LPFM service that will not destroy one at the expense of the other. Many FM translators are operated by public broadcasters deeply rooted in their communities with local boards of directors, community advisory boards and locally originated programming and they should not be categorically destroyed by LPFM service. Nevertheless should the Commission, after evaluating the comments submitted in this proceeding, believe that the public interest is better served by granting LPFM stations primary status over all authorized FM translators, then Sacred Heart proposes that the Commission open a filing window and allow existing locally-fed NCE translators **convert** to an LPFM station (Section III.).

## **I. BACKGROUND**

### **(A) Sacred Heart is the Licensee of Six Unique FM Translators That are Locally Fed and Operate Under a Waiver of the Commission's Technical Rules.**

2. Sacred Heart is the licensee of FM translator Stations W211AI, Stamford, Connecticut; W227AJ, Northford, Connecticut; W289AD, Selden, New York; W219BA, Ridge, New York; W277AB, Noyack, New York; and W217AF, Huntington Station, New York. All of these translators are fed locally and rebroadcast one of Sacred Heart's FM stations (non-commercial educational FM Stations WSHU-FM, Fairfield, Connecticut, and WSUF(FM), Noyack, New York).

3. In the early 1990s, Sacred Heart, recognizing that there was a large area and population on Long Island, New York that did not receive sufficient NCE service, applied to construct four new NCE translator stations. Sacred Heart filed applications for these translators pursuant to the Commission's *Report and Order Amending Part 74 of the Commission's Rules Concerning FM Translator Station*, 5 FCC Rcd 7212 (1990) (the "R&O"). The R&O provided that the maximum effective radiated power (ERP) for translators would be 250 watts at an HAAT of 107 meters or less. However, the R&O also provided that applicants for NCE FM translators would be able to request a waiver to operate at more than the prescribed power limitation upon a showing that the 1 mV/m contour would cover NCE FM "white area" (i.e., an area that is not served by a full-service NCE radio station). Sacred Heart's proposed translators would provide NCE FM radio service to white areas and thus, pursuant to the R&O, it requested a waiver of the translator technical limitations. Sacred Heart then spent more than a year prosecuting these applications, because it understood the importance of providing first NCE service to listeners on Long Island. It was motivated to continue in its efforts by the positive response it received from listeners who would, upon grant of the translator applications, be able to receive public radio programming for the first time.

4. On January 29, 1993, the full Commission released a *Memorandum Opinion and Order*, 8 FCC Rcd 672 (1993) (the "MO&O"), which granted Sacred Heart's four translator applications. The MO&O noted that Sacred Heart's translators in Huntington Station and Selden would provide first NCE service to 38,859 people, while the Ridge and Noyack translators proposed first NCE service to 97,664 people. In fact, the entire service area of the Ridge translator was without NCE service at the time the MO&O was issued. For these reasons, the Commission granted Sacred Heart's waiver request, allowing Sacred Heart to construct its translators at a power that exceeded the limitations adopted in the R&O.

5. Next, Sacred Heart had to secure tower sites, construct and then commence operations of each of the new stations. This process took several years, and again, cost Sacred Heart a substantial sum of money and a tremendous investment of time, which Sacred Heart was willing to spend because of its desire to provide first local NCE service to unserved areas on Long Island. In 1998, the last of the translator license applications was granted, and Sacred Heart now operates the four translators it proposed in 1991. These translators, when they were granted, provided a first NCE service to almost 140,000 people.

**(B) The Same Issues That Were Relevant When The Commission Created The LPFM Service Are Still Relevant Today.**

6. Sacred Heart previously filed Comments and Reply Comments in this proceeding on August 2, 1999, and November 15, 1999, respectively (the “1999 Comments”).<sup>3</sup> These comments were filed in response to the original *Notice of Proposed Rule Making* in this proceeding where the Commission proposed the creation of the LPFM service.<sup>4</sup> In the *1999 Comments*, Sacred Heart made many of the same arguments that it is making herein. Specifically, it stressed that it was not opposed to the creation of the LPFM service, but it wanted to ensure that locally (non-alternatively) fed NCE translators were protected. These same arguments are relevant here because the Commission is again threatening the existence of FM translator service that is locally fed and provides some locally originated programming.

## **II. DISCUSSION**

**(A) The Commission Must Continue To Protect Locally (Non-Alternatively) Fed NCE Translators From LPFM Stations.**

7. A number of commenters in this proceeding focus on the fact that many NCE FM translators are satellite-fed and provide NCE programming on a national level, and hence are not

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<sup>3</sup> A copy of these comments are attached hereto as Exhibit 1.

<sup>4</sup> 14 FCC Rcd 2471 (1999).

locally oriented stations. This is true but it overlooks the fact that there are also numerous other NCE translators that are locally-fed and provide local programming. They are operated by public broadcasters deeply rooted in their communities with local boards of directors, community advisory boards and locally originated programming. The Commission recognized the public benefits of these translators when it established the LPFM service in 2000.<sup>5</sup> Also, as the Commission stated itself in the *NPRM*, “some FM translators provide important aural services to unserved and underserved areas.”<sup>6</sup> These are substantial public interest benefits that are still relevant and must not be overlooked by the Commission.

8. Even in light of the recognized public interest benefits of local NCE translator service, the Commission, in the *NPRM*, suggests that it may make *authorized* translator stations secondary in status to pending and not yet filed LPFM applications.<sup>7</sup> While this is just one of the many options that the Commission is seeking comment on, it is this proposal that Sacred Heart takes issue with. There is no logical reason to disrupt the services provided by these locally fed translators in favor of new LPFM stations that may or may not provide such local programming. Listeners have come to expect and rely upon the services provided by many of these local translators, and for that reason alone, existing local NCE translators should be protected from all proposed LPFM stations. While the Commission believes that the local service lost by these translators will be filled in by LPFM service, there is no guarantee that an LPFM station would be able to cover the entire area that a local translator currently covers. Further, taking away existing local NCE service in favor of proposed service should not be considered a public interest benefit.

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<sup>5</sup> See *Creation of Low Power Radio Service, Memorandum Opinion and Order*, 15 FCC Rcd 19208, 19223-24 (2000).

<sup>6</sup> *NPRM*, 20 FCC Rcd at ¶ 32.

<sup>7</sup> *Id.* at ¶ 33.

**(B) The Commission Must Continue To Protect Translators That Are Operating Pursuant To A Waiver Of The Commission's Rules From LPFM Stations.**

9. If the Commission decides not to protect all licensed locally (non-alternatively) fed NCE FM translators from displacement by LPFM stations, then it should, at least, protect those stations that are operating pursuant to a waiver of Section 74.1235 of the Commission's Rules. As discussed above, in order to obtain a waiver of that rule, and permission to operate a translator station at a greater ERP than normally allowed under the Commission's Rules, an applicant had to demonstrate that it was providing service to a NCE "white area" (i.e., an area that did not receive any aural NCE service). Applicants who were able to pass that hurdle, and took the initiative to provide first NCE service to listeners in furtherance of the Commission's policy goals should be entitled to continue to operate. To decide otherwise could create a situation where, upon grant of a license for a new LPFM station, a "superpower translator" station that served white area would have to turn in its license for cancellation or severely modify its signal to the extent that it would not be practicable to operate the station. Portions of the area served by the translator may not be covered by the new LPFM station and the result could actually be the *creation* of new white area. This is clearly contrary to the Commission's mandate under Section 307(b) of the Communications Act.

**(C) The Commission Should Protect Translators On a Waiver Basis.**

10. In the event that the Commission decides to grant LPFM service primary status over all authorized translators, it should nevertheless provide grandfathered status to translators such as those licensed to Sacred Heart which provide first NCE service to certain areas. As discussed above, the grant of Sacred Heart's Long Island translator applications came at great expense to Sacred Heart, and came with the support of National Telecommunications and Information Administration, Corporation for Public Broadcasting, State University of New York, Long Island University and many Members of Congress. It was an extraordinary effort on the

part of many different parties to achieve the goal of providing as many people as possible on Long Island with a first NCE service.

11. When it filed its translator applications and invested time and money in prosecuting them, Sacred Heart recognized that, under FCC rules, its translators could be displaced by primary services. However, Sacred Heart believed that there was little risk of its Long Island translators being displaced because of the scarcity of available frequencies that would be able to operate at that minimum power level without causing interference. Thus, it decided to prosecute its translator applications. Sacred Heart could not have anticipated that those translators would later be subject to displacement by LPFM facilities.

12. The last of Sacred Heart's translator license applications was granted in October of 1998, ending a seven year process to provide first NCE service to a substantial number of people. Sacred Heart developed many loyal listeners during and after this process. Sacred Heart undertook extraordinary expense and devoted substantial resources in order to earn the right to serve underserved communities on Long Island. Its diligent prosecution of the translator applications led to new translator stations that provided more than 130,000 persons with a first NCE service. Because of these extraordinary efforts, if the Commission decides not to protect existing local NCE translator stations from LPFM, it should grandfather Sacred Heart's Long Island translators and protect them from any encroachment by new LPFM stations.

### **III. PROPOSAL**

13. If the Commission, after evaluating the comments submitted in this proceeding, believes that the public interest is better served by granting LPFM service primary status over all authorized FM translators, Sacred Heart proposes that the Commission open a filing window and allow authorized locally (non-satellite) fed NCE translators to **convert** to become LPFM stations with any necessary waiver of the LPFM technical and ownership rules. This will allow translator

stations that provide a significant public interest benefit, like Sacred Heart's translators, to continue to serve their respective listeners without potential interference from LPFM services. It will also permit the LPFM service to utilize the spectrum currently held by translators that do not qualify for this window or that decide not to file in the window.

14. Sacred Heart's proposal is similar to what the Commission permitted LPTV licensees to do when it established the Class A television service in 2000.<sup>8</sup> There, the Commission opened a window whereby qualifying LPTV licensees could convert their station to a Class A facility. The purpose of that window was to permit LPTV stations that provide locally-originated programming, often to unserved or underserved areas, the opportunity to convert to Class A and thereby receive protection from full-service TV stations.<sup>9</sup> While, the posture in the Class A proceeding is different than the posture in this proceeding (i.e. there the Commission was creating a new service (Class A service), while here, the Commission is evaluating service that it previously created (LPFM service))<sup>10</sup> the underlying policy goals are the same (i.e. a service that provides a local public interest benefit should be given the opportunity to receive protection from a service that provides equal or less of a local public interest benefit).

15. To accomplish this conversion, Sacred Heart proposes that the Commission open a window whereby "qualifying"<sup>11</sup> translator stations can apply to convert their facility to an

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<sup>8</sup> See *Establishment of a Class A Television Service, Report and Order*, 15 FCC Rcd 6355 (2000) ("*Class A R&O*").

<sup>9</sup> See *id.* at ¶ 1.

<sup>10</sup> The posture is also different because when the Commission permitted LPTV stations to convert to Class A facilities, it exempted this new service from certain Part 73 (47 C.F.R. § 73) rules. Here, an exemption is not possible because the Commission has already created the LPFM service and the associated technical rules. Thus, if the Commission permits qualifying FM translator stations to convert to LPFM facilities, as discussed below, it must grandfather certain converted LPFM stations (former translators) because they will not comply with some of the LPFM rules.

<sup>11</sup> A "qualifying" translator station should be an NCE translator station that is locally-fed. This includes both fill-in NCE translators and NCE translators that extend a station's signal.

LPFM station. The qualifying translator station must be given the same protection that it would provide to any authorized LPFM station as a result of this proceeding. This will ensure that qualifying translator stations (as converted LPFM stations) will continue to receive the protection that they enjoyed as translator stations.

16. Sacred Heart recognizes that many licensed translator stations, including its own, that qualify and will apply in this window would violate the LPFM ownership<sup>12</sup> and technical rules<sup>13</sup> if they are granted LPFM status without technical changes to their facilities or any changes to the ownership of the station. However, because these stations currently provide a public interest benefit that LPFM stations may not be able to provide, Sacred Heart proposes that the Commission provide grandfathered status to these stations as to the cited rules and allow them to operate as an LPFM station with their currently licensed technical parameters and under their current ownership. Failure to do so will frustrate the purpose of the window because the technical modifications for most stations would be prohibitively expensive, and most owners would have to divest their stations because they could not own them as LPFM stations under the current LPFM ownership rules.

17. These new LPFM (former translator) stations should, however, comply with the LPFM requirements regarding locally originated programming.<sup>14</sup> Sacred Heart offers local programming to communities in Connecticut and on Long Island, New York, and would offer much more local origination programming if it could convert to an LPFM station.<sup>15</sup> Thus, by

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<sup>12</sup> See e.g., 47 C.F.R. §§ 73.855 (Ownership Limits); 73.858 (Attribution of LPFM Station Interests); 73.860 (Cross-ownership). This is not meant to be an exclusive list of the LPFM ownership rules that translator stations might violate, but should be grandfathered from complying with.

<sup>13</sup> See e.g., 47 C.F.R. §§ 73.811 (LPFM Power and Antenna Height Requirements); 73.816 (Antennas). This is not meant to be an exclusive list of the LPFM technical rules that translator stations might violate, but should be grandfathered from complying with.

<sup>14</sup> See *Creation of Low Power Radio Service, Report and Order*, 15 FCC Rcd 2205, 2261 (2000).

<sup>15</sup> 47 C.F.R. Sec. 74.1231(f).

allowing Sacred Heart (and other translator licensees) to convert to LPFM stations, the Commission will actually be furthering its policy goal of addressing unmet needs for community-oriented radio broadcasting.

#### IV. CONCLUSION

As discussed above, it is in the public interest to protect all locally (non-alternatively) fed NCE translators from LPFM service. Many of these translators provide local programming and are important institutions in their respective communities. They are operated by public broadcasters deeply rooted in their communities with local boards of directors, community advisory boards and locally originated programming. Also, many of these translators, like those owned by Sacred Heart, provide service to NCE white areas. Thus, the Commission must protect all locally (non-alternatively) fed NCE translators from LPFM service. However, if the Commission decides that the public interest is better served by granting LPFM service primary status over all authorized FM translators, it should open a filing window and allow authorized locally (non-satellite) fed NCE translators to **convert** to become LPFM stations with any necessary waiver of the LPFM technical and ownership rules as proposed herein.

Respectfully Submitted,

SACRED HEART UNIVERSITY, INC.

By: 

Mark N. Lipp  
Scott Woodworth  
Vinson & Elkins L.L.P.  
1455 Pennsylvania Ave, NW  
Suite 600  
Washington, DC 20004-1008  
(202) 639-6500

Its Counsel

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